Fair Work Commission: 4 yearly Review of modern awards

REPLY SUBMISSION

4 YEARLY REVIEW OF MODERN AWARDS: (AM2018/26) SOCIAL, COMMUNITY, HOME CARE AND DISABILITY SERVICES INDUSTRY AWARD 2010 - SUBSTANTIVE ISSUES

AUSTRALIAN BUSINESS INDUSTRIAL

- and -

THE NSW BUSINESS CHAMBER LTD

5 APRIL 2019

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1. BACKGROUND

1.1 This reply submission is made on behalf of:

(a) Australian Business Industrial (**ABI**);

(b) the New South Wales Business Chamber Ltd (**NSWBC**);

(c) Aged & Community Services Australia (**ACSA**); and

(d) Leading Age Services Australia Limited (**LASA**),

collectively, '**our clients**'.

1.2 This reply submission is filed in accordance with the Amended Directions of the Fair Work Commission (the **Commission**) issued on 4 February 2019 in respect of the *Social, Community, Home Care and Disability Services Industry Award 2010* (the **Award**).

1.3 This reply submission addresses those claims of the Health Services Union (the **HSU**), the United Voice, and the Australian Services Union (the **ASU**) that were identified during a mention on 3 April 2019 before the President, Ross J, as being scheduled to be dealt with during the hearing listed for 12 April 2019.

1.4 Those claims are identified as follows:

(a) S44A – Deletion to the 24 hour care clause (United Voice);

(b) S47 – Variation to the excursions clause (United Voice);

(c) S51 – Variation to the overtime clause (United Voice);

(d) S57 – Variation to the public holidays clause (United Voice);

(e) S40 – Consequential amendment to the sleepover clause (United Voice);

(f) S48 – Rates or pay for casuals on weekends and public holidays (HSU);

(g) S43 – Deletion of 24 hour care clause (HSU);

(h) S19 – First aid certificate renewal (HSU); and

(i) S6 – Community language skills (ASU).

1.5 This reply submission addresses the above claims, as pursued by the respective unions in their submissions as follows:

(a) the submission of the HSU dated 15 February 2019 (**HSU Submission**);

(b) the submission of the United Voice dated 15 February 2019 (**UV Submission**) and

(c) the submission of the ASU dated 18 February 2019 (**ASU Submission**).

Our clients

1.6 ABI is a registered organisation under the *Fair Work (Registered Organisations) Act 2009* and has in excess of 4,000 members. ABI represents the interests of businesses in a variety of industries including the social, community, home care and disability services industry. Its primary role is to develop workplace policy and to shape debate on major workplace relations issues.

1.7 NSWBC is a recognised State registered association pursuant to Schedule 2 of the *Fair Work (Registered Organisation) Act 2009* and has some 18,000 members. NSWBC is the State's peak business organisation and represents all businesses from small enterprises to large corporations across a variety of industries including the social, community, home care and disability services industry.

1.8 ACSA is the leading peak body supporting church, charitable, other not-for-profit and government providers of residential care services, community care services and retirement living for older people in Australia.

1.9 LASA is the national peak body representing and supporting providers of age services across residential care, home care and retirement living. LASA's membership base is made up of private, not-for-profit, faith-based and government operated organisations providing care, support and services to older Australians.

2. LEGISLATIVE FRAMEWORK APPLICABLE TO 4 YEARLY REVIEW

2.1 The legislative framework applicable to the 4 Yearly Review has been considered in detail in *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 (***Preliminary Issues Decision***), and *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 (***Penalty Rates Decision***).

2.2 More recently, the legislative framework applicable to the 4 Yearly Review was considered in *4 yearly review of modern awards – plain language re-drafting – standard clauses* [2018] FWCFB 4177 issued on 18 July 2018[1] and summarised in the *4 yearly review of modern awards – Alpine Resorts Award* [2018] FWCFB 4984. The main propositions may be summarised as follows:

(a) section 156(2) provides that the Commission must review all modern awards and may, among other things, make determinations varying modern awards;

(b) the term "review" has its ordinary and natural meaning of "survey, inspect, re-examine or look back upon";[2]

(c) the discretion in s 156(2)(b)(i) to make determinations varying modern awards in a review, is expressed in general, unqualified, terms, but the breadth of the discretion is constrained by other provisions of the *Fair Work Act 2009 (Cth)* (**FW Act**) relevant to the conduct of the review;

(d) in particular the Modern Awards Objective in s 134 applies to the review;

(e) the Modern Awards Objective is very broadly expressed,[3] and is a composite expression which requires that modern awards, together with the NES, provide "a fair and relevant minimum safety net of terms and conditions", taking into account the matters in ss 134(1)(a)–(h);[4]

(f) fairness in this context is to be assessed from the perspective of the employees and employers covered by the modern award in question;[5]

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[1] [2018] FWCFB 4177 at [3]-[13]
[2] *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161 at [38]
[3] *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* (2012) 205 FCR 227 at [35]
[4] [2017] FWCFB 1001 at [128]; *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161 at [41]–[44]
[5] [2018] FWCFB 3500 at [21]-[24]

(g) the obligation to take into account the s 134 considerations means that each of these matters, insofar as they are relevant, must be treated as a matter of significance in the decision-making process;[6]

(h) no particular primacy is attached to any of the s 134 considerations and not all of the matters identified will necessarily be relevant in the context of a particular proposal to vary a modern award;[7]

(i) it is not necessary to make a finding that the award fails to satisfy one or more of the s 134 considerations as a prerequisite to the variation of a modern award;[8]

(j) the s 134 considerations do not set a particular standard against which a modern award can be evaluated; many of them may be characterised as broad social objectives;[9]

(k) in giving effect to the Modern Awards Objective the Commission is performing an evaluative function taking into account the matters in ss 134(1)(a)–(h) and assessing the qualities of the safety net by reference to the statutory criteria of fairness and relevance;

(l) what is necessary is for the Commission to review a particular modern award and, by reference to the s 134 considerations and any other consideration consistent with the purpose of the objective, come to an evaluative judgment about the objective and what terms should be included only to the extent necessary to achieve the objective of a fair and relevant minimum safety net;[10]

(m) the matters which may be taken into account are not confined to the s 134 considerations;[11]

(n) section 138, in providing that a modern award may include terms that it is permitted to include, and must include terms that it is required to include, qualifies that power to be exercised "only to the extent necessary to achieve the Modern Awards Objective and (to the extent applicable) the minimum wages objective", and

[6] *Edwards v Giudice* (1999) 94 FCR 561 at [5]; *Australian Competition and Consumer Commission v Leelee Pty Ltd* [1999] FCA 1121 at [81]-[84]; *National Retail Association v Fair Work Commission* (2014) 225 FCR 154 at [56]

[7] *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161 at [33].

[8] *National Retail Association v Fair Work Commission* (2014) 225 FCR 154 at [105]-[106]

[9] See *National Retail Association v Fair Work Commission* (2014) 225 FCR 154 at [109]-[110]; albeit the Court was considering a different statutory context, this observation is applicable to the Commission's task in the Review

[10] As above at [28]-[29]

[11] *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161 at [48]

emphasises the fact it is the minimum safety net and minimum wages objective to which the modern awards are directed;[12]

(o) what is necessary to achieve the Modern Awards Objective in a particular case is a value judgment, taking into account the s 134 considerations to the extent that they are relevant having regard to the context, including the circumstances pertaining to the particular modern award, the terms of any proposed variation and the submissions and evidence;[13] and

(p) where an interested party applies for a variation to a modern award as part of the 4 yearly review, the task is not to address a jurisdictional fact about the need for change, but to review the award and evaluate whether the posited terms with a variation meet the objective.[14]

2.3 When considering the merit basis to make variations, the *Preliminary Issues Decision* held that:

(a) there may be cases where the need for an award variation is self-evident. In such circumstances, proposed variations can be determined with little formality;[15] and

(b) where significant award changes are proposed, they must be supported by submissions which address the legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation.[16]

2.4 Lastly, the Commission should proceed on the basis that *prima facie* the modern award achieved the modern awards objective at the time it was made.

[12] *CFMEU v Anglo American Metallurgical Coal Pty Ltd* [2017] FCAFC 123 at [23]; cited with approval in *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161 at [45]
[13] See generally: *Shop, Distributive and Allied Employees Association v National Retail Association (No.2)* (2012) 205 FCR 227
[14] As above at [46]
[15] Ibid at [23] and [60]
[16] Ibid

3. THE SOCIAL, COMMUNITY, HOME CARE AND DISABILITY SERVICES INDUSTRY

3.1 The social, community, home care and disability services industry is undergoing unprecedented structural change by reason of the significant reforms that have recently been (and continue to be) implemented across the country.

3.2 The two main reforms which are having a significant impact on the operating environment are the National Disability Insurance Scheme (the NDIS) and the introduction of 'Consumer-Directed Care' for home care packages. Other similar reforms are also taking place in respect of State and Territory funding models. Broadly speaking, these reforms involve a move away from a block funding model to an individualised funding model.

3.3 These reforms all have a shared focus: empowering individuals to exercise a greater level of choice and control over the delivery of their support services. The reforms aim to empower individuals to exercise more choice and control in their lives by having a greater ability to determine what services are provided to them, and when, where, how and by whom those services are delivered.

3.4 However, the reforms also represent a major challenge for employers in the industry, and require businesses to rapidly transform the structure and nature of their workforces in order to remain viable.

Consumer-directed care in the home care sector

3.5 The aged care reform agenda places older Australians at the centre of the system (consumer directed care) and is predicated on four principles :

(a) ageing in place - based on the preferences of older people to age at home;

(b) consumer choice - care recipients are empowered to choose who provides the age services that best meet their changing needs and preferences;

(c) market based competition - as a mechanism to drive value for money and ensure diversity in care providers to meet consumer choices; and

(d) consumer contributions - where recipients of care and services contribute to the cost of their care, commensurate with their ability to do so.

3.6 Australia's aged care system supports more than 1.3 million older Australians annually, the majority of whom are supported at home in line with their clear preference to remain at home.

3.7 The aged care industry is comprised of residential aged care (which is covered by the Aged Care Award 2010) and home care, which is covered by the SCHCDS Award. In the non-residential aged care sector, there are two main programs under which services are delivered: the Commonwealth Home Support Program (CHSP), and the Home Care Packages (HCP) Program. Entry to the system is though My Aged Care operated by the Federal Government. The system is designed, regulated and funded by the Federal Government.

