

**4 YEARLY REVIEW OF MODERN AWARDS – SOCIAL,
COMMUNITY, HOME CARE AND DISABILITY SERVICES
INDUSTRY AWARD 2010**

SUBMISSION OF HEALTH SERVICES UNION

INTRODUCTION

1. These submissions are made further to the Fair Work Commission decision of the 4 May 2021¹ (**Decision**) concerning the Social, Community, Home Care and Disability Services Industry Award (**Award**), the hearing on 6 August 2021 (**Hearing**) and in response to the directions issued in the statement [2021] FWCFB 4863 (**Statement**)². These submissions are in addition to those filed by Health Services Union (**HSU**) on 3 August 2021.
2. In response to the Directions the HSU filed proposals³ in relation to remote response and damaged clothing prior to the Conference on 19 August 2021 (**Conference**).
3. In addition, the HSU filed a draft proposal⁴ concerning the broken shifts matter raised at point 6 of the Statement. The HSU understood following the reading of the transcript⁵, Mr Redford's proposal at PN [311] and His Honour Ross J's comments at PN [324] & [326], that the bench intended to include the discussion about broken shifts and shift work into the conference.
4. These submissions deal with the three matters identified in the Directions.

Remote response

5. The HSU noted in the earlier submissions⁶ that it supported the decision to include provisions in the Award to provide for payment for work undertaken out of hours and remote from any workplace.

¹ [\[2021\] FWCFB 2383](#)

² [\[2021\] FWCFB 4863](#)

³ [20210817 HSU Submission](#)

⁴ [Ibid](#)

⁵ [20210805 Transcript](#)

⁶ [20210803 HSU submission](#)

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6. The HSU notes the letter and draft determination⁷ filed by Australian Business Lawyers [ABL] on behalf of the parties indicated, including the HSU, on 23 August 2021 and confirms its agreement to the letter and support for the draft determination.
7. The HSU submits that the draft clause meets the framework for remote response provisionally proposed by the Commission in the Decision for:
 - a. A shorter minimum payment for an employee receiving an on call allowance;
 - b. Discrete activity within the minimum payment period not triggering an additional payment;
 - c. A definition of 'remote response' work or duties, and the essential framework of the ABI proposal;
 - d. A mechanism for recording work / time;
 - e. The minimum payment periods proposed for an employee receiving the on call allowance.
8. The definition of remote work is now worded to exclude work not intended to enliven payment under the clause, while still ensuring that all appropriate and required work would be captured. The HSU submits that the definition provides a degree of comfort to employers that employees cannot claim remote work minimum payments when undertaking their booked/ rostered work. While simultaneously ensuring that work which can't be easily pigeonholed, is covered as intended.
 - a. A shorter minimum payment is provided for employees in receipt of the on call allowance under clause 20.9, and
 - b. A higher minimum payment of 1 hour for an employee not in receipt of the on call allowance is clearly identified at 25.10(c)(i)C; and
 - c. The clause steps out in full the rates payable during the normal span of hours under clause 25.2(a); and
 - d. The rates payable outside the normal span of hours as opposed to use of the potentially confusing term 'applicable rate of pay'; and
 - e. Clearly precludes separate minimum payments where multiple instances occur within the minimum payment period; and
 - f. Provides for maintenance of a time sheet.
9. The HSU submits that excluding the matter to be determined [dealt with below] the draft determination meets the criteria set out by the Commission in its Decision.

⁷ [20210823 ABL Remote Response](#)

10. There remains only one matter in contention. The filed draft has indicated at 25.10(c)(i)B that there is a matter to be determined. The minimum applicable payment for work performed after 10pm and before 6am on any day that an employee is contacted.
11. The HSU supports the provisional decision of the Commission and submits that the minimum payment during these hours should be for an hour, regardless of the length of time any work may take during these hours. The provision concerning individual calls within the minimum call time continues to apply.
12. The HSU submits that the disutility of being disturbed between the hours of 10pm and 6am is patently more than any disutility to an employee receiving a call/ email during the day or earlier hours of the evening.
13. The HSU submits 25.10(c)(i)B of the draft determination should read as follows:
 - 25.10(c)(i) Where an employee performs remote work they will be paid for the time spent performing remote work, with the following minimum payments applying:
 - A. where the employee is on call between 6.00am and 10.00pm – a minimum payment of 15 minutes’ pay;
 - B. where the employee is on call between 10.00pm and 6.00am – a minimum payment of one [1] hour’s pay; *[emphasis added]*

