SUMMARY OF SUBMISSIONS

Fair Work Act 2009
s.156—4 yearly review of modern awards

4 yearly review of modern awards—Award stage—Group 4—*Social, Community, Home Care and Disability Services Industry Award 2010*—substantive claims

(AM2018/26)

MELBOURNE, 5 AUGUST 2021

This is a summary document only and does not purport to be a comprehensive discussion of the submissions made. It does not represent the view of the Commission on any issue.

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1. Broken shifts and minimum engagements

[1] On 4 May 2021, the Full Bench of the Commission issued a decision[1] (*the May 2021 decision*) in which it determined to make the following variations to the *Social, Community, Home Care and Disability Services Industry Award 2010* (the SCHADS Award):

> 1. Introduce a minimum payment period for part-time employees by deleting clause 10.4(c) and inserting a new clause 10.5 to provide the following minimum payment periods for part-time and casual employees:
>
> - social and community service employees (except when undertaking disability work) – 3 hours' pay, and
>
> - all other employees – 2 hours' pay.
>
> 2. Vary clause 25.6 to:
>
> - define a broken shift as a shift consisting of 2 separate periods of work with a single unpaid 'break' (other than a meal break)
>
> - clarify how this interacts with the new minimum payment clause, and
>
> - to accommodate the occasional need for a broken shift to involve more than 1 break subject to:
>
> - a maximum of 2 unpaid 'breaks' in the shift
>
> - the agreement of the employee, and
>
> - an additional payment.

[2] In the May 2021 decision, the Full Bench also expressed the following *provisional* views[2]:

> 1. The additional remuneration for working a broken shift under clause 25.6 of the SCHADS Award should be an allowance calculated as a percentage of the standard weekly rate.
>
> 2. An employee working a '1 break' broken shift under clause 25.6 should receive a broken shift allowance of **1.7% of the standard rate**, per broken shift ($17.10 per broken shift).
>
> 3. The broken shift allowance payable for a '2 break' broken shift should be set at **2.5% of the standard rate** ($25.15 per broken shift), and

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[1] [2021] FWCFB 2383.

[2] Ibid at [1266]

4. An employee who is a day worker performing work outside of the ordinary span of hours (including as part of a period of work in a broken shift) is entitled to overtime for such work.

[3] In addition, Australian Business Industrial (ABI) (and any other interested party) was provided an opportunity to present further arguments and evidence in support of its proposal for a 1 hour minimum engagement for staff meetings and training or professional development.[3]

[4] It is common ground that the additional remuneration for working a broken shift should be expressed as a percentage of the standard rate (provisional view 1 above).

Quantum of broken shift allowance

[5] The *provisional view* as to the quantum of the allowance is contested.

ABI

[6] Australian Business Industrial and others (ABI) submit that the proposed quantum is 'too high'. ABI contends that other changes which the Commission has decided to make 'will go a significant way to ameliorating the issues with the broken shifts clause (such as fragmented working patterns and very short shifts)'.[4] The particular changes highlighted by ABI are:

- implementing a two-hour minimum engagement for each part of a broken shift for part-time and casual employees in the home care and disability services streams;[5]

- limiting broken shifts to consisting of two portions of work (and one break) or, by agreement with an individual employee (on a per occasion basis), three portions of work (and two breaks).[6]

[7] As to the proposed quantum, ABI submit that 'it is clear that there is a huge disparity across the modern award system in terms of the allowances applying in relation to broken shifts': 'broken shift allowances range from $2.53 per day to $17.18 per day, with most being towards the lower end of the range'.[7]

[8] ABI contends that if the Commission's provisional view is affirmed the SCHADS Award 'will become home to the highest broken shift allowance across the entire modern award system'.[8]

[9] ABI accepts that the setting of the quantum of the broken shifts allowance requires the exercise of broad judgment; but submits that the *provisional* amounts are too high. In particular,

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[3] Ibid at [376]

[4] ABI submission, at [15].

[5] [2021] FWCFB 2383 at [377]

[6] Ibid at [488]

[7] ABI submission, at [16]

[8] Ibid at [20]

ABI contends that the proportional difference between the two allowances should not be as significant:

> *'In our submission, the introduction of a requirement that 'two break' broken shifts can only be worked by agreement with an individual on a per occasion basis means that the 'two break' allowance should not be set as high comparative to the 'one break allowance' as currently proposed.'*[9]

[10] ABI also submit that its position in respect of the quantum of the broken shift allowances is advanced on the basis that the allowances address the disutility associated with performing work on a non-continuous basis 'as well as the additional travel time and cost associated with working broken shifts and in place of the currently payable shift penalties'.[10] In particular, ABI's position is advanced on the basis that there will be no further variation to the award to introduce further entitlements in relation to travel time.

[11] ABI submits that the proposed broken shift allowances be adjusted downwards to **1.5%** ($15.47) and **2.0%** ($20.63) on the basis that 'this will provide employees with a reasonable amount of compensation for the disutility associated with working broken shifts, and still result in the allowances being at "towards the upper end of the range" compared to other modern awards'.[11]

AFEI

[12] Australian Federation of Employers and Industry (AFEI) notes that the provisional quantums are set towards the upper end of the range in other modern awards (which range from 0.28% to 2.29%) and does not agree that the broken shift allowances in the SCHADS Award should be set towards the upper end of the range in other modern awards, for 3 reasons:

1. A comparison with other modern awards is not a sound basis for determining the quantum of allowance appropriate for the SCHADS Award as it is intended to specifically address the needs of the disability services and home care industries.

2. The introduction of a 2 hour minimum engagement term will ameliorate the disutility of working broken shifts.

3. In light of the determinations made by the Commission the disutility of working broken shifts is diminished and 'allowances towards the 'upper end' of the scale is not justified and should be reduced'

[13] AFEI proposes that the broken shift allowances be:

- **1.3%** of the standard rate for a 1 break shift;
- **2.0%** of the standard rate for a 2 break shift.

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[9] Ibid at [25]

[10] Ibid at [27].

[11] Ibid at [22]

NDS

[14] National Disability Services (NDS) does not oppose the *provisional* views but observes that a question arises as to the entitlement of an employee who works a broken shift but is rostered to work hours that would currently attract a shift penalty under clause 29 and who might be assumed to be a shiftworker under clause 25.2(b), noting that:

- The draft determination at clause 25.6(d) excludes the application of the shift penalty rates in clause 29.

- A consequence is that it might appear that an employee who is rostered to work a broken shift that would currently attract a shift penalty rate under clause 29 will now receive neither a shift penalty rate, nor an overtime payment for time worked outside the span of hours under the proposed new clause 28.1 (a) or 28.1 (b) (iv).

[15] NDS submit that the above concern could be misplaced, but that some clarification is desirable. NDS observes that Clause 29.4 prevents an employee who works broken shift being classified as a shiftworker, because shifts under clause 29 are to be worked in *"…one continuous block of hours that may include meal breaks and sleepover*." The current clause 25.6(b) acts as an exception to the requirement that shifts be continuous and the draft determination removes that exception. On this basis, NDS submit that the definition at clause 29.4 would now prevent a broken shift worker being classified as a shiftworker. The overtime provision will therefore apply for all broken shift work performed outside the span of hours.

[16] NDS submit[12] that in order to avoid confusion on this point, there is merit in considering an amendment to the draft determination at clause 25.6 by amending the first sentence to read

> 'This clause only applies to day workers, who are social and community services employees when undertaking disability services work and home care employees.'

[17] NDS also submit that a further amendment to the draft variation at clause 25.6(d) would also assist to clarify this by an addition so that clause 25.6(d) reads:

> "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."

Q.1 Question for all other parties: What do you say about the changes proposed by NDS?

[18] NDS notes that it might be objected that in some cases, the replacement of a shift penalty rate that applies across a whole shift with overtime limited to the hours outside the span will result in a reduction in pay for some workers. In response to this concern, NDS submits:

> 'However, under the draft determination, when taking the broken shift allowances into account, this can generally only happen in relatively restricted circumstances where the value of the 50% overtime penalty rate adds up to less than the value of a 12.5% or 15% penalty across all hours

[12] NDS submission 3 August 2021 at para. [13]

worked. This would usually only be where less than 30 minutes is worked outside the span of hours.

Under the current award provisions, it makes little sense for employers to roster employees to work small amounts of time outside the span of hours, because the cost of the resulting shift penalty being imposed on all hours worked is disproportionate to the operational need. In other words, we doubt that it is common for an employee to be rostered to work less than 30 minutes outside the span of hours as part of a broken shift because it results in a 12.5% or 15% impost on all hours worked that day.

Furthermore, most broken shift appear to be worked during the day and within the span of hours, reflecting client need. As an example, the evidence of Mr Miller indicated that for a sample roster period, only 15% of individual in home client supports were delivered outside the span of hours[13].'[14]

Q.2 Question for the ASU, HSU and UWU: What do you say in reply to this aspect of NDS's submission?

[19] NDS submit that the *provisional* view that time worked outside the span of hours as part of a broken shift be treated as overtime 'has some desirable benefits':[15]

'The proposed variation means that it is easier to identify which rostered hours will attract the higher rate of pay, and will make it easier for providers to assign that cost to individual clients who require supports outside the span of hours.

Under the current provisions of the award, the shift penalty applies across the whole broken shift. The result is that where a worker provides support to a number of different clients during the broken shift, the cost of the shift penalty incurred for support of one client outside the span of hours, also affects the cost for other clients who only need support within the span of hours.

However, the proposed changes will result in significantly higher costs overall for providers because of the broken shift allowance applying to all broken shifts. Most work is carried out within the span of hours and does not currently attract any allowance or penalty rate.'[16]

[20] Finally, NDS notes that a further issue that arises from the draft determination at clause 25.6(d) is that there is no reference to the rate to apply to a broken shift worked on a public holiday and submits that 'it may be appropriate to consider adding a reference to public holiday rates in this clause'.[17]

Q.3 Question for NDS: What amendment is proposed?

Ai Group

[21] Ai Group submit that proposed clause 25.6(b)(ii) appears to require that agreement must be reached between an employer and employee that the employee will work a shift that is broken in twice separately, in respect of each occasion on which the employers seeks to have the employee work such a shift. Ai Group submit that the *May 2021 decision* does not detail

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[13] NDS submission and witness statement 2 July 2019 at page 5 of the statement, page 4412 of the Court Book.

[14] NDS submission 3 August 2021 at paras. [16] – [18]

[15] NDS submission 3 August 2021 at para. [19]

[16] NDS submission 3 August 2021 at paras. [20] – [22]

[17] NDS submission 3 August 2021 at para [23]

the rationale for requiring that agreement must be reached on *each occasion*. Ai Group submit that this issue should be further considered having regard to the substantial regulatory burden that it may impose on employers and the practical issues that it will raise including that:

- It appears that an employer will be required to obtain an employee's agreement before the roster is published (per clause 25.6(b)(i);

- The ability for employees to agree to work such shifts on some occasions but not others will create significant uncertainty for an employer endeavouring to roster employees and schedule client services; and

- If an employee has been engaged on the condition that they work broken shifts, it would be unfair to invalidate such arrangements and it is foreseeable that in some instances this would jeopardise the ongoing viability of the individual's employment.

[22] Ai Group submit that their earlier submissions, as summarised in the *May 2021 decision* at [511] are apposite and relevant to the consideration of the proposed clause 25.6(b)(ii). Ai Group submit that the *May 2021 decision* appeared to endorse Ai Group's submissions at [513].

[23] Ai Group submit that clause 25.6(b)(ii) should be replaced by the following:

> '(ii) For the purposes of clause 25.6(b)(i), an employer and an employee may agree that the employee will be rostered to work a broken shift (or broken shifts) with 2 unpaid breaks: (A) On an ongoing basis; (B) On a temporary basis; (C) In relation to a specific broken shift (or broken shifts); (D) In relation to a specific day (or days) of the roster cycle; and / or (E) In any other manner agreed by the employer and employee.'

[24] Ai Group have made detailed submissions regarding the proposed minimum payments clause at paragraph 4 of the draft determination.

[25] Ai Group submit that the Full Bench should consider including provisions that mitigate the unfair aspects of its decision for part-time employees that have been engaged to undertake a pattern of work inconsistent with the new minimum payments provisions, including appropriate transitional arrangements.

[26] Ai Group submit that it is foreseeable that the proposed provisions will be unfair to employers where a part-time employee has been engaged to work for less than 2-hours, as an employer may be required to pay an employee for 2-hours even where it has no capacity to require the employee to undertake productive work.

[27] Ai Group submit that this unfairness is compounded by cl.10.3(c) of the Award, regarding the agreed pattern of work, which does not allow for an employer to require an employee to work additional hours or adjust their start or finishing time to align with the proposed new minimum payment provisions. Ai Group note that other aspects of the Award (cl.29,cl.25.6) currently operate to permit the working of shifts of less than 2-hours' duration.

[28] Ai Group submit that it is unfair for an employer who entered an agreed arrangement with an employee, under longstanding terms of the Award, to now have to provide a new and greater minimum payment to such employees regardless of such arrangements, and particularly unfair if there is no requirement that the employee actually undertake a period of work which

corresponds to the relevant minimum payment. In such circumstances, Ai Group submit, there would be no incentive for the employee to agree to undertake such work and an employer may have no capacity to compel the performance of such work.

[29] Ai Group submit that there is a risk employers will not be able to afford the new minimum payment provisions, if they are out of step with how they arrange work. In such circumstances, it is foreseeable that employers will need to re-structure their operations to remove roles involving short engagements, which may necessitate the termination of employees.

[30] To address the above, Ai Group propose that the draft determination be amended to include of the following provision:

> X.X Clause 10.5 does not apply in relation to a part-time employee employed prior to [insert date] unless they have agreed, in accordance with clause 10.3(e) to vary their agreed hours of work such that they agree to work at least 2 or 3 hours (as appliable) per shift or period of work in a broken shift (as appliable).

[31] Ai Group also propose that the following further amendment be made to cl.10.5 to ensure that an employer is able to require an employee to perform an amount of work that corresponds to the relevant minimum payment period:

> X.X An employer is not required to provide the payment referred to in clause 10.5 unless the employee undertakes that number of hours of work specified in clause 10.5 during each shift or period of work during a broken shift, if requested by their employer.

[32] Ai Group submit that both proposed variations are necessary to enable an employer to permanently alter their arrangements with employees and implement rostering and staffing changes, and to align them with client and operational needs. It submits that they are necessary to ensure the Award, once amended to include the new minimum payments provisions, constitutes a fair and relevant safety net as per s.134(1).

[33] Ai Group also submit that there is a need to amend the proposed draft determination to ensure it does not operate unfairly when employees are undertaking shorter periods of work but are not required to attend a workplace.

[34] Ai Group cite paragraphs [254],[246] and [339]-[340] of the Decision, where the rationale for minimum engagement terms in modern awards was discussed and submit that a key consideration underpinning the Full Bench's decision regarding minimum engagement periods appears to be that they justify the cost and inconvenience associated with the employee's attendance at the workplace.

[35] Ai Group submit that it is not apparent from the Decision that the Full Bench has determined that a 2-hour minimum payment is justified in circumstances where an employee is not required to attend a particular location for work. Further, they submit it does not appear that the Full Bench contemplated the circumstances of remote work, or did not significantly focus upon them, when balancing the relevant judgments to determine the minimum engagement period.

[36] Ai Group submit that the entitlement to a minimum payment period for work undertaken away from the employer's designated workplace is not *necessary*, in the sense contemplated by s.138. They submit that imposing such an entitlement would be unfair to employers if it captured instances where work was only undertaken over very short period of time, where the employee had not incurred the disutility of needing to travel to a particular workplace. Such work might include, but is not limited to, remote response work as contemplated by the Decision.

[37] Ai Group submit that the notion that the adverse impact of the new minimum payment provisions may be mitigated by an employer's ability to 'build' a shift of such duration will often not be applicable to work undertaken remotely.

[38] Ai Group submit that these issues would be addressed by amending the draft determination to include a clause within the proposed cl.10.5 to the following effect:

> *The requirement to provide a minimum payment in accordance with this clause only applies in circumstances where an employee is required by their employer to attend a* ***particular workplace.***

[39] Ai Group submit that adopting this above would leave scope for the foreshadowed remote response clause to deal with regulating minimum payments for employees undertaking work award from a designated workplace.

[40] Ai Group observe that there is a degree of overlap between resolving the minimum engagement and remote response work matters, but that the insertion of the proposed clause in cl.105 is nonetheless necessary, for the following reasons:

- there is no certainty, at this stage, as to what would constitute remote response;
- the definition proposed by ABLA only captures discrete activities, and not all activities;
- based on what the Full Bench appears to have agreed in regulating remote response work, based on paragraph [647] of the Decision.
- it is unclear whether remote response work is to be dealt with to finality on the hearing scheduled for 6 August, for whether it will be the subject of further conferencing.

[41] Ai Group submit they are conscious that the above proposal would limit the application of the minimum employment provisions in the context of both part-time and casual employment, and that this approach is consistent with the Full Bench's conclusion at paragraph [297] of the Decision. They also submit that the proposed amendment to the draft determination would be necessary in the sense contemplated by s.138 of the Act.

Q.4 Question for all other parties: What do you say about the change proposed by Ai Group?

ASU

[42] The Australian Municipal, Administrative, Clerical and Services Union (ASU) supports the *provisional* views, save that if the quantums proposed are also intended to compensate employees for unpaid work travel and working unsocial hours then the ASU submit that they

are 'clearly inadequate'.[18] In particular, the ASU submit that the proposed quantum of the broken shift allowance 'is insufficient if the broken shift allowance is intended to replace shift penalties and public holiday rates'.[19]

[43] The ASU submit that the draft determination should 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."

[44] At present, clause 25.6(b) states that an employee working a broken shift will be paid as follows:

> '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.'

[45] The draft determination proposes to replace this language with the following (at clause 25.6(d)):

> 'Payment for a broken shift will be at ordinary pay with weekend and overtime penalty rates to be paid in accordance with clauses 26 and 28.'

[46] As the ASU notes, the proposed wording does not make direct reference to an employee also being entitled to shift penalties under clause 29 – in particular, penalties for working during an 'afternoon shift' or a 'night shift' or to the public holiday penalty rates at clause 34.

[47] The ASU submit that the draft variation to clause 25.6(d) has 'unintentionally removed an employee's entitlement to shift penalties for working during an 'afternoon shift' or a 'night shift' and penalty rates for working public holidays'.

[48] The ASU contends that it 'is very likely, depending on the length of the shift, that an employee working a broken shift would be paid less than an employee working an unbroken shift' and the employee working a broken shift is worse-off compared to:

- an employee working an unbroken shift; and
- an employee working a broken shift incurring shift penalties under the current broken shift clause.

