

## PART-TIME EMPLOYMENT

### TWO APPLICATIONS TO VARY THE PART-TIME EMPLOYMENT CLAUSE IN THE *SOCIAL, COMMUNITY, HOME CARE AND DISABILITY SERVICES INDUSTRY AWARD 2010, AWARD, AGED CARE AWARD 2010 AND THE NURSES AWARD 2010*

#### UNITED VOICE

#### AM2014/196

#### INTRODUCTION

1. This submission concerns variations proposed by Australian Business Industrial ('ABI') to the *Social, Community, Home Care and Disability Services Industry Award 2010* (the SCHDS Award') and by St Ives Group Pty Ltd ('St Ives') to the *SCHDS Award, Aged Care Award 2010* (the *Aged Care Award*') and the *Nurses Award 2010* (collectively: 'the Care Awards').
2. The variations seek to alter the substantive part-time work and rostering clauses of the Care Awards. The variations proposed by the employer parties depart from accepted minimum standards that are indicative of part-time employment and should not be agreed to.
3. The principal focus of this submission is the SCHDS Award and the Aged Care Award.

#### THE PROPER APPROACH TO THE APPLICATION

4. The proper approach to the review has been dealt with by United Voice elsewhere in these proceedings, we rely on those submissions.<sup>1</sup>
5. The employer parties seek to vary the Care Awards to increase the flexibility of part-time employment. In this review, the Commission must be satisfied that any variation to the Care Awards is *necessary* to achieve the modern award objectives.<sup>2</sup> Any case for change must be accompanied by probative evidence properly directed to demonstrating the merits of the variation.<sup>3</sup>

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<sup>1</sup> United Voice Submission dated 22 February 2016, [12]-[16].

<sup>2</sup> *Fair Work Act*, s 138.

<sup>3</sup> *Re Four Yearly Review of Modern Awards – Preliminary Jurisdictional Issues* [2014] FWCFB 1788, (2014) 241 IR 189 (***Jurisdictional Issues Decision***).

6. In the Jurisdictional Issues Decision, the Full Bench noted '*what is necessary in a particular case is a value judgment based on an assessment of the considerations in section 134(1)(a) to (h)*.'<sup>4</sup> To make that assessment, regard must be had to the submissions and evidence directed to those considerations.
7. Although the Commission is not bound by the rules of evidence, decisions should be based on *sound and probative evidence*. The Full Bench further stated:
 

a party seeking to vary a modern award in the context of the Review must advance a merit argument in support of the proposed variation' and that "where a significant change is proposed it must be supported by a submission which addresses the relevant legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation."<sup>5</sup>
8. Importantly, the Full Bench has found that: '*the more significant the change, in terms of impact or a lengthy history of particular award provisions, the more detailed the case must be*.'<sup>6</sup>
9. The Commission should proceed on the basis that *prima facie* the Care Awards achieved the modern awards objective at the time that they were made. Proponents of change must show that there is some material change in circumstances from time that the modern award was made that makes change necessary.<sup>7</sup> Such an approach is consistent with the provisions of Part 2-3 of the FW Act.

## **AWARD MODERNISATION**

10. The part-time employment clause in the *SCHDS Award* and *Aged Care Award* are largely identical. During award modernisation in 2009, awards dealing with health and welfare services (excluding social and community services) were dealt with together. The Commission expressly rejected part-time employment arrangements like those proposed by ABI and St Ives. The Full Bench stated (see [2009] AIRCFB 345):

*[147] There are a number of common features for the use of part-time employees. To begin, they must have reasonably predictable hours of duty. Underlying provisions vary but generally there is a requirement to provide certainty when employing part-timers. We have included a relevant provision. The next issue is in relation to changes to working hours of part-timers. There are of course notice periods for roster changes contained in the underlying awards but these seem not to be used in relation*

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<sup>4</sup> *Jurisdictional Issues Decision*, [60].

<sup>5</sup> *Jurisdictional Issues Decision*, [60].

<sup>6</sup> *Security Services Award* [2015] FWCFB 620, [8].

<sup>7</sup> *Jurisdictional Issues Decision*, [24]; *Security Services Award* [2015] FWCFB 620, [8]; *Stevedoring Industry Award* [2015] FWCFB 1729, [161].

to part-timers. Instead, part-time hours appear to be changed regularly on a daily basis where the employee consents. Many employers saw this as a necessary flexibility. The private hospital industry employer associations estimated that, on average, part-timers would work an extra six hours per week. The impact of this consent is that the employee does not receive overtime for working in excess of the rostered hours when requested but is paid at the ordinary time rate.

