Fair Work Commission: 4 yearly Review of modern awards

CASUAL EMPLOYMENT AND PART-TIME EMPLOYMENT
(AM2014/196 AND AM2014/197)

# FINAL SUBMISSIONS: SOCIAL, COMMUNITY, HOME CARE AND DISABILITY SERVICES INDUSTRY AWARD

AUSTRALIAN BUSINESS INDUSTRIAL
- and -
THE NSW BUSINESS CHAMBER LTD

30 SEPTEMBER 2016

## 1. BACKGROUND

1.1 These final submissions are made on behalf of Australian Business Industrial (**ABI**) and the New South Wales Business Chamber Ltd (**NSWBC**).

1.2 ABI is a registered organisation under the *Fair Work (Registered Organisations) Act 2009* (Cth) and has some 4,200 members, while NSWBC is a recognised State registered association pursuant to Schedule 2 of the *Fair Work (Registered Organisation) Act 2009* (Cth) with more than 18,000 members.

1.3 These final submissions are made in accordance with the Directions of the Commission issued on 10 August 2016, and are filed in support of our clients' application to vary clause 10.3(c) of the *Social, Community, Home Care and Disability Services Industry Award 2010* (**SCHCDSI Award**).

## 2. INTRODUCTION

2.1 At the heart of the casual and part-time employment proceedings (AM2014/196, AM2014/197) is an application by the ACTU *"directed at the problem of insecure employment in Australia"*. The ACTU asks the Commission to *"respond to the phenomenon of the 'permanent casual'"*, and characterises its application as a proposed *"pathway out of casual employment for long-term regular casual employees"*.

2.2 Perhaps ironically, our clients' application has a similar objective, albeit in the reverse. By this application, ABI and NSWBC seek to maintain the viability of part-time employment in the disability services sector.

2.3 It is trite that the National Disability Insurance Scheme (**NDIS**) is a significant reform of the disability services sector which is dramatically changing the planning, funding and delivery of services. While the NDIS model will undoubtedly provide significant benefit to participants, it also brings with it serious challenges for disability services organisations and the disability services workforce. Challenges arising from the person-centred care model include intermittent service usage, short notice requests for changes or cancellations, and service user 'churn' as purchasers change providers.

2.4 It is not an exaggeration to state that the landscape of the disability services sector has fundamentally changed.

2.5 There is a very real and widespread concern that the NDIS will lead to a further casualisation of the workforce in the sector. Indeed, the evidence before the Commission demonstrates that it is already occurring.[1] The same concerns have already been realised in other jurisdictions where 'person-centred' social and health care systems have been implemented, such as in the UK.[2]

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[1] Refer to paragraph 6.9 below.

[2] See Green J and Mears J, 'The Implementation of the NDIS: Who Wins, Who Loses?' *Cosmopolitan Civil Societies Journal* 6(2) 2014, pp 32-34; Hilferty F & Cortis N, '*Analysis of Workforce Indicators Suitable for the Ageing, Disability and Home Care Sectors'*, Final Report, Report for Ageing, Disability and Home Care, Department of Families and Communities, NSW Social Policy Research Centre, March 2012; Cunningham I & Nickson D '*Personalisation and its implications for work and employment in the voluntary sector*', Workforce Unit: Voluntary Sector Social Services Workforce Unit, 2010.

2.6 The consensus among employers, employees, participants and their families and carers is that the maintenance of a permanent workforce is necessary to prevent deterioration in the quality of care provided to participants under the NDIS.

2.7 Employers are keen to prevent a wholesale casualisation of the disability services sector, with the evidence before the Commission demonstrating that employers recognise the benefits of a permanent workforce and endeavour to employ people on a permanent basis wherever practicable.

2.8 Likewise, the evidence of employees makes it clear that many employees value the security and certainty of permanent part-time employment, and do not wish to be employed on a casual basis. For many, part-time employment is the most desirable form of employment as they are not able to work full-time hours because of family or other commitments.

2.9 Lastly, the evidence of Mr Bowden raises the same concerns about casualisation from the perspective of participants of the scheme.

2.10 It is clearly in the interests of both employers and employees that part-time employment continues to be an accessible, viable and sustainable category of employment. However, despite this consistent desire, the reality is that rigid and inflexible regulations relating to part-time employment are frustrating attempts to halt the slide into casualisation. It is in this context that our clients seek a variation to clause 10.3(c) of the SCHCDSI Award.

## 3. THE NATIONAL DISABILITY INSURANCE SCHEME

3.1 The Commission heard considerable evidence about the nature of the NDIS and how it is changing the structure of the disability services sector. One of the core aspects of the NDIS is the shift of control away from disability services organisations towards the individual participants, allowing them to exercise a far greater level of choice and control over how their disability support services are delivered.

3.2 Participants not only have the ability to choose which service provider to engage, they are also able to choose what services are provided to them, when those services are provided, where those services are provided, and by whom those services are provided. If participants are not happy with their service provider, they can simply terminate their service arrangements and move to another provider.