[49] The ASU submit that such shift lengths are a common feature of the disability sector. Employees working long broken shifts 'has been demonstrated in evidence filed by the ASU in this proceeding', in particular:

- Augustino Encabo gave evidence that he is regularly required to work a broken shift that runs from 9.30am until 2.30pm, and then from 3pm until 5pm – a total of seven hours. (Exhibit ASU10 at [25])

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[18] ASU submission 3 August 2021 at para. [21]

[19] ASU submission 3 August 2021 at para. [30]

- Richard Rathbone stated that he is rostered to work a broken shift that runs from 9.00am until 2.00pm, and then from 4.00pm until 6.30pm – totalling 9.5 hours. (Exhibit ASU9 at [18])

- Tracy Kinchin, a full-time employee, stated that while she is only paid for 8 hours per day, she is required to work these hours over a span of 9 to 10 hours each day. (Exhibit ASU7 at [17])

- Robert Steiner[20] worked 11 hours on Friday, 1 March 2019 between 6.00am and 9.00pm with one 4-hour break. If Mr Steiner was paid the current wage rates for a SACS employee level 2.1 he would earn $385.84 (10 hours' x $32.76 + 1 hour x $58.24). If the broken shift allowance excluded the afternoon shift allowance, Mr Steiner would only earn 367.19 (10 hours' x $29.12 + 1 hour x $58.24 + $17.75). (Exhibit ASU2)

[50] The effect of the current clause 25.6(b) is that an employee working a broken shift is paid a shift allowance in accordance with clause 29. The shifts prescribed in clause 29 are as follows:

- afternoon shift (any shift finishing after 8pm and at or before midnight Monday to Friday), and

- night shift (any shift finishing after midnight or commencing before 6am Monday to Friday).

[51] Clause 29.3 deals with the loadings for various shift types:

- an employee who works an *afternoon shift* is paid 'a *loading of 12.5%* of their ordinary rate of pay for the whole of such shift', and

- an employee who works a *night shift* is paid 'a *loading of 15%* of their ordinary rate of pay for the whole of such shift'.

[52] At [535], [539] and [540] of the *May 2021 decision* the Full Bench said:

> '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…
>
> As mentioned earlier, broken shift allowances compensate employees for the disutility of working broken shifts. Both the current SCHADS Award term and the Unions' proposed variation operate such that the additional payment for a broken shift and the quantum of that payment depend on the start/finish time of that shift. The HSU points to the anomalous outcomes which flow from the current term – some employees receive no additional compensation for working a broken shift. It seems to us that the same circumstance may arise under the variation proposed by the

[20] Steiner Statement, ASU7, [15].

Unions. For example, under the Unions' proposal an employee who commences a broken shift *after* 6am and finishes *before* 8pm receives no additional payment for working a broken shift.

The entitlement to additional remuneration for working a broken shift should not depend on the times at which the shift starts and finishes.'

Q.5 Question for the ASU / HSU / UWU: Please identify any examples in the evidence where an employee has worked a broken shift and been paid a shift allowance in accordance with clause 25.6(b).

[53] In respect of meal breaks the ASU submit 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.[21]

Q.6 Question for the ASU: Is this proposal only intended to apply to employees working broken shifts or more broadly? The ASU is to submit a draft variation to reflect its proposal.

Q.7 Question for all other parties: What do you say about the ASU"s proposal in respect of meal breaks?

[54] The ASU support the Commission's *provisional* view that if a day worker works outside the span of hours on a broken shift they should be paid overtime rates.

HSU

[55] The Health Services Union of Australia (HSU) supports the provision for a differentiation between the rate for a single break (excluding a meal break), to be paid at 1.7% of the standard rate, and that payable for 2 breaks in a broken shift, at 2.5% of the standard rate.

[56] The HSU notes that the Draft Determination does not mention shift allowances or public holiday penalty rates.

[57] The HSU submit that if the Decision intended to remove either or both these penalties, the outcome would be 'perversely anomalous' and that employees working more than 5-6 paid hours [depending on the classification of the employee] during a broken shift span that finished after 8 pm would lose pay. Further, any employee working a public holiday would be paid only ordinary rates of pay instead of public holiday rates and would stand lose substantially more.

[58] The calculations set out in the HSU's submission show the impact of the loss of shift allowances or the public holiday rates for an employee working 6 paid hours during a broken shift. 'It shows the remuneration difference between receiving the provisional allowances as proposed by the Commission for a broken shift with 1 unpaid break or 2 unpaid breaks and the shift and public holiday penalties.'[22]

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[21] ASU submission 3 August 2021 at para. [41]

[22] HSU submission 3 August 2021 at para. [26]

[59] At [556] of the Decision the Commission provides a *provisional* view that an employee who is a day worker (including part-time and casual employees) who performs work outside the ordinary span of hours (including as part of a period of work in a broken shift) should be entitled to overtime for such work.

[60] The HSU submit that the intention of the Commission was to ensure that an employee working a broken shift would receive overtime rates for any hours outside the hours of 6 am – 8 pm Monday to Sunday [clause 25.2(a)]. If this is the intention then the HSU submits that the view taken and the Draft Determination to provide for a 'day worker' to be paid overtime for work outside the 'span of hours' in the broken shift provision, 'will not function as intended when taken with the definitions of day worker and shiftworker at clause 25.2, and the provisions at clause 29 shiftwork'.[23]

[61] The span of hours clause at 25.2 states:

> **'25.2 Span of hours**
>
> **(a) Day worker**
>
> The ordinary hours of work for a day worker will be worked between 6.00 am and 8.00 pm Monday to Sunday.
>
> **(b) Shiftworker**
>
> A shiftworker is an employee who works shifts in accordance with clause 29—Shiftwork.

[62] The shiftwork clause at 29 details shiftwork and the applicable penalty rates:

> (a) **Afternoon shift** means <u>any shift which finishes after 8.00 pm</u> 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.
>
> (c) A **public holiday shift** means any time worked between midnight on the night prior to the public holiday and midnight of the public holiday.

[63] The Draft Determination at 28.1(b)(iv) provides the following:

> **'(iv)** All time worked outside the span of hours by part-time and casual <u>day workers</u> will be paid for at the rate of time and a half for the first two hours and double time thereafter, except that on Sundays such overtime will be paid for at the rate of double time, and on public holidays at the rate of double time and a half.' [emphasis added]

[64] Taking the example provided at [491] of the Decision the HSU submit that a worker rostered to work a broken shift finishing at 8.15 pm is arguably a shiftworker given the shift is rostered to finish after 8.00 pm. As a shiftworker they would be entitled to shift penalties but

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[23] HSU submission 3 August 2021 at para. [30]

would not be entitled to overtime for working outside the span of hours. The provision for overtime applies only to a day worker.

[65] The example at [491] of the May 2021 Decision states:

> **Example:**
>
> A part-time home care employee agrees to work a broken shift with 2 breaks on a Wednesday.
>
> This means that the employee must receive a minimum payment of 6 hours (new clause 10.5).
>
> The employee is rostered to work the 3 periods of work commencing at 9.00 am, 12.30 pm and 4.30 pm, respectively.
>
> During the **first period of work**, the employee:
>
> - attends to a client at home from 9.00 am to 9.30 am
> - travels 30 minutes to a second client arriving at 10.00 am, and
> - spends 1 hour with the second client finishing at 11.00 am.
>
> The employee spends 1.5 hours of the first period of work working with clients and 30 minutes travelling. The employee must be paid for 2 hours of work.
>
> The employee then has a break of 1.5 hours until the next period of work starts at 12.30 pm.
>
> During the **second period of work**, the employee:
>
> - works with a single client from 12.30 pm to 2.30 pm
> - the employee will be paid for 2 hours of work, and
> - the employee then has a break of 2 hours before the next period of work starts at 4.30 pm.
>
> During the **third period of work**, the employee:
>
> - attends to a client at home from 4.30 pm to 6.00 pm
> - travels 15 minutes to another client arriving at 6.15 pm, and
> - spends 2 hours working with the client and finishes at 8.15 pm.
>
> The employee is paid for 3.75 hours for this period. Because the shift finishes after 8.00 pm, the employee will be paid at the overtime rate for the period from 8.00 pm to 8.15 pm.
>
> The broken shift is worked over 11.25 hours, within the 12 hour span.
>
> Over the course of the shift the employee will be paid:
>
> - 7.5 hours at the applicable ordinary hourly rate
> - 0.25 hours at the overtime rate of time and a half (for work performed after 8.00pm)

- the 2 break broken shift allowance, and
- any other allowances to which the employee is entitled.

Q.8 Question for all other parties: What do you say about the HSU's submission in respect of this issue?

[66] Finally, the HSU submit that 'unless the broken shift provisions provide for prohibition against an employee being required to travel during the unpaid break in a shift or their meal break, employees are still likely to be required to travel without being paid'.[24]

UWU

[67] The United Workers' Union (UWU) supports the *provisional* views subject to the matters outlined below (particularly those matters relating to the operation of the shift loading).

[68] UWU submits the draft determination should be varied 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."

[69] Clause 29 of the SCHADS Award provides that employees covered by the award are entitled to shift allowances and penalty rates as follows:

> (a) An afternoon shift, being a shift which finishes after 8:00PM and at or before 12 midnight, Monday to Friday, a loading of 12.5% of their ordinary rate of pay for the whole of such shift;
>
> (b) A night shift, being a shift which finishes after 12 midnight or commences before 6:00AM, Monday to Friday, a loading of 15% of their ordinary rate of pay for the whole of such shift;
>
> (c) A public holiday shift, being a shift of any time worked between midnight on the night prior to the public holiday and midnight of the public holiday, a loading of 150% of their ordinary rate of pay for that part of such shift which is on the public holiday.

[70] When a broken shift is worked, these entitlements apply, and clause 25.6(b) of the SCHADS Award, which deals with broken shifts, contains a "cross reference" to the entitlement provided for in clause 29.

[71] The purpose of the entitlement to shift allowances and penalty rates is to compensate employees for the disutility associated with working at the times those allowances and penalty rates are prescribed to apply.

[24] HSU submission 3 August 2021 at para. [37]

[72] UWU submit that the broken shift allowance is not intended to compensate employees for the disutility of working at particular times of the day or days of the week which attract a particular disutility ("shifts"). 'The shift loadings / penalties do that.'[25]

> 'Accordingly, an employee who works a broken shift which, because of the time of day worked or the day of the week worked, would attract a shift loading / penalty rate under clause 29 of the award, should be entitled to both the broken shift allowance and the relevant shift loading / penalty.'[26]

[73] The UWU submits that the way the broken shift allowance provided for in other modern awards interacts with shift loadings is consistent with the submission it makes:

Award	**Are employees covered by the award entitled to both the broken shift allowance and a shift loading / penalty rate (if one would ordinarily apply)?**
Higher Education-General Staff – Award 2020	Yes
Hospitality Industry (General) Award 2020	Yes
Mining Industry Award 2020	Yes
Security Services Industry Award 2020	Yes
Cleaning Services Award 2020	Yes
Registered and Licensed Clubs Award 2020	Yes
Fitness Industry Award 2020	Yes
Animal Care and Veterinary Services Award 2020	Yes
Restaurant Industry Award 2020	Yes
Children's Services Award 2010	Yes

[74] The UWU submit that if an employee working a broken shift during times / days which would also attract an entitlement to a shift loading / penalty rate is entitled to both the broken shift allowance and the relevant loading / penalty then 'there is no basis to *reduce* the quantum of the broken shift allowance' specified in the Commission's provisional view:

> 'The quantum of the broken shift allowance which is the subject of the provisional view was calculated with regard to the particular disutilities associated with working a broken shift in the settings contemplated by this award. If there is opposition to the provisional view with respect to the quantum of the broken shift allowance under this award, the appropriate question to be asked is whether it is appropriate to fix the quantum of the allowance at the upper end of the range of other modern awards taking into account the particular disutilities associated with working broken shifts under this award – not whether the shift loading also applies. UWU submits the answer to this question is yes, given the circumstances in which employees under this award work broken shifts.'[27]

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[25] UWU submission 3 August 2021 at para. [20]

[26] UWU submission 3 August 2021 at para. [21]

[27] UWU submission 3 August 2021 at para. [23]

[75] The UWU proposes[28] the following amendment to the draft determination:

> '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, 28, 29 and 34.'

[76] In the *May 2021 decision*, at [408], the Full Bench set out the quantum of the broken shift allowance in other relevant awards. Since that time, the Commission has issued the *2020-2021 Annual Wage Review decision.*[29] We have updated the relevant table with the current applicable dollar figures, and inserted dollar figures for the *provisional view*, ABI and AFEI proposed allowances.

Award	% of standard weekly rate	Amount	Payable
Higher Education-General Staff – Award 2020[30]	0.28	$2.53	per day
Higher Education-General Staff – Award 2020[31]	1.38	$12.46	maximum per week
Hospitality Industry (General) Award 2020[32]	0.33	$2.90	per day where the period between shifts is between 2 and 3 hours
Hospitality Industry (general) Award 2020[33]	0.50	$4.39	per day where the period between shifts is more than 3 hours
Mining Industry Award 2020[34]	1.07	$9.62	per week
Security Services Industry Award 2020[35]*	1.62	$14.71	per rostered shift
Cleaning Services Award 2020[36]*	0.458	$3.78	per day
Cleaning Services Award 2020[37]*	2.29	$18.89	maximum per week

[28] UWU submission 3 August 2021 at para. [12]

[29] [2021] FWCFB 3500

[30] *Higher Education-General Staff-Award 2020*, clause C.1.3.

[31] *Higher Education-General Staff-Award 2020*, clause C.1.3.

[32] *Hospitality Industry (General) Award 2020*, clause 26.14(b)(i).

[33] *Hospitality Industry (General) Award 2020*, clause 26.14(b)(ii).

[34] *Mining Industry Award 2020*, clause 18.2(d)(iii).

[35] *Security Services Industry Award 2020*, clause 17.4

[36] *Cleaning Services Award 2020*, clause 17.2(b).

[37] *Cleaning Services Award 2020*, clause 17.2(b).

Award	% of standard weekly rate	Amount	Payable
Registered and Licensed Clubs Award 2020[38]	0.40	$3.51	per day
Fitness Industry Award 2020[39]*	1.70	$14.16	per day
Animal Care and Veterinary Services Award 2020[40]	1.60	$14.39	per shift
Restaurant Industry Award 2020[41]	0.50	$4.39	for each separate work period of 2 hours or more
Children's Services Award 2010[42]*	1.91	$17.18	per day
Social, Community, Home Care and Disability Services Industry Award 2010			
Full Bench *provisional view*[43]	1.70	17.53	first break
Full Bench provisional view[44]	2.50	25.78	second break
ABI proposal[45]	1.50	15.47	first break
ABI proposal[46]	2.00	20.63	second break
AFEI proposal[47]	1.30	13.41	first break
AFEI proposal[48]	2.00	20.63	second break

**Award appears to restrict broken shifts to 2 periods of work (i.e. one 'break', excluding meal breaks).*

Ai Group in Reply

[38] *Registered and Licensed Clubs Award 2020*, clause 19.2(c).

[39] *Fitness Industry Award 2020*, clause 17.2(b) (and for excess fares incurred, a payment of $1.95 per day).

[40] *Animal Care and Veterinary Services Award 2020*, clause 16.2(a).

[41] *Restaurant Industry Award 2020*, clause 21.3(b).

[42] *Children's Services Award 2010*, clause 15.1.

[43] [2021] FWCFB 2383 at [234]

[44] Ibid.

[45] ABI submission 3 August 2021 at [21].

[46] Ibid.

[47] AFEI submission 3 August 2021 at [53].

[48] Ibid.

[77] In its supplementary submission Ai Group opposes the Union's proposed variations to make shift allowances and public holiday penalties payable in addition to the new broken shift allowance. As t the shift allowance proposed Ai Group submits:

> 'The proposal would also change the way that the applicable shift allowance is determined, when compared to the current terms of the Award. In the context of brokens shifts, the Award currently requires that shift allowances are determined based on the finishing time of the relevant shift.[49]
>
> Significantly, the unions' proposal would result in a requirement to determine shift loadings in a manner which is different to any of the claims originally proposed by the unions. As such, it should properly be regarded as new substantive claim, rather than a matter that is capable of being addressed through the settling of the draft determination.'[50]

[78] Ai Group is not, at this stage, supportive of the proposals advanced by NDS and submits that the submissions of the unions and NDS do not appear to accord with the Commission's Decision. We can address this matter in more detail in the course of the hearing, as necessary.

[79] Ai Group submits that the Union's and NDS proposals potentially give rise to the following considerations:

(a) Whether the quantum of the broken shift allowances is appropriate or whether they should be significantly reduced (either in the context of shiftworkers alone or both shiftworkers and day workers).

(b) Whether and the extent to which the variation proposed by the unions would increase employment costs by entitling employees to a shift allowance, in addition to the broken shift allowance, in circumstances where they would not currently receive it.

(c) Whether it would be fair or necessary[51] for the shift allowance to apply to the entirety of a broken shift or whether, consistent with the approach adopted in some modern awards and predecessor instruments to the Award, it may be appropriate for the shift allowance to only apply to that part of the shift that could be said to correspond with the definition of *'afternoon shift'* and *'night shift'* (i.e. should the night shift or afternoon allowances only apply during the *'night' or 'afternoon'*?)

(d) Whether, as a matter of fact properly established through evidence, the variation proposed by the Commission would result in any reduction in the remuneration of an employee.

(e) The manner in which the proposed (and current) broken shift provisions interact with clause 29.4 of the Award.

(f) The treatment of the issue under other awards, including the extent to which the payment of such significant broken shift allowances, combined with an obligation to provide separate shift allowances, might be so out of step with the treatment of

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[49] Clause 25.6(b) of the Award.

[50] Ai Group Supplementary Submission 5 August 2021 at paras. [10] – [11]

[51] As contemplated by s.138 of the Act.

such matters in other awards that it is not, *prima facie*, a necessary element of a safety net, as contemplated by s.138 of the Act.

(g) The implications for employers and employees if shiftwork is not able to be undertaken through an arrangement involving broken shifts.

[80] Ai Group contends that these issues should not be dealt with to finality at the hearing on 6 August 2021 for the following reasons:

> 'Given the controversies that have been revealed, the Full Bench should refrain from finalising the claims relating to broken shifts and afford the parties a proper opportunity to consider the serious and complex matters raised at this late stage by the unions and NDS, and to advance further submissions and evidence in relation to this matter. The changes proposed *could* foreseeably have a very substantial financial impact upon employers, but this is not a matter about which we can be certain until we have been afforded an opportunity to engage with industry.
>
> The proposals are not matters that the parties should, as a matter of procedural fairness, be expected to deal with to finality during the hearing scheduled for 6 August 2021; nor are they matters that the Full Bench should determine without the benefit of such matters being properly ventilated before it by the parties.
>
> We suggest that, in the interests of advancing this matter in a timely and efficient way, it may be appropriate that the issues raised by the unions and NDS also be dealt with in the soon-to-be convened conference and the associated subsequent hearing contemplated in the Full Bench's statement[52] of 3 August 2021.
>
> We raise this issue in written submissions today so that the parties and Full Bench may be able to consider it prior to the commencement of the hearing.'[53]

Questions for all other parties: What do you say in response to the Ai Group proposal?