Damaged clothing

14. The HSU noted in our previous submissions⁸ that we supported the Decision to include a provision for damaged clothing in the Award and that discussions would continue to seek an agreed proposal.
15. During the conference held before Ross J on 27 May 2021 discussions moved towards making provision for small cleaning and repair rather than only professional services. The parties further worked through draft proposals from the HSU⁹ and the AiG¹⁰ at the conference before Clancy DP on Thursday 19 August 2021.
16. HSU and AiG continued discussions following the conference to develop a clause to put forward to the other parties. The final form of the proposed clause reads:

⁸ [20210803 HSU submission](#) at para 45

⁹ [HSU - damaged clothing](#)

¹⁰ [AiG - damaged clothing](#)

20.3 Laundering of clothing other than uniforms

- (a) *If during any day or shift, the clothing of an employee is soiled in the course of the performance of their duties, the employee will be paid the daily laundry allowance under clause 20.2(b) per day or shift provided that:*
- i. As soon as reasonably practicable the employee provides notice of the soiling and, if requested, evidence that would satisfy a reasonable person of the soiling and/or how it occurred; and*
 - ii. The employee complied with any reasonable requirement of the employer in relation to the wearing of personal protective equipment, either provided or paid for by the employer in accordance with 20.2(d), at the time the clothing was soiled.*

24.3 Repair and replacement of clothing other than uniforms

- (a) *If the clothing of an employee is soiled or damaged (excluding normal wear and tear), in the course of the performance of their duties, to the extent that its repair or replacement is necessary, the employer must reimburse the employee for the reasonable cost incurred in repairing or replacing the clothing with a substitute item, provided that:*
- i. As soon as reasonably practicable the employee provides notice of the soiling or damage and, if requested, evidence that would satisfy a reasonable person of the soiling or damage, how it occurred, and the reasonable repair or replacement costs;*
 - ii. At the time the clothing was soiled or damaged the employee had complied with any reasonable requirement of the employer in relation to the wearing of personal protective equipment either provided or paid for by the employer in accordance with 20.2(d); and*
 - iii. The damage or soiling of an employee's clothes is not caused by the negligence of the employee.*
- (b) *This clause will not apply where an employee is permitted or required to wear a uniform supplied by the employer or is entitled to any payment under clause 20.2.*

17. The HSU submits that the draft
- a. Ensures clarity that the provision applies to employees' own clothes;
 - b. Articulates different provisions for cleaning of soiled clothing and repair or replacement of damaged clothing;
 - c. Ensures a requirement to wear PPE is based on a reasonable request and references the provisions at 20.2(d);
 - d. Provides for employees to advise employers of a claim;
 - e. Provides that evidence will be provided when requested.
18. The HSU supports the proposed draft clause.