3.3 While it is true that employers do retain a level of control over the service (e..g through Service Agreements with participants), an unavoidable consequence of the NDIS model is that employers no longer have the same level of control over when, where, how and by whom services are delivered. The evidence of employers is that they are now grappling with a number of service-delivery challenges, including:

(a) an increase in requests for changes to services by participants/clients;

(b) an increase in client cancellations;

(c) an increase in requests for particular support workers by participants/clients; and

(d) diminishing profitability and/or viability of some types of work due to the NDIS pricing model.

3.4 The significant changes brought about by the NDIS demand that employers be more flexible and responsive in meeting the needs of participants in the new consumer-driven landscape. Employers are grappling with the tension between meeting client service requirements and expectations, while also complying with Award obligations that do not necessarily match up with the new NDIS framework.

3.5 This struggle was summed up by David Carey, CEO of ConnectAbility, when he stated during cross-examination:

> "...we want to retain good staff, so as a provider we just need to be flexible, but we're caught between a rock and a hard place where the NDIS has a set of rules and systems that is quite different to where the award is now. I mean, this award worked well five, 10 years ago, but in an NDIS environment it's a very different way of operating and there is a lot of short term - you know, like where we're supposed to give staff a week or two weeks' notification of change in roster, the NDIS has a system where they only have to give 24 hours, so there is a mismatch between the two systems and, sort of, we're caught in the middle..."

## 4. PRACTICAL ISSUES WITH CLAUSE 10.3(C) OF THE SCHCDSI AWARD

4.1 The evidence before the Commission is that clause 10.3(c) is causing significant practical problems for employers in light of the changes taking place in the industry due to the NDIS.

4.2 Clause 10.3(c) of the SCHCDSI Award requires an employer to agree on a specific pattern of work with each part-time employee at the commencement of employment, including the number of hours to be worked per week, the days on which those hours are to be worked and the specific starting and finishing times on each day the employee will work.

4.3 For many employers, when engaging new part-time employees, they are simply not able to specify the exact working hours of that employee to the level of specificity required by clause 10.3(c). This forces employers to choose between engaging new employees on a casual basis, or engaging employees on a part-time basis and then regularly seeking their consent to change starting and finishing times as necessary.

### Tension between reasonable predictability and fixed hours

4.4 There is an inherent inconsistency in clause 10.3. On the one hand, clause 10.3(a) defines a part-time employee as someone who "has reasonably predictable hours of work".

4.5 The term "reasonably" is defined as meaning "to a moderate or acceptable degree; fairly". The term "predictable" is defined as being "able to be foretold or declared in advance; expected, especially on the basis of previous or known behaviour".

4.6 The ordinary and natural meaning of the phrase "reasonably predictable", in the context of clause 10.3(a), carries with it the notion that a part-time employee must have a reasonable degree of certainty around their working hours. However, reasonable predictability does not mean "fixed", "definite", "rigid" "assured" or "unchanging".

4.7 Notwithstanding the above, clause 10.3(c) requires employers to agree on a fixed pattern of working hours. Clause 10.3(c) sits uncomfortably with the accepted notion that a part-time employee can work reasonably predictable hours. Indeed, at a conceptual level, the SCHCDSI

Award is paradoxical in that it defines a part-time employee as someone who works reasonably predictable hours, and yet then requires the establishment of a fixed regime of working hours.

4.8 Clause 10.3(c) binds an employer to a fixed, rigid working arrangement from which the employer cannot easily depart. There is no warrant for such a prescriptive and inflexible restriction.

4.9 In this regard, attention should be drawn to the ACTU 'common claim' in these proceedings, and in particular its submission of 20 June 2016 filed in response to the Issues Paper published by the Commission on 11 April 2016. In that submission, the ACTU provided its view on the conceptual difference between casual employment and part-time employment, relevantly stating:

> *Properly understood, the conceptual difference between casual and part-time employment is that a casual worker is one engaged to carry out work which is unpredictable or ad hoc. Casual work, properly understood, is work which is irregular and unpredictable from one day to the next.*
>
> *Every other form of work is properly regarded as permanent work. Permanent work involving usual hours of less than 38 is permanent part-time work.*

4.10 Conceptually, there does not appear to be contended by any party that a part-time employee must by definition have *fixed* hours of work. Indeed, the ACTU directly asserts that part-time employment includes, and should include, all work which is less than 38 hours per week and is not "*irregular and unpredictable from one day to the next".*

**Clause 10.3(c) is causing undesirable and perverse outcomes**

4.11 Since the introduction of clause 10.3(c) into the SCHCDSI Award on 1 August 2013, employers have grappled with how to continue employing part-time employees on reasonably predictable hours, without necessarily *fixing* the employee's hours of work, whilst also complying with clause 10.3(c).

4.12 One practice which has emerged, which avoids the need to regularly reach agreement with employees to change their established fixed pattern of work, is for employers to offer employees only those hours which they know with certainty will be worked in shifts that will be *fixed* (i.e. the shift will occur at the same time on the same day each week), and then regularly offer employees *additional* hours which they are free to accept or decline.