[81] In its Supplementary Submission Ai Group responds to the HSU's submission which takes issue with one aspect of the example provided and submits:

> 'The HSU's submission appears to be misguided. An employer cannot *'always cite reasonable grounds in relation to home care employees'*[54] by virtue of the example. The example is, necessarily, only an example. It does not affect the substantive operation of clause 10.3(g)(iii) and more specifically, it does not permit an employer to cite reasonable business grounds of the nature contemplated by the example in all home care scenarios.
>
> Ultimately, whether a *'lack of continuity of funding, changes in client numbers and client preferences'*[55] constitute reasonable business grounds for declining a request will turn on the facts and circumstances of a particular matter. It does not follow that, in all cases, employers of home care employees could rely on those grounds for refusing the request.
>
> If the union is in fact taking issue with the inclusion of the proposed clause 10.3(g)(iii); Ai Group would strongly oppose its removal. Such an approach would alter the operation of the

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[52] *4 yearly review of modern awards – Social, Community, Home Care and Disability Services Industry Award 2010* [2021] FWCFB 4716.

[53] Ai Group Supplementary Submission 5 August 2021 at paras. [20] – [23]

[54] HSU submission dated 3 August 2021 at [49].

[55] HSU submission dated 3 August 2021 at [48].

clause in a way that would clearly be very unfair to employers[56] and would have a significant adverse impact on business[57].'[58]

[82] In response to the ASU's proposal that clause 10.3(g) be reviewed after a year of operation Ai Group submits that 'it is unnecessary to schedule a review of the proposed new clause at this time'.[59] In support of its point, Ai Group submits:

> 'The concerns voiced by the ASU are, in our view, premature and without proper foundation. The proposed clause constitutes a significant development in the manner in which the Award regulates the hours of work of part-time employees. Under the proposed clause, employers would be able to refuse a request from an employee only where there are reasonable business grounds for doing so. Disputes arising from the operation of the clause can be dealt with in accordance with the dispute settlement procedure found in the Award and the introduction of an Award-derived right to make the relevant request will also attract the protections afforded by Part 3-1 of the Act.
>
> Further, as a consequence of the Decision, various other changes are to be made to the Award which, collectively, may to some extent serve to reduce the level of variability in the hours worked by part-time employees. When coupled with the proposed right under clause 10.3(g), the doubts expressed by the ASU about the efficacy of the clause may be unsubstantiated.
>
> Moreover, any party with the requisite standing can make an application to vary the Award at any time. If the ASU or any other relevant party forms the view that the proposed provision is deficient, it can make an application for a variation to the Award that seeks to address this. A review of the provision is not necessary in this context.'[60]

2. Minimum engagements/minimum payment – Training

ABI

[83] ABI submit that one of the consequences of the introduction of minimum engagements/minimum payments for part-time employees is that some existing part-time employees will currently be working an agreed pattern of work that includes shifts or portions of a broken shift of less than 2 hours' duration. It submits that for example, there will be a large number of part-time employees whose agreed pattern of work will include shifts or portions of work of less than 2 hours' duration.

[84] ABI submit that a natural consequence of the variations to the Award will be that employers will seek to change rosters and patterns of work to ensure, as much as practicable, that employees are being fully utilised for the full 2-hour period whenever they present for work, in order to minimise the circumstances in which they would incur labour costs for unproductive/unchargeable time.

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[56] Section 134(1) of the Act.

[57] Section 134(1)(f) of the Act.

[58] Ai Group Supplementary Submission 5 August 2021 at paras. [28] – [30]

[59] Ai Group Supplementary Submission 5 August 2021 at para. [32]

[60] Ai Group Supplementary Submission 5 August 2021 at paras. [33] – [35]

[85] However ABI contends that pursuant to clause 10.3(e) of the SCHADS Award, an employer cannot change a part-time employee's agreed pattern of hours without the individual employee's agreement. ABI submit that this means that employers may be exposed to situations where a part-time employee does not agree to vary their existing agreed pattern of work to permit the employer to obtain the maximum productive benefit of the time for which they must pay the employee on any shift.

[86] ABI submit that the sensible way to rectify this unintended implementation issue would be to introduce a transitional arrangement whereby, for a defined period of time, the requirements of clause 10.3(e) of the SCHADS Award would not apply in situations where employers vary a part-time employee's regular pattern of work to increase any shift or portion of work that is less than the applicable minimum engagement / minimum payment period.

[87] ABI therefore requests that an additional clause be inserted into clause 10.3 of the Award as follows:

> '(h) Between the period 1 July 2022 to 30 June 2023, the requirements of clause 10.3(e) do not apply in situations where an employer varies a part-time employee's regular pattern of work to increase any shift or portion of work that is less than the applicable minimum engagement / minimum payment period. Seven days' notice must be given to the employee of the change in their agreed regular pattern of work, and the new pattern of work will become the employee's agreed regular pattern of work within the meaning of clause 10.3(c).'

Ai Group in Reply

[88] In response to ABI's proposed variation Ai Group submits that the variations it proposed in its submission of 3 August 2021 at [189] – [198] should be adopted instead of ABI's proposed solution and submits:

> 'It is very common for employers and part-time employees to agree on their hours of work, for the purposes of clause 10.3(c), in the context of a contract of employment. The provision proposed by ABI would not address the difficulties that flow from this. Employers would remain bound by their contractual obligations and the suggested clause would not give an employer a right to vary a part-time employee's hours notwithstanding their contractual obligations.
>
> It is also somewhat unclear whether the *'new pattern of work'* contemplated by the clause would *'become the employee's agreed regular pattern of work within the meaning of clause 10.3(c)'*[61] during the period of 1 July 2022 – 30 June 2023; or whether it would continue as the employee's agreed pattern of work beyond that timeframe.
>
> Unless it is the latter, rather than address the key issue identified by Ai Group and ABI in their respective submissions, the proposed clause would simply delay the point in time at which an employer would be faced with the implications of the minimum payment obligations applying to existing part-time employees.'[62]

[89] At [199] – [200] of it submission dated 3 August 2021 Ai Group proposes the following further amendment be made to clause 10.5 in order to ensure that, for both part-time and casual

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[61] ABI submission dated 3 August 2021 at [111].

[62] Ai Group Supplementary Submission 5 August 2021 at paras. [46] – [48]

employees, an employer is able to require that the employee perform a corresponding amount of work to the relevant minimum payment period:

> **X.X** An employer is not required to provide the payment referred to in clause 10.5 unless the employee undertakes that number of hours of work specified in clause 10.5 during each shift or period of work during a broken shift, if requested by their employer.

[90] Ai Group also proposes that the following provision be included:

> **X. X** Clause 10.5 does not apply in relation to a part-time employee employed prior to [insert date] unless they have agreed, in accordance with clause 10.3(e) to vary their agreed hours of work such that they agree to work at least 2 or 3 hours (as appliable) per shift or period of work in a broken shift (as appliable).

Q.9 Question for all other parties: What do you say about the ABI and Ai Group's proposed amendments?

[91] In the *May 2021 Decision*, the Full Bench determined to introduce minimum engagements into the SCHADS Award for part-time employees and to also increase the existing minimum engagement for casual home care employees from one hour to two hours.

[92] At [374]-[376] of the *May 2021 Decision*, the Full Bench indicated that it did not propose, at that time, to adopt its proposal for a one-hour minimum engagement for attendances at work for:

a) staff meetings; and

b) training.

[93] At [376] the Full Bench said:

> 'ABI did not advance a cogent merit argument in support of their proposal and nor were we directed to any relevant evidence. We are not persuaded to provide a 1 hour minimum engagement for the activities identified, at this time. But that is not the end of the matter; we propose to provide ABI (and any other interested party) an opportunity to present further arguments and evidence in support of the proposed change.'

[94] ABI maintains that there should be a one-hour minimum engagement period for casual and part-time employees in the home care and disability services sectors where employees are required to attend the workplace for training and staff meetings.

[95] Whilst ABI states that it understands the rationale for minimum engagements (i.e. to ensure that the employee receives a sufficient amount of work, and income, for each attendance at the workplace to justify the expense and inconvenience associated with that attendance), it considers it appropriate that there be some reasonable accommodation for staff meetings and the provision of training.

[96] ABI submits that the importance of training for personal care workers was something that was highlighted through the Aged Care Royal Commission. By way of example, amongst

the recommendations made by the Royal Commission in its Final Report were recommendations that:

> a) a national registration scheme be established by 1 July 2022 for the personal care workforce which is to include ongoing training requirements;
>
> b) the Australian Government should implement by 1 July 2022 a condition of approval of aged care providers that all frontline aged care workers undertake regular training about dementia care and palliative care; and
>
> c) the development of short courses for the aged care workforce be fast-tracked and be designed to 'improve opportunities for learning and professional development' and 'upgrade the skills, knowledge and capabilities of the existing workforce'.

[97] ABI submit that training and development of the frontline home care and disability services workforce (i.e. support workers) is complicated by the nature of the work performed and the logistics involved in coordinating training for employees who in most cases do not work at the same location at the same time.

[98] ABI submit that given the funding constraints affecting the industry, it is concerned that the foreshadowed implementation of enhanced minimum engagements will have the effect of hampering employer efforts to bolster communication practices with their workforces and invest in learning and development programs.

[99] ABI submits that a one-hour minimum engagement would alleviate the disincentive that a higher minimum engagement period would otherwise create for employers to hold regular staff meetings and training.

[100] ABI submits that a one-hour minimum engagement for casual and part-time employees in the home care and disability services sectors, where employees are required to attend the workplace for training and staff meetings, is an appropriate inclusion in the SCHADS Award for the following reasons:

> (a) employees will obtain the benefit of two-hour minimum engagements in respect of their usual work engagements (i.e. the overwhelming proportion of their shifts), which is a significant improvement to the current Award;
>
> (b) staff meetings and training will make up an overwhelming minority of the shifts performed by casual and part-time employees, so on an overall basis it cannot be said that a shorter minimum engagement for what would only be a handful of occasions would be approaching anything that could be considered 'exploitative';
>
> (c) given the high proportion of part-time employment in the home care and disability services sectors (and the fact that the Award has previously not contained any minimum engagement period for part-time employees), we consider that the introduction of a two hour minimum engagement period will likely have the effect of reducing the level of training provided by employers to employees.

[101] In ABI's submission, a two-hour minimum engagement for casual and part-time employees in the disability and home care sectors may cause employers to determine that it is

not commercially viable to hold regular staff meetings, or to provide regular training and development.

AFEI

[102] AFEI notes that the one-hour minimum engagement for staff meetings and training was opposed by the unions on the following basis:

> "…so far as ABI seeks to reserve a one hour minimum engagement for staff meetings and the like, ABI does not identify any other award with like provision. Given the rationale for minimum engagements is the avoidance of exploitation resulting from having the income generated by an attendance at work outweighed by the time and cost of attendance, there is no basis for exempting any particular work related activity from any minimum engagement provision."[63]

[103] In relation to training for employees AFEI submits that:

> a) time in attendance at training can vary taking as little as seven minutes to at most, one hour in length;
>
> b) attendance at training can be completed online and in the employee's own home or location of their choice and does not always require attendance at a location directed by the employer;
>
> c) to some extent, the training can be undertaken by employees at mutually convenient times to the employer and employee.

[104] AFEI submits that the impact of the minimum engagement provision applying to training would be significant:

> 1. The financial impact for employers in circumstances where training only takes 10 minutes to complete online in the employee's own home but the employer would be required to pay for two hours; or
>
> 2. To counter the significant financial impact, employers may be required to 'bundle' a series of training together until there is enough training to last two hours in length before requiring the employee to undertake the training (for example, if a training module takes 10 minutes in length, the employee may be required to undertake the training only when all 12 modules have been released). The consequential impact of this option would be on the employees and participants (including but not limited to their health and safety), particularly where the training is urgent in nature which is commonly the case given the nature of this sector.[64]

[105] AFEI submit that the cost impact would significantly outweigh the disutility of the training where training is undertaken online and in the employee's own home and where there is no requirement for the employee to attend the workplace, which is the unions' argument to justify the minimum engagement provision applying in such circumstances.

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[63] Submission of AFEI, 3 August 2021, at [37].

[64] Ibid at [39].

[106] AFEI submit that due to the variable nature in the time involved to undertake training, the employee should be paid for the time it takes to complete the training. It states that for example, payment at ordinary rate for 10 minutes of training. AFEI submits that accordingly, attendance at training should be exempt from the minimum engagement provisions.

[107] AFEI submit that alternatively, employees favour the flexibility to undertake training at times convenient to them. It contends that accordingly, more flexibility should be provided to providers and employees in this respect. AFEI states that for example, with employee agreement, 3 x 20 minute training modules can be undertaken over a period of time, with all 3 training modules to be subject to the 1 hour minimum engagement.

Ai Group

[108] Ai Group submit that that the Commission's decision that part-time and casual employees should be paid for at least two hours for each shift or portion of a broken shift *should not apply* where such employees attend meetings or training that is less than two hours in duration.

[109] Ai Group submit that if a part-time or casual employee is required to attend meetings or training without being required to attend a physical workplace, no minimum payment period should apply, and if such employees are required to attend at a physical workplace, a minimum payment of not more than 1 hour should apply.

[110] Additionally, Ai Group submit that attendance at remote meetings and/ or training should not attract the application of the broken shift provisions (i.e. proposed clauses 20.10 and 25.6).

[111] Ai Group submit that meetings and/or training attended by employees covered by the SCHADS Award are typically less than 2 hours in duration and that not all meetings and/or training requires attendance at a physical workplace.

[112] Ai Group submit that remote meetings and training can be attended by employees from their respective homes or a location of their choosing. Ai Group refer to the underlying justification for minimum engagement and payment periods expressed by a Full Bench in the *Casual and Part-time Common Issues* decision[65] at paragraphs [245]-[246], in *particular 'that minimum engagement terms protect employees from exploitation by ensuring that they receive a minimum payment for each attendance at their workplace to justify the cost and inconvenience of each such attendance.*'

[113] Ai Group submit that the evidence provided in witness statements demonstrates that the duration of remote meetings and/or training is commonly considerably less than two hours, and in some instances only 5 minutes, and that employers permit employees to determine when they undertake training remotely. Ai Group submit that this further removes the scope for any disutility that may be experienced by an employee when participating in such training.

[114] Ai Group submit that the various funding arrangements applying to disability and home care make limited accommodation for costs associated with meetings and/or training, and a 2-

[65] [2021] FWCFB 2383

hour minimum payment for each such instance would result in significant additional costs which could not be recovered thought existing funding arrangements. Ai Group submit that it is not clear these arrangements will be altered to accommodate this.

[115] Ai Group submit that imposing a mandatory 2-hour minimum payment may deter employers from providing training, and so adversely affect employees' ability to develop and refine their skills. They submit that it may also affect the quality of care provided to clients.

[116] Ai Group submit that it would not be 'fair' to employees to require a two-hour minimum payment, would be out of step with the provision of a 'relevant' safety net that reflects contemporary standards and working practices (s.134(f)) and could not be said to promote flexible modern working practices (s.134(d)).

[117] Ai Group submit that any requirement to pay a broken shift allowance on account of attendance at a Remote Meeting and / or Training would further compound the unfairness and other adverse consequences for employers described above.

[118] , Ai Group further submit that due to limitations on the number of times a shift can be broken, attendance at remote meetings and/or training could cause significant disruption to the delivery of care to clients. They submit that if attendance constitutes part of a broken shift, and an employee can perform work on only two portions of a broken shift on any given day, this may result in an employer having to re-schedule a client's session or find another employee to deliver the service, which may affect continuity of care and increase the employer's regulatory burden. Applying the broken shift restrictions in these circumstances would be inconsistent with the need to promote flexible modern work practices and the efficient and productive performance of work (s.134(d)).

Q.10 Question for all other parties: What do you say in reply to the submission advanced by ABI, AFEI and Ai Group?

3. Roster changes

[119] In the *May 2021 Decision*, the Full Bench expressed the view that there is merit in varying clause 25.5(d) to permit the variation of a roster by mutual agreement in circumstances where the variation is proposed by an employee to accommodate an agreed shift swap with another employee.[66]

ABI

[120] ABI is not opposed to the *provisional* view.[67]

ASU

[121] The ASU supports the proposed variation.[68]

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[66] [2021] FWCFB 2383 at [643]

[67] ABI submission, at [40]

[68] ASU submission 3 August 2021 at para. [43]

NDS

[122] NDS is supportive of the proposed variation to allow employees to swap shifts by agreement, but proposes one amendment to the proposed clause 25.5(d)(ii) to clarify that an agreed shift swap between employees also requires the agreement of the employer. It is proposed that the provisional clause 25.5(d)(ii)(A) at [1271] of the Decision be amended to read 'if the change is proposed by an employee to accommodate an agreed shift swap with another employee, subject to the agreement of the employer;…'.

[123] In support of the proposed change, NDS submit:

> 'In some circumstances, an employer may have reasonable grounds to not agree to a proposed shift swap. In a disability service this might relate to considerations such as matching employees with the appropriate skills and attributes to the needs of a client, or fatigue management where a shift swap might result in excessive hours being worked by an employee in a short period of time.'[69]

Q.11 Question for all other parties: What do you say about the changes proposed by NDS?

Ai Group

[124] Ai Group does not oppose the Commission's provisional view at paragraph [643] of the *May 2021 decision*, provided that the proposed cl.25.5(d)(ii) makes clear that a roster variation is not required where employees agree to a shift swap, unless it is accepted or agreed by the employer. Whilst Ai Group does not oppose the SCHADS Award being varied to contemplate the proposition that employees may agree to swapping shifts, any consequential variation to the roster should not be mandated by the SCHADS Award, leaving the ultimate decision to vary the roster up to the employer.

[125] Ai Group submit that there are various reasons why an employer must retain the prerogative to determine whether a roster will be varied to accommodate a swap, including:

- it cannot be assumed all employees have the necessary skills, competence and experience to support all clients;
- a client may have informed the employer they only wish to be supported by certain employees and not by others;
- certain employees may have specific knowledge of the needs and preferences of a certain client;
- certain shift swaps may result in inefficient outcomes such as longer travel times and a necessity for handovers;
- the employer may wish to roster an employee to perform other work at that time;
- implementing the swap may result in consequences for overtime, breaks or have contractual implications for employees.