3.8 In the home care sector, the Federal Government announced reforms in 2012 creating Consumer Directed Care. Consumer Directed Care (CDC) is a model of service delivery designed to give more choice and flexibility to consumers, by allowing individuals to have more control over the types of care and services they access and the delivery of those services (including who delivers the services and when).

3.9 CDC was first piloted as a model of care within the HCP Program in 2010-11. Following the success of the pilot, all newly released Home Care Packages from August 2013 were required to be delivered on a CDC basis. From July 2015, all Home Care Packages must be delivered in a CDC basis.

3.10 Home Care Packages are generally available to older persons who need coordinated services to help them to stay in their home, and to younger persons with a disability, dementia or other special care needs that are not met through other specialist services.

3.11 Prior to the introduction of CDC, Home Care Packages in Australia were provided as a bundled set of services relatively tightly-specified by government. Availability of Commonwealth funding for these services had been capped by the allocation of funded "places" to a limited group of approved providers (as provided for in the Aged Care Act 1997), by the funding levels prescribed and by a cap on consumer fees. This created a market characterised by:

(a) limited supply;

(b) lack of price competition;

(c) limited scope for competition on quality; and

(d) limited product differentiation.

3.12 Previously, a set planning ratio dictated the number of "home care places" which were allocated to approved providers for specific geographic regions – meaning that supply was constrained both in total levels and in location.

3.13 However, the recent reforms have shifted the dynamic in the sector to a more market based system – in the old model, providers selected consumers to receive care; in the new model, consumers select suppliers.

3.14 Under the reforms, consumers' needs dictate the allocation of services. Providers, meanwhile, can provide services to (approved and prioritised) consumers wherever they are located – as long as providers have an attractive service offering. However for providers, it also brings the challenge of no longer having a guaranteed number of places and therefore income. This issue is addressed in more detail at paragraphs 4.6-4.10 below.

The National Disability Insurance Scheme

3.15 The NDIS was established under the National Disability Insurance Scheme Act 2013 (Cth), with the objectives of:

(a) supporting the independence and social and economic participation of people with disability;

(b) providing reasonable and necessary supports, including early intervention supports, for participants;

(c) enabling people with disability to exercise choice and control in the pursuit of their goals and the planning and delivery of their supports;

(d) facilitating the development of a nationally consistent approach to the access to, and the planning and funding of, supports for people with disability; and

(e) promoting the provision of high quality and innovative supports to people with disability.

3.16 The NDIS supports people under the age of 65 who have a permanent and significant disability. Under the NDIS, individual consumers (eligible '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.

3.17 Each participant's supports are set out in a 'NDIS Plan' which is developed by the National Disability Insurance Authority (NDIA) in consultation with the individual participant. Service providers do not have any control over, or input into, the NDIS Plans. NDIS Plans specify a 'global' funding amount for different categories of 'fixed' and/or 'flexible' supports, but typically do not specify details of how or when those supports are to be provided.

3.18 Participants then typically enter into a service agreement with one or more service providers for the delivery of services outlined in their NDIS Plan.

3.19 The transition to an individualised funding model has meant that employers have had to be more flexible and responsive in the delivery of their services in order to meet the goals of the individuals to whom they are established to support. This has led to a number of challenges, including:

(a) a reduction in the stability or predictability of demand, as individual participants are now free to terminate their service arrangements at any time;

(b) a fragmentation of working patterns, as the employer is no longer able to organise the work in a manner that is most efficient to it;

(c) an increase in cancellations and requests for changes to services by participants; and

(d) an increase in requests for services to be delivered by particular support workers.

3.20 The above challenges have also been accompanied by diminishing profitability and viability of providing some types of services due to the inadequacies of the NDIS pricing model, which is addressed at paragraphs 4.11-4.14 below.

4. FUNDING CONSTRAINTS

4.1 For many decades, prior to the introduction of the NDIS and the CDC reforms, there was a high degree of certainty and stability around the funding for organisations in this industry. However, as the markets have moved to a more decentralised, dynamic, market-based model, employers have had to be responsive to the needs and desires of individual consumers, resulting in significant financial stress. This is particularly so in the disability sector where prices are fixed by the NDIA, and so employers are in many cases unable to recoup an amount sufficient to meet their costs for particular services.

4.2 There are two distinct features of businesses operating in the SCHCDS industry which should be recognised.

4.3 Firstly, the prices that can be charged for most services are regulated and in some cases fixed by the Government (or otherwise businesses are limited by the funding that is provided to deliver certain services).

4.4 Secondly, many employers in the SCHCDS industry are not-for-profit organisations with a deeply-embedded mission to support the community. This fact means that these businesses are not driven by the same imperatives or motivations as most other commercial businesses.

4.5 The above two factors lead to a dynamic whereby many service providers in the SCHCDS industry, if/when faced with the choice, will elect to provide services to consumers at a loss in order to meet the organisation's mission rather than not provide the service by reason of it being unprofitable.

Financial position of the home care sector

4.6 The home care sector is under significant financial strain.

4.7 The data provided by the *StewartBrown Aged Care Financial Performance Survey* is the most contemporaneous information on the financial performance of the sector. These quarterly surveys are the largest benchmark within the aged care sector and incorporate detailed financial and supporting data from some 25,000 home care packages across Australia.

4.8 According to this data, the average profit per client per day for home care providers fell 48 percent over the two year period between the December quarter of 2016 and the December quarter of 2018, from $6.40 to $3.33 per client per day.[17]

4.9 Its most recent report, the *Aged Care Financial Performance Survey; Sector Report (Six months ended December 2018)*, contains financial data based on over 27,164 home care packages (503 home care programs) across Australia. The Report indicates that:

(a) the HCP segment experienced "a significant decline in profitability in FY18 with revenue and overall EBT per client per day declining";[18]

(b) while there had been seasonal improvement in results since the end of the financial year in 2018, the underlying year-on-year results indicate declining financial performance;[19]

(c) there was a financial performance decline in the 2018 financial year, seeing revenues reduce by an average of 6.1 per cent resulting in an overall reduction in profitability of 29.8 per cent;[20]

(d) the number of providers have increased by 80.6 per cent since June 2016, however the number of home care funding packages has only increased by 43.4 per cent in the same period;[21] and

[17] EBT per client per day.
[18] StewartBrown, *Aged Care Financial Performance Survey; Sector Report (Six months ended December 2018),* 2019, p.27
[19] Ibid, p.5
[20] Ibid, p.6

(e) there has been a decline in Level 4 (high care) packages, with a decline in return from $24.80 per client per day in July 2015 to $5.92 per client per day, representing a return on revenue of 5.3 percent which is described as "bordering on being unsustainable".[22]

4.10 This decline in profitability likely reflects a range of factors including input costs increasing at above the rate of indexation, increased competition driving lower prices or more attractive service offerings to maintain or grow market share, and reduction in the level of package utilisation.

Financial position of the disability sector

4.11 A regular complaint of service providers in the disability services sector is the inadequacy of the NDIS pricing system. In certain areas, there are signs of market failure.

4.12 The legitimacy of this concern has been borne out in a range of studies, including most comprehensively in the Final Report of the Independent Pricing Review commissioned by the NDIA and published by McKinsey & Company dated February 2018.[23]

4.13 Amongst a range of findings, the Independent Pricing Review found:[24]

(a) "signals that concerning" in the attendant care market, including a "significant proportion of providers that currently have unprofitable operating models"; and

(b) while some providers have operating models that are profitable at the current price points, "many are struggling, particularly traditional providers delivering attendant care supports", which is attributable to a combination of factors, including:

(i) higher overheads;

(ii) challenges in adapting to unit pricing and NDIA systems improvement opportunities;

(iii) lower utilisation of workers; and

(iv) higher labour costs.

4.14 The findings of the Independent Pricing Review are consistent with the feedback from service providers that has been received over the past few years, which is summarised in the

[21] StewartBrown, *Aged Care Financial Performance Survey; Sector Report (Six months ended December 2018),* 2019, p.6
[22] Ibid, p.29
[23] McKinsey & Company, *Independent Pricing Review: National Disability Insurance Agency* (Final Report, February 2018)
[24] Ibid, p.5

Independent Pricing Review and a range of other surveys and publications, including the *State of the Disability Sector Report 2018* published by National Disability Services (NDS). This feedback includes that:

(a) current loadings for complex participants do not fully reflect the additional costs of serving those participants;[25]

(b) travel allowances do not adequately cover the costs of provider travel and participant transport in regional areas and isolated communities;[26]

(c) in attendant care, existing providers are struggling to adjust their business models to operate under the NDIS unit-funding model and the current level of price caps;[27]

(d) a very large number of service providers ranked the NDIS pricing as their top concern, and believed they would not be able to provide NDIS services at their current prices; [28]

(e) many service providers are not making a profit/surplus;[29] and

(f) the inadequacy in pricing has resulted in some providers discontinuing services to some participants.[30]

[25] McKinsey & Company, *Independent Pricing Review: National Disability Insurance Agency* (Final Report, February 2018), p.4
[26] Ibid
[27] Ibid
[28] National Disability Services, *State of the Disability Sector Report 2018*, p.9-10
[29] Ibid, p.18
[30] Ibid, p.27

5. THE UNIONS' CLAIMS

5.1 The Unions' claims must be considered against the backdrop of the significant structural reforms that have been implemented over the last five years, and the significant financial and operational pressure currently being experienced by businesses as they struggle to transition to a radically new system of service delivery.

5.2 Our clients do not have any philosophical objection to the Award providing a 'fair and relevant' minimum safety net of terms and conditions. However, the task before the Commission ultimately requires a balancing exercise whereby the needs and interests of employees are balanced with the needs of employers in order to ensure a fair, sustainable and viable industry.

5.3 From the perspective of service providers in this industry, yhe reality is that any variation to the Award which results in increased labour costs will inevitably have a material adverse impact on employers in the industry and will threaten the viability of their operations and their ability to continue providing certain services, unless there is some equivalent increase to the funding received by the business.

5.4 Equally, any variation that adversely affects employers' operational flexibilities will also have a material adverse impact on the businesses' ability to deliver quality services to some of the most vulnerable members of the community.