4.13 The result of clause 10.3(c) is that employers offer a lower number of *guaranteed* hours than employers know are available, simply because they are unable to specify the precise starting time, finishing time, and day on which all shifts will be performed.

4.14 This has detrimental impacts on employees. Part-time employees are offered a lower guaranteed number of hours, which may or may not provide them with certainty of a sufficient living wage. They are then left to rely on notionally 'additional' hours (which they may regularly and systematically perform) to which they have no guaranteed entitlement, to supplement their artificially low guaranteed number of hours.

## 5. VARIATION SOUGHT

5.1 ABI and NSWBC seek a variation in the terms set out in the Amended Draft Determination filed on 5 July 2016 in order to remedy the issues caused by clause 10.3(c).

5.2 The Amended Draft Determination seeks a new fair and relevant framework for the arrangement of working hours for certain specified part-time employees. It seeks to remove some of the more onerous obligations in clause 10.3(c), whilst retaining sufficient protections for employees.

5.3 The Amended Draft Determination proposes a new clause 10.3(d) which is proposed to operate as an alternative to the existing obligation in clause 10.3(c) for a certain class of part-time employee. The part-time employees to whom clause 10.3(d) would apply are those employees who provide direct supports to clients (i.e. support workers) where those clients have discretion to vary when their support is provided.

5.4 Under the proposal, where an employer employs a part-time employee to perform support work for clients who have discretion to vary when their support is provided, the parties may utilise clause 10.3(d). Under the proposed clause 10.3(d):

(a) an employer and a part-time employee are required to reach agreement on the number of hours to be worked each week, having regard to the employee's stated availability (or unavailability);

(b) the employer may then roster the part-time employee to work their designated number of hours at times which conform to the employee's stated availability; and

(c) those hours will be rostered in accordance with the existing rostering requirements of clause 25.5, which require rosters to be posted two weeks prior to the commencement of the roster period.

5.5 The proposed clause 10.3(d) would prohibit an employer from requiring an employee to work at times which they had specified they were not available, but would otherwise provide an employer with a level of flexibility to roster the employee across the spectrum of their "available" days and times, subject to providing notice of the roster 14 days' in advance.

5.6 In our submission, this type of arrangement 'gets the balance right' for employers and employees.

5.7 We turn now to a consideration of the evidence before the Commission which warrants the granting of the variation.

## 6. THE EVIDENTIARY CASE

6.1 The Employer Parties[3] filed a comprehensive evidentiary case in support of this application, which included:

(a) an affidavit of Anthony Rohr, Executive Manager of People, Culture and Safety at Mei-Wel Limited(Exhibit 228);

(b) a statement of Hugh Packard, CEO at Valmar Support Services Ltd (Exhibit 254);

[3] The Employer Parties included ABI, NSWBC, Jobs Australia, National Disability Services and St Ives Group.

(c) a statement of David Carey, CEO of ConnectAbility Australia (Exhibit 233);

(d) a statement of Dr Ken Baker AM, CEO of National Disability Services (Exhibit 232);

(e) a statement of Dr Jennifer Fitzgerald, CEO of Scope (Aust) Ltd (Exhibit 282);

(f) two statements of Lois Andrijich, General Manager Human Resources (Operations) for the St Ives Group (Exhibits 235 and 236);

(g) a statement of Leah Miles, Administration Assistant (Operations) of the St Ives Group (Exhibit 234); and

(h) a tender bundle of materials filed by ABI and NSWBC (Exhibit 251).

6.2 Each of the employer witnesses attended the hearing and was cross-examined on their evidence.

6.3 The evidence of the employer witnesses was largely consistent across in terms of their experiences under the NDIS and the practical implications the reforms are having on their operations. Much of the evidence of the employer witnesses was supported by quantitative data. The evidence of the employer witnesses should be accepted.

**Key findings available on the evidence**

6.4 The appropriate factual conclusions to be drawn from the evidence are as follows.

6.5 The NDIS is a major reform in the SCHCDSI industry, which enables eligible participants to exercise more choice and control in their lives through an individualised funding model. Under the NDIS, participants have greater choice and control over how their services are delivered, which includes control over what services are provided to them, when those services are provided, where those services are provided, and by whom those services are provided. Participants have the ability to choose their service providers, and to terminate their service arrangements at their discretion.[4]

6.6 While early iterations of the NDIS Plans were quite prescriptive[5], the more recent NDIS Plans are far less prescriptive and do not specify the days or times when services are to be provided.[6]

6.7 The competitive client-centred NDIS model has led to a number of workforce challenges, including:

(a) an increased demand for one-on-one support rather than group support;[7]

(b) a growth in home and community-based supports rather than centre-based supports;[8]

[4] See Baker Statement at [11]; Rohr Affidavit at [6]-[7], [17]-[19]; page 1 of Tab 5 of Exhibit 251, being the *Explanatory Memorandum to the National Disability Insurance Scheme Bill 2012*; Carey Statement at [15]-[16]; Packard Statement at [24]-[34]; Fitzgerald Statement at [17].
[5] See Paddick Statement; See also Packard evidence at PN5671.
[6] See Packard evidence at PN5671-PN5684. Compare this to the Paddick Statement at [12] and then Paddick in cross-examination at PN5116-PN5118.
[7] See Carey Statement at [18].
[8] Baker Statement at [26], Fitzgerald at PN879, PN908.