[126] Ai Group propose cl.25.5(d)(ii) should be amended to read as follows:

> "**(ii)** However, a roster may be changed at any time:

[69] NDS submission 3 August 2021 at para. [25]

(A) if the change is proposed by an employee in respect of an agreed shift swap with another employee, that the employer has agreed to accommodate; or …"

[127] Ai Group submit that the above amended proposal would ensure that the operation of the clause is fair to the employer and moderate the impact on the clause on them, as per s.134(f) of the modern awards objective. Ai Group submit that in its current proposed format in the draft determination, the clause cannot be said to promote flexible work practices and the efficient and productive performance of work, as per s.134(d).

[128] Ai Group submit that their proposed amendment to the clause appears consistent with the Full Bench's *provisional* view, in particular that an SCHADS Award should 'permit', rather than mandate, a roster variation where is it agreed by employees. Further, the draft clause proposed by the Commission states that a roster 'may' be changed in the relevant circumstances. Ai Group submit that the proposed clause should be varied as they submit above.

Q.12 Question for all other parties: What do you say about the changes proposed by Ai Group?

4. Client cancellation

[129] The proposed client cancellation clause is set out at item 10 of the draft determination as follows:

'10. By deleting clause 25.5(f) and inserting the following:

(f) Client cancellation

(i) Clause 25.5(f) applies where a client cancels or changes a scheduled home care or disability service, within 7 days of the scheduled service, which a full-time or part-time employee was rostered to provide.

(ii) Where a service is cancelled by a client under clause 25.5(f)(i), the employer may either:

(A) direct the employee to perform other work during those hours in which they were rostered; or

(B) cancel the rostered shift.

(iii) Where clause 25.5(f)(ii)(A) applies, the employee will be paid the amount payable had the employee performed the cancelled service or the amount payable in respect of the work actually performed, whichever is the greater.

(iv) Where clause 25.5(f)(ii)(B) applies, the employer must either:

(A) pay the employee the amount they would have received had the shift not been cancelled; or

(B) subject to clauses 25.5(f)(v) and (vi), provide the employee with make up time in accordance with clause 25.5(f)(vii).

(v) The make up time arrangement can only be used where the employee was notified of the cancelled shift at least 12 hours prior to the scheduled commencement of the shift. In these cases, clause 25.5(f)(iv)(A) applies.

(vi) The make up time arrangement cannot be used where the employer is permitted to charge the client in respect of the cancelled service. In these cases, clause 25.5(f)(iv)(A) applies.

(vii) Where the employer elects to provide make up time:

(A) the make up time must be rostered in accordance with clause 25.5(a);

(B) the make up time must be rostered to be performed within 6 weeks of the date of the cancelled shift;

(C) the employer must consult with the employee in accordance with clause 8A regarding when the make up time is to be worked prior to rostering the make up time; and

(D) the make up shift can include work with other clients or in other areas of the employer's business provided the employee has the skill and competence to perform the work.

(viii) Clause 25.5(f) is intended to operate in conjunction with clause 25.5(d) and does not prevent an employer from changing a roster under clause 25.5(d)(i) or (ii).

ABI

[130] ABI is opposed to the *provisional* view that the window for arranging make up time be only 6 weeks.

[131] ABI submits that as set out in the *May 2021 Decision* at [822], it had proposed that the client cancellation clause operate such that, where the employer elects to provide make up time:

(a) the make up time would be required to be rostered in accordance with clause 25.5(a); and

(b) the make up time would be required to be rostered to be performed within 3 months of the date of the cancelled shift.

[132] ABI states that its proposal that make up time be rostered in accordance with clause 25.5(a) was put on the basis that make up time could be rostered over a 3 month time window.

[133] ABI submits that if the time window is reduced to 6 weeks, the requirement to roster make up time in accordance with clause 25.5(a) should be varied.

[134] It submits that the two elements above are interrelated. Clause 25.5(a) provides:

> "(a) The ordinary hours of work for each employee will be displayed on a fortnightly roster in a place conveniently accessible to employees. The roster will be posted at least two weeks before the commencement of the roster period."

[135] ABI submits that if make up time is required to be displayed on a fortnightly roster posted at least two weeks before the commencement of the roster period, a large chunk of the 6 week window will not be available to the employer.

[136] ABI provides the following example of this issue to illustrate the point:

(a) An employer utilises a fortnightly roster (e.g. 5-18 July, 19 July - 1 August, 2-15 August, etc.);

(b) A client cancellation event occurs on 6 July 2021;

(c) As at 6 July 2021, the employer had already published the subsequent fortnightly roster (the roster for the fortnightly period commencing 19 July 2021 had been published on 5 July 2021);

(d) The employer is not due to publish the next fortnightly roster 19 July 2021 (13 days after the client cancellation event);

(e) The next fortnightly roster is then published on 19 July 2021;

(f) As the roster must be published 14 days in advance, the first work day shown on that roster is 2 August 2021.

[137] ABI submits that having regard to the above example, the first day on which the employer could properly roster the employee's make up time is 2 August 2021, some 27 days after the client cancellation event (on 6 July 2021). It submits that therefore, the nominal '6 week' period which the employer has to arrange the employee's make up time is actually only 16 days.

[138] ABI submits that as demonstrated by the above example, the requirement for make up time to be rostered in accordance with clause 25.5(a) results in scenarios where the proposed 6 week period does not give employers a reasonable or sufficient period of time to effectively schedule make up time.

[139] ABI submits that it should be noted that many frontline disability services and home care workforces consist of predominantly part-time employees, and those workers already have a fixed agreed pattern of work under clause 10.3(c) which cannot be varied without agreement in writing. It states that it may not, therefore, be straightforward to simply find a spare (and appropriate) 'make up' shift within a 16 day window.

[140] ABI submits that a range of factors must be considered in offering an employee make up time: the employee's location, the employee's skillset; client needs; client preferences; the employee's availability to work additional make up hours over and above their existing workload, etc.

[141] ABI states that by way of example, if a part-time employee currently works 32 hours per week and has a 5 hour shift affected by a client cancellation event, it may be very difficult for an employer to find a spare 5 hour shift for them to perform in a window potentially as short as 16 days (particularly given the employee already works 32 hours per week).

[142] ABI submits that there are two ways in which this issue can be addressed:

(a) Firstly, a 3 month time period could be adopted (as originally proposed by our clients), which would provide a larger (and more reasonable) time window in which the make up time can be worked; or

(b) Secondly, in the alternative, the requirement to publish make up time shifts on the normal roster in accordance with clause 25.5(a) could be removed and be replaced with the ability to schedule make up time on 7 days' notice (or less by agreement).

[143] ABI submits that the second option above (at (b)) is preferable for both employers and employees and should be adopted.

[144] ABI submits that in relation to point (a) above, the Full Bench 'acknowledge[d] the force' of the point made by the UWU as recorded at [813] of the *May 2021 Decision*:

> 'The time within which make-up may be worked should not be three months. Three months is an excessive length of time. The three month time frame will allow larger balances of make-up time to accrue and also greater deficits in remuneration for work performed when make-up time is worked. The current Award clause requires that make-up time must be worked in 'that, or the subsequent fortnightly period'. We propose that the time in which make up can be worked is extended to only the next 2 fortnightly periods i.e. a month. This extension should enable employers to find an appropriate make-up shift for the employee, whilst not being so long as to lose the nexus between the paid shift and the make-up time shift.'

[145] ABI acknowledges that a 3 month time window will potentially allow larger balances of make up time to accrue, which in broad terms is not in the interests of employers or employees. ABI also agrees that there is merit in retaining a nexus, as much as possible, between the paid cancelled shift and the make up time shift.

[146] In ABI's view, it is in the interests of both employers and employees that make up time be worked as soon after the cancelled shift as practicable.

[147] ABI states that this is why it has reached the conclusion that the idea at paragraph 58(b) is a better solution to the issues it has raised with the 6 week window.

[148] ABI states that under the proposed drafting, the requirement to roster make up time in accordance with clause 25.5(a) has the somewhat anomalous effect that an employee would not be able to work make up time until 15 days after the cancelled shift (at the earliest), and in some cases not until 27 days after the date of the cancelled shift.

[149] ABI submits that this is a strange outcome which:

(a) will restrict an employer's ability to schedule make up time in a timely manner;

(b) is not conducive to assisting employers to organise make up time; and

(c) extends/weakens the 'nexus' between the cancelled shift and the make up time.

[150] ABI submits that the obvious reasonable solution is to remove the requirement to roster make up time in accordance with clause 25.5(a), and to instead allow make up time to be scheduled on 7 days' notice, or such earlier period by agreement with the individual employee (following consultation with the employee as already provided for in the clause).

[151] ABI submits that in this regard, it is notable that clause 25.5(d)(i) already provides the employer with an ability to change an employee's roster on seven days' notice.

[152] ABI submits that if the current Award already confers a right on employers to change an employee's roster on seven days' notice, it would seem appropriate that an employer should also be able to schedule make up time on seven days' notice in the event of a client cancellation event, rather than having to go through the somewhat clunky process of rostering make up time pursuant to clause 25.5(a).

[153] ABI submits that this would enable the employer to have access to a greater proportion of the available 6 week window.

[154] ABI submits that without this amendment to the drafting, the make up time arrangement will be very difficult for employers to utilise in practice.

[155] ABI submits that this is a reasonable and sensible adjustment to the proposed drafting and one which should be adopted.

[156] ABI submits that if this proposal is not adopted, it presses for a 3 month time window and maintain that it represents a fair and reasonable time period to give employers a sufficient opportunity to find an available (and suitable) shift and roster make up time.

[157] ABI's proposed changes to Item 10 of the draft variation determination are set out below:

(f) Client cancellation

(i) Clause 25.5(f) applies where a client cancels or changes a scheduled home care or disability service, within 7 days of the scheduled service, which a full-time or part-time employee was rostered to provide.

(ii) Where a service is cancelled by a client under clause 25.5(f)(i), the employer may either:

(A) direct the employee to perform other work during those hours in which they were rostered; or

(B) cancel the rostered shift or the affected part of the shift.

(iii) Where clause 25.5(f)(ii)(A) applies, the employee will be paid the amount payable had the employee performed the cancelled service or the amount payable in respect of the work actually performed, whichever is the greater.

(iv) Where clause 25.5(f)(ii)(B) applies, the employer must either:

(A) pay the employee the amount they would have received had the shift or part of the shift not been cancelled; or

(B) subject to clauses 25.5(f)(v) ~~and (vi)~~, provide the employee with make up time in accordance with clause 25.5(f)(vi~~i~~).

(v) The make up time arrangement can only be used where the employee was notified of the cancelled shift (or part thereof) at least 12 hours prior to the scheduled commencement of the ~~shift~~cancelled service. In these cases, clause 25.5(f)(iv)(A) applies.

~~(vi) The make up time arrangement cannot be used where the employer is permitted to charge the client in respect of the cancelled service. In these cases, clause 25.5(f)(iv)(A) applies.~~

(vi~~i~~) Where the employer elects to provide make up time:

(A) the employer must provide the employee with 7 days' notice of the make up shift (or a lesser period by agreement with the employee)~~make up time must be rostered in accordance with clause 25.5(a)~~;

(B) the make up time must be ~~rostered to be performed~~worked within 6 weeks of the date of the cancelled ~~shift~~service;

(C) the employer must consult with the employee in accordance with clause 8A regarding when the make up time is to be worked ~~prior to rostering the make up time~~; and

(D) the make up ~~shift~~ time can include work with other clients or in other areas of the employer's business provided the employee has the skill and competence to perform the work.

(vi~~i~~i) Clause 25.5(f) is intended to operate in conjunction with clause 25.5(d) and does not prevent an employer from changing a roster under clause 25.5(d)(i) or (ii).

Q.13 Question for all other parties: What do you say about ABI's proposal?

"Double dipping" issue

[158] At [241] of the *May 2021 Decision,* the Full Bench noted that ABI was 'to consider the 'double dipping' point' in relation to the client cancellation clause, which was discussed at [825]-[827] of the Decision.

[159] ABI submits that in that part of the *May 2021 Decision*, the Full Bench considered an issue that had been raised by the ASU about the potential for ABI's proposed client cancellation clause to create a situation where employers could 'double-dip' by receiving income for multiple client services (the initial cancelled service and the subsequent make-up service) while only being required to pay the employee for one shift.

[160] ABI states that initially, in response to the ASU issue, on 12 October 2019 it indicated that it was 'not opposed to a variation to our proposal to explicitly state that the employer may only require an employee to work make-up time where the employer is permitted to charge the client a cancellation fee.'

[161] ABI submits that at [827] of the Decision, the Full Bench indicated that this issue could be addressed in the process of finalising the variation determination arising from our decision.

[162] ABI submits that it has now had an opportunity to consider the 'double dipping' issue in more detail. It no longer considers it appropriate that there be a provision prohibiting the use of the make up time arrangement 'where the employer is permitted to charge the client in respect of the cancelled service'.

[163] Under ABI's clients' proposed clause, an employer would not be able to utilise the make up time arrangement 'where the employee was notified of the cancelled shift after arriving at the relevant place of work to perform the shift'.

[164] ABI states that the Commission did not adopt that part of its proposal, and instead has provisionally altered it such that an employer is only able to use the make up time arrangement 'where the employee was notified of the cancelled shift at least 12 hours prior to the scheduled commencement of the shift'.

[165] ABI submits that provisional adjustment 'materially diminishes the scope for employers to utilise the make up time regime'. For that reason, ABI submits that it does not consider it reasonable or appropriate that there be a further limitation on an employer's ability to utilise the make up time regime. In particular, it considers that there are a range of difficulties with the inclusion of a further limitation that is based directly on 'permission to charge' a client in respect of a cancelled shift. Some of these difficulties are as follows:

> 1. There are a range of different funding and pricing regimes applicable to disability services and home care work, such as the NDIS, Home Care Packages, Commonwealth Home Support Programme (CHSP), etc. Each of those programs are structured differently and have different rules around pricing and cancellations. Those structures and rules are also frequently changing and evolving as reforms are implemented. The effect of this is that the Award term would be susceptible to change (and capable of being changed) as a result of changes to government policy.

2. ABI does not consider it appropriate for the Award to include entitlements that are directly linked to government regulation. It states that such an approach is unconventional in the context of the modern awards system.

3. The notion of 'permitted to charge' introduces a level of ambiguity and uncertainty. ABI states that by way of example:

(a) Does the phrase 'permitted to charge' mean permitted by law, in the sense of there being no legal prohibition on the business charging the client, or does the phrase 'permitted to charge' refer to whether the business is permitted to charge under the terms of the particular service agreement between the business and the client?

(b) Does the phrase 'permitted to charge the client in respect of the cancelled service' mean an ability to charge the full amount that the client would have paid for the service, or does it mean an ability to charge anything (e.g. a $1 cancellation fee)?

(c) How does the clause operate in a block-funding setting?

[166] ABI submits that given that the Commission's provisional view involves confining the scope of the make up time regime to circumstances where an employee was notified of the cancelled shift at least 12 hours prior to the scheduled commencement of the shift, our clients oppose the inclusion of a sub-clause further limiting the operation of the make up time clause by reference to an employer's 'permission to charge'.

[167] ABI submits that as the Full Bench has made clear throughout these proceedings, industry funding and pricing regulations are relevant considerations but are not determinative to the Commission's decision-making task. ABI submits that the Commission should therefore resist establishing an award term the scope and operation of which would be uncertain and dependent on government policy making or funding/pricing regulations.

The use of the word 'shift'

[168] ABI states that at [819] of the *May 2021 Decision*, the Full Bench held that the use of the word 'shift' in the proposed clause 25.5(f)(v) may require further consideration.

[169] ABI states that it tends to agree with the Commission's concern and submits that given the incidence of broken shifts in the disability and home care sectors (and the practice of bundling client services into a single shift or portion of work), we consider that the client cancellation clause should be re-drafted to apply not just to a 'shift' but to a 'shift', 'portion of work' or a 'part of a shift'.

AFEI

[170] AFEI submits that the Commission expressed the provisional view that make up shifts can only be used when the employee is provided with 12 hours' notice prior to the scheduled commencement of the shift and that consequently this means that make up shifts cannot be used where less than 12 hours' notice is provided to the employee. In such circumstance, and as

provided in the draft variation determination, an employer must "pay the employee the amount they would have received had the shift not been cancelled".

[171] AFEI submits that the variation differs to the current award provision as follows:

> a) currently, no payment is required to be made to the employee where notice of client cancellation is given to the employee by 5:00pm the day prior (i.e. this can be less than 12 hours notice); and
>
> b) there is no restriction on 'make up time' being linked to notice; and
>
> c) extension of cancellation provision to disability services

[172] AFEI submits that the variations would impose significant limitations on service providers (financial, bureaucratic and administrative) where:

> a) the Commission has already acknowledged that service providers in this sector now have less certainty in relation to revenue; are experiencing greater volatility in demand for services; and are experiencing an increase in cancellations by clients; an increase in requests for changes to services by consumers; and
>
> b) the likelihood of client cancellation in home care and disability services with less than 12 hours' notice is a strong possibility by reason of the nature of this industry (ill health or injury, medical appointments, hospitalisation, transfer to permanent residential care etc), and particularly in circumstances where there is no funding to cover this additional financial cost.

[173] AFEI submits that furthermore, for providers who currently roster or who plan to roster employees in advance, a practice that would become more of a necessity now in the light of the variations concerning minimum engagement and broken shifts, the make up shift limitation of 6 weeks would present an overly complex administrative onus/burden on employers.

[174] AFEI submits that the variation as proposed is inconsistent with section 134(d), 134(f), 134(g) of the Fair Work Act 2009 (Cth) and is not necessary to achieve the modern awards objective.

Ai Group

[175] Ai Group submit that it is concerned that clauses 25.5(f)(ii), 25.5(f)(ii)(B), 25.5(f)(iii), 25.5(f)(iv)(A), 25.5(f)(v), 25.5(f)(vi) and 25.5(f)(vii)(B)) refer only to client cancellations and do not refer to *client changes*.

[176] Ai Group, noting that proposed clause 25.5(f)(i) expressly applies where a client 'cancels or changes' a service, submit that it is clear from the proposed provision and the existing clause 25.5(f) that the provisions are intended to apply to both client cancellations and client changes to a scheduled service.