5.5 By way of summary, our clients oppose the following variations sought by the Unions:

(a) S44A – Deletion to the 24 hour care clause (United Voice);

(b) S47 – Variation to the excursions clause (United Voice);

(c) S51 – Variation to the overtime clause (United Voice);

(d) S57 – Variation to the public holidays clause (United Voice);

(e) S40 – Consequential amendment to the sleepover clause (United Voice);

(f) S48 – Rates or pay for casuals on weekends and public holidays (HSU);

(g) S43 – Deletion of 24 hour care clause (HSU);

(h) S19 – First aid certificate renewal (HSU); and

(i) S6 – Community language skills (ASU).

5.6 Each of these claims is addressed in detail below.

6. CLAIMS RELATING TO 24 HOUR CARE CLAUSE (S43, S44A AND S40)

The HSU and United Voice claims

6.1 The HSU and United Voice both seek the deletion of clause 25.8 of the Award, which deals with 24 hour care. The current clause provides:

> ***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 eight hours of care during this period.*
>
> *(b) The employee will normally have the opportunity to sleep during a 24 hour care shift and, where appropriate, a bed in a private room will be provided for the employee.*
>
> *(c) The employee engaged will be paid eight hours work at 155% of their appropriate rate for each 24 hour period.*

6.2 The United Voice also seek a consequential amendment to remove certain wording in clause 25.7(a),[31] which will be an uncontroversial amendment if the 24 hour care clause is removed from the Award.

6.3 While the United Voice have articulated their concerns about the 24 hour care clause in some detail in their written submissions, the HSU have advanced a whole three paragraphs in support of the proposed deletion of clause 25.8.

6.4 A range of submissions are advanced in support of the deletion of clause 25.8, including that:

(a) the clause is unclear, in that it provides no certainty regarding the hours or work of an employee or the sleeping arrangements to be applied; [32]

(b) the clause is rarely used;[33]

(c) the entire engagement is 'work' and should be remunerated as such;[34]

[31] This is described as claim S40.
[32] HSU Submission at [64]-[65]; United Voice Submission at [18]
[33] Ibid

(d) the clause does not adequately compensate employees, or provides for remuneration at a "discounted rate", for the time they are required to be available for work;[35]

(e) the clause may breach section 323 of the FW Act because it permits an employer to require an employee to work for a 24 hour period but does not require the employer to pay the employee in full for that work;[36]

(f) the clause creates situations where an employee is effectively liable to work in excess of the notional hours attributed to the engagement, and the hours that such engagements will 'require' the employee to work are not foreseeable;[37] and

(g) leaving employees for lengthy periods on duty dealing with complex interpersonal matters is problematic.[38]

6.5 We address firstly the history and rationale for the current 24 hour care clause, and then turn to each of the above arguments in detail below.

History of the 24 hour care clause

6.6 Provisions relating to 24 hour care have been a common and important feature of industrial regulation in the SCHCDS industry for many years.

6.7 Numerous pre-reform awards contained 24 hour care provisions, including:

(a) the *Charitable Sector, Aged and Disability Care Services (State) Award 2003*;[39]

(b) the *Charitable, Aged and Disability Care Services (State) Award*;[40]

(c) the *Community Services (Home Care Service of New South Wales) Care Workers Award 2002*;[41]

(d) the *Community Services (Home Care) (ACT) Award 2002*;[42]

(e) the *Disabilities Services Award*;[43]

(f) the *Disability Support Workers Award - State 2003*;[44]

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[34] United Voice Submission at [24]
[35] Ibid at [65]-[66]
[36] United Voice Submission at [30]
[37] United Voice Submission at [20]
[38] United Voice Submission at [34]
[39] AN120117
[40] AN120118
[41] AP815060
[42] AP816351
[43] AN150046

(g) the *Home and Community Care Award 2001*;[45]

(h) the *Miscellaneous Workers Home Care Industry (State) Award* [NAPSA – NSW];[46] and

(i) the *Social and Community Services Employees (State) Award*.[47]

6.8 These pre-reform awards covered a very large number of employees across the home care and disability services sectors throughout the majority of States and Territories.

6.9 During the Award Modernisation process which led to the making of the current Award, the AIRC published an Exposure Draft on 25 September 2009 contained a 24 hour care provision at clause 24.8.

6.10 Following the publication of the Exposure Draft, parties were given the opportunity to file submissions in respect of the Exposure Draft. Notwithstanding that the unions raised a number of concerns about the terms of the Exposure Draft, it is notable that the union parties did not raise any issue with the proposed 24 hour care clause. For example, no issue was raised with the 24 hour care clause in the following submissions of the unions:

(a) the submission of the ASU dated 16 October 2009;

(b) the submission of the HSU dated 16 October 2009;

(c) the submission of the ACTU dated 16 October 2009; and

(d) the submission of the AWU (Queensland Branch) dated 16 October 2009.

6.11 In contrast, the employer parties did raise issue with the Exposure Draft provision. For example:

(a) In its submission of 16 October 2009, AFEI raised concerns with the clause and submitted that the clause may result in severe operational difficulties for employers providing this type of service and may ultimately cause such a service to become unviable. AFEI then submitted that clause 5 of the *Miscellaneous Workers – Home Care Industry (State) Award* should be adopted;[48]

(b) In its submission of 19 October 2009, ABI raised concerns with aspects of the clause, including that the wording in the Exposure Draft failed to contemplate the situation whereby an employee is required to provide care for a client outside of the client's

[44] AN140093
[45] AP806214
[46] AN120341
[47] AN120505
[48] At [24]-[27]

home. The ABI submission also enclosed a marked-up version of the Exposure Draft which included the specific amendments sought;[49] and

(c) In its submission of 19 October 2009, the Aged Care Employers raised the same concern as ABI about the clause being limited to the provision of care within a client's home, and proposed an amendment to that effect.[50]

6.12 In response to the above submissions, the ASU filed a submission on 5 November 2009 in which it rejected "as a standard award condition across the whole industry" the proposition of the employers that the clause be amended to allow for the provision of care outside the client's home.[51] Notably, the ASU then, in response to the proposal for the insertion of a "Live-In employees" provision as per the *Miscellaneous Workers – Home Care Industry (State) Award*, stated:

> *The ASU supports the Full Bench decision to insert the 24 hour care provisions as a standard and submits that the existence of a "Live In" care provision in one New South Wales award is not a proper basis for inclusion of such a condition in the Modern Award.* [emphasis added]

6.13 The ASU submission of 5 November 2009 then attached a 'comparison table' summarising the various positions of the interested parties. The table records, in respect of the 24 hour care clause, that each of the "ASU, HSU, AWU, LHMU, ACTU" ... "support" the ED.[52]

6.14 No other written submission was made by any union concerning the 24 hour care clause in the Exposure Draft. Nor have we been able to identify any specific discussion about the clause during the hearings held between October and November 2009.[53]

6.15 Given the lack of dispute between the main interested parties in respect of the clause, the AIRC unsurprisingly retained the clause unaltered when it made the modern award on 4 December 2009.[54]

6.16 Subsequent to the Award Modernisation process, the Award has contained a 24 hour care clause since it was created in 2010.

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[49] At [51]-[53]
[50] At [11]
[51] At [16]
[52] See page 2 of comparison table attached to submission.
[53] See transcripts of 26-30 October 2009 and 4-5 November 2009.
[54] [2009] AIRCFB 945

6.17 Aside from a variation to the clause following an application by the ASU in 2012 to clarify that it only applies to home care employees,[55] the clause has otherwise operated without any controversy until these proceedings.

The rationale for, and importance of, the 24 hour care clause

6.18 The Unions' support for the inclusion of the 24 hour care clause during the Award Modernisation process reflects the fact that these provisions were common features of the pre-reform industrial relations system, and represents an acknowledgement of the importance of the Award facilitating 24 hour care arrangements.

6.19 While the 24 hour care clause is not used on a daily basis by most service providers, it facilitates the provision of a valuable service to elderly Australians who are in receipt of home care services. By way of example, where a family has an elderly family member in their care and the family wishes to take a holiday, the 24 hour care clause allows them to arrange for a home care worker to attend their home and provide care to the elderly family member in his/her own home, without the need to organise respite care in an out-of-home setting. These arrangements are consistent with the aims of the CDC model of encouraging individuals to stay at home for as long as possible and to give consumers choice about how they are cared for. The Award should continue to facilitate the delivery of such a service.

Response to the Union contentions

6.20 Before turning to the issues raised by the unions, we make the following observations about the current clause:

(a) first, the operation of the clause is limited to employees working in the home care stream, and so the clause must be viewed in that context and consideration must be given to the peculiar characteristics pertaining to that sector;

(b) second, while the clause requires an employee to be available for duty in a client's home for a 24 hour period, it explicitly requires them to provide "no more than eight hours of care"; and

(c) third, the clause provides for a loading of 155% of the appropriate rate of pay for the 8 hours of work performed.

6.21 We now address each of the unions' submissions.

[55] Fair Work Commission; PR531544

Alleged ambiguity or lack of clarity

6.22 Concerns have been raised by both the HSU and the United Voice about the lack of clarity in the clause. The matters complained of appear to be confined to:

(a) first, that the clause is silent as to what happens when an employee is required to perform more than 8 hours' work;[56]

(b) second, that the clause provides no certainty regarding the hours or work of an employee, creates situations where an employee is effectively liable to work in excess of the notional hours attributed to the engagement, and the hours that such engagements will 'require' the employee to work are not foreseeable;[57] and

(c) third, that the clause is unclear regarding aspects relating to sleeping.[58]

6.23 We respond to these matters as follows.

6.24 As to the first matter, it is correct that the clause does not specify what happens where an employee is required to perform more than 8 hours' work during a 24 hour care shift. Our clients accept that there is a degree of tension within the clause given that it states, on the one hand, that an employee is required to be "available for duty ... for a 24 hour period", and then on the other hand states that the employee "is required to provide a total of no more than eight hours of care during this period".

6.25 Our clients' view is that the intent of the clause is that employees are not required to perform any more than 8 hours' work, however there may be occasions where additional work may be required (for example, in the event of a medical emergency). While the employer may not be able to require the employee to perform more than 8 hours' work, the employee can agree to perform additional work and, where that occurs, such work will amount to work that is additional to their rostered hours and will be regulated by the overtime provisions at clause 28.