(c) an increase in requests for services of shorter durations;[9]

(d) an increase in the frequency with which clients request changes to their services;[10]

(e) an increase in clients cancelling services on a particular day, including cancellations at short notice;[11]

(f) an increase in requests for particular support workers by participants/clients;[12]

(g) an increase in clients cancelling their service agreements and going to other service providers;[13]

(h) regular changes by participants of their NDIS Plans;[14] and

(i) diminishing profitability and/or viability of some types of work due to the NDIS regulated pricing model.[15]

6.8 As a result of these issues, changes to rosters or are occurring more frequently[16], and rostering has become increasingly complex.[17]

6.9 The NDIS has also led to an increase in casual employment in the SCHCDSI industry, which in part at least reflects the nature of the new operating environment and the heightened variability of service requirements.[18]

6.10 There is also evidence of new service forms emerging in the major metropolitan markets which are built on business models of engaging independent contractors.[19]

6.11 There is a mutual desire, from both employers and employees, to encourage permanent part-time employment in favour of casual employment.[20] Employers in the SCHCDSI industry recognise the benefits of maintaining a permanent workforce of well trained, experienced and committed staff, and many employers endeavour to employ people on a permanent basis whenever practicable.[21] Part-time employment is an important feature of the SCHCDSI industry, representing a significant proportion of the workforce.[22]

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[9] See Fitzgerald Statement at [42]-[51]; Baker Statement at [31]; Carey Statement at [30]-[31].
[10] Baker Statement at [26]; Fitzgerald at PN728, PN802.
[11] Baker Statement at [26]; Carey Statement at [38].
[12] Baker Statement at [26].
[13] See Packard at PN5818, 5580.
[14] See Baker Statement at [23].
[15] See Baker Statement at [20]-[25].
[16] Baker Statement at [27].
[17] Baker Statement at [27]; Fitzgerald Statement at [40]-[41].
[18] Rohr Affidavit at [21], [53]-[54]; Packard Statement at [47]-[51], See also Packard at PN5609 and Fitzgerald at PN879 and PN884.
[19] Baker Statement at [32].
[20] Rohr Affidavit at [17]-[19]; Packard Statement at [24]-[34]; Carey Statement at [33]; Fitzgerald at PN962.
[21] See Packard evidence at PN5609; Fitzgerald at PN962.
[22] See Rohr Affidavit at [11] and [14]-[15]; Packard Statement at [16], [20]-[21]; See also Tab 9 of Exhibit 251, being the *NDS Victoria: Disability Services Workforce Data Project Final Report*, August 2011, which at page 3 estimated that 36.8% of the disability sector workforce is part-time. See also Carey Statement at [32]-[33]; Fitzgerald Statement at [31]; see also Fitzgerald at PN962.

6.12 Many employees in the SCHCDSI industry also prefer permanent part-time employment over casual employment.[23] Employees value a guaranteed weekly income[24] and leave entitlements[25], among other things. Many part-time employees do not wish to be engaged on a casual basis as they value the perceived increased security that comes with part-time employment.[26] Further, many part-time employees are not able to take on full-time employment due to family or other commitments.[27]

6.13 Clause 10.3(c) of the SCHCDSI Award is operating as a disincentive to engaging employees on a part-time basis.[28] A perverse and undesirable consequence of clause 10.3(c) is that employers are offering employees a lower number of guaranteed hours than what they might otherwise be able to offer if they did not need to agree on specified working days and starting and finishing times prior to commencement.[29]

**Brief comments on the Union parties' evidence**

6.14 The vast majority of the lay evidence advanced by the Union parties was from residential support workers.

6.15 It is readily acknowledged that many residential support workers are able to be provided with a regular and predominantly *'fixed'* pattern of work given that the work involves predictable 24/7 care for residents in a particular home. Residential support workers are not the focus of our clients' application.

6.16 Notably, the Union parties elected not to file any evidence from non-residential support workers who work in lifestyle and leisure programs or day programs, etc. These non-residential support workers are the employees for whom compliance with clause 10.3(c) of the SCHCDSI Award is most impractical.

6.17 Non-residential support workers perform support work outside of a residential environment, with a focus on social and community participation. It includes supporting clients to engage in community activities such as attending events, obtaining education and skills training for independence in the community, or in preparation for transition to employment.

6.18 An analysis of the Union parties' evidence shows that of the 14 lay witness statements filed in relation to the 'NDIS and related issues' aspect of these proceedings:

(a) two witness statements related to the Aged Care Award 2010 and so are not relevant to the SCHCDSI Award or matters for determination before the Commission in respect of this application;[30]

[23] See Keane Statement; Fairweather at PN5214.
[24] Keane Statement at [19].
[25] Keane Statement at [20]-[21].
[26] Denny Statement at [7]; Packard at PN5667.
[27] See Wiegard at PN5965-PN5970; Bookalil at PN5431.
[28] See Packard at PN5597.
[29] See Bowden at PN5514, See Keane at PN6114, See Fitzgerald at PN1027.
[30] See Statement of Mary Hajistassi; Statement of Melissa Coad. These statements related to the Aged Care Award 2010 and are irrelevant to our clients' application. They should be disregarded in the context of our clients' application.

