

**From:** Kyle Scott <[Kyle.Scott@ablawyers.com.au](mailto:Kyle.Scott@ablawyers.com.au)>  
**Sent:** Tuesday, 15 October 2019 6:52 PM  
**To:** Chambers - Ross J <[Chambers.Ross.j@fwc.gov.au](mailto:Chambers.Ross.j@fwc.gov.au)>  
**Cc:** Chambers - Clancy DP <[Chambers.Clancy.DP@fwc.gov.au](mailto:Chambers.Clancy.DP@fwc.gov.au)>; Chambers - Lee C <[Chambers.Lee.c@fwc.gov.au](mailto:Chambers.Lee.c@fwc.gov.au)>; 'Brent Ferguson' <[Brent.Ferguson@aigroup.com.au](mailto:Brent.Ferguson@aigroup.com.au)>; 'Ruchi Bhatt' <[Ruchi.Bhatt@aigroup.com.au](mailto:Ruchi.Bhatt@aigroup.com.au)>; 'shue.yin.lo@afei.org.au' <[shue.yin.lo@afei.org.au](mailto:shue.yin.lo@afei.org.au)>; 'peggms24@gmail.com' <[peggms24@gmail.com](mailto:peggms24@gmail.com)>; 'Stephen.Bull@unitedvoice.org.au' <[Stephen.Bull@unitedvoice.org.au](mailto:Stephen.Bull@unitedvoice.org.au)>; 'Natalie.Dabarera@unitedvoice.org.au' <[Natalie.Dabarera@unitedvoice.org.au](mailto:Natalie.Dabarera@unitedvoice.org.au)>; 'mrobson@asu.asn.au' <[mrobson@asu.asn.au](mailto:mrobson@asu.asn.au)>; 'rachell@hsu.net.au' <[rachell@hsu.net.au](mailto:rachell@hsu.net.au)>; Madeleine Tiedeman <[Madeleine.Tiedeman@Ablawyers.com.au](mailto:Madeleine.Tiedeman@Ablawyers.com.au)>  
**Subject:** RE: AM2018/26 - SCHCDS Award [ABLAW-lmanageDocs.FID135800]

Dear Associate,

We refer to the above matter.

As advised to the Full Bench today, our clients seek leave to file an Amended Draft Determination, copies of which are **attached**. We attach both a marked-up version and a clean version for convenience.

We note that the Amended Draft Determination involves the withdrawal of two claims, and amendments to two other claims which serve to narrow the issues in dispute between the parties.

Subject to any alternative course the Bench may wish to take, we can make submissions in support of our request for leave to file this Amended Draft Determination during the hearing tomorrow.

We note the parties have been copied into this correspondence.

Yours sincerely

**Kyle Scott**

Associate Director  
Australian Business Lawyers & Advisors

Newcastle Office: Suite 402, Level 4, Watt Street Commercial Centre  
45 Watt Street, Newcastle NSW 2300

Dir: +612 4989 1010 | Mob: 0422 286 133 | Fax: +612 9954 5029  
Tel: +612 9458 7005 | Web: [www.ablawyers.com.au](http://www.ablawyers.com.au) |  [LinkedIn](#)



# AMENDED DRAFT DETERMINATION

*Fair Work Act 2009*

s.156 - 4 yearly review of modern awards

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

(AM2018/26)

XXXX

XXXX

XXXX

XXXX, XX XXXX 201X

*4 yearly review of modern awards – Social, Community, Home Care and Disability Services Industry Award 2010.*

A. Further to the decision issued on XXX in AM2018/26 ([201X] FWCFB XXXX), the above award is varied as follows:

1. By deleting clause 25.5(d)(ii) and inserting in lieu thereof:

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

- A. by agreement between the employer and relevant employee, provided the agreement is recorded in writing;
- B. to enable the service of the organisation to be carried out where another employee is absent from work on account of personal/carer's leave, compassionate leave, community service leave, ceremonial leave, leave to deal with family and domestic violence, or in an emergency; or
- C. where the change involves the mutually agreed addition of hours for a part-time employee to be worked in such a way that the part-time employee still has four rostered days off in that fortnight or eight rostered days off in a 28 day roster cycle.

2. By deleting clause 25.5(f) and inserting in lieu thereof:

**(f) Client cancellation**

- (i) This clause applies where a client cancels or changes a scheduled home care or disability 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 clause 25.5(f)(v), provide the employee with make up time in accordance with clause 25.5(f)(vi).
- (v) The make up time arrangement cannot be utilised where the employee was notified of the cancelled shift after arriving at the relevant place of work to perform the shift. In these cases, clause 25.5(f)(iv)(A) applies.
- (vi) The make up time arrangement cannot be utilised 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 3 months 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.

