BEFORE THE FAIR WORK COMMISSION

Fair Work Act 2009 (Cth)

Title of matter:	4 yearly review of modern awards—*Social, Community, Home Care and Disability Services Industry Award 2010*—Tranche 2
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Background

1. These submissions are made to the Fair Work Commission (the **Commission**) by the Australian Federation of Employers and Industries (AFEI) in respect to the 4 yearly review of the Social, Community, Home Care and Disability Services Industry Award 2010 – Tranche 2 (AM2018/26).

2. In particular, these submissions are in reply to the outstanding union claims listed at Attachment C to the Amended Directions of 11 July 2019, except those claims in relation to travel time. AFEI intends to file submissions in reply to travel-related union claims by 3 September 2019.

The claims

3. Proposed variations to the Social, Community, Home Care and Disability Services Industry Award 2010 ('the **Award'**/'the **SCHADSI Award**') in Tranche 2 have been filed by the Health Services Union (**HSU**), the United Voice, and the Australian Services Union (**ASU**).

4. The union claims relevant to these submissions include proposals to vary the Award in respect to:

   a. Overtime for part-time employees working additional hours (HSU)

   b. Overtime for part-time and casual employees working more than 8hrs (HSU)

   c. Minimum engagements periods (HSU)

   d. Rosters (United Voice)

   e. Broken shifts (United Voice, HSU, ASU)

   f. Recall to work (HSU)

   g. Client Cancellation (HSU)

   h. Telephone allowance (United Voice, HSU)

   i. Clothing allowance (United Voice, HSU)

   j. Sleepovers (HSU)

5. AFEI objects to the claims, as outlined in these submissions.

Legal Framework

6. The legislative framework applicable to the 4 yearly review (the **Review**) was considered in some detail in the 4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues Decision.[1] The Decision outlined a number of principles to be considered in relation to the Review of a modern award.

7. ***Firstly***, in exercising its power to vary an award, the Commission must ensure that the award, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account the matters contained in the modern awards objective.[2]

8. ***Secondly***, the objects of the Fair Work Act are also relevant to the exercise of this power.[3] The objects include, amongst other things, providing workplace relations laws that are flexible for businesses and acknowledging the special circumstances of small and medium-sized businesses.[4]

9. ***Thirdly***, the need for a 'stable' modern award system requires a party seeking to vary a modern award to advance a merit based argument in support of the proposed variation. In this regard, the circumstances of the proposal will dictate the extent of argument required. Relevantly, where there is a proposal for a substantial variation, such a proposal must be supported by submissions in addition to probative evidence properly directed at demonstrating facts which support the variation.[5]

10. ***Fourthly***, the party seeking the variation must demonstrate that the variation they propose only includes terms necessary to achieve the modern awards objective.[6]

11. ***Fifthly***, in conducting the review, the Commission will have regard to the historical context of the award.[7]

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1 [2014] FWCFB 1788 ('Jurisdictional Issues Decision')
2 Ibid at [23]; the modern award objectives are found at s134 of the *Fair Work Act*
3 Ibid at [10]
4 *Fair Work Act* s.3(a) and (g)
5 *Jurisdictional Issues Decision* at [23]
6 Ibid at [32]
7 Ibid at [24]

Nature of the Industry

12. The Community Services sector is predominantly operated by not-for-profit organisations, many being charitable organisations, and most charitable organisations being small (revenue less than $250,000) to medium (revenue less than $1m) in size.[8]

13. In the disability care sector, around 78 per cent of the businesses are community/not-for-profit organisations while a further 21 per cent operate as commercial/private businesses.[9]

14. The sector is highly labour-intensive, staff/labour costs account for a very high proportion of total operating costs, usually more than 70%, but often more than 80% of total operating costs. Service providers in the industry also operate with very low profit margins.[10]

15. The sources of income for organisations in the industry are diverse, including:

    a. Various Commonwealth Government departments;

    b. Various State Government departments;

    c. Councils;

    d. NDIS fee for services;

    e. Fees as a contribution from clients;

    f. Full fees;

    g. Philanthropic Trusts;

    h. Donations;

    i. Sponsorships for services

16. In 2017-2018:

    a. Total Australian, State and Territory government recurrent expenditure on community services (including aged care services, services for people with disabilities, child protection services, and youth justice services) was estimated to be $31.5 billion in 2017-18, around 13.4 per cent of total government expenditure on services;[11]

    b. Total recurrent expenditure on child protection, out-of-home care, family support services and intensive family support services was $5.8 billion nationally; and[12]

    c. Total recurrent expenditure on youth justice community-based supervision and group conferencing was $333 million across Australia.[13]

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8 Australian Charities and not for Profit Commission definition: website, https://www.acnc.gov.au/tools/topic-guides/charity-size

9 Department of Jobs and Small Business *Labour market for personal care workers 2017* - Appendix A

10 Bennett, R, *A Report on the Funding and Sustainability of the Community Services Sector* – Report relied upon in AFEI's submission to the Equal Remuneration Case 2010-2012

11 https://www.pc.gov.au/research/ongoing/report-on-government-services/2019/community-services

12 https://www.pc.gov.au/research/ongoing/report-on-government-services/2019/community-services/child-protection

13 https://www.pc.gov.au/research/ongoing/report-on-government-services/2019/community-services/youth-justice

17. Government block-funding is provided in some sectors, and is obtained by tendering or sometimes commissioning from the funding Government Department or agency. Block funding contracts typically have a specified period or number of years (usually three years, but could be shorter) before being re-tendered. Recipient organisations are contracted to agreed outputs or outcomes and other conditions.

18. In the 2011 Equal Remuneration Decision, the Full Bench of the Commission observed that '*there is widespread reliance on government funding and that because of the pervasive influence of funding models any significant increase in remuneration which is not met by increased funding would cause serious difficulties for employers, with potential negative effects on employment and service provision*'.[14]

19. With 87.2% of respondents to the 2019 Fair Work Commission Survey of SCHADS Employers identifying that they received a *significant* proportion of income from Commonwealth, State or Local Government[15], it is evident that widespread reliance on government funding remains a major feature of the SCHADS industry. Accordingly, it remains true for the purpose of claims made in these proceedings, that increases in remuneration and consequent wage costs which are not met by increased funding would cause serious difficulties for employers, with potential negative effects on employment and service provision.

Developments in the industry

20. More recently, while private investment in welfare operations has increased, industry operators have been forced to increasingly rely on charitable donations by private citizens and companies.[16]

21. In recent years, the National Disability Insurance Scheme (NDIS) and My Aged Care Services have led a dramatic shift in the industry's funding from government block-funding to client directed, and client-specific funding. The NDIS is the first sector of the industry to provide clients the power to exercise choice and control by being able to purchase their supports directly from providers.

22. The NDIS is a fee for service, mostly on an hourly service basis. A client is able to determine the service required and the service provider within an agreed NDIS plan. This plan may be negotiated with the NDIA, with the services of a Plan Adviser, and the administration and information managed by the NDIS Plan organisation. Alternatively the plan may be self-managed where the person with a disability or their designated support person manage the choice of provider and expenditure.

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[14] [2011] FWAFB 2700 at [272]

[15] Fair Work Commission Survey analysis of the *Social, Community, Home Care and Disability Services Industry Award 2010* June 2019

[16] IBIS Personal Welfare Services in Australia March 2019

23. The replacement of block grants with individual client funding has reduced certainty of funding for NDIS providers, impacting operational planning and certainty of workforce needs. This is particularly so as under the NDIS model, the fee is paid by the NDIS on delivery of the service, and for most categories of service has a regulated hourly rate set by the NDIS.