[177] Ai Group submit that the proposed clause 25.5(f) should be amended as follows to make clear that clauses 25.5(f)(ii), 25.5(f)(ii)(B), 25.5(f)(iii), 25.5(f)(iv)(A), 25.5(f)(v), 25.5(f)(vi) and 25.5(f)(vii)(B)) also apply to both client cancellations and client changes:

'**(f)** Client cancellation

> **(i)** Clause 25.5(f) applies where a client cancels ~~or changes~~ a scheduled home care or disability service, within 7 days of the scheduled service, which a fulltime or part-time employee was rostered to provide. For the purposes of clause 25.5(f), a client cancellation includes circumstances in which a client reschedules a scheduled home care or disability service.'

[178] Ai Group submit that the final sentence of proposed clause 25.5(f)(v)–Make-up Time is unclear and the reference to 'these cases' is ambiguous. It proposes replacing the final sentence with:

> 'Where the employee was notified of the cancelled shift less than 12 hours prior to the scheduled commencement of the shift, clause 25.5(f)(iv)(A) applies.'

[179] Ai Group agreed for the reasons articulated by the Commission at paragraph [819] of the *May 2021 decision* that the word 'shift' in proposed clause 25.5(f) requires further consideration and submitted.

[180] Pointing to proposed clause proposed clause 25.5(f)(ii)(B), Ai Group submit that an issue arises as to whether the clause permits the cancelling of an entire shift or only that portion of the shift that relates to the service to be provided to the client that cancelled the scheduled service.

[181] Ai Group submit that clause 25.5(f) should enable the cancellation of the shift or part thereof, so that in the event of a client cancellation an employer is afforded the flexibility to cancel the whole shift or a portion of the shift.

[182] Ai Group submit that a cancellation by a client may result in a need to reschedule all of the work to be performed by the employee during that shift. It states an employee may be rostered to perform a shift that involves servicing two clients, one after the other, at a location requiring the employee to travel a significant distance. If one of those clients cancelled their scheduled service, the employer may seek to cancel the whole shift and re-schedule the service required by the other employee too, because this would result in a more efficient and productive outcome in the circumstances. However, in other situations, an employer may seek to cancel only that part of a shift that is attributable to the service that was to be delivered to the client who has cancelled their service.

[183] Ai Group submit its proposed approach is consistent with the need to encourage the productive performance of work, as per s.134(1)(d) of the Act, and better enables employers to manage client cancellations efficiently and effectively and reduce the employment costs resulting from client cancellations, as per s.134(1)(f) of the Act.

[184] Ai Group submit that proposed clause 25.5(f)(ii)(B) should be amended as follows:

> '**(B)** cancel the rostered shift or part thereof.'

[185] Ai Group submit that proposed clause 25.5(f)(iv)(A) should be amended as follows:

> '**(A)** pay the employee the amount they would have received had the shift or part of the shift not been cancelled; or '

[186] Ai Group submit that proposed clause 25.5(f)(v) should be amended as follows:

> '**(v)** The make up time arrangement can only be used where the employee was notified of the ~~cancelled shift~~ cancellation at least 12 hours prior to the scheduled commencement of the shift. … '

[187] Ai Group submit that proposed clause 25.5(f)(vii)(B) should be amended as follows:

> '**(B)** the make up time must be rostered to be performed within 6 weeks of the date of the cancelled shift or partially cancelled shift.'

[188] Ai Group submit that the application of the minimum payment requirements to part-time employees in the event of a client cancellation substantially undermines the flexibility that clause 25.5(f) purportedly provides, explaining that an employee may be rostered to perform two hours of work, during which they are required to service two clients. If one of those clients cancels the scheduled service, the employer could, cancel a portion of the shift in accordance with the proposed clause 25.5(f) and the employee would be required to work for the remainder of the shift. The employer would then have the option of providing the employee with make-up time in respect of the cancelled portion of the shift, so long as the employee was provided with the requisite period of notice.

[189] Ai Group submit that if an employee is entitled to at least two hours' pay by virtue of the proposed clause 10.5 for the work performed on that day, notwithstanding the proposed clause 25.5(f) of the Award, the utility of the client cancellation clause is wholly undermined and employers would face the very cost that the client cancellation clause is designed to relieve employers of.

[190] Ai Group submit a similar situation may arise if an employee is rostered to perform a shift that is more than two hours in length and by virtue of a client cancellation, a part of the shift is cancelled by the employer. If one or both remaining portions of the shift are of less than two hours duration and the shift is then treated as a broken shift, by virtue of clause 10.5 it appears that the employee would be entitled to at least two hours' pay in respect of each portion of the shift. As a result, the utility of the client cancellation clause will again be undermined.

[191] Ai Group submit that the combined effect of the proposed changes to clauses 10.5 and 25.5(f) would unfairly and inappropriately limit the flexibility otherwise afforded by the client cancellation provisions. Ai Group submit that accordingly, the minimum payment obligation should not apply in the circumstances described.

[192] Ai Group submit that proposed clause 25.5(f) should be amended as follows to give effect to this:

[193]

(a) An additional clause 25.5(f)(vii)(E) should be introduced:

'**(E)** a part-time employee will not be entitled to the minimum payments prescribed by clause 10.5 in respect of make-up time worked.'

(b) An additional clause 25.5(f)(ix) should be introduced:

'(ix) Where part of a shift is cancelled in accordance with clause 25.5(f), a parttime employee will not be entitled to the minimum payments prescribed by clause 10.5 in respect of the remaining portion or portions of that shift.'

[194] Ai Group submit that the approach proposed is consistent with the need to promote flexible modern work practices and the efficient and productive performance of work and will ensure that the Award is simple and easy to understand.

[195] Ai Group also submit that a client cancellation that results in a portion of a shift being cancelled may result in a shift being broken and constituting a broken shift. Ai Group submit that a shift that is broken by virtue of a client cancellation does not constitute a broken shift for the purposes of the proposed clauses 20.10 and 25.6.

[196] Ai Group submit that an additional clause 25.5(f)(x) should be included as follows:

'(x) A shift does not constitute a broken shift for the purposes of clause 20.10 and clause 25.6 where a shift is broken due to a portion of the shift being cancelled in accordance with clause 25.5(f).'

Q.14 Question for all other parties: What do you say about the changes proposed by Ai Group?

ASU

[197] The ASU contends that it is 'manifestly unfair to allow an employer to require additional work from an employee when they have billed their funding body for that employee's wages for the cancelled period'. The ASU notes that the client cancellation term already offers the employer an 'unusual ability to unilaterally vary an employee's hours of work', and submits that 'employers should not be able to expect a windfall gain when a client cancels a shift'.[70]

[198] The ASU contends that an employer is able to claim payment for a cancelled service, the employer must pay the employee and must not direct the employee to make up the duties.

[199] In the May Decision, the Commission identified that an employee may be entitled to different payments where they perform alternative duties during a cancelled shift and decided that an employee should be entitled to the greater of the amount payable for the cancelled service or the amount payable for the alternative duties (see draft determination at clause 25.5(f)(iii)).

[200] The ASU submits that the Commission should take the same position in respect to alternate duties during a cancelled shift and propose the following addition to sub clause 25.5(f)(vi):

[70] ASU submission 3 August 2021 at para. [47]

(E) an employee who works make up time will be paid the amount payable had the employee performed the cancelled service or the amount payable in respect of the work actually performed, whichever is the greater.

Q.15 Question for all other parties: What do you say about the ASU's proposal?

NDS

[201] NDS has no objection to the *provisional* view set out in the Decision at [1276] regarding the draft clause 25.5(f)(v) requiring 12 hours' notice as a threshold for the use of make up time.

[202] At [1277] of the *May 2021 decision* notes that the use of the word "shift" in this context at clause 25.5(f)(v) may require further consideration. In respect of this issue, NDS submits that the client cancellation provision is really dealing with the cancellation of an appointment with a client, which may be for just part of the shift to be worked by the employee that day and that elsewhere in the clause, the term 'service' is used to refer to the period of work that relates to the appointment that the client is cancelling. NDS submits that the word 'shift' could be replaced by 'service' throughout clause 25.5, except at 25.5(vii)(D) where the phrase "make up shift" could be replaced with "make up time" to be consistent with other references to make up time in the clause.

Q.16 Question for all other parties: What do you say about the changes proposed by NDS?

HSU

[203] The HSU supports the *provisional* views and the Draft Determination that notification of cancellation must be made more than 12 hours prior to the shift before the employee can be asked to work a make-up time shift, and that such make-up time must be rostered within 6 weeks of the cancelled shift.

UWU

[204] The UWU supports the second *provisional* view and Item 1 of the draft determination which gives effect to this *provisional* view.

[205] UWU submits that it 'remains concerned that a variation which simply confirms employees' rights to refuse to work additional hours (or to provide that working additional hours is voluntary) does not provide a fair and relevant minimum safety net for employees working in the settings contemplated by this award'.[71]

[206] In the *May 2021 decision* the Full Bench found that the evidence clearly establishes that employers regularly offer part-time employees work in excess of their guaranteed hours[72]; and that 'there is no evidence to suggest that part-time employees are being forced to work additional hours'.[73]

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[71] UWU submission 3 August 2021 at para. [51]

[72] The decision at [973]

[73] The decision at [972]

[207] The UWU does not cavil with these findings. However, the UWU submits that the Commission should also find 'that employees working under this award often work additional hours because they feel obliged to – because they feel a sense of professional and caring responsibility - and as such free consent to accept or reject the working of such hours (which occurs frequently) often may not exist, whatever the award says'.[74]

[208] UWU supports the proposal to introduce a mechanism within the award similar to that which exists in some other awards, which would provide that an employee who has not signed a consent form to perform additional hours at ordinary rates of pay (up to the relevant limits) would, if they did perform additional hours be paid for that work at overtime rates.

5. Overtime for part-time workers

[209] The Full Bench expressed the *provisional* view that the SCHADS Award should be varied in 2 respects:

- To make it clear that working additional hours is voluntary, and
- To introduce a mechanism whereby a part-time employee who regularly works additional hours may request that their guaranteed hours be reviewed and increased, and their employer cannot unreasonably refuse such a request.[75]

NDS

[210] NDS has no objection to the proposed new clause 10.3 (f) which clarifies that additional hours worked by part-time employees are subject to agreement.

[211] In the draft determination, clause 10.3(g)(iii) provides that an employer may refuse the request only on reasonable business grounds, and provides an example including where a there is uncertainty about funding and client numbers and preferences for home care employees.

[212] NDS submits that the term "reasonable business grounds" is well understood and does not require the use of examples which might serve to unnecessarily restrict the scope of such grounds. It is decided that examples would be beneficial in order to provide guidance to employers and employees, NDS submits that the current draft needs some reworking to avoid any unnecessary restriction on what can constitute reasonable business grounds.

[213] The specific change to the draft proposed involves the home care employee example in the draft determination. NDS submits that this example could also reasonably apply to disability support work, and conceivably to work performed in other parts of the SACS sector and suggests that this should be amended by removing the words "*For home care employees*".

ABI

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[74] UWU submission 3 August 2021 at para. [56]

[75] Ibid at [987]

[214] ABI does not oppose either of those *provisional* views. It has, however, proposed some amendments to the proposed drafting of the clause as follows:

1. In relation to clause 10.3(g)(i), it considers that a more accurate description of what is being contemplated by 10.3(g) is the increase of an employee's guaranteed hours. The mischief that the clause was designed to address was the act of an employer setting a part-time employee's guaranteed hours at an artificially low level. Therefore, the clause provides a mechanism for employees who regularly work more than their guaranteed hours to make a request to their employer for their guaranteed hours to be increased.

   It submits that such an agreement to increase an employee's guaranteed hours may not necessarily 'reflect the ordinary hours regularly being worked' by the employee. Nor should it have to. In ABI's view, the Commission should not narrow the ways in which an employer and employee can reach agreement on increased guaranteed hours for the employee. In ABI's view, this wording may have the unintended effect of limiting the operation of the clause.

   Additionally, ABI has concerns about the proposed use of the phrase 'ordinary hours'. While it has not considered the issue in great detail, it states that it should not be assumed that the additional hours worked by an employee were 'ordinary hours' within the meaning of the Award.

2. In relation to the example appearing immediately following clause 10.3(g)(iii), ABI proposes that the example be bolstered to include some additional scenarios that may provide a reasonable business ground for an employer to refuse a request.

   While ABI appreciates that the example might have been adapted from its proposal, having now considered the drafting in more detail it is unnecessary to provide specific examples in relation to the home care sector; those examples are equally applicable to other streams under the Award such as the disability services stream.

   It submits that additionally, the example of covering an employee who is on annual leave seems unnecessarily confined, and ABI has proposed that this be amended to 'leave' generally. This would then encompass a broader range of absences such as parental leave, personal leave, unpaid leave, absences on workers compensation, etc.

3. ABI submits that an additional sub-clause be inserted to confirm that an employee cannot make a request for a review of guaranteed hours where they have refused a previous offer to increase their guaranteed hours in the last 6 months, or where their employer has refused a request from the employee to increase their guaranteed hours based on reasonable grounds in the last 6 months.

[215] ABI's proposed amendments to the wording of clause 10.3(g) are as follows:

'**(g) Review of guaranteed hours**

(i) Where a part-time employee has regularly worked more than their guaranteed hours for at least 12 months, the employee may request in writing that the employer vary the agreement made under clause 10.3(c) to ~~reflect the ordinary hours regularly being worked~~increase their guaranteed hours.

(ii) The employer must respond in writing to the employee's request within 21 days.

(iii) The employer may refuse the request only on reasonable business grounds.

EXAMPLE: Reasonable business grounds to refuse the request may include (but is not limited to): changes to funding arrangements; changes in client numbers and/or preferences; the volatility of working patterns or lack of predictability of working hours; where there is a reasonable basis for anticipating that the additional hours will not be able to be provided on an ongoing basis (for example, where ~~that~~ the reason ~~that~~ for the employee ~~has~~ having regularly worked additional agreed hours is due to a temporary circumstance (—for example, where ~~this~~ it is the ~~direct result~~consequence of another employee being absent on ~~annual~~ leave). ~~For home care employees, reasonable business grounds to refuse a request may also include the lack of continuity of funding, changes in client numbers and client preferences~~.

(iv) Before refusing a request made under clause 10.3(g)(i), the employer must discuss the request with the employee and genuinely try to reach agreement on an increase to the employee's guaranteed hours that will give the employee more predictable hours of work and reasonably accommodate the employee's circumstances.

(v) If the employer and employee agree to vary the agreement made under clause 10.3(c), the employer's written response must record the agreed variation.

(vi) If the employer and employee do not reach agreement, the employer's written response must set out the grounds on which the employer has refused the employee's request.

(vii) Clause 10.3(g) is intended to operate in conjunction with clause 10.3(e) and does not prevent an employee and employer from agreeing to vary the agreement made under clause 10.3(c) in other circumstances.

(viii) An employee cannot make a request for a review of their guaranteed hours when:

(A) The employee has refused a previous offer to increase their guaranteed hours in the last 6 months; or

(B) The employer refused a request from the employee to increase their guaranteed hours based on reasonable grounds in the last 6 months.

[216] ABI also proposes that the drafting in respect of overtime for day workers when working outside the span of hours be amended slightly 'to aid precision', as follows:

> 28.1 Overtime rates
>
> (a) Full-time employees
>
> A full-time employee will be paid the following payments for all work done in addition to their rostered ordinary hours on any day and/or, in the case of day workers, for work done outside the span of hours under clause 25.2(a) ~~(day workers only)~~:

Q.17 Question for all other parties: What do you say about the amendments proposed by ABI?

Ai Group

[217] Ai Group submits the drafting of the proposed clause 10.3(g) which considers the making of a request and agreement in relation to a part-time employee's hours by reference to those hours agreed on at engagement per clause 10.3(c) should be varied to also contemplate any subsequent agreement to vary hours under clause 10.3(e).

[218] Ai Group submits clause 10.3(g)(i), dealing with the eligibility to request a review of part-time hours, is contradictory. It contends the provision proceeds on the basis that an employee who makes a request is regularly working ordinary hours that could be the subject of an agreement pursuant to clause 10.3(c) of the Award however an employee need not in fact be working such hours to be eligible to make a request.

[219] Ai Group further submit that the broad eligibility criteria will potentially impose an unjustifiable regulatory burden on employers to consider requests from employees even if their working patterns are not characterised by sufficient regularity so as to enable a variation to their agreed hours of work. This would result in an employee being guaranteed a higher number of ordinary hours of work per week with predetermined start and finish times.

[220] In Ai Group's view, the irregularity in the additional hours would likely cause an employer to refuse to vary the agreed hours as the irregularity is caused by a lack of certainty as to whether the employee can be offered additional hours on an ongoing basis and if so, when those hours will be required to be worked.

[221] Ai Group further note clause 10.3(g) does not provide for any limitation as to the frequency that an eligible part-time employee could make a request that their hours of work be reviewed. Ai Group contend that, where a request has been refused, an employee should not be eligible to make a subsequent request for a period of at least 6 months.

[222] Accordingly, Ai Group submits clause 10.3(g)(i) should be replaced with the following:

> **(g) Review of guaranteed hours**

(i) Clause 10.3(g) applies to a part-time employee if:

(A) Over the preceding 12 months, they have regularly worked ordinary hours in addition to their guaranteed hours;

(B) Those additional hours constituted a pattern of hours which, without significant adjustment, the employee could continue to perform as a part-time employee under the provisions of this award; and

(C) The employee has not made a request pursuant to clause 10.3(g)(iii) that was refused by the employer in the preceding 6 month period.

(ii) A part-time employee to whom clause 10.3(g) applies is an **Eligible Part-time Employee**.

(iii) An Eligible Part-time Employee may make a request to their employer, in writing, that the agreement made under clause 10.3(c) or an agreement subsequently made under clause 10.3(e) be varied to reflect the ordinary hours regularly worked by the employee over the preceding 12 month period.

[223] Ai Group oppose the example at clause 10.3(g)(iii) and submits it is unlikely that a part-time employee would be required to regularly work additional hours for a period of at least 12 months because another employee has been on annual leave. Further, the example is also relevant to work performed by employees classified as 'social and community services employees' who perform disability work.

[224] Ai Group propose the following amendments to the example:

> EXAMPLE: Reasonable business grounds to refuse the request may include that the reason that the employee has regularly worked additional agreed hours is temporary—~~for example where this is the direct result of another employee being absent on annual leave~~. For home care employees and employees performing disability services work, reasonable business grounds to refuse a request may also include the lack of continuity of funding, changes in client numbers and client preferences.

[225] In relation to the proposed clause 10.3(g), Ai Group submit an amendment should be made to clarify the effect of a variation to an agreement made under clause 10.3(c). It proposes the insertion of a new penultimate subclause as follows:

(ix) If the employer and employee agree to vary the agreement made under clause 10.3(c) or clause 10.3(e):

(A) The hours of work agreed upon by the employer and employee will constitute ordinary hours of work; and

(B) The agreement may subsequently be varied by agreement between the employer and employee in writing. Any such agreement may be ongoing or for a specified period of time.