6.26 In our submission, the above position is the logical conclusion and reflects the proper construction of the current Award having regard to the principles of interpretation of industrial instruments.[59]

6.27 In relation to the second matter, we reject the suggestion that the clause provides "no certainty" concerning the hours or work of an employee.[60] To the contrary, clause 25.8(a)

[56] HSU Submission at [65]
[57] United Voice Submission at [20]
[58] HSU Submission at [65]
[59] See *AMWU v Berri Pty Limited* [2017] FWCFB 3005

expressly provides that "The employee is required to provide a total of no more than eight hours of care during this period". In practice, there is likely to be some flexibility as to precisely when the 8 hours of work are to be performed over the 24 hour period, as is required given the nature of the work. However, ultimately the span of the engagement (being 24 hours) is clearly known to the employee.

6.28 In relation to the third matter, an issue is raised with the alleged lack of clarity around the phrase "...where appropriate, a bed in a private room will be provided for the employee". Specifically, the HSU complain that the clause is ambiguous as to whether the employee will be provided with "a safe and clean space to sleep". It is of course accepted that the current clause does not expressly provide that employees will be provided with "a safe and clean space to sleep", however we are not aware that the absence of any such wording has caused an issue before in the 9 years the clause has been in operation. There is certainly no evidence of any issue before the Commission upon which a finding could be made that the clause is not operating sensibly.

6.29 Ultimately, if the Commission forms the view that one or more aspects of the clause are ambiguous or would benefit from clarification, our clients would not be opposed to the clause being varied to resolve any such ambiguity provided the substance of the clause is not altered. This would of course be consistent with s 134(1)(g) of the FW Act.

6.30 However, it must be stressed that a finding of ambiguity in the clause's operation does not necessitate or warrant the wholesale deletion of the clause.

Prevalence of use of the 24 hour care clause

6.31 Importantly, the HSU do not assert that the clause is *not* used. Rather, the HSU assert that the 24 hour care clause is "rarely used".

6.32 While our clients do not dispute that the clause may not be used frequently by all employers, the clause is utilised by a number of employers throughout Australia.

6.33 Indeed, a quick internet search for "24 hour home care" returns a lengthy list of providers who offer 24 hour care in the home care sector. Further, there are a large number of enterprise agreements in operation in the home care sector that contain 24 hour care provisions.[61]

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[60] United Voice Submission at [18]

[61] See for example, *Fresh Hope Care Home Care Enterprise Agreement 2017* (AG2018/1325); *Regis Aged Care Pty Ltd, ANMF & HWU Enterprise Agreement – Victoria 2017* (AG2018/5594); *Jubilee Community Care Enterprise Agreement 2016* (AG2016/3888); *Just Better Care Northern Rivers Enterprise Agreement 2018* (AG

An allegation that the entire 24 hour period is "work"

6.34 The thrust of the unions' submissions is that where an employee is required by their employer to stand in readiness for work, or is otherwise not free to engage in leisure activities, the time should be treated as time worked and paid as such.

6.35 At a theoretical level, the proposition is sound. However, the modern award system contains a range of provisions dealing with situations where employees are required to be on-call, on stand-by in readiness for work, or otherwise available to perform work. These situations and provisions are not unusual, and clause 25.8 of the Award is no different to other clauses in a large number of other modern awards that require employees to be on stand-by or otherwise on-call whilst not performing "work". The various modern awards deal with those situations differently, and provide for different compensation mechanisms, having regard to the specific obligation imposed on employees and the particular circumstances applying in that industry.[62]

Remuneration applying to 24 hour care shifts

6.36 As stated above, clause 25.8 entitles employees to 8 hours' pay at 155% of the appropriate rate of pay.

6.37 The unions argue that the remuneration provided by clause 25.8 is inadequate when one considers the requirements imposed on employees. However, the unions do not provide any indication as to what level of remuneration they consider would be adequate. They simply assert that the entitlements provided by the Award are inadequate.

6.38 There is no evidence before the Commission as to the value of the work that would justify any change to the amounts payable for the work. In the absence of any evidence regarding the disutility associated with the performance of 24 hour care shifts, the Commission should

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2018/7264); *Just Better Care Multi Enterprise Agreement 2018* (AG 2018/1456); *Australian Unity Home Care Enterprise Agreement 2017* (AG2017/6064); *Australian Unity Home Care EA 2017*; *Flexi Care Inc Care Providers Enterprise Agreement 2017* (AG2017/5995); *Thompson Health Care, NSWNMA, ANMF NSW Branch and HSU New South Wales Branch Enterprise Agreement 2017*; *Flexi Care Inc Care Providers Enterprise Agreement 2017; JBC Brisbane North Enterprise Agreement 2015* (AG2015/6180); *Amana Living Home Care Enterprise Agreement 2015* (AG2015/4566); *SYC Specialised Residential Care Workers Enterprise Agreement 2014-2016* (AG2014/6402); *Envigor Home Care Enterprise Agreement 2014* (AG 2015/143); *Southern Cross Care (Victoria) Community Services Enterprise Agreement 2014* (AG2015/412); *Multicultural Aged Care Services Geelong Inc, Community and Home Care Employees, Enterprise Agreement 2013* (AG2013/2499); *SOS Home Carers' Agreement 2013* (AG2013/2282); *Jewish Care Victoria Inc – Social, Community, Home Care, Disability, Health Professionals & Support Services Enterprise Agreement 2011-2014* (AG2012/5038); *After-Care (A'sia) Pty Ltd Enterprise Agreement 2010* (AG 2011/14915)

[62] See for example, clause 26.6 of the *Electrical, Electronic and Communications Contracting Award 2010*; clause 21.8 of the *Telecommunications Services Award 2010*.

not depart from the prima facie position that the 155% loading provides appropriate compensation for the work undertaken and any disutility associated with the engagement.

Alleged arguable contravention of section 323 of the FW Act

6.39 We do not consider that clause 25.8 contravenes section 323 of the FW Act.

6.40 The chief submission advanced by the United Voice appears to be that clause 25.8 "may" breach s 323 of the FW Act because it "permits an employer to require an employee to work for a 24 hour period but does not require the employer to pay the employee in full for the performance of the work".[63]

6.41 That submission should be rejected. As stated in paragraph 6.27 above, the clause explicitly does *not* require an employee to undertake more than eight hours' work. Further, as stated in paragraph 6.35 above, the notion of employees standing in readiness to perform work (but not actually performing any work at that time) is not a novel or unusual feature of the modern award system.

Fatigue concerns

6.42 The United Voice assert that "leaving one employee for long periods of time to deal with complex interpersonal matters is problematic".[64] The submission is not developed any further than that single sentence, and is unsupported by any evidence.

6.43 As previously stated, the clause requires employees to provide no more than 8 hours' care, and provides for the opportunity to sleep. Given the lack of further detail or evidence in support of the assertion, it should be given no weight and disregarded.

Conclusion

6.44 None of the matters complained of by the unions warrant the clause being deleted from the Award. That is a significant step which would have adverse implications for the elderly and disabled members of the community who receive care in their home under this clause.

6.45 The claim should be dismissed.

[63] UV Submission at [30]
[64] Ibid at [34]

7. UNITED VOICE CLAIM RELATING TO EXCURSIONS (S47)

The United Voice claim

7.1 The United Voice seek a variation to clause 25.9(a) to alter the way in which TOIL is calculated or accrued where employees agree to supervise clients in excursion activities involving overnight stays away from home during the week (i.e. between Monday and Friday).

7.2 Clause 25.9(a) currently provides that where employees undertake 'excursion' work during the week, they will be paid at the ordinary rate of pay for time worked between the hours of 8.00am and 6.00pm up to a maximum of 10 hours per day, and that the employer and employee may agree to accrual of time instead of overtime payment for all other hours.

7.3 The United Voice propose that where an employer and employee agree to TOIL instead of overtime, the time accrued will be calculated at the overtime rate. By that we understand that the intention is that where TOIL is agreed, an employee would be required to be given the equivalent amount of time off work based on the applicable rate of pay that would have otherwise been payable (i.e. the employee would take 1.5 hours or 2 hours off work for each hour of overtime worked, depending on the overtime rate that would have applied). This is described as the 'time for penalty' approach, rather than the 'time for time' approach.

7.4 The United Voice also propose a consequential amendment to clause 25.7, which is uncontroversial if their claim in respect of clause 25.9 was to be successful.

7.5 In support of the claim, the United Voice assert that the existing clause is ambiguous as to whether the accrual of time would be equivalent to the normal hourly rate or the overtime rate.[65] Further, they submit that:

(a) unless their variation (or interpretation) was to be accepted, the clause would not meet the modern awards objective as employees would not be compensated for working overtime;[66]

(b) it is unfair for the Award to provide for TOIL on an 'hour for hour' basis, as the arrangement does not reflect the "true value of the work";[67] and

[65] United Voice Submission at [44]
[66] Ibid at [45]
[67] Ibid at [46]

(c) the clause "allows employers to apply pressure" on employees to accept accrual of time at an 'hour for hour' rate instead of paying overtime, given the "power imbalance" that exists between employer and employee.[68]

7.6 We address each of these contentions as follows.

Alleged ambiguity of the clause

7.7 Contrary to the United Voice assertion, there is no ambiguity in the existing clause as to the 'rate' of accrual of TOIL.

7.8 Having regard to the principles as to the proper interpretation of industrial instruments[69], it should be uncontroversial that the TOIL process in clause 25.9 operates on a 'time for time' basis. That has been the prevailing or default position since the *Family Leave Test Case*[70] in 1994, and so if the drafters of the Award intended for a different approach to be taken, they would have explicitly stated that.

7.9 Further, the main TOIL provision in the Award, clause 28.2, expressly states at clause 28.2(c) that the period of time off that an employee is entitled to take is the same as the number of overtime hours worked. Given that express provision, certainly the framers of the Award would have expressly specified in clause 25.9 if a different arrangement was intended to apply.

7.10 Lastly, it should be noted that the current Award position regarding the rate of TOIL reflects the position in two of the main pre-reform awards upon which the modern award was based, namely the *Social and Community Services (ACT) Award 2001* and the *Social and Community Services (State) Award* (NSW).

7.11 For the reasons outlined above, there is no substance to the United Voice claim that clause 25.9 is ambiguous. However, and in any event, to the extent that the Commission was minded to make the clause abundantly clear, our clients would not oppose the insertion of wording in clause 25.9 to specify that TOIL is to be taken on a 'time for time' basis.