24. Under the NDIS there has been a significant increase in market competition for funded, client directed and fee for service clients. Service delivery providers are, however, limited in the use of strategies for remaining competitive (typically employed in more commercial settings), due to the high degree of regulation in pricing and service delivery under the NDIS.

25. Pricing regulation under the NDIS is intended to address various public policy interests, and is intended to continue until the market matures. In the meantime, price regulation needs to strike a fine balance of fiscal sustainability for the relevant stakeholders, which include not only tax-payers, but also some of the most vulnerable members of the community as recipients of the various human service providers.

26. As might be expected from such a diverse industry, the costs of providing services can be varied depending on the size, range and type of services provided, the extent to which it uses volunteers and/or obtains Local Council or other subsidies for its building or other infrastructure.

27. The staffing costs of providing an hour of service include not only direct service delivery staff, but also the management, administration, coordinator(s), and other specialised positions. Many of these positions are also covered by the SCHADSI Award. Cost savings measures to account for increases in staff wage costs which are not fully funded may occur by reducing non-support worker staff, and limiting investment in staff development and training; or alternatively, reducing the amount of supply or service hours if the cost increases are related to the weekend, overtime or other higher staff cost activities.

28. The cost of providing services could also be much higher where there are a limited number of clients, as this means the cost of the infrastructure, administration and other non-direct service delivery costs are higher per hour of service. This is of particular concern in areas of 'thin markets'. In our submissions of 22 May 2019, AFEI addressed the Department of Social Services and NDIA commissioned 'NDIS Thin Markets Project' at [35]-[36]. As highlighted in our earlier submissions, thin market challenges include:

    - '*Low client numbers (or difficulty finding/connecting with clients that are in a region), and/or highly dispersed clients result in higher per-client costs than can be supported under existing NDIS staff utilisation';* and
    - areas where '*providers have said there is not enough participant demand to support them to maintain a trained, skilled workforce*' and that thin market challenges '*not only present barriers to new providers entering the NDIS, they may also constrain the ability of current providers to deliver services'*.

29. As outlined in our earlier submissions, potential responses to thin markets are identified in the Thin Markets Project discussion paper as including 'market facilitation, market deepening, regulation, and alternative commissioning models'.[17] Irrespective of the approach taken by the Department, it is apparent that the market will continue to evolve (with an unknown degree of intervention) at least in the next few years, and is far from 'settled'.

30. It is also noted that the NDIS has not yet been fully rolled out, and that the composition of the NDIS market and labour market has evolved throughout its transition. To this point, we refer to our submissions of 22 May 2019 at [32]-[33].

31. Various government initiatives, including the thin markets project, contribute to the current evolutionary, uncertain, and complex nature of the industry and market, which is by no means 'settled' or 'matured'.

32. In the current state of the industry, unfunded increases in wage costs are likely to have negative effects on employment and services.

Submissions in Reply

Overtime for part-time employees working additional hours (HSU)

33. The HSU seeks to vary Clause 28.1(b)(iii) to require all time worked by part-time employees which exceeds hours agreed in 10.3(c) to be treated as overtime and paid at the rate of time and a half for the first two hours and double time thereafter.

34. The Award currently provides under the heading of Clause 28.1 – Overtime rates, and sub-clause 28.1(b) – Part-time employees and casual employees:

> ***(i)*** *All time worked by part-time or casual employees in excess of 38 hours per week or 76 hours per fortnight will be paid for at the rate of time and a half for the first two hours and double time thereafter, except that on Sundays such overtime will be paid for at the rate of double time and on public holidays at the rate of double time and a half.*
>
> ***(ii)*** *All time worked by part-time or casual employees which exceeds 10 hours per day, will be paid at the rate of time and a half for the first two hours and double time thereafter, except on Sundays when overtime will be paid for at the rate of double time, and on public holidays at the rate of double time and a half.*
>
> ***(iii)*** *Time worked up to the hours prescribed in clause 28.1(b)(ii) will, subject to clause 28.1(b)(i), not be regarded as overtime and will be paid for at the ordinary rate of pay (including the casual loading in the case of casual employees).*

[17] https://engage.dss.gov.au/wp-content/uploads/2019/04/Thin-Markets-Project-Discussion-Paper-2019-04-05.pdf

Reply to HSU contentions concerning the Modern Awards Objective – s134(da)

35. In support of their claim, the HSU argue '*the overtime functions under the Award do not meet the Modern Award objective, which recognises (at s.134(da)), the need to provide additional remuneration for employees working overtime; or employees working irregular or unpredictable hours'*. AFEI disputes this contention for several reasons, as outlined below.

36. ***Firstly,*** the Award clearly already provides additional remuneration for part-time employees who perform overtime. This is outlined in Clause 28.1(b)(i) and (ii) above.

37. ***Secondly,*** it is also clear from the text of the Award that it does not regard the hours worked by a part-time employee up to 38 per week/76 per fortnight, or 8 per day, as overtime. This is expressed in unequivocal terms at clause 28.1(b)(iii).

38. ***Thirdly,*** it is apt to point out that s134(da) does not amount to a statutory directive that modern awards must provide additional remuneration for employees working overtime. This was observed both in the Award Flexibility Decision, and subsequently in the Penalty Rates Decision.[18] Rather, Section 134(da) is but one consideration to be taken into account, along with a number of other considerations to be taken into account in s134, in the Commission's task of ensuring that the modern award provides a 'fair and relevant minimum safety net'.[19] s134(da) therefore does not amount to an imperative to make the variation sought by the HSU.

39. ***Fourthly,*** there are relevant provisions in the Fair Work Act and the Award which address any adverse consequences arising due to working overtime. Section 62(2) gives an employee a right to refuse to work additional hours 'if they are unreasonable'. The criteria for determining whether additional hours are reasonable or unreasonable are set out in s.62(3).[20]

40. ***Fifthly,*** any claim in reliance on the relevance of s134(da) would require probative evidence in support of a merit argument addressing the circumstances of employers and employees in the industries covered by this Award. The HSU evidence is, however, insufficient to make findings of substance on the circumstances of employees covered by the various sectors in the SCHADS industry. Observations may, however, be made that the HSU part-time employee witnesses appeared to suffer negligible inconvenience as a result of working additional hours. For example:

    a. The additional hours worked by Ms Wilcock and Ms Waddell were within their 'available hours';[21] and

    b. Ms Thames expressed that she is contracted to work a 'minimum of 20 hours a week'[22] and would 'like to have more hours'.[23]

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[18] Re 4-yearly review of modern awards – Penalty Rates [2017] FWCFB 1001 ('Penalty Rates Decision') [197]

[19] Penalty Rates Decision [196]

[20] See also discussion in the Penalty Rates Decision at [155]

[21] Statement of Pamela Wilcock at [4], Statement of Heather Waddell at [7].

[22] Statement of Thelma Thames at [9]

[23] Ibid

Reply to HSU contentions concerning a 'structural incentive to underestimate hours'

41. The HSU also argue in support of their claim that '*the absence of any penalty associated with the performance of such work creates a 'structural incentive to underestimate the hours of work required of a part-time employee at the time of engagement and/or rostering'*.