Q.18 Question for all other parties: What do you say about Ai Group's proposed changes?

ASU

[226] The ASU maintains its position that additional hours worked by a part-time employee beyond their contracted hours should be paid as overtime.

[227] The ASU submits that the proposed changes to overtime arrangements for part-time employees are unlikely to have much practical utility to employees and that there unintended negative consequences for employers.[76]

[228] The ASU submits that the Commission should adopt the position taken by the Award Modernisation Full Bench in *Award Modernisation* [2009] AIRCFB 345 in relation to the *Aged Care Award 2010*, the *Nurses Award 2010* and the *Health Professionals and Support Services Award 2010;*[77] namely, employees be provided with the opportunity to give written consent to work additional hours at their ordinary rates of pay up to 10 hours per day or 38 hours per week. If they did not give that consent, they would be paid at overtime rates for the additional hours. In support of this proposal the ASU submits:

> *'This would provide a fair and relevant safety net to part-time employees without any significant impact on flexibility for employers, given the noted willingness of SCHDS Industry workers to make agreements to work additional hours.'*[78]

[229] In the absence of an entitlement to overtime for part-time employees where they are required to work additional hours, the ASU supports the introduction of the 'review of part-time hours' term but 'doubt it will do very much to ensure that an employee's contracted hours reflect their actual weekly working hours'.[79]

[230] The ASU disagrees with the proposition that the prevalence of 'review of part-time hours' clauses in enterprise agreements implies utility and may inform the structure of an appropriate award term:

> 'The number of Enterprise Agreements referred to by the Commission are products of negotiations, which may include trading conditions and productivity discussions…
>
> Without an appropriate mechanism to deal with disputes, the clause could not function as a safety net.' [80]

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[76] ASU submission 3 August 2021 at para. [53]

[77] [147]-[149].

[78] ASU submission 3 August 2021 at para. [63]

[79] ASU submission 3 August2021 at para. [65]

[80] ASU submission 3 August 2021 at para. [66] and [68]

[231] The ASU proposes that the clause be reviewed after a year of operation.[81]

HSU

[232] The HSU notes the example in the Draft Determination providing that reasonable business grounds for home care employees *may also include lack of continuity of funding, changes in client numbers and client preferences* and so submits that 'such provision would mean that an employer could always cite reasonable business grounds in relation to home care employees regardless of the permanency of the performance of additional hours and the length of time they'd been performed'.[82] We do not support the inclusion of such an exemption but otherwise supports the inclusion of the mechanism for review.

Ai Group in Reply

[233] In its supplementary submission Ai Group responds to the ASU/UWU proposal that the Award requires agreement 'in writing' to work additional hours and that if such agreement is not reached, part-time employees will be paid at overtime rates.

[234] Ai Group contends that this is a new substantive proposal which has not previously been the subject of submissions or evidence; and that the ASU has not identified any evidence in support of the assertions advanced at [59] of its submission. Ai Group submits:

> 'It is axiomatic that the approach proposed by the unions would substantially increase the regulatory burden facing employers[83], by requiring written agreement with their employees in respect of the performance of additional hours. It would also create a structural incentive for employees to not agree to perform additional hours of work and it may result in increased employment costs[84].
>
> Ai Group's primary position is that the material before the Commission does not establish that the proposal advanced by the unions is *necessary* to ensure that the Award achieves the modern awards objective and accordingly, it should be rejected. In particular, for the reasons advanced, the Award would not provide a *fair* safety net (as it applies to for employers)[85] if the proposal was adopted, it would not encourage flexible modern work practices or the efficient and productive performance of work[86] and it would have an adverse impact on employers[87].
>
> If the Commission is not minded to adopt the above course of action, parties opposing the proposal should be allowed an opportunity to lead evidence in relation to the matter and to make further detailed submissions. In the limited window available between the filing of the unions' material and the proceedings listed on 6 August 2021, we have not had a sufficient opportunity to do so.'[88]

Questions for all other parties: What do you say in response to the Ai Group proposal?

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[81] ASU submission 3 August 2021 at para. [69]

[82] HSU submission 3 August 2021 at para. [49]

[83] Section 134(1)(f) of the Act.

[84] Section 134(1)(f) of the Act.

[85] Section 134(1) of the Act.

[86] Section 134(1)(d) of the Act.

[87] Section 134(1)(f) of the Act.

[88] Ai Group Supplementary Submission 5 August 2021 at paras. [41] – [43]

6. 24 hour care

AFEI

[235] AFEI submits that in relation to the new requirement for the employee to be afforded the opportunity to sleep for a "continuous period of 8 hours", it is AFEI's understanding that the FWC appreciates that during a 24-hour care shift, an employee's sleep could be interrupted. However, clause 25.8(c) of the draft variation determination does not reflect this understanding and further, the clause as currently drafted, fails to take into account the realities of an employee performing a 24-hour care shift which include that:

> (a) the purpose of 24-hour care is so that a carer is with a client for a 24-hour period providing one-on-one personalised care
>
> (b) employees will have an opportunity to sleep during the shift, often for more than 8 hours; and
>
> (c) 24 hour clients are often frail and suffer from medical diagnoses such as dementia and as such, they will need to get out of bed during the night to use the toilet.

[236] AFEI suggests as a practical alternative either the removal of the word "continuous" in clause 25.8(c) of the draft variation determination or the variation of the provision to make clear that where an employee undertakes work in the night, that such work would count towards the 8 hours of care work.

Q.19 Question for all other parties: What do you say about the changes proposed by AFEI?

AIG

[237] Ai Group submit that it is clear from paragraph [1034] of the *May 2021 decision*, particularly the phrase 'in any 12 month period', that the proposed cl.31.2(b) is intended to provide an employee who has worked at least eight 24-hour care shifts 'in any 12 month period' with an additional week of annual leave.

[238] Ai Group submit that despite this, the proposed cl.31.2(b) does not express a period of time within which the eight 24-hour care shifts must be worked in order to render an employee eligible for an additional week of annual leave, and that an employee who performs eight 24-hours care shifts over a period of two years would also be entitled to an additional week of leave.

[239] In order to align the proposed cl.31.2(b) with the view expressed by the Full Bench in the *May 2021 decision*, Ai Group submit that the proposed clause should be amended as follows:

> '(b) an employee who works at least eight 24-hour care shifts in accordance with clause 25.8 during the yearly period in respect of which their annual leave accrues; …'

[240] Ai Group submit that this amended proposed wording adopts the language currently used in cl.31.2 and is intended to mitigate the additional regulatory burden from this variation to the Award. They suggest that rather than a requirement to assess whether an employee works eight 24-hour care shifts in *any* 12 month period, the relevant period of time should be the yearly period in respect of which an employee accrues annual leave, which will generally correspond with when they first commenced employment in a permanent position.

Q.20 Question for all other parties: What do you say about the changes proposed by Ai Group?

NDS

[241] NDS proposes one amendment to the draft determination for the clause dealing with 24-hour care.

[242] The draft clause 25.8(c) provides '…an opportunity to sleep for a continuous period of 8 hours…'. NDS submits this creates a concern about what happens if there is an unplanned interruption such that the opportunity for a continuous period of sleep is denied and that it may assist with clarity to use wording that aligns with the wording of clause 25.7 which deals with sleepovers.

[243] NDS proposes that the first sentence of the draft clause 25.8 (c) could be replaced with:

> 'The employee may be required to sleep overnight at the premises where the client for who the employee is responsible is located (sleepover). This period of sleepover will be scheduled to be a continuous period of 8 hours. In the event of the employee on sleepover being required to perform work during the sleepover period, the employee will be paid for the time worked in accordance with clause 25.8(e).'

Q.21 Question for all other parties: What do you say about the changes proposed by NDS?

HSU

[244] The HSU supports the Draft Determination, including the provisions at 31.2 Quantum of leave that provides for an employee working more than eight 24-hour-care shifts to be a shiftworker for the purposes of an additional week's annual leave.

7. Equal Remuneration Order

[245] Ai Group submit that two tables are presented at item 7 of the draft determination. The fourth column of the table related to Social and Community Services employees is headed 'Final ERO Rate Percentage', while the fourth column of the table related to Crisis Accommodation employees is headed 'Final Rate Percentage'.

[246] Ai Group notes that at [1259] of the *May 2021* decision, the Full Bench indicates that the heading 'Final Rate Percentage' would be used in both tables.

[247] Ai Group submit that the heading 'Final Rate ERO Percentage' should be used in both tables in order to clearly express that the rates in that column are derived from the ERO.

Q.22 Question for all other parties: What do you say in response to Ai Group's submission?

8. Operative Date

Union submissions

[248] The HSU, ASU and UWU support the operative date of 1 October 2021 being maintained and submit that most matters of substance were determined in the May 2021 decision and employers have been on notice since then that they will need to implement changes by 1 October 2021.

ABI

[249] ABI opposes the provisional operative date and seek a commencement date of not earlier than the first full pay period on or after 1 July 2022. ABI contend there are 4 important factors which warrant a longer transition period. Firstly, changes to the Award come at a time when the industry is facing significant strain due to concurrent factors including the challenges associated with the COVID-19 pandemic, the ongoing Disability Royal Commission, Aged Care Royal Commission, the state of flux in relation to NDIS and home care sector regulation, and ongoing funding issues for service providers.

[250] Secondly, ABI notes changes arising from the Decision represent significant changes that fundamentally alter well-established and longstanding industrial arrangements since that have been in place since before 2010. The changes can be categorised as significant in that they will be imposed additional financial cost of employers through the introduction of new minimum engagement periods, allowances, overtime entitlements. Further, ABI submit these changes will significantly reduce flexibilities relating to rostering, allocation of work and will impose substantial additional regulatory burden on employers.

[251] Thirdly, ABI submit the funding constraints in the industry further a warrant a delayed operate date. To mitigate the financial impact following changes to the Award home care providers are likely to seek to renegotiate their existing home care agreements with clients, with no guarantee a customer will agree to changes in prices. ABI also submit that, as the NDIA does not intend to adjust current pricing control until 1 July 2022, appropriate transitional arrangements must be implemented to reduce the impact of associated increases in employment costs. Further ABI note that for many employers, their organisation budgets for the 2021-22 financial year would have already been established and would not have taken into account costs increases arising from the Decision.

[252] Finally, ABI submit that changes to the Award will likely trigger a major review of, and changes to, the operating model of Award-regulated employers as they seek to mitigate the impacts of the changes on their enterprises. ABI contend that these adjustments take time and will require consultation with employees, clients and other stakeholders and/or the renegotiation of contractual arrangements. Further, ABI note that ancillary changes to employer payroll systems will take approximately 6 months to implement into payroll systems. It is therefore appropriate, in ABI's view, that it is appropriate that employers are given a reasonable period of time to implement these adjustments to their operations.

AFEI

[253] AFEI submit that the operative date should be no later than July 2022, and ideally no earlier than twelve months from when all matters in the Tranche 2 decision have been finalised. AFEI submit that the implementation of the Tranche 2 Decision would result insignificant unbudgeted costs for employers as follows:

- Variations to minimum engagement and broken shift provisions are likely to result in an increased cost for employers.
- Client cancelation and remote response would result in an increased cost for employers;
- The anticipated increase could not be budgeted for in this financial year.
- Funding under the Government subsidised home care packages do not extend to a number of variations to the Award including broken shift allowance; minimum engagement; client cancellation payment; clothing and equipment; and remote response.
- Funding under the National Disability Insurance Scheme does not capture all variations in the Tranche 2 decision.
- Not all employers in the sector receive Government funding for significant amount of their services.
- Implementation of the Tranche 2 decision in October 2021 in the absence of significant funding would negatively impact employers on the basis that it is either the employer who would absorb the cost impact or the costs would be passed onto participants.
- Employers who do not rely on Government funding and, as a consequence of the Tranche 2 decision, pass on the cost impact to participants through increases to fees for the provision of services, face the prospect of participants preferring alternative aged care providers (i.e. loss in business), at a time when service providers are already facing significant challenges including being exposed to greater competition for business.

[254] AFEI further submit that the Tranche 2 decision will require employers to make significant variations to employee rosters, recruitment and training of staff as follows:

- Minimum engagement for part time employees (and variation to minimum engagement for casual employees); limiting operation of broken shifts; introducing remote response and varying payment provisions in client cancellation would require service providers to make operational changes including re-rostering employees.
- Variations as a result of the Tranche 2 decision would significantly limit provider flexibility to rosters and would need to be revised for viability of businesses.
- Providers may be required to consider recruitment and training of staff to fulfil service demands and consequent gaps in services arising from the variations.

[255] AFEI submit that the Tranche 2 operative date of 1 October 2021 is unworkable for employers facing multiple challenges including:

- Structural change by reason of reforms implemented across the country
- Financial strain since the introduction of the NDIS
- Home care providers facing increased competition with alternative aged care providers
- Implementation of the Improved Payment Arrangements reform, which changes the way the Government pays he care packages program subsidies and supplements to providers, moving to a program of payment in arrears for services delivered. AFEI submit this is a significant cost burden on providers.
- Responses to the COVID-19 pandemic including Government public health orders, health and safety of employees and clients and vaccination of employees

[256] AFEI submit that consideration should be given to the need for service providers to consult with participants on forthcoming changes to their services including service fees and renegotiation of contracts.

[257] AFEI submit that a transitional arrangement would be appropriate to enable providers to implement practices to give full effect to the Tranche 2 decision by:

- reviewing and varying current rostering practices (including modifications to rostering systems and practices, testing out the changes and training of employees on the new rostering practices);
- recruiting and training new employees;
- implementation of a system to obtain employee agreement on broken shifts;
- consulting with employees concerning changes to working practices;52 and
- consulting with clients regarding changes to service provision and costs.

[258] AFEI further submit that NDIS price guides and pricing limits are usually published annually in July and increases to home care subsidies and supplements take effect from July each year.

[259] AFEI submit that an operative date of no earlier than July 2022 would also provide service providers with an opportunity to campaign for more funding.

Ai Group

[260] Ai Group opposes the Commission's *provisional* view that the proposed variations to the SCHADS Award will have an operative date of 1 October 2021. They submit that the variations should not commence operation for at least 12 months from the date that all of the variations are finalised, and a final determination is published.

[261] Ai Group cite paragraphs [14]-[36] of the decision of 18 October 2018 in relation to the Award[89], whereby, Ai Group submit, the Full Bench decided to postpone the operative date of the variation to casual loadings for the following reasons:

- the variations would increase to employment costs;
- the variations would reduce employer flexibility;
- not-for-profit organisations require a transitional period to seek funding;
- increases in employment costs for not-for-profit organisations within a budget cycle may place them under financial pressure; and
- the social, community, home care and disability services industry is undergoing structural changes due to nationwide reforms.

[262] Ai Group submit that, in the *May 2021 decision*, the Full Bench made a number of findings relevant to issue of the appropriate operative date. AI Group submit that at paragraph [218] of the Decision, the Commission recognised that many service providers in the SCHADS industry are not-for-profit organisations, and that there have been significant regulatory changes in the disability and home care sectors over recent years. Ai Group also refer to the Full Bench's

[89] [2019] FWCFB 7096

findings at paragraph [218] that 'consumer-directed care' and greater market pressure are affecting services providers.

[263] Ai Group submit that these findings are relevant as they highlight the challenges many organisations under the SCHADS Award are facing. As a consequence, Ai Group submit that the premature introduction of the proposed variations will have a significant impact on employers in the aged and disability care sectors. Ai Group also submit that the findings support the proposition that employers are constrained in their ability to develop rosters and schedules for client care of their choosing, which limits the extent to which they can vary rosters and schedules in response to the *May 2021 decision*.

[264] Ai Group also highlight findings of the Full Bench in the *May 2021 decision* in relation to funding arrangements, at paragraph [218] (12)-(27). They submit these findings are relevant because they highlight the existing deficiencies in the various funding models that apply to employers in the aged and disability care sectors and the challenges that providers face as a result. Ai Group submit these challenges will be compounded if additional employment costs are imposed on employers, before funding arrangements can be altered to account for variations made to the Award.

[265] Ai Group also highlight various findings of the Full Bench in relation to service delivery and working arrangements, at paragraphs [232],[322] and [784] of the *May 2021 decision*. Ai Group submit that these findings highlight that working arrangements and practices in the sector deviate substantively from the revised Award provisions determined by the Commission in various ways, which they submit goes to the impact that the proposed variations will potentially have.

[266] Ai Group also refer to the finding of the Full Bench at [218](3) of the *May 2021 decision* that it is common for employees to be employed by and to be performing work for more than one employer covered by the Award. They submit that this highlights an additional challenge faced by employers in preparing rosters, and will undermine their ability to implement changes in response to the Decision.

[267] Ai Group submit that in grappling with the *May 2021 decision* and its implications for their enterprise, employers face an additional compliance burden in implementing the recently introduced casual conversion provisions in the Act, in a sector with a high proportion of casual employees.

[268] Ai Group submit that there is relevant evidence led in the proceedings regarding the impact of the proposed variations. They refer to the witness statement of Richard Cabrita and Aleysia Leonard, that the proposed variations will have the effect of increasing employment costs for employers, sometimes significantly, which may pose a threat to the viability of the some or all of their service provision. They also note that some employers commonly roster broken shifts that are broken more than once and/or twice.

[269] Ai Group submit that the witness statements of Richard Cabrita and Aleysia Leonard show that some employers will need to alter the way they implement broken shifts, and that to mitigate the cost impact of the proposed variations, employer will need to make alternation to the arrangements that have in place. These alterations will involve analysis of their rosters, consultation with their clients, one by one, as well as their employees.

[270] Ai Group point to the regulatory requirements of the Aged Care Quality Standards which prohibit them from unilaterally determining when a client will receive their services, and how they are provided, when a client expresses a preference, which Ai Group submit they commonly do.

[271] Ai Group point to other factors that pose a challenge to rostering for employers including client demand, employee availability, employee's capability, skills, experience and qualifications; the geographic location of clients and funding constraints, relying on the witness statement of Christopher Nillsen

[272] Ai Group submit employers will need time to reconfigure their payroll and other systems, including testing time, and pay associated costs. Ai Group also submit that employers will need to implement a variety of new or varied business processes in response to the proposed variations, and that employees covered by the Award will need to be trained in respect of these changes.

[273] Ai Group submit that the current funding arrangements do not take into account the SCHADS Award variation, that changes to the NDIS funding are not automatically or necessarily made when an Award is varied and that NDIA's pricing arrangements are reviewed annually, applying from 1 July, among others. Ai Group note that funding from the Commonwealth Home Support Program also do not take into account costs employers will incur as a result of the proposed variations, nor will funding arrangements necessarily altered in response to Award variations.