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[68] United Voice Submission at [46]

[69] See for example *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union' known as the Australian Manufacturing Workers Union (AMWU) v Berri Pty Limited* [2017] FWCFB 3005

[70] *Family Leave Test Case - November 1994* (1994) 57 IR 121; *Family Leave Test Case, Supplementary Decision* (1995) AILR 3-060

Response to other submissions

7.12 As to the other matters raised by the United Voice as summarised in paragraph 7.5 above, we respond as follows.

7.13 In response to paragraph (a), that assertion must be rejected. Contrary to the United Voice submission, the existing clause and Award *does* compensate employees for working overtime. The only circumstance where an employee would not receive overtime payments is where the employee has elected to take TOIL in lieu of the overtime payment.

7.14 In respect of paragraph (b), the Award as presently constructed ultimately allows individual employees to determine how they wish to "value" the work they have performed: they can choose to be paid at overtime rates, which is the default position, or they can reach agreement with their employer to take TOIL. That "value" judgement is something that individual employees will assess differently and make their own individual decisions about.

7.15 In respect of paragraph (c), the suggestion that employers are able to "apply pressure" on employees to take TOIL rather than receive overtime payments is unsupported by any evidence at all, and should be disregarded.

The Award Flexibility decisions

7.16 The United Voice have conveniently ignored the various Full Bench decisions in the common issues Award Flexibility proceedings, which recently considered in detail the issue of TOIL in the modern award system.

7.17 In those proceedings, the Commission considered a number of claims to vary certain modern awards in respect of make up time and TOIL. In the July 2015 decision[71], the Full Bench expressed certain provisional views about the type of model TOIL term to be inserted into 113 modern awards, of which the SCHCDS Award was one.

7.18 Relevant to the issue of the 'rate' of TOIL, the Full Bench held at [255]:

> *We have had regard to these contextual differences in our consideration of the Family Leave Test Case. Despite the differences in the statutory framework we have concluded that some aspects of the Family Leave Test Case TOIL provision retain their cogency in the current statutory context. <u>In particular, we see no reason to depart from the test case standard regarding the calculation of time for the purpose</u>*

[71] [2015] FWCFB 4466

of TOIL, that is at the ordinary rate (i.e. time for time) rather than the overtime rate (i.e. time for penalty). [emphasis added]

7.19 The Full Bench then outlined a provisional model term which included the following:

Overtime taken as time off during ordinary time hours shall be taken at the ordinary time rate; that is, an hour for each hour worked.[72]

7.20 A subsequent Full Bench decision of 8 July 2016 then affirmed the provisional view that the model TOIL term should provide for TOIL on a 'time for time' basis.[73]

7.21 The decisions of the Full Bench in the Award Flexibility proceedings are centrally relevant to the current United Voice claim here, and only serve to reinforce that the United Voice claim should be dismissed.

7.22 The United Voice have failed to articulate any basis for the Commission departing from the decisions of the Award Flexibility Full Bench.

[72] Ibid at [267]
[73] [2016] FWCFB 4258

8. ASU CLAIM RELATING TO COMMUNITY LANGUAGE ALLOWANCE (S6)

The ASU claim

8.1 The ASU seek the introduction of an allowance titled "Community Language and Signing Work" into clause 20 of the Award.

8.2 Under the proposed clause, employees using a community language in addition to their normal duties to provide services to persons who speak other languages or those with hearing difficulties, will receive an allowance.

8.3 The quantum of the allowance will be determined by how often an employee uses the community language skill. If an employee uses the language occasionally to meet demands, they will be paid $45.00 per week. If an employee provides regular assistance with their community language, they will be entitled to $68.00 per week.

8.4 The proposed clause is set out in full below:

20.10 Community Language and Signing Work

20.10.1 Employees using a community language skill as an adjunct to their normal duties to provide services to speakers of a language other than English, or to provide signing services to those with hearing difficulties, shall be paid an allowance in addition to their weekly rate of pay.

20.10.2 A base level allowance shall be paid to staff members who language skills are required to meet occasional demands for one-to-one language assistance. Occasional demand means that there is no regular pattern of demand that necessitates the use of the staff members language skills. The base level rate shall be paid as a weekly all purposes allowance of $45.00.

20.10.3 The higher level allowance is paid to staff members who use their language skills for one-to-one language assistance on a regular basis according to when the skills are used. The higher level rate shall be paid as a weekly all purposes allowance of $68.00.

20.10.4 Such work involves an employee acting as a first point of contact for non-English speaking service users or service users with hearing difficulty. The employee identifies the resident's area of inquiry and provides basic assistance, which may include face-to-face discussion and/or telephone inquiry.

20.10.5 *Such employees convey straightforward information relating to services provided by the employer, to the best of their ability. They do not replace or substitute for the role of a professional interpreter or translator.*

20.10.6 *Such employees shall record their use of community language skills.*

20.10.7 *Where an employee is required by the employer to use community language skills in the performance of their duties*

a) *the employer shall provide the employee with accreditation from a language/signing aide agency*

b) *The employee shall be prepared to be identified as possessing the additional skill(s)*

c) *The employee shall be available to use the additional skill(s) as required by the employer.*

20.10.8 *The amounts at 2.10.2 and 2.10.3 will be adjusted in accordance with increases in expense related allowances as determined by the Fair Work Commission.*

8.5 By way of summary, the grounds relied upon by the ASU in support of this variation consist of the following:

(a) an assertion that the ability to communicate in more than one language is a skill that is highly sought after in potential employees in the social and community sector; [74]

(b) a submission that the use of language skills is not contemplated by the classifications in the Award and therefore not taken into account for the purposes of the base rates of pay; [75]

(c) an assertion that the value of bilingual workers in the community sector is recognised as providing a superior professional service to clients;[76] and

(d) an assertion that community organisations make extensive use of professional interpreters and translators to assist people who find themselves unable to communicate effectively with essential community services.[77]

[74] ASU Submission at [39]
[75] ASU Submission at [39]
[76] ASU Submission at [42]
[77] ASU Submission at [43]

Response to the claim

Preliminary issue

8.6 As a threshold issue, in order for the claim to succeed, the Commission must be satisfied that the existing wage structure does not already contemplate employees exercising a 'community language skill'.[78]

8.7 While it is accepted that the current classification structures in the Award do not explicitly refer to "language" skills or proficiency, that fact does not establish that the Award classifications and rates of pay do not take into account these capabilities. The capabilities which are the subject of the application (i.e. an ability to speak a language other than English) are not new capabilities, and may indeed have been taken into account in the determination of wages in the industry. Certainly, the evidence falls short of establishing that there has been some proliferation of the requirement to use these skills in the industry.

8.8 To the extent that the above threshold issue can be satisfied, the claim for a new allowance essentially involves the proposition that employees should be compensated for being required to utilise a particular skill that is not otherwise compensated for in the Award.

8.9 Although s 156(3) does not apply to this claim, the principles applicable to such claims are relevant here as guiding principles. In the present case, there is no explanation as to how the ASU have reached the quantum of the allowances sought, nor sufficient evidence that would allow the Commission to make a proper assessment as to the value of the "skill".

Merit basis for variation

8.10 Turning to the general rationale for the variation, it is not disputed that *certain* employers will value the ability of an employee or prospective employee to speak a community language other than English. That is an uncontroversial proposition, and is not one that is unique to the SCHCDS industry.

8.11 Nor is it uncontroversial that employers will value a range of other competencies. Employers in the SCHCDS industry value a whole range of different life skills, experiences and attributes held by employees that may not be an inherent part of the particular role. For example, in the home care and disability sectors where personal care is provided to individuals, employers actively seek to match support workers with consumers who have shared experiences or interests.

[78] See s 139(1)(g)(ii) FW Act.

8.12 Employees in this sector demonstrate an ability to build rapport with consumers, and therefore become highly valued employees, in a range of different ways. These attributes make them more desirable employees in the sector. A community language skill is just one of a number of life skills that employees may possess.

8.13 For the Commission to insert the proposed allowance into the Award, it must be satisfied that the claim does not offend section 138. In our submission, the evidence before the Commission does not permit the Commission to reach that conclusion.

8.14 While there may be certain sections of the industry for which a community language is required to be used, we do not consider that the issue arises across the industry, or even in a large part of the industry. It strikes us that a community language allowance is something that is better left to be dealt with at the enterprise level, rather than on an industry basis.[79]

8.15 We turn now to some of the other issue that must be considered in the context of the ASU claim.

Ambiguity of the proposed variation

8.16 The proposed variation is unclear in a number of respects. For example:

(a) clause 20.10.1 introduces the term "community language skill" but does not define the term;

(b) the purpose and effect of the words "according to when the skills are used" in clause 20.10.3 are unclear;

(c) clause 20.10.4 commences by stating "Such work...", however it is not clear whether the "work" being referred to is the work contemplated by clause 20.10.3, 20.10.2 or 20.10.1;

(d) equally, clause 20.10.5 commences with "Such employees...", however it is not clear to which employees the clause is referring (i.e. does the clause refer to employees caught by clause 20.10.3, employees caught by clause 20.10.2, or is it a broader reference to clause 20.10.1?);

(e) it is not clear what the purposes of clauses 20.10.4 and 20.10.5 are. Are they intended to be definitions of "community language skill", or do they have some other purpose?; and

[79] See s 134(1)(b) of the FW Act.

(f) clause 20.10.1 is an operative provision imposing an obligation on employers to pay an allowance (see *"shall be paid"*), the quantum of which is referable to clauses 20.10.2 and 20.10.3. However, the clause does not state that an allowance is only payable where the employee is "required by their employer" to use the skill. The variation should not be made without such a precondition.

8.17 While some of the above issues may be able to be rectified, the proposed variation suffers from further issues which are less easily resolved.

8.18 First, the proposed allowance is expressed to apply to employees using a community language skill "as an adjunct to their normal duties". The term "adjunct" is defined as:

> *noun* 1. something added to another thing but not essentially a part of it.
>
> 2. a person joined to another in some duty or service; an assistant.
>
> 3. *Grammar* a modifying form, word, phrase, etc., depending on some other form, word, phrase, etc.
>
> 4. *Logic* a non-essential attribute.
>
> –*adjective* 5. joined to a thing or person, especially subordinately; associated; auxiliary.

8.19 The proposed variation would therefore require employers and employees to make an assessment as to whether a person's language skills are utilised as an "adjunct" to their normal duties, or whether it is used as a core part of their work. Such a distinction is likely to be difficult to draw in many cases.