3. By deleting clause 20.9 and inserting in lieu thereof:

**20.9 On call allowance**

An employee required by the employer to be on call (i.e. available for recall to duty at the employer's or client's premises and/or for remote response duties) will be paid an allowance of:

- (i) \$19.78 for any 24 hour period or part thereof during the period from the time of finishing ordinary duty on Monday to the time of finishing ordinary duty on Friday; or
- (ii) \$39.16 in respect of any other 24 hour period or part thereof on a Saturday, Sunday, or public holiday.

4. By inserting at clause 3.1:

**3.1** In this Award, unless the contrary intention appears:

**Workplace** means a place where work is performed except for the employee's residence.

5. By deleting clause 28.4 and inserting in lieu thereof:

28.4 Recall to work

(a) An employee who is recalled to work overtime after leaving the workplace and requested by their employer to attend a workplace in order to perform such overtime work will be paid for a minimum of two hours' work at the appropriate rate for each time recalled. If the work required is completed in less than two hours the employee will be released from duty.

6. By inserting a new clause 28.5 and 28.6:

**28.5 Remote response when not on call**

- (a) An employee who is not required to be on call and who is requested to perform work by the employer via telephone or other electronic communication away from the workplace (a remote response request) will be paid at the appropriate rate for a minimum of one hour's work on each occasion a remote response request is made, provided that multiple remote response requests made and concluded within the same hour shall be compensated within the same one hour's payment. Any time worked continuously beyond one hour will be rounded to the nearest 15 minutes and paid accordingly.
- (b) Any further requests to perform remote response work will be paid an additional one hour for each time so requested provided that multiple remote response requests made and concluded within the same hour shall be compensated within the same one hour's payment.
- (c) An employee who performs work in accordance with this clause 28.5 must maintain and provide to their employer a time sheet specifying the time at which they commenced and concluded performing any work away from the workplace and a description of the work that was undertaken. This record must be provided to the employer prior to the end of the next full pay period or in accordance with any other arrangement as agreed between the employer and the employee.
- (d) The employer is not required to pay an employee for any time spent performing work away from the workplace in accordance with this clause if the employee does

not comply with the requirements of clause 28.5(c). This clause does not apply if the employer has not informed the employee of the reporting requirements.

- (e) This clause does not apply to an employee performing remote response duties in accordance with clause 28.6 of this Award.

## **28.6 Remote response when on call**

- (a) This clause applies to an employee who is required to be on call and who is required to perform work by the employer via telephone or other electronic communication away from the workplace.
- (b) Where an employee is directed or authorised by their employer to perform remote response duties:
- i. between 6.00am and 10.00pm, the employee will be paid at the appropriate rate specified in this Award for any such work performed between these hours, with a minimum payment of 15 minutes. Where an employee undertakes multiple separate instances of remote response duties during a particular period and the total time spent performing those duties does not exceed 15 minutes, only one minimum payment is payable. Time worked past 15 minutes will be rounded up to the nearest 15 minutes.
  - ii. between 10.00pm and 6.00am the employee will be paid at the appropriate rate for a minimum of 45 minutes work on each occasion a remote response request is made, provided that if multiple remote response requests are made and concluded within the same 45 minute period they shall be compensated within the same 45 minute payment. Any time worked continuously beyond each 45 minute period will be rounded up to the nearest 15 minutes and paid accordingly.
- (c) An employee who performs remote response duties must maintain and provide to their employer a time sheet specifying the time at which they commenced and concluded performing any remote response duty and a description of the work that was undertaken. This record must be provided to the employer prior to the end of the next full pay period or

in accordance with any other arrangement as agreed between the employer and the employee.

- (d) The employer is not required to pay an employee for any time spent performing remote duties if the employee does not comply with the requirements of clause 28.6(c). This clause does not apply if the employer has not informed the employee of the reporting requirements.

B. This determination comes into operation from XX XXXX 201X. In accordance with s.165(3) of the Fair Work Act 2009 these items do not take effect until the start of the first full pay period that starts on or after XX XXXX 201X.