42. To address this contention, the specific provisions of clause 10.3(c) and (e) are extracted below:

> ***(c)*** *Before commencing employment, the employer and* [part-time] *employee will agree in writing on:*
>
> ***(i)*** *on a regular pattern of work including the number of hours to be worked each week, and*
>
> ***(ii)*** *the days of the week the employee will work and the starting and finishing times each day.*
>
> ***(e)*** *The agreement made pursuant to clause 10.3(c) may subsequently be varied by agreement between the employer and employee in writing. Any such agreement may be ongoing or for a specified period of time.*

43. AFEI disputes the HSU's inference that employers and part-time employees in the industry should be reaching agreement on a higher quantum of hours as part of the regular pattern of work, at the time of engagement/rostering.

44. From a practical perspective, the regular pattern of hours agreed in Clause 10.3(c) should be hours which the employer can reasonably predict are needed as productive hours of work, and will be needed on an ongoing basis. This is in the circumstances that:

a. the employer is unable to vary the regular pattern of work without agreement from the employee in writing;

b. part-time employment is (by its nature) ongoing.

45. It is therefore reasonable and sensible for employers to be cautious in their predictions of hours of work that can be offered as a regular pattern of work on a permanent basis. Particularly due to fluctuation in service delivery requirements, which may be outside the employer's control, and in the circumstances that NDIS service fees are paid to the service provider on delivery of the service (rather than on service-booking).

46. It is also largely relevant that the regular pattern of hours fixed pursuant to clause 10.3 involves an agreement with the part-time employee. The part-time employee therefore has the prerogative to impose caveats in respect to the hours they will be required to present themselves for work on a regular basis.[24]

[24] Subject to s62 of the Act.

47. To the extent the Award permits employers some degree of prerogative in estimation of the regular pattern of part-time hours of work that may be offered on a permanent basis, this is consistent with the 'need to promote flexible modern work practices and the efficient and productive performance of work' (s.134(1)(d)). It is not an appropriate basis to vary the Award in the manner sought by the HSU.

48. It is also relevant to note that the Full Bench of the Commission rejected a claim from employers in the Part Time and Casual Employment Case for additional flexibility in relation to part-time employment, basing the decision (in part) on the existing ability to roster part-time employees to perform additional hours without incurring overtime rates:

> *'Second, we consider that the current provision as is applied in practice is reasonably flexible…clause 28.2(b)(iii) allows for part-time workers to work additional hours up to 10 in a day or 38 in a week or 76 in a fortnight without the payment of any overtime penalty rate, so there is a considerable capacity to assign additional hours that may arise at short notice to employees* ***without the cost exceeding what the NDIA price structure will allow.*** *The evidence showed that employees are generally willing to work such additional hours if it does not interfere with fixed private commitments'.*[25] [our emphasis]

49. If the Award were varied to include overtime rates for part-time employees working hours additional to those agreed in Clause 10.3(c), this would remove flexibility in the Award which the Commission has already identified as 'reasonable', and has acknowledged the relevance of existing provisions in meeting industry needs.

The impact of applying overtime rates to agreed additional hours up to 38 per week/ 76 per fortnight

50. AFEI also disputes the HSU's inference that overtime rates would result in an increase in hours agreed with part-time employees at the time of engagement/rostering. There is no evidence that the variation would result in part-time employees having any higher agreed/rostered hours if overtime provisions applied for hours worked in excess of those agreed in Clause 10.3(c).

51. It is plain that the variation would, however, result in substantially additional cost to employers for offering any additional hours to part-time employees, as compared to casual employees.

52. Significantly, under the NDIS an employer cannot recover the overtime cost of a part-time employee's additional hours.[26]

[25] Part Time and Casual Employment Decision [637]

[26] https://www.ndis.gov.au/media/1455/download

53. The variation would also have the effect that a full time employee and a part-time employee being entitled to substantially different pay without any difference in the quantity, quality or value of the work. For example:

a. A part-time employee with 20 agreed hours per week, would receive the equivalent of 55x the ordinary hourly rate for working 38 hours in a week.

b. It could even result in a part-time employee being entitled to a higher weekly pay for working less hours than a full time employee. A part-time employee with 20 agreed hours per week would receive the equivalent of 39x the ordinary hourly rate for working 30 hours in a week.

Such a result would be inconsistent with the modern awards objective to promote the efficient and productive performance of work.[27]

54. It would also impact the viability of offering part-time employment (or accepting requests for part-time employment) for those who would prefer reduced permanent hours due to family or other personal commitments, and serve as a further disincentive to offer additional hours to part-time employees. Such a result would also be inconsistent with the modern awards objective to promote social inclusion through increased workforce participation.[28]

Relevance of the increase in cost of part-time employment to the current workforce composition

55. In its submissions, the HSU identify that '*of the permanent workforce of disability support workers, part-time work is the dominant, and increasing, mode of employment*'.[29] In comparing the proportion of part-time employment to casual employment, however, casual employment remains the preferred mode of employment overall in the industry.[30]

56. In its 2017 Part Time/Casual Employment Decision, the Full Bench observed:

> *'…there remains considerable uncertainty as to how the NDIS will operate and what will be the pattern of service demand from participants once the NDIS is fully implemented. We consider it to be likely that this uncertainty is a major reason for the current degree of preferment for casual employment, and that once the NDIS has been fully implemented and its operation becomes more certain and stable, part-time employment will be maintained as a substantial feature of the workforce.'*

[27] s134(1)(d)

[28] s134(1)(c)

[29] HSU submissions at [12]

[30] Fair Work Commission Survey analysis of the *Social, Community, Home Care and Disability Services Industry Award 2010* June 2019, p7

57. Since the 2017 Part Time/Casual Employment decision, there has remained considerable uncertainty in the NDIS market. Most significantly, the NDIS has not yet been fully implemented. Further uncertainty in the pattern of service demand in the NDIS industry was highlighted in our submissions of 22 May 2019 at [35]-[37].

58. The continued uncertainty in the industry and associated preferment for casual employment weighs against a decision that would increase the cost and regulatory burden of part-time employment and undermine the preferred course of establishing part-time employment as a substantial feature of the workforce.

In conclusion

59. The HSU:

a. does not make out a merit argument for the variation;

b. does not provide justification for removing a flexibility for employers in the Award which has been specifically acknowledged by the Full Bench in its 2017 Part-Time and Casual Employment Decision;

c. does not provide justification for the additional cost burden to employers that would arise as a result of the proposed variation;

d. particularly in circumstances where overtime costs are not recoverable, serve as a distinctive to provide additional part time hours;

e. proposes a variation that is not consistent with the modern awards objective;

f. is not supported by probative evidence, and should be rejected.

Claims for overtime after 8 hours per day (HSU)

60. The HSU further propose to vary the Clause 28.1(b)(ii) so that all time worked by part-time or casual employees which exceeds 8 hours per day, will be paid at the rate of time and a half for the first two hours and double time thereafter.

61. Clause 28.1(b)(ii) is under the heading '28.1 Overtime rates'. The provision thus signals to the reader that it deals with incidents of work which are overtime.

62. The Award's current provision of overtime becoming payable after 10 hours per day enables the facilitative provision in clause 25.1(b)[31] to have proper effect. So where an employee or majority of employees have reached agreement with their employer to work 10 ordinary hours in a day pursuant to clause 25.1(b), the hours up to 10 can be treated as 'ordinary hours'. This is important to maintain for several reasons:

a. ***Firstly***, by having the character of ordinary hours, they will attract superannuation for both part-time employees and casual employees;

b. ***Secondly,*** by having the character of ordinary hours, they will attract annual leave accruals;

c. ***Thirdly,*** by having the character of ordinary hours, they can be part of a part-time employee's regular pattern of hours, and can be relied on by the employee as a predictable source of income, and can be relied on by the service provider (employer) and client as predictable hours of the employee's availability;

d. ***Fourthly,*** if the ninth and tenth hours were not ordinary hours, then this result would undermine the agreement reached pursuant to 25.1(b).