**[148]** We have some reservations about the nature of the consent in circumstances where a supervisor directly requests a change in hours on a day where the part-timer had otherwise planned to cease work at a particular time. Existing provisions require that any amendment to the roster be in writing and we have retained this provision. We also have no doubt that many part-time employees would welcome the opportunity to earn additional income. However, there may also be part-timers who would be concerned to ensure that their employment is not jeopardised by declining a direct request from a supervisor to work additional non-rostered hours at ordinary rates. From the submissions of the employers this is a major cost saving and used widely.

**[149]** Whilst all the relevant underlying awards have different provisions there is a general opportunity for part-time employees to consent to working additional hours at ordinary rates within an average of less than a 38 hour week. We have sought to provide some common provisions which retain cost savings for employers in the knowledge that any change requires written consent. There was never any suggestion that asking part-timers to work additional hours did not relate to unforeseen circumstances on the day.

11. The current part-time clause in the *Aged Care Award* was the outcome of Award Modernisation in 2009. The Award was varied in 2010 to clarify that alterations to the agreed pattern of work can be made on a one off basis as well as on a more permanent basis.<sup>8</sup>
12. Similar variations to those advanced by St Ives were sought by employer parties in both Award Modernisation and later in the Transitional Review. These claims were rejected.<sup>9</sup>
13. When the *SCHDS Award* was made in 2010 a part-time employee was ‘one engaged on less than 38 hours per week... and who has reasonably predictable hours of work’. The current *SCHDS Award part-time employment Clause* (10.3 (c)) was inserted in 2013 during the Transitional Review.<sup>10</sup> The Commission found that the

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<sup>8</sup> *Aged Care Award 2010* [2010] FWAFB 2026 [67].

<sup>9</sup> *Aged Care Award* [2013] FWC 5696; *Leading Aged Services Australia NSW-ACT* [2014] FWCFB 129.

<sup>10</sup> *Australian Municipal, Administrative, Clerical and Services Union* [2013] FWC 4141, [20].

current award provision was a standard award entitlement which would impose little administrative burden on employers. Vice President Watson stated:<sup>11</sup>

*[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, especially when there is no award minimum engagement period. In my view the concerns of the employers can be allayed by standard procedures that comply with the clause, such as those that have been developed for employers covered by similar provisions in other awards. I will make this change prospective to allow employers to prepare for the change. If significant practical problems emerge an appropriate variation can be sought. I will insert the clause sought by the ASU with effect from 1 August 2013.*

14. The current part-time provision in the *SCHDS Award* (clause 10.3 (c)) is largely identical to the clause in the *Aged Care Award* (save for some additional flexibilities provided by the interaction with the rostering clause) so the reasoning of the Commission in making the *Medical Practitioners Award* is relevant.

## **IS THE MODERN AWARDS OBJECTIVE MET BY THE PROPOSED VARIATIONS?**

### Section 134(1) (a) -relative living standards and the needs of the low paid

15. Security of work is particularly important for the low paid. As a general principal this can be addressed by ensuring regularity of income and predictability of hours. The evidence from award part-time workers filed by United Voice emphasises that having a reliable regular income is an important safety net consideration.

### Section 134(1) (b) -the need to encourage collective bargaining

16. The part-time clauses in the Care Awards are part of the fair and relevant minimum safety net of terms and conditions.
17. As the Full Bench of the Australian Industrial Relations Commission held in *Re Victorian Catholic and Schools Education Officers Award* the safety net character of the award system makes it relatively independent of the enterprise agreement stream.<sup>12</sup> Enterprise bargaining allows great scope for the content of an industrial instrument because it is essentially a consensual process underpinned by the award safety net.<sup>13</sup>

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<sup>11</sup> *Australian Municipal, Administrative, Clerical and Services Union* [2013] FWC 4141.

<sup>12</sup> (1996) 70 IR 155, p 161.

<sup>13</sup> (1996) 70 IR 155, p 161. (1996) 70 IR 155, p 162.

18. The Applicants' apparent objective is more properly a matter for enterprise bargaining. No evidence has been presented of any award-based impediment to enterprise bargaining. In particular, St Ives is not an industry peak body or industrial association but an individual employer. It can negotiate an enterprise agreement with its employees to achieve its goals. It has led no evidence as to why it cannot achieve the flexibility it seeks through enterprise bargaining.