(b) three witness statements were from employees who are not intended to be caught by the Amended Draft Determination;[31] and

(c) two witness statements from union officials relating to a member survey were of such poor quality that they simply cannot be relied on and must be wholly disregarded.[32]

6.19 The seven witness statements referred to above should be disregarded.

6.20 The statement of Mick Paddick should also be disregarded as it has now lost its currency. The NDIS Plan attached to his statement was an early iteration of the plans, and Mr Paddick's comments about the specificity within plans are no longer accurate.[33] Mr Paddick accepted as much under cross-examination, and indicated that he does not have "direct contact with plans any more", except with extremely complex clients.[34]

6.21 In relation to the Paddick statement, it would have perhaps assisted the Commission to hear from "Cheryl", the support worker employed to provide supports to "Bob", the de-identified participant whose out-of-date NDIS plan was attached to the Paddick statement.

6.22 Bob's plan provides a useful example of the type of evidence that was lacking in these proceedings. Bob's plan encompasses providing 1:1 support to undertake activities like going shopping, going out to lunch, going for walks, going to the beach, going to movies, and going to football matches. Bob has funding for community access on Saturdays, and one of Bob's social participation goals is to "attend some of the Geelong Football matches".

6.23 The AFL draw for the 2016 season shows that games are not played at the same time each week. For example, the Geelong Cats had 6 home games scheduled on a Saturday. Those games had variable starting times ranging from 1.45pm, 2.10pm, 4.35pm, and 7.25pm.

6.24 This is an example of the rostering difficulties that arise from the NDIS. Of course, it is not the case that Bob will always get what he wants, but clearly there are frequent conversations occurring between service providers, workers and participants whereby working hours and rosters are adjusted to fulfil the objectives of the NDIS. It is in this context that the rigid requirements under clause 10.3(c) are no longer 'fair and relevant' to the nature of work being performed.

6.25 Regrettably, there was no direct evidence before the Commission from non-residential support workers who work on a part-time basis providing the types of flexible supports set out in Bob's plan.

6.26 In respect of the expert evidence relied upon by the Union parties, the report of Dr Olav Muurlink titled 'Predictability and control in working schedules' was generic in nature and in the form of a literature review rather than any specific analysis of the SCHCDSI industry or the NDIS.[35]

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[31] See Statement of Susie Bady; Statement of Christine Gamble; Statement of Angela Jamieson.
[32] See Statement of Leon Wiegard; Statement of Camille Furtado.
[33] See Packard evidence at PN5671; See Paddick in cross-examination at PN5116-PN5118.
[34] PN5144-PN5145.
[35] See PN6358, PN6448-PN6452.

6.27 The report sought to summarise the literature and studies which looked at the apparent link between workers having a perceived lack of control over working schedules and certain deleterious health consequences.

6.28 While interesting, most of the report related to studies and data from other jurisdictions. Further, to the extent that the report referred to Australian data, such data was found wanting: limited sample sizes, studies on issues unrelated to part-time employment, and studies unrelated to the care industry.

6.29 It also became apparent during cross-examination that the report, on closer inspection, mischaracterised and/or exaggerated the findings of certain studies or data.[36] Notably, Dr Muurlink also seemed to 'cherry pick' certain studies that seemed to 'fit his thesis', while overlooking or paying scant regard to better, larger, more statistically sound studies where the findings of such studies did not fit his narrative.[37]

6.30 On the whole, the Muurlink report was of limited assistance to the proceedings. Even if the assertions in the report were accepted, it does not seem to take us very far.

6.31 It is all one thing to say that employees should, hypothetically and in an ideal world, have greater predictability over their working hours. Unfortunately, however, such a view ignores the complex reality of operating under the NDIS. The disability services sector was not the architect of the NDIS and it has no choice but to 'play the cards it has been dealt', which is an operating environment whereby consumers have greater control and the nature of work has become less predictable.

6.32 In our submission, a regime whereby a permanent part-time workforce can continue to be used to deliver services that meet the needs of participants, with employees working "reasonably predictable" but not "fixed" hours, with those hours being established in a reasonable manner taking into account the needs of employees, strikes the right balance and provides a 'fair and relevant minimum safety net'.

6.33 We now turn to the legislative framework and the modern awards objective.

## 7. THE LEGISLATIVE FRAMEWORK AND THE MODERN AWARDS OBJECTIVE

7.1 The relevant legislative framework was outlined in the Preliminary Issues Decision. The relevant legislative framework has also been extensively outlined in these proceedings, including in the various submissions filed by the Australian Chamber. Without traversing the relevant framework in detail, it is relevant to note that section 156(5) of the Fair Work Act 2009 (Cth) (**FW Act**) requires the Full Bench to review the Awards "in [their]... own right".