63. The HSU evidence is gravely insufficient for the Commission to make any findings about the overall impact of the current provisions on employees covered by the SCHADSI Award, this is particularly so as:

a. The evidence referred to in respect to this claim is limited to two support workers.[32] Such evidence would be insufficient for the Commission to make any findings about the overall impact of the current provisions on a single workplace let alone an entire sector, let alone an entire industry;

b. The HSU rely on a reference to the nature of providing 'personal or domestic assistance for elderly clients or clients with a disability';[33] whereas the SCHADSI Award covers a wide range of other occupations.[34]

64. One relevant observation which may be made about the union evidence includes that a number of witnesses expressed the desire to work more hours[35].

65. If the proposed variation were made, it would also shorten the period of client care that could be available for the same price. This is a particularly undesirable outcome for NDIS participants who may already face high risk of supply shortage, including those in outer regional, remote or very remote areas, those with complex needs, or have acute care needs such as in crisis situations.

66. For the reasons outlined above, the claim should be rejected.

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[31] Clause 25.1 corresponds with clause 13.1(b) in the Exposure Draft as at 15 March 2019. The Exposure Draft at Clause 7.2, lists 13.1(b) as a facilitative provision.

[32] HSU Submissions at [47]

[33] HSU Submissions at [47]

[34] SCHADSI Award, Schedule B

[35] See for example statements of Thelma Thames at [9], Deon Fleming at [17], Trish Stewart at [11]

Minimum engagement periods – (HSU) S10

67. The HSU has made a claim for a minimum engagement period of 3 hours for all employees covered by the Award.

68. The HSU minimum engagements claim affects casual employees, part-time employees, and full-time employees in all sectors of the Award.

69. Some observations may be made about the implications of this claim, which are relevant across casual, part-time and full-time employment. These include:

    a. the variation could have the result that an employer would be liable to pay an employee for hours during which no productive work is being performed, particularly in circumstances where the service requirement is set by the client; or,

    b. diminish the services offered to, for example, NDIS participants where services required are less than the proposed minimum engagement of 3 hours.

Claim for 3 Hour Minimum Engagement – Part Time Employees

HSU evidence

70. Contrary to the HSU submission[36], its evidence does not establish that it is '*commonplace within the industry for employees to be "rostered" to perform very short shifts – sometimes less than an hour…'*. The following observations can be made about the HSU evidence in respect to this claim:

    a. The HSU lay witness evidence relied on includes that of several union officials, 3 part-time employees, and three statements from persons whose names and employers are not given. This volume of evidence is gravely insufficient to establish any indicative industry practices.

    b. The evidence of HSU union officials and Ms McDonald, to the extent it deals with shift lengths is hearsay, has little probative value, and should not be given any weight.

    c. In respect to Social and Community Services sectors of the SCHADSI Award (other than disability services) affected by the claim, such as migrant support services, youth support services, Aboriginal and Torres Strait Islander support services, and others, there appears to be no evidence apart from HSU union officials.

    d. In respect to the Family Day Care stream of the SCHADSI Award, which is also affected by this claim, there appears to be no evidence at all filed by the HSU.

    e. The SCHADSI Award does not apply to any of the named part-time employee witnesses relied on by the HSU[37], as they are all covered by enterprise agreements. Evidence about the length of shifts or periods of work performed by those employees pursuant to an enterprise agreement is irrelevant to these proceedings.

[36] Para [29]

[37] Ms Waddell, Ms Thames, and Mr Lobert

f. The subject matter of Ms McDonald's co-authored article (attached to her statement), is limited in scope to disability support workers. Whereas the 'industry' covered by the SCHADSI Award includes not only other sectors, but also different types of workers in the disability services sector. The article further acknowledges:

   i. '*The 10 DSWs cannot be seen as representative of all DSWs working under the NDIS*'

   ii. '*It is not possible to generalise from the experiences of this small sample…*'

Relevant Award History

71. In Part 10A Award Modernisation, it was brought to the AIRC's attention that there existed minimum engagement periods for part-time employees in some pre-modern awards, and no minimum engagement periods for part-time employees in others.[38]

72. Subsequent to Part 10A Award Modernisation, the absence of a minimum engagement period for part-time employees in the Award was taken into account in a decision by VP Watson in the 2-yearly transitional review, to insert the requirement to agree on a regular pattern of part-time hours. VP Watson stated at [20]:[39]

> ***[20]*** *That part of the application seeking a requirement that part-time arrangements be agreed in writing prior to commencing employment is a common award provision. It requires employees to be given clear information as to the basis of their employment when they are engaged. I consider that the case for such a clause is strong, <u>especially when there is no award minimum engagement period</u>*' [our emphasis].

73. Further, in the Part Time and Casual Employment Decision, the Full Bench again considered the absence of part-time minimum engagement periods in the Award 'most important' in its determination of whether there ought to be variation to the Award safety-net in relation to part-time employment conditions. This is evident at [635] and [638] of the Decision (emphasis added by AFEI):

> *[635] We are not satisfied at this time, having regard to the various matters specified in s134(1), that the new provision proposed by ABI and supported by Jobs Australia is necessary to achieve the modern awards objective. We have reached this conclusion for the following reasons.*
>
> …
>
> *[638] <u>Most importantly, the SCHADSI Award does not contain any requirement for a minimum number of hours' work per week, nor (unlike the current provisions in the Hospitality Awards) does it provide for any minimum hours per day.</u> This latter aspect of the award was emphasised by Vice President Watson in his 2013 decision which added the current clause 10.3(c), in the passage we have earlier set out. <u>That means that the agreed pattern of hours for a part-time employee can encompass short periods of service, which a number of the employer witnesses envisaged would be an increasingly common feature of the NDIS service model…</u>*

[38] AM2008/24, AFEI Submissions, 24 July 2009

[39] [2013] FWC 4141 at [20]

74. The history of the Award demonstrates that the absence of a part-time minimum engagement period has been treated as a flexibility to employers which balances other restrictions on part-time employment, particularly those in clause 10.3(c) of the Award.

75. The absence of a part-time minimum engagement period is thus an important feature of the Award's safety-net and should not be disturbed without flexibility gains for employers. To do so would result in a safety net which is not fair to employers. As flexibility gains for employers are not part of the HSU proposed variation, the claim should be rejected.

Implications of the claim

76. We refer to our submissions above at paras. 19 and 32 concerning implications of the cost of the claim generally.

77. We further refer to our submissions above at paras. 55—58 concerning the impact of increasing costs associated with part-time employment in this Award.

78. As outlined above, the HSU has not established a merit case for the inclusion of a minimum engagement period for part-time employees, supported by evidence. The proposed variation would also unnecessarily disturb the Award's safety net, and would involve additional cost/reduced flexibility for employers. The proposed variation could also have an adverse impact on service delivery. The claim should therefore be rejected.

Minimum Engagements – Casual Employees

79. The HSU seeks to vary the minimum engagement periods provided for casual employees in Clause 10.4(c) of the Award.

80. This would result in a change to the casual minimum engagement periods as follows:

Sector	Current minimum engagement	HSU Proposed variation	Increase proposed by HSU
Home care employees	1 Hr	3 Hrs	2 Hrs
Disability services work	2 Hrs	3 Hrs	1 Hr
Family day care scheme sector	2 Hrs	3 Hrs	1 Hr

81. In support of their claim, the HSU argue that the question of minimum engagement periods did not receive any systematic consideration in the award modernisation process.[40] AFEI disputes this contention particularly in relation to casual employment. The HSU's claim rather re-agitates a matter that has already been given due consideration by the AIRC Full Bench during Part 10A Award Modernisation.