[274] Ai Group submit that there is no indication that any changes will be made to Home Care Packages, or the Veterans Home Care Program in response to the proposed variations and outline the challenges employers may face in securing additional funding from these programs.

[275] Ai Group submit that the disability and aged care sectors are facing a number of other challenges, including the response to COVID-19, regulatory reforms of the Royal Commission into Aged Care Quality and Safety and the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, and others.

[276] Ai Group submit that the interests of employers should not be 'subjugated' to the interests of employees.[90] They submit that the introduction of new requirements on 1 October 2021, or at any time within 12 months of the date of the Commission's final determination is not necessary to achieve the modern award objective because: it would be very unfair to employers (s.134(1)); it would not foster the efficient and productive performance of work (s.134(1)(d)); and it would have a significant adverse impact on business, including in relation to employment costs, productivity and the regulatory burden (s.132(f)).

[277] Ai Group submit that it is not fair, appropriate or desirable that the quality or continuity of the care delivered to some of the most vulnerable members of the community be compromised, or that, worse, employers decide that they are not in a position to continue to provide services to them in a way that is sustainable.

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[90] See [2019] FWCFB 7096 at [23]-[24]

[278] Ai Group submit that that each of the bases upon which the Commission decided to postpone the implementation of changes to the Award in relation to the casual loading in the decision of 18 October 2019[91] are apposite to this matter.

[279] In the alternative, Ai Group submit that if the Commission does not accept their submissions in this regard, then they should at the very least decide that the variations will commence operation on 1 Jul 2022, moving to determine the final form of the variations as soon as practicable so as to ensure employer's have the requisite degree of certainty needed to being implementing the changes by the operative date.

[280] In its Supplementary Submission Ai Group advances the following submission in relation to its witness evidence:

> 'The evidence called by Ai Group deals in large part with the potential implications of the proposed Award variations that were considered in the Decision. The evidence is primarily relied upon by Ai Group in support of its contention that the operative date of the variations should be delayed.
>
> Elements of the evidence called by Ai Group is, to that extent, somewhat speculative in nature. However, evidence concerning potential or upcoming regulatory reform will necessarily be speculative. This should not undermine the weight that is attributed to it.
>
> We note that in the Decision, the Commission said as follows in respect of criticism made by the unions of employer evidence that was called in relation to its claims concerning part-time employment: (emphasis added)
>
> > [970] The Unions criticised this evidence on the basis that it was vague and uncertain. We accept that there is some substance to this criticism. <u>But, of necessity, evidence as to the likely consequences of a particular regulatory change will often be speculative.</u> Despite the limitations in the evidence we accept that the variation proposed by the HSU is likely to change the organisation of work in the industry and that the imposition of overtime rates will act as a deterrent to employers offering additional hours to parttime employees. …[92]
>
> Similar observations were made by the Commission in the context of its decision about claims to reduce penalty rates and evidence that was led from employers about the potential impact if those claims were successful:
>
> > [771] … In light of the concessions made, we accept that much of the evidence of the lay witnesses may be regarded as speculative in nature. But this is necessarily the case. Evidence about intentions in light of proposed changes is necessarily hypothetical and speculative. Hospitality is a dynamic sector, subject to constant change, in response to changes in consumer preferences. It would be difficult to predict, with certainty, what precise actions would be taken in response to a particular change.[93]
>
> Ai Group's evidence should be viewed through the same lens that was adopted by the Commission in the aforementioned decisions.'[94]

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[91] [2019] FWCFB 7096

[92] Decision at [970].

[93] *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [771].

[94] Ai Group Supplementary Submission 5 August 2021 at prars. [50] – [54]

NDS

[281] NDS submit that the variations will have a major impact on the operations of some disability services impose significant costs which are currently unfunded.
NDS submit that an operative date of 12 months after the finalisation of determinations should apply. NDS submit in the alternative that the determinations should operate no earlier than 1 July 2022.

[282] NDS submit that for services that make extensive use of broken shifts the new shift allowance as well as the changes to minimum engagement is significant and unfunded.

[283] NDS submit that the cost of the new broken shift allowance amounts to a 7.1% increase for a broken shift of 8 hours with a single break and 10.4% if there are two breaks.

[284] NDS submit that employers will require time to manage increased costs associated with the variation and that employers have budgeted for the financial year and have limited capacity to adjust within the provisional operative date of October 2021.

[285] NDS submit that funding arrangements should be given significant weight in this matter, in the context of major change. NDS submit that the main funding source for disability services is the National Disability Insurance Agency, which has announced an annual review of pricing which will commence in August 2021 and conclude in December 2021, with a view to implementing any changes from 1 July 2022.

[286] NDS submit that payroll systems will require significant change in order to accommodate different calculations of allowances and penalty rates.

[287] NDS submit that changes to minimum engagement and broken shifts are likely to drive changes in rostering practices. NDS submit that the changes will have significant effects on hours of work for employees with pre-existing patterns of work. NDS submit that new rostering arrangements will require genuine consultation and development of measures to mitigate any adverse effects on employees.

NDS submit that changes to rostering may also require renegotiation of service agreements with clients with respect to the timetabling of support delivery and submit that the time required for this is potentially significant.

9. Individual employer submissions

Includa Services

[288] Includa Services (Includa) is an NDIS Registered provider. Includa supports the proposed changes that will align part-time workers with causals for a 2 hour minimum engagement.

[289] Includa submit that a broken shift allowance, in addition to paid travel between engagements is not a rational response to multiple engagements in a 24 hour period. Includa submit that one of these two proposed provisions would be suitable and submit that the broken shift allowance may be more appropriate and practical measure.

[290] Includa submit that the Commission should clearly articulate how the ability to swap shifts impacts on the proposed changes to remote response/return to work provisions. In particular whether an employee questing a swap or a worker agreeing to a swap be considered a remote work response.

[291] While Includa agrees in principle that employees should be remunerated for their work completed outside of face-to-face support provision, Includa submit that the particulars of what constitutes a return to work and how this impacts remuneration should be clearly stipulated.

[292] Includa submit that they hope Award changes stipulate whether an employer will have the ability to refuse an employee the 2-hour minimum engagement for a cancelled shift if they refuse to be redirected to other work.

[293] Includa supports the proposed 24-hour care changes but suggests this be extended to shifts on a supported holiday and suggests a reconsideration of the excursion clause to ensure consistency.

[294] Includa supports the proposed changes to sleepover supports. Includa submits that in addition to the proposed changes, the current allowance is extremely low and does not adequately remunerate employees for the inconvenience of spending a night away from their home.

Home Care Assistance Australia

[295] Home Care Assistance Australia (HCAA) is a home care franchise that services aged and disabled consumers in their homes.

[296] HCAA oppose a minimum engagement of 2 hours for casual and part-time staff and submit that if minimum engagements are increased, this will significantly disadvantage and hurt consumers, staff and organisations.

[297] HCAA submit that their client receive limited funding and to maximize their funding they may request an hourly service each day over a week. HCAA submit that the current 1 hour minimum engagement is consistent with their client needs and accommodates staff needs as well.

[298] HCAA submit that the proposed changes will impact their female workforce. HCAA submit that the current structure of the award supports flexibility for families.

[299] HCAA oppose the change to broken shift provisions.

[300] HCAA submit that a maximum of two breaks will limit the service and flexibility their clients receive. HCAA is also concerned that the allowance set for the additional shift will act as a deterrent to provide employees with that additional shift on request.

[301] HCAA submit that they are concerned that broken shifts worked outside ordinary hours of work will attract overtime.

[302] HCAA submit that additional rules and allowances in an already complex award will increase the risk of accidental non-compliance. HCAA submit that broken shift changes pose a risk to flexible work arrangements for staff and a reduction in consumer choice.

[303] HCAA support the proposal for a minimum engagement of 2 hour for staff meetings and training.

[304] HCAA submit that the payment for travel time should be as an allowance.

[305] HCAA support the proposed changes to client cancellations.
[306] HCAA submit that the award is complex and submit that the removal of complex loadings and allowances will lead to positive outcomes for staff.

Australian Community Industry Alliance

[307] Australian Community Industry Alliance (ACIA) is the national peak body representing community care and support providers.

[308] ACIA submit that budgets and funding have already been set and in order to lobby funding bodies this can take up to a year.

[309] Australian Community Industry Alliance submit the minimum engagement extension to 2-hours should be reconsidered. They state client's quality of life and care provision will be impacted by the changes, especially in rural and regional areas where clients requiring complex care frequently need short and frequent service provision.

[310] Australian Community Industry Alliance submit that travel time alone as a core requirement will increase costs of wages by 7%.

[311] Australian Community Industry Alliance submit that as budgets, funding arrangements and client agreements regarding service provision have already been set, changes to the Award should not be implemented until 1 July 2022. Client agreements already dictate choice of hours, times and workforce requirements, and these will take a year to re-negotiate. They submit that an operative date of 1 October 2021 is too short a time to implement the changes proposed. They also express concern that quality and quantity of services will be reduced due to budgetary constraints.

Australian Unity

[312] Australian United provides a range of healthcare, financial and independent and assisted living services.

[313] Australian Unity is concerned that the minimum engagement and broken shift aspects of the May decision will have unintended negative impacts on customers, some employees and aged care providers.

[314] Australian Unity submit that the reorganisation of rostering to implement the changes to minimum engagement and broken shifts will have a significant impact on customers' care choices and continuity of care, and is likely to adversely affect some employees who prefer to perform flexibility work around their other commitments. They submit that the proposed

changes are significant and a reasonable period of time will be required to allow care provides, employees and customers to implement them in a way that mitigates, to the extent possible, their adverse implications.

[315] Australian Unity submit that the *May 2021 decison* will produce outcomes that are inconsistent with the principles on which the Aged Care Quality Standards' and National Standards for Disability Services are based, and with which Australian Unity is required to comply, as practices designed to implement the standards are not easily adjusted to accommodate the decision.

[316] Australia Unity submit that their customers very commonly seek services that require less than 2 hours of care (e.g. showing, making a meal, getting ready for bed) and their employees are rostered to perform shifts or portions of broken shirts that are less than 2 hours in duration. Many employees are also rostered to work broken shifts that are broken twice or more. Such shifts are particularly prevalent during the weekend due to the increased costs of services to the customer due to penalty rates.

[317] Australian Unity submit that the conclusion reached in the Decision that 'employers often bundle a series of short-duration customer services together to create a shift for employees. Employers also attempt to 'build' a shift for workers by combining numerous customer services so that the shift is attractive to employees' ([2021] FWCFB 2383, at [372]) does not appropriately recognise competing factors to be taken into account when scheduling services and rostering employees. Arranging work through 'bundling' has the potential to compromise care, customer choice and employee preference and may not result in the best clinical outcome.

[318] Australian Unity submit that the core of their service delivery model is to give primacy to customer preference, including the time of services and choice of care worker. Australian Unity also submit that bundling of services to a single care worker is unachievable due to employee choice. For these reasons, they submit that whilst bundled services may be operationally efficient, it is not always preferred.

[319] Australian Unity submit that rostering is a complex decision-making challenge that goes beyond a process of negotiation with the customer and involves taking into account customer choice, continuity of care, care worker availability, skills, experience, the location of customers relative to care workers and hours of work obligations in industrial instruments.

[320] Australian Unity submit that they anticipate the proposed changes to minimum payments and broken shifts will bring about a significant and unintended negative impacts on many of their customers, unintended negative impacts on some of their employees, and increased challenges for them in managing an already complex rostering environment.

[321] Australian Unity submit that they anticipate the proposed changes to minimum payments and broken shifts will impact on care standards due to reduced customer choice and continuity of care and possible inability to access services, in particularly in regional, rural and remote areas.

[322] Australian Unity submit that the proposed changes to minimum payments and broken shifts will impact employees by limiting their ability to obtain secure and significant hours of work; impact their wellbeing as a result of under-utilisation; potentially de-skill them; increase

the physical demands on them as a result of less breaks and is also likely to decrease the flexibility of working hours.

[323] Australian Unity submit that implementing the proposed changes to minimum payments and broken shifts would require that they perform a substantial amount of analysis and extensive consultation with customers and employees, including reviewing existing rosters and customer schedules, recruiting and training additional care workers, reconfiguring their payroll systems and conducting an internal education process. They consider that a significant period of time will be required to implement these changes, acknowledging that they will not immediately be impacted by any decision as their relevant employees are covered by, expired, enterprise agreements.

[324] Australian Unity submit that it is appropriate to delay the operation of the Award for a period of at least 12 months.

[325] Regarding the Commission's invitation to provide further arguments in support of a 1-hour minimum engagement for meetings and training, Australian Unity submit that their employees are required to complete numerous e-learning training modules, the majority of which take less than 2-hours.

[326] Australian Unity generally permit their employees to undertake the modules from own homes and are paid. A requirement to pay employees for at least 2-hours in circumstances where the training is of lesser duration would impose an unreasonable cost burden on employees.

[327] Australian Unity submit that 1-hour minimum payment period should apply where an employee attends a meeting or undertakes training required by the employer and that where training occurs online in an employee's home and can be done at time of the employee's choosing, that there be no minimum payment.

[328] Australian Unity further submit that where an employee has previously performed work in the day of a duration at least equal to the minimum shift, that there be no need to treat the additional hours as a separate shift (and therefore no need to apply the minimum start again) and that the break between the last period of work and the commencement of the training is not considered a break for the purpose of the broken shift definition.

Hireup

[329] Hireup is a national, NDIS-registered provider of disability support services.

[330] Hireup submits that changes to minimum shift lengths and changes to broken shifts will cause significant disruption to Hireups clients and have significant operation impacts for Hireup.

[331] Hireup submit that change to increase minimum engagement to 2 hours will have substantial impact. Ireup submit that more than one-third of Hireup clients have booked a shift of less than two hours in the past 12 months. Hireup submit that many of the services that are provided to clients are by their nature services which do not mandate a minimum two-hour engagement.

[332] Hireup submits that the flexibility of choosing short shifts can be of great value to clients and employees, with employees completing shifts around activities such as education or family caring.

[333] Hireup submit that adequate time should be given to advocate for increased funding from the NDIA in order to ensure clients are able to receive the level of service they need. Hireup submits that the operative date of 1 October 2021 provides insufficient time for this to occur.

[334] Hireup submit that some support workers will be unable to service their current client load if they are required to work a minimum of two hours each shift. Hireup submit that this may put some clients in a position where they can no longer have their chosen support worker for a usual shift.

[335] Hireup submit that the changes proposed would require a significant diversion of resources for their business and have a significant impact on the way their technology works. Hireup submit that it would be inappropriate to seek to make changes with any less than six months preparation.

[336] Hireup submits that the conclusions of the Full Bench regarding travel time do not reflect the experience of Hireup, which tends to result in local workers supporting people in their local neighborhood.

[337] Hireup submit that the changes to broken shifts will limit the available choices for clients and will result in a new direct cost not factored into NDIA funding. Hireup submit that if the change is introduced before 1 July 2022, providers and participants will not have an opportunity ot engage with the NDIA to press for adjustments.

[338] Hireup submits that the changes to broken shifts will result in a significant consultation and education campaign with clients and workers.

[339] Hireup submit that the changes proposed in relation to broken shifts will occupy their development team for three months at a minimum at an estimated cost of $200,000.

[340] Hireup submit that due to the fact that contractors and ABN-holders are not required to adhere to the relevant industrial award, changes to the award that further limit the flexibility of disability support services can result in incentivising clients and workers to engage support services directly with each other, without a service provider or employer, and without any requirement to adhere to quality and safety standards of the NDIS (aside from the basic Code of Conduct). This could be an unintended consequence that results in fewer services being provided with coverage of NDIS quality and safety assurances.

[341] Hireup submit that the Report of the Inquiry into the Victorian On-Demand Workforce 16 reviewed Australian Bureau of Statistics (ABS) data and found that between 2014 and 2018, the number of independent contractors in the broad category of healthcare and social assistance increased by 29%, from 70,700 in 2014 to 91,700 in 2018, compared with a 19% increase in the overall health care and social assistance workforce during the corresponding period. This indicates the likelihood of a much faster rate of growth already occurring in work being conducted through contracting platforms than through care services provided by employer organisations.

[342] Hireup submit that given that many of the proposed changes to the award may result in higher costs for employers, and therefore higher flow-on costs for services provided by those employers, it is likely to introduce a strong incentive from the perspective of NDIS participants with finite funding to seek cheaper, and more flexible, options for support services. Hireup submit that a rushed rollout of the changes without time to consult with and educate the disability community may unintentionally act as a turbo-charge to a trend that is already gathering momentum in the disability sector.

[343] Hireup submit that they believe a shift away from employed support work to contracted or self-employed support could lead to greater risks and liabilities being placed on workers and participants, alongside losses of benefits such as guaranteed wages.

Fighting chance

[344] Fighting chance operates operates three social businesses, Jigsaw – which seeks to train and transition employees with disability into award wage employment, Avenue – which is a coworking space where people with all levels of ability are supported to complete meaningful and supported work tasks, and Base – which operates a number of supported independent living homes for people with disability.

[345] Fighting Chace submit that the vast majority of training which employees undertake in a home care or supported living content is undertaken online and away from the care-home. Fighting Chance submit that a minimum engagement of 2 hours which could be triggered by the performance of online at home training could have a significant impact on employers in the industry.

[346] Fighting Chance submit that on-line at home training should be excluded from any minimum engagement obligations which generally apply under the award.

[347] Fighting Chance submit that undertaking training should not be regarded as a matter which is regarded as performing a 'broken shift where an employee is determining the date and time when they choose to undertake that training.

Association of Private Nursing Services

[348] The Association of Private Nursing Services (APNS) is an organisation representing approximately 40 independent companies delivering in-home support in the community, aged care and disability sectors.

[349] APNS submit the 'Disability Support Worker Cost Model', used by the NDIA to estimate the cost of delivering a billable hour of support work, does not include the changes from the May decision and therefore the NDIA price effective 1 July 2021 also does not factor in those additional costs. APSN submit the increase to the cost of delivering each hour of service will be most impacted as a result of changes to broken shifts, minimum engagement and remote response.

[350] The Association of Private Nursing Services (APNS) submit that their members have advised that it is not possible to complete the logistics required to implement the reviewed Award by the proposed commencement date of 1 October 2021 and submit that 1 July 2022 would be a more reasonable time frame to implement the proposed variations.