7.2 Inherent in that statutory obligation is a requirement that the Commission take into account the particular circumstances of the SCHCDSI industry, including the fundamental changes taking place by reason of the NDIS.

7.3 In considering our clients' application, the Full Bench is required to consider whether a merit case has been advanced, accompanied by probative evidence properly directed to

[36] See PN6374-PN6429.
[37] See PN6432-PN6447.

demonstrating the facts supporting the proposed variation, such as to warrant the Full Bench exercising its discretion pursuant to s 139 of the FW Act.

7.4 The Full Bench must also be satisfied that any such exercise of discretion is consistent with s 134 of the FW Act, and that the proposed changes would be consistent with s 138 of the FW Act.

## 8. THE SCHCDSI AWARD DOES NOT MEET THE MODERN AWARDS OBJECTIVE

8.1 While section 134(1) requires the Commission to take into account a number of specified matters, it does not require the Commission to take into account each of the individual factors as such: rather, the overarching requirement is to ensure that the SCHCDSI Award, together with the NES, provides a fair and relevant minimum safety net of terms and conditions taking into account those prescribed matters.[38]

8.2 It is our clients' contention that the SCHCDSI Award, together with the NES, does not currently provide a "fair and relevant safety net of terms and conditions", to the extent that clause 10.3(c) acts as a barrier or disincentive to the employment of part-time employees in the disability services sector.

8.3 Such a finding is available on the evidence, as detailed above, and such a conclusion is reached by taking the matters in s.134(1)(a)-(h) into account. We briefly address each of the matters in s.134(1)(a)-(h) as follows.

### Relative living standards and the needs of the low paid

8.4 There is a degree of tension within this limb of the modern awards objective in respect of this application. From one perspective (the Union parties' perspective), the proposed variation removes the entitlement of certain prospective part-time employees to reach agreement on a *fixed* regime of work. In that sense, the variation could be characterised as reducing the certainty of part-time employees as to *when* their hours will be worked.

8.5 However, any potential reduction in the certainty as to *when* hours will be worked must be weighed against the benefits of a likely improvement in the certainty of income that comes with being able to be offered a higher number of guaranteed hours, as well as the maintenance of permanent employment in the sector.

8.6 The proposed variation will improve the relative living standards of the low paid by maintaining security of employment and improving their security of income. It will do that in two ways. Firstly, the amendment of clause 10.3(c) will prevent a shift towards casualisation, thereby assisting to maintain permanent part-time jobs in the sector. Secondly, by employers no longer being encumbered by a requirement to establish a fixed working pattern which can only be varied by agreement in writing, it will free up employers to offer employees a greater number of guaranteed hours.

8.7 The forced practice of offering employees an artificially low number of 'guaranteed' hours purely because the employer cannot guarantee *precisely when* certain predictable work will be required to be performed has detrimental implications for employees in circumstances where their preference is to have certainty of a higher weekly income.

[38] See *CSR Limited v CSR & Holcim Staff Association* [2015] FCAFC 95

**The need to encourage collective bargaining**

8.8 There is a limited capacity to collectively bargain in the disability services sector due to the regulated pricing model and government funding arrangements. The structural features of the workplace and funding arrangements prevent employers from collectively bargaining to any significant extent. While enterprise bargaining does occur, most employers are simply not able to offer salary improvements above the SCHCDSI Award.

8.9 One might argue that rigid, inflexible Award provisions like clause 10.3(c) are to be promoted because they encourage collective bargaining. In that sense, the evidence of Hugh Packard about Valmar's enterprise bargaining could be advanced in support of such a proposition.

8.10 However, such an argument overlooks the overarching requirement that modern awards provide a '*fair and relevant*' minimum safety net. In our submission, it is not appropriate for inflexible provisions to be maintained as part of the minimum safety net purely as an incentive to collectively bargain. Such an approach misconstrues the statutory task.

8.11 In respect to the evidence of Hugh Packard, Mr Packard gave evidence that clause 10.3(c) was making it 'operationally very difficult and impractical to use part-time employees'.[39] This was one of the key reasons why Valmar reinitiated enterprise bargaining with its workforce in early 2016.[40] However, the Valmar experience should not be taken as an example of the awards system working by promoting enterprise bargaining.

8.12 The *Valmar Support Services Ltd Enterprise Agreement 2016* (**Valmar EA**) was approved by the Commission on 1 August 2016, although not without considerable difficulty and disputation.

8.13 Initially, the ASU opposed the approval of the Valmar EA.[41] One of the grounds in opposing the agreement was that clause 16.1 of the Valmar EA, which regulates part-time employment, departed from the clause 10.3(c) of the SCHCDSI Award. Clause 16.1 of the Valmar EA departs from clause 10.3(c) in the following respects:

(a) it requires an employer and employee to agree on a 'guaranteed number of hours per week or per fortnight (or other accounting period as agreed between the employer and employee concerned)';

(b) it requires the agreement of the 'guaranteed number of hours' to reflect the actual regular number of hours to be worked;

(c) it removes the requirement for parties to reach agreement on the days of the week that a part-time employee will work or their starting and finishing times; and

(d) it permits the written ratification of an agreed variation to the guaranteed hours after the variation has occurred.