[40] HSU submission at [25]

82. In fact, the first exposure draft for the SCHADSI Award during Part 10A Award Modernisation included a 3hr minimum engagement period for all casuals in all sectors.[41] In response, various parties including AFEI, made submissions to the AIRC, raising the differences in minimum engagement periods across pre-modern awards in the various sectors to be covered by the Award, and arguing the need to maintain casual minimum engagement periods that were relevant to the industry.

83. In respect to the Social and Community Services Sector, the NSW *Social and Community Services Employees (State) Award,* covering both disability work, and other social and community services work, had a casual minimum engagement of 2 hours.

84. In respect to the Home Care sector, the majority of pre-modern awards provided for a minimum casual engagement of 1 hour or less:

Casual Minimum Engagement	**Instrument**
1 hour	*Miscellaneous Workers Home Care Industry (State) Award [NAPSA – NSW]**
	Attendant Care – Victoria Award 2004
	Community Services (Home Care) (ACT) Award 2002
	*Community Services (Home Care Service of New South Wales) Care Workers Award 2002 ***
No minimum engagement	*Home and Community Care Award 2001*

* For casual employees engaged other than Live-In house-workers

** For employees engaged in personal care services, and respite care services to personal care clients.

85. The AIRC also received comprehensive submissions on the rationale for a 1hr minimum engagement period in the home care industry.

86. The Full Bench of the AIRC, when making the SCHADSI Award, ultimately rejected the imposition of a sector-wide 3 hour minimum engagement period for casual employees, stating:

> '*The minimum period of engagement for casuals has been altered to take into account the different sectors of this industry.*'[42]

87. In the circumstances the AIRC has already given specific consideration to the history and needs of the relevant sectors covered by the Award in setting the casual minimum engagement periods, the current provisions should not be disturbed unless there is sufficient evidence of any change in the circumstances of the sectors or employees that would warrant departure from the current provisions.

[41] http://www.airc.gov.au/awardmod/databases/social/Exposure/social.pdf

[42] [2009] AIRCFB 945 at [83]

88. The HSU's direct evidence in relation to its proposal to vary the casual minimum engagement period claim only appears to include two statements from casual employees, one in disability services, and the other in home care. Such limited evidence would be insufficient to give the Commission a proper indication of a single workplace let alone an entire sector, let alone a number of sectors covered by the Award. Furthermore, the HSU has not filed any evidence in respect to its proposal to vary the casual minimum engagement period for the Family Day Care Scheme Sector from 2 hours to 3 hours.

89. Such limited evidence does not assist the Commission in its review of minimum engagement periods for casual home care employees, casual disability services employees, or casual family day care scheme employees.

90. The HSU has not established a merit case for variation to the casual minimum engagement period, and any such variation would unnecessarily disturb arrangements in the Award which have been prescribed specifically for particular industries. The variation would involve increased cost/reduced flexibility for employers, and could also have an adverse impact on service delivery. The proposed variation should therefore be rejected.

Minimum Engagements – Full Time Employees

91. The HSU's proposed minimum engagement period of 3 hours would also apply to full-time employees. AFEI objects to this.

92. In support of their claim, the HSU refer to the rationale for minimum engagement periods as outlined in the 2017 Casual and Part-Time Employment Case.[43] It is clear, from the fact that most modern awards do not include full-time employment minimum engagement periods, that this rationale has nominal relevance to full time employees.

93. The HSU argues in support of their claim that '*it is commonplace within the industry for employees to be 'rostered' to perform very short shifts*…'. This contention cannot, however, be accepted by the Commission on the evidence which has been filed by the HSU. The HSU has not, however, filed any evidence of full-time employees identifying the length of shifts undertaken by them in order to establish what is/ is not commonplace for this mode of employment.

94. Further reasons for rejecting this claim include:

    a. There is no evidence of employers in the industry unnecessarily rostering full-time employees for very short shifts.

    b. Contrary to the circumstances of a casual employment generally (which is by the hour), a person in full time employment will not receive any less pay for working a short shift. Rather, a full time employee will receive 38 hours' pay each week[44] irrespective of whether they work short shifts or not.

[43] HSU Submissions at [23]

[44] Unless the person's hours are averaged over a fortnight/4-week period, in which they will receive 76 hours' pay every fortnight, or 152 hours' pay every month.

c. If a short shift is worked by a full-time employee, they will still have the balance of their full-time hours available to them, which will need to be structured in rostered shifts that comply with the maximum shift length provisions in Clause 25.1.

95. The HSU has not established a merit case for inserting a full-time minimum engagement period in this Award, and has produced no probative evidence in support of this aspect of its claim. For the reasons outlined above, the proposed variation should be rejected.

Rosters (United Voice)

96. The United Voice propose to vary clause 25.5(d)(i) so that full time and part-time employees will be entitled to payment of overtime for roster changes where seven days' notice is not provided.

97. As the United Voice do not propose to vary clause 25.(d)(ii), (iii), or (f), there would appear to be only four circumstances where this variation would have application, these being:

a. Where a full-time employee's roster has been changed with less than 7 days' notice by agreement to include hours that are different, but not additional to their original rostered hours;

b. Where a part-time employee's roster has been changed with less than 7 days' notice by agreement, to include hours that are different, but not additional to their original rostered hours;

c. Where a full-time or part-time employee's roster has been changed with less than 7 days' notice to include hours that are different, but not additional to their original rostered hours, without the employee's agreement; and

d. Where a part-time or full-time employee's hours have been changed with less than 7 days' notice to include hours that are additional to their original rostered hours without the employee's agreement.

98. In respect to the first two circumstances, it would be highly inappropriate that the Award impose an overtime rate for variation to rostered hours where the change has been made by mutual agreement between the employer and the employee. In respect to this, we refer to our submissions in support of the ABL proposed variation to clause 25.5(d).

99. In respect to the third circumstance, the United Voice states '*the Award does not explicitly identify what the consequence is for the employer for failing to provide seven days' notice of a roster change in a situation where the exceptions in clause 25.5(d)(ii) and (iii) do not apply'*. There is, however, no requirement that an Award specify the consequences for non-compliance with a particular term. There is further, no imperative in the Fair Work Act to impose a penalty provision in the Award to address non-compliance. The implications of non-

compliance with Award terms is sufficiently addressed in Chapter 4 of the *Fair Work Act 2009*. The Act also provides:

a. rights and protections to employees so that issues of non-compliance with Award terms can be raised without adverse action taken against them;

b. union rights of entry for investigation of non-compliance;

c. Fair Work Ombudsman powers of investigation of non-compliance;

d. standing of employees, and unions to seek legal redress for non-compliance with an Award; and

e. powers of the Fair Work Ombudsman for compliance enforcement.

100. The United Voice evidence does not address the extent to which any of the avenues already available under the Act to address non-compliance have been exhausted unsuccessfully, prior to seeking variation to the Award to impose further regulation. Additional regulation in such circumstances is inappropriate, particularly taking into account the modern awards objective at s134(f) to take into account the impact of the regulatory burden.