Broken Shifts

19. In the HSU's earlier submissions¹¹ we indicated support for the decision of the Commission to include provision for a broken shift allowance and the disutility for which such an allowance will compensate as stepped out at [550]¹²:
 - a. *length of the working day being extended because the hours are not worked continuously, and*
 - b. *additional travel time and costs associated with presenting for work on 2 occasions*
20. The disutility provided for by payment of the various shift penalties relates to the evening, night or early morning hours worked by an employee and the impact on their lives.
21. The competing views were essentially stepped out in the Statement in which the Commission directs the parties to consider:
 - 1 *NDS' proposal that the first sentence of clause 25.6 of the draft variation determination be amended to read: 'This clause only applies to day workers who are social and community service employees when undertaking disability services work and home care employees.'*
 - 2 *NDS' proposal that clause 25.6(d) of the draft variation determination be amended to read: 'Payment for a broken shift will be at ordinary pay with weekend and overtime penalty rates, including for time worked outside the span of hours, to be paid in accordance with clauses 26 and 28.'*
 - 3 *The ASU proposal that clause 25.6(d) of the draft variation determination be amended as follows: 'Payment for a broken shift will be at ordinary pay with shift, weekend, public holiday, and overtime, penalty rates to be paid in accordance with clauses 26 and 28, 29 and 34.'*
 - 4 *The ASU proposal that, in the absence of a provision for paid travel time, the SCHADS Award should provide a clear statement that employees must not be required to travel between work locations during their meal breaks and that overtime should be payable until an employee is allowed a meal break free from travel. The ASU has filed a draft determination in respect of this issue.*

¹¹ [20210803 HSU submission](#) at paras 6-10

¹² [2021] FWCFB 2383

22. The HSU indicated in earlier submissions¹³ that we thought the references to both penalty rates and public holidays in the draft clause was unintentional. And further that we did not read the Decision to intentionally exclude shift workers or the intent to only make a provision for day workers to work broken shifts.
23. In considering the proposal by NDS that the clause have limited application, the HSU makes no comment or submission as it does not impact on HSU members covered by this Award.
24. The HSU submits that making the changes to the draft determination proposed by the Commission¹⁴ as suggested by the NDS at point 2 above would leave shift workers working broken shifts in a basically unregulated environment.
25. There is only the single proposed clause relating to broken shifts. Even the current poor regulation of payment based on the finishing time of a broken shift would not be available to a shift worker, nor would the provisions for a broken shift allowance.
26. The HSU submits that confining the clause to day workers and paying employees working beyond 8pm or commencing before 6am at overtime rates would reduce that employee's ordinary working hours, impacting negatively on their accrued leave entitlements.
27. The HSU contends that the position would have to ignore the provisions of clauses 29.2 and 29.3, which provides for shift times:
 - a. **Afternoon shift** means any shift which finishes after 8.00 pm and at or before 12 midnight Monday to Friday.
 - b. **Night shift** means any shift which finishes after 12 midnight or commences before 6.00 am Monday to Friday.

And that it is only 29.4 that suggests that broken shifts cannot be worked by a shift worker.

28. The HSU supports the draft clause provided by the ASU¹⁵ and detailed at point 3 above.
29. HSU also submits that to ensure clarity an additional provision must be drafted excluding the operation of 29.4 for the purposes of a broken shift or making the broken shift an exception to the rule of 29.4.

¹³ [20210803 HSU submission](#) at paras 13-27

¹⁴ [2021] FWCFB 2383

¹⁵ [20210803 ASU](#)

Current Award provisions

30. During the Hearing the several views were expressed on the possible interpretation of the current provisions concerning shift work particularly at clause 29.4 and its relationship with broken shifts, and whether the payment of shift penalties under 25.6(b) was intended to apply to shift workers or only determine how a broken shifts was to be paid.
31. The HSU believes that it was generally expressed by the parties that it there is a common understanding that shift workers are currently working broken shifts and are paid shift penalties determined by the finishing time of that shift, that is where the shift finishes after 8pm, when working such a shift.
32. At PN [290] His Honour Ross J indicates that the parties should consider what the award means as it currently stands. And later at [305] His Honour expands on the premise:

[305] ...I think the first position, the starting point is how are broken shifts currently worked in the award - under the award - not about whether people are breaching the award or not, but what does the award currently mean; ... what the award means at the moment, for whatever reasons, and you said [sic] it out;
33. Regardless of evidence of whether or not shift workers are currently working broken shifts, this does not determine the correct interpretation of a clause or the entitlements of an employee under the Award.
34. The questions we were asked to consider at PN [290] and [305] are interesting arguments but in the HSU's submission not one we have to determine to decide there is an ambiguity which needs to be resolved.
35. The Commission is unable to exercise judicial power¹⁶ to make a finding about these matters and any opinion expressed won't bind the parties. The Commission can clearly find that the current provisions, and indeed the proposed new clause[s], have an unresolved inconsistency or ambiguity and determine that it must be corrected.
36. The HSU has read and agrees with the ASU submissions that for the Commission to form or express an opinion could risk judicial review, and further their summation of the Commission's task in the current proceedings.