8.14 Initially, Commissioner Saunders sought an undertaking that clause 10.3(c) of the Award be reinstated into the enterprise agreement, however Valmar declined to offer that undertaking

[39] Packard at PN5605.
[40] Packard at PN5697-5700.
[41] See F18 filed by ASU on 7 June 2016 in proceedings AG2016/1229.

as it would have undermined the key reason why Valmar had sought to create an enterprise agreement in the first place.[42]

8.15 After some correspondence between the parties, Valmar offered the following revised undertaking in respect of clause 16.1:

> Indicative rosters, taking into account employees' working times preferences / requests, will be posted as far out as is realistically possible and Valmar will do whatever it can to minimise changes to rosters once they are posted.

8.16 In response to the revised undertaking, the ASU filed a written submission dated 27 July 2016 which indicated that it did not consider that the 'expanded undertaking' offered by Valmar was sufficient to meet the better off overall test. However, the ASU then oddly indicated that it 'does not oppose nor support the making of the enterprise agreement'.

8.17 Ultimately, the undertaking at paragraph 8.15 above was accepted by the Commission and the Valmar EA was approved with undertakings on 1 August 2016.[43]

8.18 The Valmar enterprise bargaining experience demonstrates a number of things:

(a) firstly, clause 10.3(c) was causing such practical problems for Valmar that it decided to reinitiate enterprise bargaining;

(b) secondly, while enterprise bargaining remains "an exception" in the industry due to government funding arrangements[44], Valmar was in the fortunate position of being able to offer 3% in overaward payments because of its unusually low overheads and rural location;[45]

(c) thirdly, due to government funding arrangements, the majority of employers in the disability services sector are simply not able to offer similar overaward payments so as to procure the same level of flexibilities through collective bargaining.

8.19 The Amended Draft Determination is unlikely to have any detrimental impact on an employer's propensity to collectively bargain in light of the funding limitations.

**The need to promote social inclusion through increased workforce participation**

8.20 By removing clause 10.3(c) as a barrier to offering working hours to part-time employees, the proposed variation will provide prospective part-time employees with a greater number of guaranteed hours thereby increasing their workforce participation.

**The need to promote flexible modern work practices and the efficient and productive performance of work**

8.21 This factor lends strongly towards the granting of the proposed variation. Employers in the disability services sector must adopt flexible modern work practices in order to meet the objectives of the NDIS. The evidence before the Commission overwhelmingly supports such a contention.

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[42] See Packard at PN5697-5700.
[43] [2016] FWCA 5199.
[44] ASU submission in respect of the Valmar EA, 27 July 2016.
[45] See Packard at PN5735.

8.22 The Commission should be mindful of the need to promote flexible modern work practices and the efficient and productive performance of work. It should do so by:

(a) ensuring that there are no artificial barriers to the performance of work; and

(b) ensuring appropriate fluidity of the use of labour without unnecessary or arbitrary restrictions.

**The need to provide additional remuneration for employees working overtime, working unsocial, irregular or unpredictable hours, working on weekends or public holidays, working shifts**

8.23 The SCHCDSI Award provides penalty rates for work in excess of 38 hours per week and for work performed outside the span of ordinary hours, as well as on Sundays and public holidays. In respect of employees working irregular or unpredictable hours, the casual loading compensates employees for such working arrangements.

8.24 While the proposed variation seeks a greater degree of flexibility in the rostering of part-time employees, it is not a *carte blanche*. It does not permit an employer to roster a part-time employee like a casual employee. Clause 10.3(a) defines a part-time employee as someone who works 'reasonably predictable' hours. That definition imposes a limitation on the rostering flexibilities provided for by our clients' proposed variation.

8.25 In light of the above, this factor is a neutral consideration.

**The principle of equal remuneration for work of equal or comparable value**

8.26 In 2012, the Commission made an Equal Remuneration Order in respect of workers employed under the SCHCDSI Award, providing wage increases of between 23 and 45 % over 10 years.[46] That order was made on the basis of a finding of gender-based undervaluation of work in the sector.

8.27 A Full Bench of the Commission recently considered the proper construction of Part 2–7 of the FW Act and issues relating to the legal and conceptual framework of equal remuneration applications.[47] In its decision, the Full Bench held that section 302(5) cannot be satisfied on the basis of gender-based undervaluation without the need for a comparator.

8.28 On the basis of the two decisions referred to above, the SCHCDSI Award provides equal remuneration for men and women workers for work of equal or comparable value. This factor of the modern awards objective is not relevant to the present application and is a neutral consideration.

**The likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden**

8.29 This factor lends strongly towards the granting of the proposed variation. If granted, the proposed variation will have a positive impact on business and productivity, allowing disability services organisations to continue employing disability support workers on a permanent part-time basis to provide flexible supports to participants under the NDIS.

[46] [2012] FWAFB 5184.
[47] [2015] FWCFB 8200.