8.20 Second, there is then a lack of clarity as to which allowance is payable. The language in clauses 20.10.2 and 20.10.3 requires an assessment as to the frequency of use (i.e. whether there is "no regular pattern" of use or whether the usage is on a "regular basis").

8.21 Third, there is also a lack of clarity as to when the allowance is payable, or how it is to be calculated. For example, if an employee is, from the commencement of their employment, required to *occasionally* use a community language skill as an adjunct to their normal duties, is the obligation to pay the allowance triggered immediately and payable on an ongoing basis given that there is some expectation that in the future they may need to use their language on an occasional basis? Or is the allowance only payable in respect of pay periods where the skill is actually utilised? Does the clause require employers to make that assessment at the conclusion of each pay period? If so, over what period is the assessment made?

8.22 Fourth, what happens when the level of usage fluctuates over time between occasional and regular? How often must a review and assessment be made?

Accreditation

8.23 The proposed variation should properly include a requirement for employees to have their community language skill accredited by an appropriate body as a precondition of receiving the allowance. However, as currently drafted, the proposed variation does not do this.

8.24 Clause 20.10.7(a) does not operate as a precondition to the obligation to pay at clauses 20.10.1, 20.10.2 and 20.10.3.

8.25 Further, clause 20.10.7(a) imposes an obligation on employers to "provide the employee" with accreditation if their purported skill is required. There is no sound basis for the burden of accreditation to be placed on employers. It should operate as a precondition of payment, but should be something that is obtained by the relevant employee. For example, it would be unfair for employers to incur costs in respect of sending an employee to obtain accreditation for a skill in circumstances where an employee has represented that they have a certain language proficiency for which the employer is not in a position to assess. The claim does not meet the modern awards objective in that respect.

Implications of the ASU claim

Cost to employers

8.26 Given that the ASU claim proposes to insert a new monetary entitlement in the form of an allowance payable in certain circumstances, the variation will undoubtedly have an adverse impact on employment costs for a number of employers.[80] The extent of the cost imposition cannot be measured, given the lack of evidence before the Commission as to the number of employees who possess community language skills, the proportion of those who use them as an adjunct to their role, and how frequently the skill is used (or required to be used).

8.27 It would also involve an up-front cost in respect of having to cover the costs of employee accreditation.

Administrative burden

8.28 The proposed variation, if properly understood, creates a significant administrative burden on employers. This burden arises from the need to maintain a new suite of records regarding the language proficiency of certain employees and their usage of that language skill.

[80] Fair Work Act 2009 (Cth), s.134(1)(f)

8.29 It will also impose administrative complexity in processing the proposed allowance. As stated at paragraph 8.21 above, it is unclear how the payment obligation is to be determined or paid.

Conclusion

8.30 The claim is inconsistent with section 138 and should be dismissed.

9. UNITED VOICE CLAIM RELATING TO PUBLIC HOLIDAYS (S57)

The United Voice claim

9.1 The United Voice seek the introduction of a new clause, to be numbered clause 34.2(c), that would prohibit employers altering rosters for the purpose of avoiding public holiday entitlements under the Award or the NES.

9.2 The argument advanced by the United Voice in support of this variation is a bald assertion, unsupported by evidence, to the effect that "there are some employers who are altering the rosters of part-time employees to avoid the payment of public holiday rates".[81]

Response to United Voice claim

9.3 The claim is a novel one.

9.4 Contrary to the generic assertion proffered by the United Voice, the Award as presently formulated does not permit an employer to alter a part-time employee's roster at a whim. Rather, the Award contains numerous conditions on such an exercise, including:

(a) chiefly, the requirement at clause 10.3(c) that employers reach agreement in writing with part-time employees on a set pattern of work, which can then only be varied by agreement with the individual employee (and recorded in writing);

(b) second, employers must provide 7 days' notice of roster changes in accordance with clause 25.5(d), subject to certain exceptions; and

(c) third, the consultation obligations at clause 8A would apply.

9.5 The effect of clause 10.3(c) is that an employer could not lawfully engage in the practice complained of unless the employee agrees to the variation (which must be recording in writing in accordance with clause 10.3(e)), and the other applicable provisions of the Award are satisfied.

9.6 This claim should be dismissed.

[81] United Voice Submission at [166]

10. HSU CLAIM TO VARY RATES OF PAY FOR CASUALS ON WEEKENDS AND PUBLIC HOLIDAYS (S13 AND S48)

The HSU claim

10.1 The HSU seek to increase the rates of pay payable to casual employees when working on weekends and public holidays.

10.2 They seek to do this by having the Award varied to provide that the casual loading is payable in addition to the penalty rates provided for in clauses 26 and 34.2.

10.3 The relevant current Award provisions are set out below:

> ***26. Saturday and Sunday work***
>
> *Employees whose ordinary working hours include work on a Saturday and/or Sunday will be paid for ordinary hours worked between midnight on Friday and midnight on Saturday at the rate of time and a half, and for ordinary hours worked between midnight on Saturday and midnight on Sunday at the rate of double time. These extra rates will be in substitution for and not cumulative upon the shift premiums prescribed in clause 29—Shiftwork and the casual loading prescribed in clause 10.4(b), and are not applicable to overtime hours worked on a Saturday or a Sunday.*
>
> *...*
>
> ***34.2 Payment for working on a public holiday***
>
> *(a) An employee required to work on a public holiday will be paid double time and a half of their ordinary rate of pay for all time worked.*
>
> *(b) Payments under this clause are instead of any additional rate for shift or weekend work which would otherwise be payable had the shift not been a public holiday.*

10.4 The bases for the proposed variations consist of the following contentions:

(a) a general assertion that the casual loading should be paid in addition to any overtime, weekend and/or public holiday penalty, given the function of the casual loading;[82]

(b) a submission that the proposed variation is consistent with the 'default approach' discussed by the Full Bench in the *Penalty Rates Decision*;[83] and

[82] HSU Submission at [48]

(c) a submission to the effect that it is unfair for other penalties to operate to subsume the casual loading.[84]

10.5 We address these two proposed variations as follows.

Threshold issue – work value considerations

10.6 There is a threshold question as to whether s 156(3) applies to this claim.

10.7 Section 135 of the FW Act relevantly provides that:

(1) Modern award minimum wages cannot be varied under this Part except as follows:

(a) modern award minimum wages can be varied if the FWC is satisfied that the variation is justified by work value reasons (see subsections 156(3) and 157(2));

10.8 Section 156(3) provides:

In a 4 yearly review of modern awards, the FWC may make a determination varying modern award minimum wages only if the FWC is satisfied that the variation of modern award minimum wages is justified by work value reasons. [emphasis added]

10.9 Section 284(3) provides the definition for 'modern award minimum wages', which is expressed as follows:

(3) Modern award minimum wages are the rates of minimum wages in modern awards, including:

(a) wage rates for junior employees, employees to whom training arrangements apply and employees with a disability; and

(b) casual loadings; and

(c) piece rates. [emphasis added]

10.10 Given that the effect of the HSU claim would be to increase the amount payable to casual employees when working on weekends and public holidays, there is a reasonable basis to conclude that the claim represents a proposal to vary "modern award minimum wages". On the basis, the claim can only succeed if it is justified by "work value reasons".

10.11 The HSU have failed to meet the requirements of s 156(3).

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[83] HSU Submission at [48]
[84] Ibid at [52]

Background to clause 26 of the Award and previous decisions

10.12 In putting their position, the HSU conveniently ignore the relevant historical background to clause 26 of the Award and the previous decisions (including a Full Bench decision) which involved a detailed consideration of the rationale for the current Award position.

10.13 The issue of rates of pay for casuals on weekends has been considered in detail by the Commission on at least two occasions since the Award was made:

(a) Firstly, by VP Watson in the course of the 2 yearly review of the Award;[85] and

(b) Secondly, by a Full Bench of the Commission in the context of an appeal against the decision of VP Watson.[86]

10.14 The relevant background to this matter is set out as follows.

10.15 When the Award was first made on 4 December 2009, clause 26 provided that:

> *26. Saturday and Sunday work*
>
> *26.1 Employees whose ordinary working hours include work on a Saturday and/or Sunday, will be paid for ordinary hours worked between midnight on Friday and midnight on Saturday at the rate of time and a half, and for ordinary hours worked between midnight on Saturday and midnight on Sunday at the rate of double time. These extra rates will be in substitution for and not cumulative upon the shift premiums prescribed in clause 29—Shiftwork.*
>
> *26.2 Casual employees who work less than 38 hours per week will not be entitled to payment in addition to any casual loading in respect of their employment between midnight on Friday and midnight on Sunday.*[87]

10.16 This clause remained unchanged until the transitional review of the Award. As part of the 2 yearly review of the Award, the ASU sought to delete clause 26.2, which would have had the effect of entitling casual employees to the same penalties as provided for full-time and part-time employees when working on weekends.

10.17 In a decision of 27 June 2013, VP Watson determined to vary clause 26 to provide for casual employees to receive the applicable weekend penalties in lieu of the casual loading when working on weekends (the **VP Watson Decision**).[88]

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[85] *Australian Municipal, Administrative, Clerical and Services Union* [2013] FWC 4141
[86] *Australian Municipal, Administrative, Clerical and Services Union* [2014] FWCFB 379
[87] See PR991066

10.18 In reaching the conclusion, VP Watson had regard to both the history of the provision and the approach taken by a Full Bench in modifying an identical provision in the *Aged Care Award 2010*.[89]

10.19 The ASU then appealed against the VP Watson Decision in respect of the findings in relation to, inter alia, the issue of weekend penalty rates for casual employees.