Section 134(1) (c) -the need to promote social inclusion through increased workforce participation

19. There is no evidence that the current part-time provisions in the Care Awards are deterring workforce participation. The evidence shows that in both home care and disability care, the new funding arrangements will either have a neutral or positive impact on employment.
20. Permanent employment provides a basis for the employee to make more stable work and social arrangements, thus promoting social inclusion. Further, the ongoing nature of permanent employment promotes participation by laying a foundation for stable and long term employment. The current part-time employment provisions provide a stable and predictable pattern of work for part-time workers. To weaken these protections would mean that part-time employment under the Care Awards would lose what the Full Bench in award modernisation called '*the essential integrity of part-time employment*'.<sup>14</sup> The Full Bench held that part-time employment '*should be akin to full time employment in all respects except that the average weekly ordinary hours are fewer than 38*'.<sup>15</sup> The requirement that an employee be given clear information as to the basis of their engagement when they are engaged (*Aged Care Award* clause 10.3 (b) and *SCHDS Award* clause 10.3 (c)) is a common award provision in many modern awards. The evidence from award part-time workers filed by United Voice emphasises the importance of predictable hours for social inclusion.
21. In the case of the *SCHDS Award*, this provision is a particularly important element of the safety net because the award specifies no minimum engagement for part-time employees. This consideration was noted when the clause was inserted in the transitional review.<sup>16</sup> The evidence from award part-time workers filed by United Voice emphasises the already significant flexibility of this award and the deleterious effect that the employer's ability to change the pattern of work at short notice has on the lives of individual workers.

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<sup>14</sup> [2008] AIRCFB 1000, [291].

<sup>15</sup> [2008] AIRCFB 1000, [291].

<sup>16</sup> *Australian Municipal, Administrative, Clerical and Services Union* [2013] FWC 4141, [20].

22. The evidence of Dr Olav Muurlink will show that working irregular and unsystematic hours has a negative effect on the physical and psychological health, and on the social life, of workers and their families and the people they care for.

Section 134(1) (d) -the need to promote flexible modern work practises and the efficient and productive performance of work

23. There is no compelling material indicating that the current award arrangements are inflexible and in some way inconsistent with the efficient and productive performance of work. The evidence of the part-time workers filed by United Voice clearly shows that employees readily agree to work additional hours or change their hours when required.
24. There is already significant flexibility in the part-time employment arrangements in each of the Care Awards, which already depart significantly from the federal standard.
25. The rostering clauses in the *SCHDS Award* (clause 25.5 (d)), *Aged Care Award* (clause 22.6 (c)) and *Nurses Awards* (clause 25.4) all allow for rosters to be altered by mutual consent at any time and on seven days' notice. At a minimum, this supports the view that there is no impediment to an employer and employee coming to agreement concerning a change in hours.
26. Further the part-time work clauses within the Care Awards should not be viewed in isolation and in each award there are significant provisions that promote flexibility and provide to employers the ability to change rosters and patterns of work at short notice.
27. The part-time employment arrangements within the *Aged Care Award* contains the following flexible features:
  - a. the roster may be changed at any time under clause 22.6 (d) which provides that the restrictions on changing the roster do not apply to any mutually agreed additional hours worked by part-time employees, these additional hours are not paid at overtime rates;
  - b. under clause 22.7, employees may be rostered on broken shifts, with one or more breaks, and where the span of hours is not more than 12 hours; and
  - c. under clause 25.1 (b) (iii), a part-time employee is not entitled to overtime for work in excess of their rostered hours if they agree to work additional hours under clause 10.3 (c).
28. The part-time employment arrangements within the *SCHDS Award* contains the following flexible features:
  - a. there is no minimum engagement for part-time employees;