[Insert the Seal of the Fair Work Commission]

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# **AMENDED DRAFT DETERMINATION**

*Fair Work Act 2009*

s.156 - 4 yearly review of modern awards

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

(AM2018/26)

XXXX

XXXX

XXXX

XXXX, XX XXXX 201X

*4 yearly review of modern awards – Social, Community, Home Care and Disability Services Industry Award 2010.*

A. Further to the decision issued on XXX in AM2018/26 ([201X] FWCFB XXXX), the above award is varied as follows:

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~~1. By deleting clause 25.1 and inserting in lieu thereof:~~

~~**25.1 Ordinary hours of work**~~

~~(a) The ordinary hours of work will be 38 hours per week or an average of 38 hours per week over the employee's roster period, up to a maximum of four weeks.~~

~~(b) Subject to clause 25.1(c), the maximum ordinary hours that can be worked per shift is 8.~~

~~(c) By agreement between an employer and an individual employee, ordinary hours may be worked up to 10 hours per shift.~~

2. By deleting the words 'or period of work' in clause 25.4(a).

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3.1. By deleting clause 25.5(d)(ii) and inserting in lieu thereof:

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- (ii) However, a roster may be altered at any time:
  - A. by agreement between the employer and relevant employee, provided the agreement is recorded in writing;
  - B. to enable the service of the organisation to be carried out where another employee is absent from work on account of personal/carer's leave, compassionate leave, community service leave, ceremonial leave, leave to deal with family and domestic violence, or in an emergency; or
  - C. where the change involves the mutually agreed addition of hours for a part-time employee to be worked in such a way that the part-time employee still has four rostered days off in that fortnight or eight rostered days off in a 28 day roster cycle.

4.2. By deleting clause 25.5(f) and inserting in lieu thereof:

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**(f) Client cancellation**

- (i) This clause applies where a client cancels or changes a scheduled home care or disability 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 clause 25.5(f)(v), provide the employee with make up time in accordance with clause 25.5(f)(vi).

(v) The make up time arrangement cannot be utilised where the employee was notified of the cancelled shift after arriving at the relevant place of work to perform the shift. In these cases, clause 25.5(f)(iv)(~~BA~~) applies.

~~(vi) The make up time arrangement cannot be utilised 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.~~

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~~(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 3 months 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.

~~5.3.~~ By deleting clause 20.9 and inserting in lieu thereof:

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### **20.9 On call allowance**

An employee required by the employer to be on call (i.e. available for recall to duty at the employer's or client's premises and/or for remote response duties) will be paid an allowance of:

- (i) ~~\$19,7817.96~~ for any 24 hour period or part thereof during the period from the time of finishing ordinary duty on Monday to the time of finishing ordinary duty on Friday; or

(ii) ~~\$39,1635.56~~ in respect of any other 24 hour period or part thereof on a Saturday, Sunday, or public holiday.

4. By inserting at clause 3.1:

3.1 In this Award, unless the contrary intention appears:

Workplace means a place where work is performed except for the employee's residence.

5. By deleting clause 28.4 and inserting in lieu thereof:

28.4 Recall to work

(a) An employee who is recalled to work overtime after leaving the workplace and requested by their employer to attend a workplace in order to perform such overtime work will be paid for a minimum of two hours' work at the appropriate rate for each time recalled. If the work required is completed in less than two hours the employee will be released from duty.

6. By inserting a new clause 28.5 and 28.6:

28.5 Remote response when not on call,

(a) An employee who is not required to be on call and who is requested to perform work by the employer via telephone or other electronic communication away from the workplace (a remote response request) will be paid at the appropriate rate for a minimum of one hour's work on each occasion a remote response request is made, provided that multiple remote response requests made and concluded within the same hour shall be compensated within the same one hour's payment. Any time worked continuously beyond one hour will be rounded to the nearest 15 minutes and paid accordingly.

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(b) Any further requests to perform remote response work will be paid an additional one hour for each time so requested provided that multiple remote response requests made and concluded within the same hour shall be compensated within the same one hour's payment.

(c) An employee who performs work in accordance with this clause 28.5 must maintain and provide to their employer a time sheet specifying the time at which they commenced and concluded performing any work away from the workplace and a description of the work that was undertaken. This record must be provided to the employer prior to the end of the next full pay period or in accordance with any other arrangement as agreed between the employer and the employee.

(d) The employer is not required to pay an employee for any time spent performing work away from the workplace in accordance with this clause if the employee does not comply with the requirements of clause 28.5(c). This clause does not apply if the employer has not informed the employee of the reporting requirements.

(e) This clause does not apply to an employee performing remote response duties in accordance with clause 28.6 of this Award.

**28.6 Remote response when on call**

(a) This clause applies to an employee who is required to be on call and who is required to perform work by the employer via telephone or other electronic communication away from the workplace.