101. Further in respect to the first three circumstances, if a roster change with less than 7 days' notice attracted overtime rates of pay, this would result in uncertainty ascertaining which hours are overtime and which are ordinary hours. This would also have implications for identifying which hours attract superannuation and leave accruals, and could result in uncertainty in determining whether a person had been provided with their full weekly/fortnightly ordinary hours pursuant to any contractual arrangements.

102. In respect to the last circumstance, an employer may require an employee to work reasonable additional hours in accordance with s62 of the Act. The Act already directly addresses the adverse consequences associated with working additional hours by providing a right to refuse to work unreasonable hours. The criteria for determining whether additional hours are reasonable or unreasonable are set out in s62(3) and include the employees personal circumstances,[45] whether the employee is entitled to receive overtime payments,[46] the needs of the workplace or enterprise in which the employee is employed,[47] the nature of the employee's role[48], and the usual patterns of work in the industry in which the employee works.[49]

103. In support of the proposed variation, the United Voice rely on the evidence of Ms Sinclair. The roster changes referred to in Ms Sinclair's statement at [23] appear to largely involve the working of additional hours. Ms Sinclair claims that '*[I] am concerned that if I complain or don't accept additional hours, I will be rostered less.*'. This is, however, at odds with her statement that she '*need*[s] *the hours'.*[50]

[45] s62(3)(b)
[46] s62(3)(d)
[47] s62(3)(c)
[48] s62(3)(h)
[49] s62(3)(g)
[50] Statement of Belinda Sinclair at [26]

104. The United Voice's argument is not supported by probative evidence, and does not provide a basis for the Commission to conclude that the proposed variation is necessary in order for the Awards to achieve the Modern Awards Objective. The proposed variation would, however, result in unnecessarily high regulatory restraints and costs associated with achieving mutually suitable working arrangements with employees, as well as uncertainty for employers and employees in determining entitlements. The proposed variation should therefore be rejected.

Broken Shifts (HSU, United Voice and ASU)

105. The HSU seek to restrict broken shifts in three ways, as outlined at [39] of their submissions:

a. that the shift may only be broken once and not multiple times;

b. that the minimum period of engagement should be applied to each period of work in a broken shift; and

c. that the employee is paid, as if working, for the time necessary to travel between clients required to be undertaken during any break in the shift.

106. In respect to the HSU claim, AFEI will address the first two proposed changes in these submissions, and address the claim concerning time in travel in conjunction with submissions in reply to the Union claims concerning travel time.

107. The United Voice seeks to vary the Award so that shift allowances are determined by 'the starting or finishing time' of the broken shift, and so 'the maximum number of broken shifts which can be worked per day is two'.

108. The ASU seeks to include a 15% loading for employees working broken shifts, payable for each hour of the broken shift from commencement of the shift to conclusion of the shift inclusive of all breaks.

109. Relevant to all the union claims, is the fact that broken shift provisions as they currently stand, were inserted into the Award to specifically address the needs of the disability services and home care industries. This is evident in:

a. the terms of the Award, by limiting operation of the broken shift provision to the social and community services employees performing disability work, and home care employees[51]; and

b. submissions made to the AIRC during Award Modernisation proceedings for the SCHADSI Award about the operational requirements of the industries.[52]

[51] Clause 25.6

[52] See for example, oral submissions in transcript of proceedings, 5 November 2009, at pn3118, and pn1375

The number of breaks in a broken shift

110. In respect to Broken Shifts, the Award currently provides at 25.6(a) that '*a broken shift means a shift worked by an employee that includes one or more breaks (other than a meal break) and where the span of hours is not more than 12 hours'*.

111. It is clear on the Award terms, that the broken shift provision was specifically intended to allow employers the ability to roster an employee for a broken shift which contains more than one unpaid break. If this was not intended, the words 'or more' would not have been included in the provision.

Minimum engagements in a broken shift

112. The proposed variation to require the minimum period of engagement to apply to each period of work in a broken shift is not appropriate for the relevant sectors. This is particularly so in the context of the HSU's claim to increase the minimum engagement period for home care employees from 1 hour to 3 hours.

113. In the Part 10A Award Modernisation process, the AIRC heard the following oral submissions from AFEI concerning one example of the industries' difficulties with applying minimum engagement periods to incidents of work during a broken shift:

> [PN3118] *… Firstly, where in a small community there is one person requiring assistance, assistance to get out of bed, attend to personal matters and get the person ready for the day ahead whatever that might be and that may take an hour, it might take a bit more than an hour.*
>
> [PN3119] *Then that same person in reverse needs to have that whole process reversed at the end of the day to get the person back to bed. If the employer is required to pay a three hour minimum on each one of those staff that's clearly inequitable because the work that's required is significantly less than three hours. The other circumstance is where you may have two or three people in the same community who all require to get out of bed at a certain time and it might be the same time and have all the same processes completed and at the end of the day the same process is completed again. To have one or three people paid three hours for each shift is once again clearly inequitable and it's unable to roster a person to say well, we will use your full three hours, we'll use your full three hours dealing with the three people in the morning and three people in the evening.*
>
> [PN3120] *The trouble is that you have a person then dealt with at 8 o'clock, another person dealt with at 9 o'clock and another person getting out of bed at 10 o'clock and…we say that that needs to be attended to in this award as a unique and critical issue in this award.*

114. The example above of work being required at the start and end of the day is also consistent with the statement of ASU witness Mr Rathbone, concerning his rostering.

115. If the variation to prevent broken shifts from having multiple breaks is made, then this would inevitably have the result of broken shifts finishing earlier (i.e. the shift would need to end once work is completed on the second side of the break). An employer would then be unable to roster the employee for a further shift until the expiration of an additional 10 hours in accordance with the need to provide rest breaks between shifts in Clause 25.4.

The proposed variation could therefore result in inconvenience to employees as:

a. The variation to prevent multiple breaks would limit the amount of remuneration an employee is able to earn over the same span of hours; and

b. Part-time employees wishing to maximise the number hours they work within their available hours may experience longer periods of time during which the employer is prevented from offering them available work, due to the mandatory 10hr rest break.

Shift loading determined by starting or finishing time of the broken shift

116. Currently, the Award stipulates that the shift allowance applicable to a broken shift is determined by the finishing time of the broken shift. The application of shift penalties to broken shifts has already been varied since the Award was made, as part of the 2-yearly review of the SCHADSI Award.

117. When the Award was made, Clause 25.6(b) stated: '*Payment for a broken shift will be at ordinary pay with penalty rates and shift allowances in accordance with clause 29—Shiftwork, with shift allowances being determined by the* ***commencing time*** *of the broken shift*.' [emphasis added].

118. A union proposal to vary the Award provision in the 2-yearly review, followed by a conference convened by the Commission, led to a determination by consent issued by SDP Kauffman, to replace the previous Clause 25.6(b) with the current provision, which states '*Payment for a broken shift will be at ordinary pay with penalty rates and shift allowances in accordance with clause 29—Shiftwork, with shift allowances being determined by the* ***finishing time*** *of the broken shift."*[53] [Our emphasis].

119. As the provision determining shift penalties to apply to broken shifts has already been the subject of consideration through Commission-based conferencing, and drafting by the consent of the parties, the position should not be departed from unless there has been a material change in circumstances since that time.

120. Since the 2-yearly review, there has been no material variations to the broken shifts provisions or the shift penalties provisions that would justify departure from the approach taken at that time. There is thus no basis to justify the variation, and the claim should therefore be rejected.

[53] 21 Nov 12 PR531544

15% loading

121. The ASU's proposed inclusion of a 15% loading on broken shifts could be expected to have a number of unnecessary and unwarranted adverse impacts, discussed below.