10.20 In the appeal decision[90] (the **Appeal Decision**), a Full Bench upheld the findings in of VP Watson in respect of the issue of weekend penalty rates for casual employees. In dismissing this aspect of the appeal, the Full Bench held:

> *[29] In paragraph [33] of the Decision, it is reasonably apparent that Vice President Watson intended that that casual employees should be entitled to the weekend penalty rates for ordinary time work specified in clause 26.1, but that consistent with the approach taken by the Full Bench in paragraph [59] of the Aged Care Award 2010 decision, those weekend penalty rates should be in substitution for and not in addition to the casual loading. This meant that his Honour intended that the total loading for casual employees should be increased from 25% to 50% for Saturdays and from 25% to 100% for Sundays.*
>
> *[30] We do not consider that the ASU has succeeded in demonstrating any error in his Honour's consideration of that part of its claim which concerned the working of ordinary hours by casual employees on weekends. Although in paragraphs [30]-[33] of the Decision his Honour did not make an explicit finding concerning the weight of regulation in pre-existing awards and instruments, we consider that it is implicit in his Honour's reference to and reliance upon the approach taken in the Aged Care Award 2010 decision that he recognised the weight of the pre-existing position but considered that the increase in the casual loading should be regarded as an offsetting factor.*
>
> *[31] We accept that the ASU was able to demonstrate convincingly that the predominant position in the pre-existing awards and instruments was that casual employees were entitled to penalty rates for working ordinary hours on weekends of the same quantum as those applying to full-time and part-time employees in addition to payment of a casual loading. To the extent that the respondents took*

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[88] *Australian Municipal, Administrative, Clerical and Services Union* [2013] FWC 4141 at [31]-[33]
[89] Ibid at [33]
[90] *Australian Municipal, Administrative, Clerical and Services Union* [2014] FWCFB 379

issue with the ASU's analysis in this respect, it was largely at the margins and did not serve to alter the main conclusion to be drawn from the analysis. However, it is equally clear that as a result of the adoption of a standard 25% loading for casual employees in modern awards, a large majority of casual employees will upon the completion of the operation of the SCHCDS Award's transitional provisions have received an increase in their casual loading. In the majority of pre-existing awards and instruments, the casual loading had been 20% or less, so that many casual employees will receive a reasonably substantial increase in their ordinary rate of pay (leaving aside weekend penalties) under the SCHCDS Award. In rectifying the omission of weekend penalty rates, we consider that it was open to Vice President Watson, as it was to the Full Bench in the Aged Care Award 2010 decision, to take that matter into account and to award weekend penalty rates that operated to the exclusion of the casual loading. We do not consider that in taking this course, his Honour fell into error in any of the respects identified in paragraph 2.3 of the ASU's appeal notice. [emphasis added]

10.21 The above passage discloses a sound rationale for the current Award position. That is, the introduction of the Award effectively led to an increase to the quantum of the casual loading for many casual employees, and so that fact was quite properly taken into account in determining the appropriate level of remuneration to be payable to casual employees when working on weekends.

10.22 Other than pointing to the observations of the Full Bench in the Penalty Rates decision as to the 'default approach' to determining penalty rates for casual employees and asking the Commission to adopt that approach, the HSU have failed to recognise or engage with the particular factors that were unique to the SCHCDS industry and which led the Commission to set the current entitlements for casuals working on weekends in the way that they did.

10.23 The HSU have not advanced any persuasive argument that would warrant the Commission revisiting or departing from the conclusion of the Full Bench in the Appeal Decision.

Public holiday entitlements

10.24 While the issue of public holiday rates of pay for casual employees was not the subject of consideration by VP Watson during the 2 yearly review, the observations of the Full Bench in the Appeal Decision are equally applicable. That is, introduction of the Award resulted in an increase to the quantum of the casual loading for many casual employees. Accordingly, we submit that, consistent with the decision of VP Watson as affirmed by the Full Bench in the

Appeal Decision, that fact is relevant and should be taken into account when considering the HSU claim for a further increase to amounts payable to casual employees when working on public holidays. The HSU proposal should not be adopted without a proper consideration and assessment of this background.

Conclusion

10.25 The HSU claims should be dismissed.

11. UNITED VOICE CLAIM RELATING TO OVERTIME RATES FOR CASUALS (S51)

The claim

11.1 The United Voice seek a variation to clause 28.1(b)(iv) of the Award to provide that casual employees are entitled to the casual loading when working overtime.

11.2 The current clause provides:

> *(iv) Overtime rates payable under this clause will be in substitution for and not cumulative upon:*
>
> *(A) the shift premiums prescribed in clause 29—Shiftwork; and*
>
> *(B) the casual loading prescribed in clause 10.4(b),*
>
> *and are not applicable to ordinary hours worked on a Saturday or a Sunday.*

11.3 The United Voice seek to remove clause 28.1(b)(iv)(B) such that clause 28.1(b)(iv) will be read as follows:

> *(iv) Overtime rates payable under this clause will be 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 a Sunday.*

11.4 The rationale for the claim is an assertion that casual employees do not receive an amount in respect of casual loading when working overtime.

11.5 The United Voice assert that the 'default approach', as referenced in the *Penalty Rates Decision*, should be adopted unless there is some 'cogent industry or sector specific reason'.[91] The United Voice relies on passages from the Penalty Rates Decision in support of this claim, and argue that the casual loading and overtime rates serve different functions and so should therefore both be payable.

Threshold issue – work value considerations

11.6 There is a threshold question as to whether s 156(3) applies to this claim. The submissions contained in paragraphs 10.6-10.11 above are equally applicable to this claim.

11.7 Given that the effect of the HSU claim would be to increase the amount payable to casual employees when working overtime, there is a reasonable basis to conclude that the claim represents a proposal to vary "modern award minimum wages". On the basis, the claim can only succeed if it is justified by work value reasons.

[91] United Voice Submission at [164]

11.8 The United Voice have failed to meet the requirements of s 156(3).

Background to clause 28.1(b) of the Award and previous Full Bench decision

11.9 The UV submission does not address the relevant historical background to clause 28.1 of the Award. Notably, this issue (and this exact claim) was previously the subject of an unsuccessful application to vary the Award by the ASU during the 2 yearly review of the Award.

11.10 We outline some of the relevant background to this claim as follows.

11.11 When the Award was first made, it did not contain any overtime entitlement for casual employees.[92]

11.12 During the 2 yearly review of the Award, the ASU made an application to vary the Award to provide for casual employees to receive overtime payments, which were sought to be payable in addition to the casual loading.

11.13 The application was one of a number that was dealt with by VP Watson, the findings of which are contained in his decision of 27 June 2013 (described above as the **VP Watson Decision**). In that first instance decision, VP Watson declined the application.[93]

11.14 The ASU subsequently appealed this aspect of the VP Watson decision.

11.15 On appeal, the Full Bench overturned the aspect of the VP Watson Decision dealing with overtime entitlements for casuals[94], and then re-determined the claim.

11.16 The Full Bench concluded that the absence of overtime provisions applicable to casual employees in the Award was an "oversight"[95], and observed that there was no sound rationale for casual employees being excluded from overtime penalty rates in circumstances where they apply to full-time and part-time employees.

11.17 Turning then to the specific variation to be made, the Full Bench determined that the overtime entitlements for casual employees should be in substitution for the payment of the casual loading.[96] In reaching that conclusion, the Bench took into account:

(a) the "somewhat mixed" position which applied in the pre-existing awards and instruments in respect of the overtime rates payable;[97] and

[92] See clause 28.1 of Award as made on 4 December 2009
[93] *Application by Australian Municipal, Administrative, Clerical and Services Union* [2013] FWC 4141 at [34]-[36]
[94] Ibid at [36]
[95] Ibid at [38]
[96] Ibid at [44]

(b) that the provision of overtime penalty rates for casual employees, even without the addition of the casual loading, will be a significant benefit for those casuals who work overtime, and will equalise the overtime cost of full-time, part-time and casual employees.

11.18 The Bench then specifically noted that their decision did not intend to foreclose further consideration in the four yearly review process as to whether, under the SCHCDS Award, the casual loading should be payable in addition to weekend and overtime penalty rates.[98]

Response to the United Voice's submissions

11.19 As outlined above, a Full Bench of the Commission has already considered and determined the manner in which overtime rates are to be payable to casual employees. Accordingly, as a starting point the Commission should not depart from that previous Full Bench decision unless there are cogent reasons for doing so.

11.20 That said, it is acknowledged that the Full Bench, when determining that overtime rates for casual employees should be in substitution of the casual loading, also expressly referred to the potential for further consideration of the issue during the 4 yearly review of the Award. In that context, it is acknowledged that the principle of the Commission generally following previous Full Bench decisions unless there are cogent reasons for not doing so, must be viewed in that light.

11.21 Again, we submit that the Commission should take into account the observations of the Full Bench in the Appeal Decision to the effect that the making of the Award resulted in an increase to the quantum of the casual loading for many casual employees. In our submission, that provides a basis for the Commission not applying the 'default' position as referred to in the *Penalty Rates Decision*.

Conclusion

11.22 The United Voice claim should be dismissed.

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[97] Ibid at [42]
[98] Ibid at [45]

12. HSU CLAIM RELATING TO FIRST AID CERTIFICATION

The HSU claim

12.1 Clause 20.4 of the Award currently provides for payment of a first aid allowance to full-time, part-time and casual employees where they:

(a) are required by the employer to hold a current first aid certificate; and

(b) are required to perform first aid at their workplace or, in the case of home care employees, are required to be responsible for the provision of first aid to employees employed by the employer.

12.2 The quantum of the first aid allowance is currently:

(a) $16.03 per week for full-time employees; or

(b) a pro rata amount of the above for part-time and casual employees based on their ordinary weekly hours of work.

12.3 The HSU seek the introduction of a new and further entitlement in respect of the costs and time associated with an employee maintaining a first aid certification. Specifically, they seek the insertion of the following provision to supplement the existing clause 20.4:

First aid refresher

(i) Where an employee is required to maintain first aid certification, the employer will pay the full cost of the employee updating their first aid certification by:

a. reimbursing the employee's registration and attendance expenses; or

b. paying the registration and attendance costs.

(ii) Attendance at first aid refresher courses will be work time and paid as such.

12.4 In support of this variation, the HSU submit that:

(a) many employees engaged in disability support or home care roles are required to hold a current first aid certificate in the performance of their roles;[99]

(b) even where the employer does not require an employee to possess first aid certification, the qualification is likely to be beneficial for the employer; and

[99] HSU Submission at [63]

(c) where an employee is required to maintain their first aid certification, they should be entitled to be reimbursed for the costs of maintaining that certification.

12.5 In considering these submissions, it is necessary to first consider the history of the existing first aid allowance clause, the scope of its operation and the rationale for the current provision.