[351] APNS submit that the following work will be required to be completed in order to implement the decision:

- Seek information and advice to clearly understand all variations made to the Award to ensure compliance.
- Work with third party providers of rostering and/or pay roll services to ensure changes are incorporated (including software modifications);
- Train and instruct rostering, administration, and finance / pay roll staff regarding the changes required so that they can be implemented correctly, including Broken Shift Allowance and Minimum Engagement periods;
- Consult and advise customers / consumers (including following consultation protocols set by legislation) regarding any changes required eg, to staff delivering services, service delivery times, and/or costs which are required to accommodate the changes to the Award and the working arrangement of their support staff;
- Consult and work with impacted support staff who may be required to change their work patterns (eg, one hour minimum engagement to two hour minimum engagement) to enable them to arrange appropriate changes in availability if required;
- Approach funding bodies and individual customers to adjust pricing models as required to accommodate Award changes.

[352] APNS submit that service agreements are in place with clients and variations to contractual arrangements require consultation with clients and agreement. APNS submit that their members indicated that it would not be possible to consult with each individual client that would be impacted by the 1 October 2021 date particularly given the issues related to the Covid-19 pandemic and current public health stay at home orders.

Zest Personalised Care

[353] Zest Personalised Care (Zest) is a registered NDIS Provider whose employees are covered under the SCHADS Award.

[354] Zest submits it supports the proposal to implement a minimum 1-hour engagement for meetings, professional development and training however it opposes a minimum engagement of two hours for permanent part-time staff. Zest submits that it cannot charge its participants for a minimum engagement period under current NDIS funding models and that setting a minimum engagement period would impact on its ability to provide support workers it its participants to enable them to achieve their care plan outcomes.

[355] Zest submits that it also opposes the changes to broken shifts as it is not flexible enough to provide services to its participants, particularly in regional areas where there is limited availability of support workers. Zest contends that further restrictions on broken shifts could be detrimental to its participants as costs such as overtime cannot be charged back.

[356] Zest supports the payment of an allowance to workers travelling between participant shifts as a more practical way of compensating workers.

[357] Zest does not support its support workers being able to swap shifts between themselves as it risks the appropriate skills mix not being available to its participants. Zest also raises concerns that it cannot ensure fatigue and workplace health and safety of support workers, such as the provision of regular breaks, if staff are allowed to swap shifts amongst themselves.

[358] Zest submits that, while it agrees support workers should be remunerated for work performed or on call work, it does not agree that responding to messages regarding rosters or answering a question regarding a previous shift constitutes work that should be remunerated. It contends that placing a payment arrangement on such responses would cause a hindrance to daily operation and could cause excessive workload and cost as well as encourage delinquent behaviour.

[359] Zest agrees with being able to pay the employee the amount of they would have received for the shift and to provide the employee with make-up time to be performed within 3 months of the date of the cancelled shift. Zest also agrees with consulting the employee in relation to when the makeup time will be performed.

[360] Zest agrees with the reasonable reimbursement of damaged or soiled clothing and equipment

[361] Zest supports the change to the Sleepover clause whereby employees should have access to clean bed linen and access to food preparation facilities.

ATTACHMENT A

MA000100 PRXXXXXX

DRAFT DETERMINATION

Fair Work Act 2009
s.156—4 yearly review of modern awards

Application to vary the Social, Community, Home Care and Disability Services Industry Award 2010

(AM2018/26 and AM2020/100)

Social, Community, Home Care and Disability Services Industry Award 2010

[MA000100]

Social, community, home care and disability services

JUSTICE ROSS, PRESIDENT
DEPUTY PRESIDENT CLANCY
COMMISSIONER LEE MELBOURNE, XX MONTH 2021

Four yearly review of modern awards – Award stage – Group 4A awards – substantive issues – Social, Community, Home Care and Disability Services Industry Award 2010.

A. Further to the decisions issued by the Full Bench of the Fair Work Commission on 4 May 2021 ([2021] FWCFB 2383) and XX MONTH 2021 ([2021] FWCFB XXXX), the above award is varied as follows:

1. By deleting clause 10.3 and inserting the following:

10.3 Part-time employment

(a) A part-time employee is one who is engaged to work less than 38 hours per week or an average of less than 38 hours per week and who has reasonably predictable hours of work.

(b) The terms of this award will apply to part-time employees on a pro-rata basis on the basis that the ordinary weekly hours of work for full-time employees are 38.

(c) Before commencing employment, the employer and employee will agree in writing on:

(i) a regular pattern of work including the number of ordinary hours to be worked each week (**the guaranteed hours**), and

(ii) the days of the week the employee will work and the starting and finishing times each day.

(d) The agreed regular pattern of work does not necessarily have to provide for the same guaranteed hours each week.

(e) The agreement made pursuant to clause 10.3(c) may subsequently be varied by agreement between the employer and employee in writing. Any such agreement may be ongoing or for a specified period of time.

(f) Nothing in clause 10.3(e) requires an employee to agree to any change in their guaranteed hours.

(g) Review of guaranteed hours

(i) Where a part-time employee has regularly worked more than their guaranteed hours for at least 12 months, the employee may request in writing that the employer vary the agreement made under clause 10.3(c) to reflect the ordinary hours regularly being worked.

(ii) The employer must respond in writing to the employee's request within 21 days.

(iii) The employer may refuse the request only on reasonable business grounds.

EXAMPLE: Reasonable business grounds to refuse the request may include that the reason that the employee has regularly worked additional agreed hours is temporary—for example where this is the direct result of another employee being absent on annual leave. For home care employees, reasonable business grounds to refuse a request may also include the lack of continuity of funding, changes in client numbers and client preferences.

(iv) Before refusing a request made under clause 10.3(g)(i), the employer must discuss the request with the employee and genuinely try to reach agreement on an increase to the employee's guaranteed hours that will give the employee more predictable hours of work and reasonably accommodate the employee's circumstances.

(v) If the employer and employee agree to vary the agreement made under clause 10.3(c), the employer's written response must record the agreed variation.

(vi) If the employer and employee do not reach agreement, the employer's written response must set out the grounds on which the employer has refused the employee's request.

(vii) Clause 10.3(g) is intended to operate in conjunction with clause 10.3(e) and does not prevent an employee and employer from agreeing to vary the agreement made under clause 10.3(c) in other circumstances.

2. By deleting clause 10.4(c).

3. By renumbering clause 10.5 as 10.6.

4. By inserting a new clause 10.5 as follows:

10.5 Minimum payments for part-time and casual employees

Part-time and casual employees will be paid for the following minimum number of hours, at the appropriate rate, for each shift or period of work in a broken shift:

(a) social and community services employees (except when undertaking disability services work)—3 hours;

(b) all other employees—2 hours.

5. By deleting Note 1 and Note 2 appearing at the beginning of clause 15.

6. By inserting the following note as a new paragraph after the end of clause 15:

NOTE 1: A **transitional pay equity order** taken to have been made pursuant to item 30A of Schedule 3A to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) has effect in accordance with that item. Transitional pay equity orders operate in Queensland as provided for in items 30A (6) and (7).

7. By inserting the following note as a new paragraph after the end of clause 15:

NOTE 2: An equal remuneration order [PR525485] also applies to employees in the classifications in Schedule B—Classification Definitions—Social and Community Services Employees and Schedule C—Classification Definitions—Crisis Accommodation Employees of this award. The final rates of pay resulting from the equal remuneration order are set out below. The 'current hourly wage' and 'current weekly wage' in the tables below form employees' ordinary rates of pay for all purposes:

Equal remuneration rates for applicable Social and Community Services employees—from 1 December 2020

	Clause	**Minimum weekly wage**	**Final ERO Rate Percentage**	**Current weekly wage**	**Current hourly wage**
Classification		**$**	**%**	**$**	**$**
Social and community services employee level 2	15.2				
Pay point 1		877.60	123	1079.45	28.41
Pay point 2		905.10	123	1113.27	29.30

	Clause	Minimum weekly wage	Final ERO Rate Percentage	Current weekly wage	Current hourly wage
Pay point 3		932.60	123	1147.10	30.19
Pay point 4		957.60	123	1177.85	31.00
Social and community services employee level 3	15.3				
Pay point 1 (associate diploma/advanced certificate)		957.60	126	1206.58	31.75
Pay point 2		985.10	126	1241.23	32.66
Pay point 3 (3 year degree)		1006.10	126	1267.69	33.36
Pay point 4 (4 year degree)		1026.70	126	1293.64	34.04
Social and community services employee level 4	15.4				
Pay point 1		1054.20	132	1391.54	36.62
Pay point 2		1081.80	132	1427.98	37.58
Pay point 3		1109.60	132	1464.67	38.54
Pay point 4		1134.30	132	1497.28	39.40
Social and community services employee level 5	15.5				
Pay point 1		1162.00	137	1591.94	41.89
Pay point 2		1186.90	137	1626.05	42.79
Pay point 3		1214.60	137	1664.00	43.79
Social and community services employee level 6	15.6				
Pay point 1		1242.30	140	1739.22	45.77
Pay point 2		1269.70	140	1777.58	46.78
Pay point 3		1297.20	140	1816.08	47.79
Social and community services employee level 7	15.7				
Pay point 1		1324.70	142	1881.07	49.50
Pay point 2		1352.50	142	1920.55	50.54
Pay point 3		1380.00	142	1959.60	51.57
Social and community services employee level 8	15.8				
Pay point 1		1407.50	145	2040.88	53.71
Pay point 2		1435.10	145	2080.90	54.76
Pay point 3		1462.90	145	2121.21	55.82

Equal remuneration rates for Crisis Accommodation employees—from 1 December 2020

	Clause	Minimum weekly wage	Final Rate Percentage	Current weekly wage	Current hourly wage
Classification		**$**	**%**	**$**	**$**
Crisis accommodation employee Level 1	15.3				
Pay point 1 (associate diploma/advanced certificate)		957.60	126	1206.58	31.75
Pay point 2		985.10	126	1241.23	32.66
Pay point 3 (3 year degree)		1006.10	126	1267.69	33.36
Pay point 4 (4 year degree)		1026.70	126	1293.64	34.04
Crisis accommodation employee level 2	15.4				
Pay point 1		1054.20	132	1391.54	36.62
Pay point 2		1081.80	132	1427.98	37.58
Pay point 3		1109.60	132	1464.67	38.54
Pay point 4		1134.30	132	1497.28	39.40
Crisis accommodation employee level 3	15.5				
Pay point 1		1162.00	137	1591.94	41.89
Pay point 2		1186.90	137	1626.05	42.79
Pay point 3		1214.60	137	1664.00	43.79
Crisis accommodation employee level 4	15.6				
Pay point 1		1242.30	140	1739.22	45.77
Pay point 2		1269.70	140	1777.58	46.78
Pay point 3		1297.20	140	1816.08	47.79

8. By inserting clause 20.10 as follows:

20.10 Broken shift allowance

(a) An employee required to work a broken shift with 1 unpaid break in accordance with clause 25.6(a) will be paid an allowance of 1.7% of the standard rate, per broken shift.

(b) An employee who agrees to work a broken shift with 2 unpaid breaks in accordance with clause 25.6(b) will be paid an allowance of 2.5% of the standard rate, per broken shift.

9. By deleting clause 25.5(d)(ii) and inserting the following:

(ii) However, a roster may be changed at any time:

(A) if the change is proposed by an employee to accommodate an agreed shift swap with another employee; or

(B) to enable the service of the organisation to be carried on where another employee is absent from duty on account of illness, or in an emergency.

10. By deleting clause 25.5(f) and inserting the following:

(f) Client cancellation

(i) Clause 25.5(f) applies where a client cancels or changes a scheduled home care or disability service, within 7 days of the scheduled service, which a full-time or part-time employee was rostered to provide.

(ii) Where a service is cancelled by a client under clause 25.5(f)(i), the employer may either:

(A) direct the employee to perform other work during those hours in which they were rostered; or

(B) cancel the rostered shift.

(iii) Where clause 25.5(f)(ii)(A) applies, the employee will be paid the amount payable had the employee performed the cancelled service or the amount payable in respect of the work actually performed, whichever is the greater.

(iv) Where clause 25.5(f)(ii)(B) applies, the employer must either:

(A) pay the employee the amount they would have received had the shift not been cancelled; or

(B) subject to clauses 25.5(f)(v) and (vi), provide the employee with make up time in accordance with clause 25.5(f)(vii).

(v) The make up time arrangement can only be used where the employee was notified of the cancelled shift at least 12 hours prior to the scheduled commencement of the shift. In these cases, clause 25.5(f)(iv)(A) applies.

(vi) The make up time arrangement cannot be used where the employer is permitted to charge the client in respect of the cancelled service. In these cases, clause 25.5(f)(iv)(A) applies.

(vii) Where the employer elects to provide make up time:

(A) the make up time must be rostered in accordance with clause 25.5(a);

(B) the make up time must be rostered to be performed within 6 weeks of the date of the cancelled shift;

(C) the employer must consult with the employee in accordance with clause 8A regarding when the make up time is to be worked prior to rostering the make up time; and

(D) the make up shift can include work with other clients or in other areas of the employer's business provided the employee has the skill and competence to perform the work.

(viii) Clause 25.5(f) is intended to operate in conjunction with clause 25.5(d) and does not prevent an employer from changing a roster under clause 25.5(d)(i) or (ii).

11. By deleting clause 25.6 and inserting the following:

25.6 Broken shifts

This clause only applies to social and community services employees when undertaking disability services work and home care employees.

(a) Broken shift with 1 unpaid break

(i) An employer may only roster an employee to work a broken shift of 2 periods of work with 1 unpaid break (other than a meal break).

(ii) An employee rostered to work a broken shift with 1 unpaid break must be paid the allowance in clause 20.10(a).

(b) Agreement to work a broken shift with 2 unpaid breaks

(i) Despite clause 25.6(a), an employer and an employee may agree that the employee will be rostered to work a broken shift of 3 periods of work with 2 unpaid breaks (other than meal breaks).

(ii) An agreement under clause 25.6(b)(i) must be made on each occasion that the employee will be rostered to work a broken shift with 2 unpaid breaks.

(iii) An employee rostered to work a broken shift with 2 unpaid breaks must be paid the allowance in clause 20.10(b).

(c) Where a break in work falls within a minimum payment period in accordance with clause 10.5 then it is to be counted as time worked and does not constitute a break in a shift for the purposes of clause 25.6(a)(i) or clause 25.6(b)(i).

(d) Payment for a broken shift will be at ordinary pay with weekend and overtime penalty rates to be paid in accordance with clauses 26 and 28.

(e) The span of hours for a broken shift is up to 12 hours. All work performed beyond a span of 12 hours will be paid at double time.

(f) An employee must receive a minimum break of 10 hours between broken shifts rostered on successive days.

12. By deleting clause 25.7(c) and inserting the following:

(c) The span for a sleepover will be a continuous period of 8 hours. Employees will be provided with a separate room with a bed and clean linen, the use of appropriate facilities (including access to food preparation facilities and staff facilities where these exist) and free board and lodging for each night when the employee sleeps over.

13. By deleting clause 25.8 and inserting the following:

25.8 24-hour care

This clause only applies to home care employees.

(a) A **24-hour care** shift requires an employee to be available for duty in a client's home for a 24-hour period. During this period, the employee is required to provide the client with the services specified in the care plan. The employee is required to provide a total of no more than 8 hours of care during this period.

(b) An employer may only require an employee to work a 24-hour care shift by agreement.

(c) The employee will be afforded the opportunity to sleep for a continuous period of 8 hours during a 24-hour care shift and employees will be provided with a separate room with a bed and clean linen, the use of appropriate facilities (including access to food preparation facilities and staff facilities where these exist) and free board and lodging for each night when the employee sleeps over.

(d) The employee will be paid 8 hours' work at 155% of their appropriate rate for each 24-hour period.

(e) If the employee is required to perform more than 8 hours' work during a 24-hour care shift, that work shall be treated as overtime and paid at the rate of time and a half for the first 2 hours and double time thereafter, except on Sundays when overtime will be paid for at the rate of double time, and on public holidays at the rate of double time and a half. An employer and employee may utilise the TOIL arrangement in accordance with clause 28.2.

(f) An employee may refuse to work more than 8 hours' work during a 24-hour care shift in circumstances where the requirement to work those additional hours is unreasonable.

14. By deleting clause 28.1 and inserting the following:

28.1 Overtime rates

(a) Full-time employees

A full-time employee will be paid the following payments for all work done in addition to their rostered ordinary hours on any day or outside the span of hours (day workers only):

(i) disability services, home care and day care employees—for all authorised overtime on Monday to Saturday, payment will be made at the rate of time and a half for the first 2 hours and double time thereafter;

(ii) social and community services and crisis accommodation employees—for all authorised overtime on Monday to Saturday, payment will be made at the rate of time and a half for the first 3 hours and double time thereafter;

(iii) for all authorised overtime on a Sunday, payment will be made at the rate of double time;

(iv) for all authorised overtime on a public holiday, payment will be made at the rate of double time and a half; and

(v) overtime rates under this clause will be in substitution for, and not cumulative upon, the shift premiums prescribed in clause 29—Shiftwork and Saturday and Sunday work premiums prescribed in clause 26—Saturday and Sunday work.

(b) Part-time employees and casual employees

(i) All time worked by part-time or casual employees in excess of 38 hours per week or 76 hours per fortnight will be paid for at the rate of time and a half for the first 2 hours and double time thereafter, except that on Sundays such overtime will be paid for at the rate of double time and on public holidays at the rate of double time and a half.

(ii) All time worked by part-time or casual employees which exceeds 10 hours per day, will be paid at the rate of time and a half for the first 2 hours and double time thereafter, except on Sundays when overtime will be paid for at the rate of double time, and on public holidays at the rate of double time and a half.

(iii) Time worked up to the hours prescribed in clause 28.1(b)(ii) will, subject to clause 28.1(b)(i), not be regarded as overtime and will be paid for at the ordinary rate of pay (including the casual loading in the case of casual employees).

(iv) All time worked outside the span of hours by part-time and casual day workers will be paid for at the rate of time and a half for the first two hours

and double time thereafter, except that on Sundays such overtime will be paid for at the rate of double time and on public holidays at the rate of double time and a half.

(v) Overtime rates payable under clause 28.1(b) will be in substitution for and not cumulative upon the shift premiums prescribed in clause 29—Shiftwork and are not applicable to ordinary hours worked on a Saturday or Sunday.

15. By deleting clause 31.2 and inserting the following:

31.2 Quantum of leave

For the purpose of the NES, a shiftworker is:

(a) an employee who works for more than 4 ordinary hours on 10 or more weekends during the yearly period in respect of which their annual leave accrues; or

(b) an employee who works at least eight 24-hour care shifts in accordance with clause 25.8;

and is entitled to an additional week's annual leave on the same terms and conditions.

16. By updating cross-references accordingly.

B. This determination comes into operation on **1 October 2021**. In accordance with s.165(3) of the *Fair Work Act 2009* this determination does not take effect in relation to a particular employee until the start of the employee's first full pay period that starts on or after **1 October 2021**.

PRESIDENT