122. For service providers who operate predominantly in disability support/home care, the cost impact of a 15% increase generally would be significant. We refer to our submissions above concerning the serious difficulties for employers, and potential negative effects on employment and service provision where there are increased wage costs without commensurate increases in funding. Taking into account s134(1)(f) of the modern awards objective, the proposed variation would not result in a fair and relevant safety net for employers, and should be rejected.

Conclusions – broken shifts

123. Each of the unions' claims in isolation could be expected to have unnecessary adverse consequences. The combination of multiple and overlapping claims could be expected to have very serious adverse consequences including:

a. increased costs for providers offering discrete incidents of disability support/home care services, and depending on funding arrangements, increased costs to vulnerable clients often dependant on such services;

b. disruption to and/or reductions in services including the times services are available to clients who only require short periods of support at varying times of the day, to maximise independence and choice;

c. potentially, and undesirably, multiple carers providing services to the same client on any one day; and,

d. potentially less hours of work available to individual employees.

124. The limited nature of the union evidence in these proceedings does not provide a basis for factual findings about the relevant industry service needs nationally (including in areas with varying degrees of supply/demand for particular services), how services and broken shifts are structured in the industry nationally, or the impact of broken shifts on award-covered employees. As a result, there is no supported basis to justify departure from the current Award terms.

125. Without a merit basis in support of the proposed variations, and given the potential adverse impacts to employers and service delivery, the Commission cannot be satisfied that the variations would result in a safety-net that only includes terms to the extent necessary to meet the modern awards objective. The claims should therefore be rejected.

Recall to work (HSU)

126. The HSU seek to vary the recall to work provisions to require that an employee be paid for a minimum of one hours' work at the overtime rate for each time *an employee is required to perform work from home after leaving the employer's or a client's premises, including:*

i. Responding to phone calls, message or emails;

ii. Providing advice ('phone fixes')

iii. Arranging call out/rosters of other employees; and

iv. Remotely monitoring and/or addressing issues by remote telephone and/or computer access;

127. AFEI objects to the variation sought.

128. The proposed variation improperly characterises the circumstances under which a person is performing work as a 'recall' as the circumstances described in (i)-(iv) of the proposed variation do not involve any *return to a place.* The proposed provision presupposes that the employee had been performing work at the employer's premises or a client's premises, and then goes home. Work subsequently performed at home does not meet the ordinary meaning of a 'recall,' that is '*a person who is recalled is summoned to return to a place in a manner where there is a requirement for the person to return*.'[54]

129. Taking into account the rationale for minimum engagement periods generally,[55] there is no basis for imposing a minimum payment of one hour for responding to a phone call, remotely addressing issues by computer access, or performing any of the other duties identified in (i)-(iv) of the HSU's proposed variation when the individual is at their home, and is not required to leave their home, and where the individual:

a. Is not inconvenienced by losing any time associated with travelling to the employer's premises to perform the work then return and back home again;

b. Is not incurring the expense of unpaid travel to another location in order to perform the work, and then return home again; and

c. Is not expected to wear work clothes, or change into a work uniform.

130. Unlike the balance of Clause 28.4 of the Award which applies to when an employee is recalled to work an employee recalled to work *overtime,* the proposed provision would appear to impose the minimum payment at overtime rates for work performed that does not necessarily involve overtime (pursuant to clause 28.1). This would have the inappropriate implication of work performed as ordinary hours from home attracting a substantially higher rate of pay than work performed as ordinary hours at the employer's premises or a client's premises.

[54] [2018] FWC 4334 at [59]

[55] HSU Submissions at [23]

131. There is no evidence from the HSU that the work identified in (i)-(iv) would require 1 hour of work. It is more likely, that individual incidents of such work would take substantially less than 1 hour, and could be as short as 5 minutes to respond to a phone call or message. This could have the result that a person who spends a total of 15 minutes on the phone, by taking three 3 x 5 minute calls, could be entitled to 3hrs' pay at overtime rates. That is, the equivalent of 5 hours' pay, for 15 minutes' work. Such an outcome would result in an employee being paid an amount that is extremely disproportionate to the work performed. This would not result in a fair safety net for employers.

132. There are various other aspects of the proposed provision which would cause it to be unfair to employers. These include,

a. While the proposed provision expresses that the employee would need to be 'required' to perform work from home, it does not specify who/from where the 'requirement' arises. An employee might claim an entitlement under this provision for working from home where they have self-determined that they are required to perform the work, where this has not been authorised by the employer; and

b. The provision does not require the employee to provide any evidence of the time undertaken in performing the work from home, or the extent of work that was performed.

133. For the reasons outlined above, the claim should be rejected.

Client cancellation (HSU)

134. As part of the Commission's review of the client cancellation provisions, it will be taking into account proposals to vary the provision from ABL (including on behalf of ABI, NSWBC, ACSA and LASA), as well as from the HSU.

135. In consideration of these competing claims, the Commission should prefer the proposed variation submitted by ABL (including on behalf of various other employers). AFEI relies on its submissions of 3 July 2019 in respect to that claim.

Telephone allowance (United Voice, HSU)

136. The HSU and United Voice both seek to vary Clause 20.6 of the Award, in respect to the telephone allowance.

137. The HSU seeks to replace the current provision so that it states:

> *Where the employer requires an employee to use a mobile phone for any work-related purpose, the employer will either:*
>
> *a. Provide a mobile phone fit for purpose and cover the cost of any subsequent charges; or*
>
> b. *Refund the cost of purchase and subsequent usage charges on production of receipts.*

138. The United Voice seek to vary the current provision so that it states: *Where the employer requires an employee to install and/or maintain a telephone* ***or mobile phone*** *for the purpose of being on call* ***or to access work related information****, the employer will refund the installation costs and the subsequent rental charges on production of receipted amounts.*

139. For ease of reference, the current Award provision is extracted below:

> '*where the employer requires an employee to install and/or maintain a telephone for the purpose of being on call, the employer will refund the installation costs and the subsequent rental charges on production of receipted amounts.'*[56]

140. Some important observations can be made about the current provision. ***Firstly***, it only applies where an employee is required to install/maintain a phone for being on call. This is a very specific and discrete set of circumstances. Insofar as it is limited to on-call, this involves a period of time when the employee is *'required to be available for recall to duty in respect to any 24hr period or part thereof during the period from the time of finishing ordinary duty on Monday to the time of finishing ordinary duty on Friday*.' It is clear that this is in reference to a telephone at the employee's place of residence. ***Secondly,*** it does not require an employer to cover the cost of purchase for a phone.

141. A similar claim was made by the United Voice and HSU in the 4-yearly review of the Aged Care Award 2010, heard earlier this year. In the course of those proceedings, it became apparent that the proposed variation would impose costs on employers to cover phone/rental charges where overwhelmingly, the workforce already owned a personal mobile phone.[57]

142. The breadth of the proposed extension to the current provisions is therefore significant and requires a merit argument with probative evidence demonstrating the relevant facts. The HSU and United Voice have not, however, established such a basis for variation.

[56] Clause 20.6

[57] See in particular, transcript at PN182-PN194

143. Where an employer has not provided a mobile phone, the HSU's proposed variation would allow an employee to seek reimbursement for the cost of their personal mobile phone, even where:

a. the employer does not assume any property rights in the mobile phone, notwithstanding that they have paid the full cost of it; and/or

b. work-related usage of the phone does not result in any expense to the employee that is additional to their personal expenses;

The HSU does not make out a merit basis for imposing such costs on employers.