History of the clause

12.6 The first aid allowance clause has undergone a couple of variations since the Award was first introduced.

12.7 Initially, when the Award was first made the clause read as follows:

> *19.4 First aid allowance*
>
> *An employee who holds a current first aid certificate issued by St John Ambulance or Australian Red Cross Society or equivalent qualification, and who is required by their employer to perform first aid duty at their workplace, will be paid an allowance of 1.67% of the standard rate per week.*

12.8 However, three applications were subsequently made in 2010 which sought to vary the clause.[100] Those applications were dealt with together by VP Watson. In broad terms, the applications raised two issues:

(a) Firstly, that the clause contained an ambiguity or error in respect of home care employees, given that:

(i) the phrase "at their workplace" created ambiguity in relation to employees in the home care stream, given the nature of the work;

(ii) the intent of the clause was to apply to situations where employees were required to provide first aid to fellow employees (rather than to customers or clients);

(iii) the pre-reform awards covering home care employees did not provide entitlements to a first aid allowance; and

(iv) a first aid certificate is an inherent requirement for the role of a home care employee, is part of the certificate III qualification, and so is already contemplated as part of the classification structure; and

[100] Matters AM2010/77, AM2010/109, AM2010/112

(b) secondly, that the clause did not deal with the issue of pro rata entitlements for part-time and casual employees.[101]

12.9 On 3 August 2010, VP Watson held that the clause contained ambiguities in respect of the two issues referred to above, and indicated that he was inclined to grant the applications and adopt the wording sought by VECCI, however directed the parties to confer in relation to the precise terms of the variation to be made.

12.10 After hearing further form the parties on 21 September 2010 and considering two alternative formulations, VP Watson decided to make the variation in the terms proposed by VECCI.[102]

12.11 The subsequent Determination varied the clause so as to read:

19.4 First aid allowance

(a) First aid allowance—full-time employees

A weekly first aid allowance of 1.67% of the standard rate per week will be paid to a full-time employee where:

(i) an employee is required by the employer to hold a current first aid certificate; and

(ii) an employee is required by the employer to be, in a given week, responsible for the provision of first aid to employees employed by the employer.

(b) First aid allowance—casual and part-time employees

The first aid allowance is payable at 1/38th of the full-time allowance per hour for part-time and casual employees where:

(i) an employee is required by the employer to hold a current first aid certificate; and

(ii) an employee is required by the employer to be responsible for the provision of first aid to employees employed by the employer.[103]

12.12 The decision of VP Watson was then the subject of an appeal brought by the ASU.

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[101] See Transcript of AM2010/77, AM2010/109, AM2010/112, 3 August 2010
[102] Transcript of AM2010/77, AM2010/109, AM2010/112, 21 September 2010 at [94]-[95]
[103] See PR500495

12.13 In the appeal proceedings, the parties were encouraged by the Full Bench to have discussions to endeavour to resolve the issues between them regarding the clause, and this led to a consent position being reached regarding an award variation which resolved the various parties' concerns with the clause.

12.14 In light of that agreed position, on 23 December 2010 the Full Bench allowed the appeal by consent, set aside the variation made on 21 September 2010, and varied the Award to include the first aid provision as agreed between the parties.[104]

12.15 The clause read as follows:

(a) First aid allowance - full - time employees

A weekly first aid allowance of 1.67% of the standard rate per week will be paid to a full-time employee where:

(i) an employee is required by the employer to hold a current first aid certificate; and

(ii) an employee, other than a home care employee, is required by their employer to perform first aid at their workplace; or

(iii) a home care employee is required by the employer to be, in a given week, responsible for the provision of first aid to employees employed by the employer.

(b) First aid allowance - casual and part - time employees

The first aid allowance in 19.4(a) will apply to eligible part time and casual employees on a pro rata basis on the basis that the ordinary weekly hours of work for full - time employees are 38.

Rationale for the current Award position

12.16 A number of observations can be made from the above background to the current first aid allowance entitlement.

12.17 Firstly, the clear intent of the existing first aid allowance at clause 20.4 is that it applies only to those employees who are designated as first aid officers in a particular workplace and who may be called on to render first aid to colleagues in the event of an illness or injury. The allowance does not apply to employees who might be required to hold a certification as

[104] See [2010] FWAFB 9880.

an inherent requirement for their position or where the role might involve rendering first aid assistance to a client (e.g. support workers in the home care and disability services streams).

12.18 Secondly, the rationale for the Award not providing first aid allowance entitlements to employees who provide support and care to clients (e.g. home care and disability services employees) is due to the very nature of the work undertaken by those employees.

12.19 This rationale is sound, and was ventilated during the hearing before VP Watson, as demonstrated by the following exchange between the Vice President and Mr Nucifora for the ASU on 21 September 2010 at PN36-PN42:

> *THE VICE PRESIDENT: Just about every one of the employees would be required to perform first aid if there's someone injured in a basic sense, because the clients are incapable of administering basic first aid to themselves.*
>
> *MR NUCIFORA: Yes, your Honour, and we would say that there is no recognition in the classification structure for first aid qualifications. It is - - -*
>
> *THE VICE PRESIDENT: Isn't it inherent in the nature of the work and the nature of the certificates they hold at various levels? I haven't looked at the detail of the certificate courses that employees in this sector commonly hold. They are quite skilled in dealing with everything that's required for the care of their clients.*
>
> *MR NUCIFORA: I was just distinguishing them from, say, the Nurses Award and those that provide medical attention.*
>
> *THE VICE PRESIDENT: Yes, and for example the house with those suffering epilepsy, a lot of those employees are former nurses that have come from an institution where the services are provided to a house in the community but they are - they have nursing experience and, to a point, qualifications.*
>
> *MR NUCIFORA: We would suggest, your Honour, that it might have been an issue that was dealt with at the review, and that certainly there'd be discussions between the parties about how some of the new sectors that have been picked up by the modern award - because clearly it didn't come up or we're not aware that it came up under the previous underpinning awards, and I'm talking about the SACS awards in particular, but there certainly was a practice where they were required to provide first aid to service users outside the traditional workplace.*
>
> *THE VICE PRESIDENT: Or even in their traditional workplace. The argument against you is that for many employees in this sector, it's part and parcel of their job to*

administer basic first aid, and to hold certain qualifications to perform those basic duties, and it is encompassed within the classification structure. That's the argument against you.

12.20 That is why the Award clause was varied in the manner it was by VP Watson at first instance and then through the consent position of the parties endorsed by the Full Bench on appeal.

Response to the HSU claim

12.21 For the same reasons that underpin the scope of the existing clause 20.4, the Award should not be varied to require employers to reimburse employees for maintaining their ability to perform the inherent requirements of their position.

12.22 The HSU claim is not limited to employees who fall within the scope of clause 20.4. Rather, the claim seeks to provide an entitlement to all employees who are required to maintain first aid certification, regardless of whether they are designated first aid officers at their workplace to provide first aid to their fellow employees.

12.23 That being the case, the claim will capture a huge number of employees in the industry, by reason of the very nature of the work undertaken by the vast majority of them.

12.24 The HSU claim should be dismissed for the following reasons:

(a) first, the proposed variation is inconsistent with the modern awards system;

(b) second, the proposed variation allows for employees with more than one job in the industry to receive reimbursement from multiple employers for the single cost; and

(c) third, if granted the variation will impose significant costs on employers in circumstances where (in many cases) the employer will not be able to pass the additional cost onto customers.

<u>Inconsistency with modern awards system</u>

12.25 The modern award system does not typically provide for allowances in respect of costs borne by employees in maintaining their ability to perform the inherent requirements of their position. To provide some relevant examples:

(a) the *Nurses Award 2010* does not require employers to reimburse employees for the costs associated with maintaining their registration with the Nursing and Midwifery Board of Australia;

(b) the *Health Professionals and Support Services Award 2010* does not require employers to reimburse employees for the costs associated with maintaining their registration with the relevant health profession Board;[105]

(c) neither the *Passenger Vehicle Transportation Award 2010*, nor the other two road transport industry awards[106], require employers to reimburse employees for the costs associated with maintaining the applicable heavy vehicle licences; and

(d) the *Legal Services Award 2010* does not require employers to reimburse certain employees for the costs associated with maintaining their professional certifications (e.g. practising certificates).

12.26 As another example, many Award-covered employees across the award system are required to hold and maintain a valid driver's license as a necessary (and inherent) requirement for their position, and yet modern awards do not contain allowances in respect of the costs incurred in holding and maintaining a driver's license. Many awards do of course provide a motor vehicle allowance in respect of employees required to use their vehicles in the course of their duties. However, that is a different proposition to compensating employees for the costs associated with holding and maintaining a driver's license in order to allow them to perform the inherent aspects of their role.

Potential for reimbursement from multiple employers

12.27 The evidence in these proceedings is that secondary employment within the industry (i.e. individuals holding more than one job in the industry with multiple employers) is not uncommon.[107]

12.28 As presently drafted, there would be nothing preventing an employee from claiming back the costs of first aid certification from multiple employers at the same time, and obtaining a windfall gain that is in excess of the costs incurred by the employee. A clause which allows for such practices or outcomes does not lead to the Award meeting the modern awards objective of providing a 'fair and relevant' minimum safety net.

12.29 Even if such a mechanism was to be inserted into the proposed clause preventing employees from claiming back the cost from multiple employers, there is still a question about which employer would be required to pay, and how that question would be determined.

[105] See Australian Health Practitioner Regulation Agency
[106] The *Road Transport and Distribution Award 2010* and the *Road Transport (Long Distance Operations) Award 2010*
[107] Statement of Bernie Lobert at [1]; United Voice Submission at [133]

Cost implications for businesses

12.30 Lastly, the costs associated with this claim should not be underestimated. As stated above (and acknowledged by Vice President Watson in 2010), a very large number of employees in this industry are required, as an inherent requirement of their position, to hold a first aid certificate. The Award has never before contained a term requiring employers to cover those costs. For large employers in the industry, the costs would be significant.

12.31 Further, in many cases those costs will not be able to be passed onto customers, given the regulated nature of the industry, meaning that the variation will have a direct adverse impact on the viability of the industry.

Conclusion

12.32 For the reasons outlined above, the HSU claim should be dismissed.

12.33 In the alternative, to the extent that the Commission is minded to introduce a provision into the Award to require employers to reimburse employees for the time and cost associated with maintaining their first aid certification, such a clause should be limited to those employees to whom the existing clause 20.4 applies. That is, the clause should only apply to employees who are designated as first aid officers to provide first aid to fellow employees at their workplace.

13. CONCLUSION

13.1 For the reasons outlined in this submission, the claims should be dismissed.

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