- b. if a client cancels an appointment, a part-time home care employee's roster can be changed under clause 25.5 (f) of the Award if the client is notified that their roster is being changed because of a client cancellation before 5.00 PM the day before, they will not be paid for the shift if they are notified about the client cancellation after that time, they will only be paid for the minimum specified hours, an employee can also be directed to work make up time sometime in that roster period or the next;
  - c. the roster may be changed at any time under clause 25.5 (d) (iii) which provides that the restrictions on changing the roster do not apply to mutually agreed additional hours worked by part-time employees, these additional hours are not paid at over time rates;
  - d. under clause 28.1 (b), a part-time employee is not entitled to be paid overtime unless they work for longer than 10 hours in a day or 38 hours in week the weekly ordinary hours may be averaged over a fortnight; and
  - e. under clause 25.6, disability services employees and home care employees may be rostered on broken shifts, with one or more breaks, and where the span of hours is not more than 12 hours.
29. The St Ives application would actually reduce existing flexibilities in the part-time employment provisions of the *Nurses Award*, which are sufficiently broad to cover the breadth of workplaces where nurses are found. The *Nurses Award* currently allows for different rostering arrangements by agreement. The St Ives variation would alter this arrangement.
30. Lastly, employers and employees can make individual flexibility agreement in each of the Care Awards which would resolve most of the matters complained of by the Applicants.

Section 134(1)(e) – the principle of equal remuneration for work of equal or comparable value

31. Almost all employees in the home care and the residential aged care sectors are women.<sup>17</sup> Incomes in the industry are low, and there is some evidence that this is connected to the relatively higher incidence of part-time employment in the industry and the lack of overtime.<sup>18</sup> We note the article of Charlesworth and Heron, which compares working time protections to in the *SCHDS Award* and *Aged Care Award* to the *Manufacturing and Associated Industries Award 2010*, a traditionally male

<sup>17</sup> Australian Government, *Occupational Bulletin, Aged and Disable Carers*. (<http://joboutlook.gov.au/jouploads/4231.pdf>) .

<sup>18</sup> Productivity Commission (2011), *Disability Care and Support*, Report no 54, Vol 2, 699 (*'Productivity Commission Report'*).

dominated industry to argue that there remain significant gendered differences in working time minima for workers in gendered industries.<sup>19</sup>

Section 134(1) (f)- the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden

32. Appropriate part-time work arrangements provide for productivity gains and are at worst neutral in relation to employment costs. It is problematic to characterise the level of paper work required by the part-time work clauses in the Care Awards as a regulatory burden.
33. Quality of care is vital to the future of the aged care and disability care industries.<sup>20</sup> Continuity and predictability in the pattern of the provision of care is consistent with high quality care. The care provided in these industries is generally low acuity care and is provided in a planned manner. Accordingly, the nature of these services is that they tend to be performed in a routine manner and this allows for both the recipients and providers of the care to negotiate mutually acceptable times for the service to be provided in advance. The current part-time clauses provide sufficient flexibility to negotiate both temporary and permanent variations to the agreed pattern of work of part-time employees. The witness statement of Melissa Coad describes the wider regulatory and funding arrangements for the aged care industry and changes in the industry.
34. A key threat to the productivity of the aged care and disability care industries is a lack of staff. The growing demand for both disability and aged care services will drive increased competition in the industries. The Productivity Commission has identified a high turnover of staff in the disability care industry as a key concern in implementing the NDIS and noted that staff shortages will undermine the implementation of the NDIS.<sup>21</sup> It has suggested that improved working time conditions may attract more people to the industry and improve retention of staff.<sup>22</sup> While employment in aged care appears to be more stable, staffing shortages have also been considered a problem since 2012.<sup>23</sup> Recent industry reports suggest that increased demand for

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<sup>19</sup> Charlesworth, S., & Heron, A. (2012). 'New Australian working time minimum standards: reproducing the same old gendered architecture?' *Journal of Industrial relations*, 54(2), 164-181.

<sup>20</sup> Australia Aged Care Quality Agency (2015), *Let's Talk About Quality Report*, National Consultation Report, Australian Government, Canberra 42;

<sup>21</sup> *Productivity Commission Report*, Vol 2, 703-704;

<sup>22</sup> *Productivity Commission Report*, Vol 2, 704

<sup>23</sup> King, D., Mavromaras, K., Wei, Z, He, B., Healy, J., Macaitis, K., Moskos, M., & Smith, L. (2013), *2012 National Aged Care Workforce Census and Survey Report*, Report, Department of Health and Aging, Canberra, 7-9.



aged care services and competition will require the industry to attract new workers.<sup>24</sup> The high median age of aged and disabled carers (47 years) suggests the industry is having trouble attracting staff. A reduction in conditions, which the employer applications can be characterised as resulting in, is problematic in a sector that is already characterised by skill shortages and the undersupply of labour.