144. In relation to rental charges for matters unrelated to on-call, the HSU and United Voice proposed variations do not limit reimbursement of charges to those incurred for performance of work only. An employee could therefore incur charges (or use credit from available data on a plan) on a mobile phone due to personal use away from work, and utilise an employer's Wi-Fi when using the mobile phone at work (without using any of the mobile phone plan's data allocation), and still claim reimbursement of rental charges for the phone. Imposing rental charge costs on an employer in these circumstances would not be fair or relevant for employers, and would be inconsistent with the modern awards objective.

145. Both the HSU and the United Voice propose to extend the circumstances in which an employee will be eligible for a telephone allowance. The HSU proposes that the allowance apply to use of a mobile phone '*for any work-related purpose.*' The United Voice proposes that the allowance apply in circumstances of on call and '*to access work-related information*.' Notably:

a. The HSU provide no definition or scope for 'any work-related purposes.' Such words could therefore be open to wide interpretation. For example, 'work calls' can be taken to mean anything including an employee's call because they are sick, will be late for work, train delays etc. Such 'work' calls places an obligation on employers that is simply not fair nor relevant, and is thus inconsistent with the modern awards objective;

b. In support of their claim, the United Voice relies on statements from witnesses that rosters are provided by their employer via their own mobile phone. Communication between an employer and an employee about the hours in which they will be rostered for work does not involve the performance of work, but are rather steps taken by an employee to ensure they are ready, willing and able to work. Imposing such costs on employers is not fair nor relevant, and is also thus inconsistent with the modern awards objective.

146. For the reasons outlined above, the HSU and United Voice proposed variations should be rejected.

Clothing allowance (United Voice, HSU)

147. The HSU and United Voice both make claims in respect to clothing allowance provisions. AFEI objects to these claims.

HSU – Uniform and Damaged Clothing allowance

148. The HSU proposes a 'damaged clothing allowance' as follows:

> *(i) Where an employee, in the course of their employment suffers any damage or soiling of clothing or other personal effects (excluding hosiery), upon provision of proof of the damage, employees shall be compensated at the reasonable replacement value of the damaged or soiled item of clothing;*
>
> *(ii) This clause will not apply where the damage or soiling is caused by the negligence of the employee.*

149. To the extent the proposed provision could require an employee to pay the replacement cost of an item that is 'soiled' but is nonetheless able to be suitably cleaned, the employee could claim compensation from their employer for the value of the item, and then clean the item themselves. In such circumstances, the employee could be receiving compensation where no loss has actually arisen.

150. The proposed provision does not require that the employee actually purchased the clothing which had become damaged or soiled, or even that the employee owned the clothing which had become damaged or soiled. In this way, the employee could seek payment to cover a cost that they have not even incurred themselves.

151. The provision would also appear to allow an employee to claim an uncapped amount of compensation for the replacement of clothing or personal effects. It is common-sense that an employee should bear their own risk for choosing to unnecessarily wear expensive items to work. An employer should not be liable for an employee's decision to unnecessarily wear expensive items to a job where there is a prospect of damage or soiling of those items. This would not result in a fair safety net to employers.

152. Whilst the proposed provision requires that the employee provide proof of damage (to the clothing or personal effects), it does not require that the employee provide evidence that the damage occurred during the course of the employment, and that it did not involve negligence of the employee.

153. The proposed provision appears to replicate a term in the Yooralla Allied Services Agreement. There is, however, no such term in any other Modern Award. To the extent an employer is prepared to agree to an allowance in respect to damaged/soiled clothing or effects, this is more appropriately addressed at the workplace level in enterprise bargaining.

154. The HSU has not established that the variation would result in an Award that only includes terms to the extent necessary in order to achieve the modern awards objective. Rather, the proposed variation would result in uncertainty, and inappropriate additional cost to employers.

155. For the reasons outlined above, the claim should be rejected.

United Voice– Variation to clothing allowance

156. The United Voice proposes to insert a new provision in clause 20.2, that '*an adequate number of uniforms should allow an employee to work their agreed hours of work in a clean uniform without having to launder work uniforms more than once a week.'*

157. The United Voice has not, however, made out a substantive case that the variation is necessary, or that the Award is not operating effectively without it.

158. In support of their claim, the United Voice rely on the sole evidence of Ms Sinclair. Ms Sinclair's evidence shows that, without the United Voice provision:

a. Ms Sinclair is a part-time employee, and was provided two uniform shirts at the commencement of employment.

b. Within two weeks of requesting additional uniform, Ms Sinclair employee was provided with an additional three shirts.

c. Notwithstanding the provision of uniforms, Ms Sinclair (who works five days each week) was also provided a uniform allowance, amounting to 10 x $1.23, that is, the equivalent of a uniform allowance for 10 shifts in the fortnight.

d. Ms Sinclair was also provided a laundry allowance each fortnight.

159. In the circumstances Ms Sinclair received a monetary uniform allowance which satisfied the current Clause 20.2(b), her evidence is not relevant to the United Voice's proposal to define 'adequate number of uniforms' for the purpose of Clause 20.2(a), and does not assist the Commission on this claim. Rather the evidence shows an example of an employer providing uniforms free of charge on request where this was not required, in circumstances where a uniform allowance is being paid.

160. For the reasons outlined above, the claim should be rejected.

Sleepovers

161. The HSU proposes to vary the sleepover provisions d at Clause 25.7(c) to include additional prescription of facilities to be provided to an employee when performing a sleepover. These include for example, a requirement for a 'lockable room with a peephole or similar in the door, a bed, and a telephone connection in the room'.

162. The current Award term already requires employees performing a sleepover to be provided with a separate room with a bed, use of appropriate facilities (including staff facilities where these exist) and free board and lodging for each night when the employee sleeps over.

163. The AIRC, in Award Simplification, undertook removing non-allowable matters from Awards, such as provisions relating to amenities considered to be overly prescriptive. For example, in The Hospitality Industry - Accommodation, Hotels, Resorts and Gaming Award 1995, the following provision was removed:

> *An employer shall provide a separate dressing room each for male and female employees, adequately lighted and ventilated with suitable floor coverings and floor space to be sufficiently roomy to accommodate all employees likely to use it at the one time; a table and adequate seating accommodation for staff to partake of meals, and lounge or settee and steel or vermin-proof lockers; adjacent thereto wash basins and showers with hot and cold water and toilets for staff use.*[58]

164. The approach taken by the AIRC reflects that the determination of which specific amenities should be provided for employees is more appropriately addressed at the workplace level rather than in Award prescription. This allows more individualised consideration of the circumstances in identifying amenity needs, such as the nature of the client's profile, the location at which the sleepover will be performed, the employee's level of training and skill, and other amenities already provided to the employee.

165. The HSU does not explain in it submissions any aspect of its argument for including such a substantial degree of prescription in the Award concerning facilities. The HSU say only '*the clause should be amended to ensure appropriate facilities are provided when employees are required to perform a sleepover shift*.'[59]

166. While it is anticipated that the HSU's concerns may be motivated by work, health and safety reasons, it is relevant that employers are already obliged to ensure, so far as reasonably practicable, the health and safety of its workers. If health and safety obligations are not met, there are avenues for reporting concerns to applicable State/Territory work health and safety regulators.

167. The Commission has not been provided with any basis to be moved to vary the Sleepover provisions of the Award. The claim is without merit and should be rejected.

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[58] Re Award Simplification, 1997 H0008 Dec 1533/97 M Print P7500

[59] HSU submissions at [73]