¹⁶ [RE CRAM; Ex parte THE NEWCASTLE WALLSEND COAL Co. PTY. LTD](#)

37. When the award was made in 2010 clause 25.6 (b) read:
- (b) Payment for a broken shift will be at ordinary pay with penalty rates and shift allowances in accordance with clause 29 – shiftwork, with shift allowances being determined by the starting time of the broken shift.*
38. The only change to this provision was made during the 2012 proceedings in a Consent Determination in AM2012/29¹⁷ when the clause was changed to read:
- (b) Payment for a broken shift will be at ordinary pay with penalty rates and shift allowances in accordance with clause 29 – shiftwork, with shift allowances being determined by the finishing time of the broken shift. [emphasis added]*
39. The HSU notes that regardless of the parties views on the intention of the AIRC and later FWA in making these decision, or of the parties interpretations of these words, even this clause as it is currently worded provides and ambiguity in the sense that it would be easy to read these words to mean that shift workers can work a broken shift, and when they do they are paid according to the finishing time of the shift.
40. We note that at [550]¹⁸ the Commission stepped out the disutility for which the [broken shift] allowance/s is payable as compensating for the:
- *length of the working day being extended because the hours are not worked continuously, and*
 - *additional travel time and costs associated with presenting for work on 2 occasions.*
41. The HSU also notes that in considering the AiG view that the impact of current provisions applying varied outcomes for employees working broken shifts is not anomalous, at PN [535] the Commission¹⁹ stated.
- [535] *We disagree. A broken shift allowance is intended to compensate employees for the disutility of working a broken shift. The way the current term operates means that some employees who work broken shifts will receive no additional remuneration to compensate for the associated disutility. Such an outcome is anomalous; and wrong in principle.*
42. The disutility of working a broken shift applies to a shift worker who works a broken shift. They also suffer the disutility of working less to unsociable hours.

¹⁷ [PR531544](#)

¹⁸ [2021] FWCFB 2383

¹⁹ *ibid*

43. The broken shift allowance proposed by the Commission in their decision of 4 May 2021²⁰ should be afforded to any worker who suffers the disutility of working a broken shift. This does not remove or compensate for the disutility of a shift workers less sociable hours. It is, if anything, compounded.
44. The HSU submits that a shift worker is entitled to the benefit of both allowance and penalty rates for the separate and distinct disutility for which each endeavour to compensate.
45. s134 of the *Fair Work Act 2009*, the Modern Award Objectives includes at
(1)(g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern award;
 And at s134(2)
*(2) The modern awards objective applies to the performance or exercise of the FWC's **modern award powers**,*
46. The Commission has the power to decide to remove ambiguity and ensure there can be no further confusion about the applicability of both what is paid to a shift worker when working a broken shift, and that they can work that shift.
- s160 Variation of modern award to remove ambiguity or uncertainty or correct error*
- (1) The FWC may make a determination varying a modern award to remove an ambiguity or uncertainty or to correct an error.*
- (2) The FWC may make the determination:*
- (a) on its own initiative; or*
- (b) on application by an employer, employee, organisation or outworker entity that is covered by the modern award; or*
- (c) on application by an organisation that is entitled to represent the industrial interests of one or more employers or employees that are covered by the modern award; or...*
47. HSU submits that the Commission should exercise its powers under s160(2)(a) and act on its own initiative to vary the proposed draft to ensure that shift penalties apply for a shift worker working a broken shift, and to ensure the ambiguity is removed in relation to the provisions of clause 29.4 by the insertion of additional wording as follows:
- 29.4** Shifts are to be worked in one continuous block of hours that may include meal breaks and sleepover. *Broken shifts are an exception to this provision.*

²⁰ ibid