35. There will always be demands on care giver and providers to provide more services and respond to requests for additional services. Providers will need to balance the competing demands of staff and employees to ensure quality of service. A regulatory race to the bottom may increase the ease of rostering but it will not address the future workforce needs of the industry. Any regulatory burden caused by requiring variations to agreed patterns of work to be recorded in writing is likely to be offset by the productivity gains associated with a more planned and stable workforce.

Section 134(1)(g) – the need to ensure a simple, easy to understand, stable and sustainable modern award system

36. The aged care and disability services sectors are undergoing significant change but the ultimate effect of these changes is unknown. Neither consumer directed care ('CDC') nor the National Disability Insurance Scheme ('NDIS') have been fully implemented. We note that no lay evidence from an employer currently operating under the NDIS has been filed in support of the St Ives variations. There is limited evidence before the Commission of the actual impact of either scheme. The employer claims are most accurately described as speculation about the future of the sectors involved. In the face of such uncertainty, consideration of the need for a stable modern award system would suggest no change should be made until the real situation is known and the need for change is apparent
37. Further, not all employers and employees covered by the *SCHDS Award* and *Nurses Award* will be affected by either the NDIS or CDC. There is no evidence before the Commission concerning family day care employees; crisis accommodation services employees; most nurses; or social and community assistance employees (who do not work in the disability sector). For the proposed variations to meet the modern awards objective, the Applicants would need to demonstrate that the variations are apt for all the work covered by the *SCHDS Award*.

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<sup>24</sup> Aged Care Financing Authority (2015), *Third Report on the Funding and Financing of the Aged Care Sector*, Report, Australian Government, Canberra, 15-16.

Section 134(1)(h) – the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy

38. There is no evidence to suggest that the current part-time employment clauses in the care awards are having a deleterious effect on the national economy.

**CONCLUSION**

39. The part-time employment clauses in the Care Awards currently provide a '*fair and relevant minimum safety net of terms and conditions*' and meet the modern awards objective. The proposed amendments are not necessary to meet the modern awards objective and there is no proper basis for the Commission to exercise its discretion to vary the Care Awards in the terms sought by the employer parties in this 4 yearly review. The variations proposed will make significant changes to the current part-time employment clauses in the Care Awards and there is limited evidence before the Commission in support of the proposed variations. Further, the employer parties to date have not advanced cogent merit arguments to vary the part-time employment provisions in the Care Awards.
40. United Voice acknowledges the concerns raised by employers about the increasing rate of casualisation in the industry. It unclear if this change is a permanent feature of these sectors or a temporary effect of the rapid pace of change. Diminishing the core requirements that provide predictability to part-time employees is not the appropriate response to casualisation..
41. United Voice notes that variations to the rostering clauses proposed by St Ives will affect the employment conditions of full time employees.
42. United Voice supports the variations and submission of the ACTU made in the Part-time Employment (AM2014/196) and Casual Employment (AM2014/197) common issues proceedings and considers that an effective casual conversion clause and a 4 hour minimum engagement will significantly assist in making part-time work arrangements an option that employers will more readily adopt.

## ATTACHMENTS

- [Witness Statement of Mary Hajistassi](#)
- [Witness statement of Melissa Coad](#)
- [Witness statement of Veronica Keane](#)
- [ABS, Australian Industry, 2013-14, Cat no 8155.0](#)
- [ABS, Counts of Australian Businesses , including Entries and Exits, June 2011 to June 2015, cat no 81650.2](#)
- [ABS, Counts of Australian Businesses , including Entries and Exits, June 2011 to June 2015, cat no 81650.3](#)
- [ABS, Employee Earnings and Hours, Australia, May 2014, cat no 63060](#)
- [Aged Care Financing Authority \(2015\), Third Report on the Funding and Financing of the Aged Care Sector, Report, Australian Government, Canberra](#)
- [Australia Aged Care Quality Agency \(2015\), Let's Talk About Quality Report, National Consultation Report, Australian Government, Canberra](#)
- [Australian Government, Occupational Bulletin, Aged and Disable Carers,](#)
- [Charlesworth, S & Heron, A. \(2012\). 'New Australian working time minimum standards: reproducing the same old gendered architecture?' \*Journal of Industrial relations\*, 54\(2\), 164-181](#)
- [King, D., Mavromaras, K., Wei, Z, He, B., Healy, J., Macaitis, K., Moskos, M., & Smith, L. \(2013\), 2012 National Aged Care Workforce Census and Survey Report, Report, Department of Health and Aging, Canberra](#)