8.30 Currently, clause 10.3(c) imposes a regulatory and administrative burden, as it requires an employer to specify start and finish times for each employee, and then record any agreed variations in writing.

8.31 The evidence demonstrates that roster changes are occurring more frequently under the NDIS, meaning that the administrative burden occasioned by clause 10.3(c) is increasing correspondingly. Increased time and effort is being expended by specialist rostering staff to deal with such changes, which add to overall employment costs.

8.32 The grant of the proposed variation and the removal of this unreasonable regulatory burden would not only have the benefit of allowing employers to roster their permanent part-time staff more flexibility, which may result in employees being provided with more hours of work, but are likely to also have a direct impact on the costs associated with the work undertaken by rostering staff, with savings potentially able to be channelled back into service provision or wage costs for frontline employees delivering the support services.

**The need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards**

8.33 The Commission should remove the inherent inconsistency within clause 10 the SCHCDSI Award to ensure the Award is simple and easy to understand.

**The likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy**

8.34 This factor lends towards the granting of the proposed variation.

8.35 If granted, the proposed variation will have a positive impact on business and productivity, allowing disability services organisations to continue employing disability support workers on a permanent part-time basis to provide flexible supports to participants under the NDIS and counter the current trend of casualisation of this part of the workforce.

## 9. ALTERNATIVE FORMULATIONS

9.1 As was observed by a Full Bench of the Commission in the common issues annual leave proceedings, the 4 yearly review is essentially a regulatory function. The Commission is not creating an arbitral award in settlement of an *inter partes* industrial dispute, but rather it is reviewing a regulatory instrument.[48]

9.2 If the Commission finds that the SCHCDSI Award is not providing a fair and relevant minimum safety net of terms and conditions by reason of clause 10.3(c), the Commission must vary the SCHCDSI Award to ensure that the modern award meets the modern awards objective.

9.3 However, it is not the case that the Amended Draft Determination must succeed or fail. The Commission is not bound to grant the variation on the precise terms sought by ABI and NSWBC. It is open to the Commission to determine that an alternate formulation should be adopted.

[48] See [2015] FWCFB 3406 at [156].

9.4 To the extent that it assists the Commission, we draw attention to a range of other alternative formulations of clause 10.3(c) contained within enterprise agreements approved by the Commission, which remedy some of the practical problems which clause 10.3(c) is causing. Many of those enterprise agreements were approved with the support of one or more of the Union parties who have opposed our clients' application in these proceedings.

9.5 By way of example, we have identified a large number of enterprise agreements, predominantly in the aged care industry, which adopt the following provision regarding part-time employment:

> *(a) A part-time employee is an employee who is engaged to work less than an average of 38 ordinary hours per week and whose hours of work are reasonably predictable.*
>
> *(b) Before commencing part-time employment, the employer and employee will agree in writing the guaranteed minimum number of hours to be worked and the rostering arrangements which will apply to those hours.*
>
> *(c) Reasonable additional hours may be worked in accordance with clause 15 - Hours.*
>
> *(d) Review of Part-time Hours: At the request of an employee, the hours worked by the employee will be reviewed annually. Where the employee is regularly working more than their guaranteed minimum number of hours then such hours shall be adjusted by the employer, and recorded in writing to reflect the hours regularly worked. The hours worked in the following circumstances will not be incorporated in the adjustment:*
>
> > *(i) if the increase in hours is as a direct result of an employee being absent on leave, such as for example, annual leave, long service leave, maternity leave, workers compensation; and*
> >
> > *(ii) if the increase in hours is due to a temporary increase in hours only due, for example, to the specific needs of a resident or client.*
>
> *(e) Any adjusted guaranteed minimum number of hours resulting from a review identified in sub-clause 12.3(d) should, however, be such as to readily reflect roster cycles and shift configurations utilised at the workplace.*[49]

9.6 The formulation contained within the Valmar EA, referred to earlier in these submissions, may also be relevant to the Commission's consideration of alternative terms of any variation.[50]

## 10. CONCLUSION

10.1 The proposed variation:

(a) is supported by probative evidence properly directed toward demonstrating the facts supporting the proposed variation in respect of the SCHCDSI Award, such as to warrant the Full Bench exercising its discretion pursuant to s 139 of the FW Act;

[49] We can provide the Commission with a list of enterprise agreements containing this provision or a provision in substantially similar terms.

[50] See *Valmar Support Services Ltd Enterprise Agreement 2016* (AG2016/1229)

(b) is consistent with the modern awards objective as outlined in s 134 of the FW Act; and

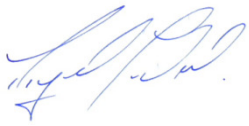
(c) does not go beyond what is necessary to achieve the modern awards objective within the scope of s 138 of the FW Act.

10.2 For the above reasons, ABI and NSWBC submit that the proposed variation should be granted.

**AUSTRALIAN BUSINESS LAWYERS & ADVISORS**

**On behalf of Australian Business Industrial and the New South Wales Business Chamber Ltd**

**30 September 2016**



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