(b) Where an employee is directed or authorised by their employer to perform remote response duties:

i. between 6.00am and 10.00pm, the employee will be paid at the appropriate rate specified in this Award for any such work performed between these hours, with a minimum payment of 15 minutes. Where an employee undertakes multiple separate instances of remote response duties during a particular period and the total time

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spent performing those duties does not exceed 15 minutes, only one minimum payment is payable. Time worked past 15 minutes will be rounded up to the nearest 15 minutes.

ii. between 10.00pm and 6.00am the employee will be paid at the appropriate rate for a minimum of 45 minutes work on each occasion a remote response request is made, provided that if multiple remote response requests are made and concluded within the same 45 minute period they shall be compensated within the same 45 minute payment. Any time worked continuously beyond each 45 minute period will be rounded up to the nearest 15 minutes and paid accordingly.

(c) An employee who performs remote response duties must maintain and provide to their employer a time sheet specifying the time at which they commenced and concluded performing any remote response duty and a description of the work that was undertaken. This record must be provided to the employer prior to the end of the next full pay period or in accordance with any other arrangement as agreed between the employer and the employee.

(d) The employer is not required to pay an employee for any time spent performing remote duties if the employee does not comply with the requirements of clause 28.6(c). This clause does not apply if the employer has not informed the employee of the reporting requirements.

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~~6. By inserting new clause 20.10 as follows:-~~

~~**20.10 Remote response**~~

~~(a) In this award, remote response duties means the performance of the following activities by an employee outside of hours at the direction of, or with the authorisation of, their employer:-~~

~~(i) responding to phone calls, messages or emails;-~~

~~(ii) providing advice ('phone fixes');-~~

- ~~(iii) — arranging call out/rosters of other employees; and~~
- ~~(iv) — remotely monitoring and/or addressing issues by remote telephone  
— and/or computer access,~~
- ~~in circumstances where the employee is not required to attend their employer's premises, or any other particular place of work, and at a time when the employee is either on call or has not otherwise been rostered to work.~~
- ~~(b) — Subject to clause 20.10(f), where an employee is directed or authorised by their employer to perform remote response duties between 6.00am and 10.00pm, the employee will be paid at the applicable rate of pay specified in this Award for any such work performed between these hours, with a minimum payment of 15 minutes.~~
- ~~(c) — Where an employee undertakes multiple separate instances of remote response duties during a particular period referred to in clause 20.10(b), and the total time spent performing such duties does not exceed 15 minutes, only one minimum payment is payable.~~
- ~~(d) — Subject to clause 20.10(f), where an employee is directed or authorised to perform remote response duties between 10.00pm and 6.00am the employee will be paid at the applicable rate of pay specified in this Award for any such work performed between these times, with a minimum payment of one hour. Where such work exceeds one hour, payment will be made at the applicable rate for the duration of the work.~~
- ~~(e) — Where an employee undertakes multiple separate instances of remote response duties during a particular period referred to in clause 20.10(d), and the total time spent performing duties does not exceed one hour, only one minimum payment is payable.~~
- ~~(f) — Subject to clause 20.10(g), an employee who performs remote response duties must maintain and provide to their employer a time sheet specifying the time at which they commenced and concluded performing any remote response duty and a description of the work that was undertaken. This record must be provided to the employer prior to the end of the next full pay period or in accordance with any other arrangement as agreed between the employer and the employee.~~

~~(g) An employer may implement an alternate method or system for the recording and notification of the details referred to in clause 20.10(f).~~

~~(h) An employer is not required to pay an employee for any time spent performing remote duties if the employee does not comply with the requirements of clause 20.10(f) or any alternate method or system pursuant implemented under clause 20.10(g).~~

~~(i) For the purposes of this clause, remote response duties do not include employees undertaking administrative tasks such as (but not limited to) reviewing or inquiring about their roster or seeking changes to their roster.~~

~~(j) Clause 28.3 does not apply where an employee performs remote response work in accordance with this clause.~~

~~7. By deleting clause 28.4 and inserting in lieu thereof:~~

~~**28.4 Recall to work overtime at the employer's or client's premises**~~

~~An employee recalled to work overtime after leaving their place of work to attend at a premises where work is performed will be paid for a minimum of two hours' work at the appropriate rate for each time recalled. If the work required is completed in less than two hours the employee will be released from duty. This clause does not apply to an employee performing remote response duties in accordance with clause 20.10 of this Award.~~

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B. This determination comes into operation from XX XXXX 201X. In accordance with s.165(3) of the Fair Work Act 2009 these items do not take effect until the start of the first full pay period that starts on or after XX XXXX 201X.

[Insert the Seal of the Fair Work Commission]

XXXX