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**Sent:** Friday, 15 November 2019 2:58 PM

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**Cc:** AMOD <AMOD@fwc.gov.au>

**Subject:** AM2018/26 - Social, Community, Home Care and Disability Services Industry Award 2010

Dear Parties,

I write in relation to the above matter.

The Commissioner thanks the parties for the responses received in respect to the 24-hour care clause.

As foreshadowed in correspondence of 7 November 2019, the Commissioner has prepared the **attached** draft report based on the information provided by the parties. As previously advised, the attached report is a draft only. Parties are to advise the Commission if there is any aspect of the report they consider inaccurate by no later than **close of business 22 November 2019**.

Please do not hesitate to contact me if you have any queries in relation to this matter.

Kind regards,

**Sarah Martiniello**

Associate to Commissioner Lee

**Fair Work Commission**

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The Fair Work Commission acknowledges that our business is conducted on the traditional lands of Aboriginal and Torres Strait Islander peoples. We acknowledge their continuing connection to country and pay our respects to their Elders past present and emerging.





# **DRAFT REPORT**

*Fair Work Act 2009*

s.156 - 4 yearly review of modern awards

## **4 yearly review of modern awards**

(AM2014/285)

### **SOCIAL, COMMUNITY, HOME CARE AND DISABILITY SERVICES INDUSTRY AWARD 2010**

COMMISSIONER LEE

MELBOURNE, 14 NOVEMBER 2019

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

[1] On 28 October and 7 November 2019, conferences were held to discuss the 24-hour care clause in the *Social, Community, Home Care and Disability Services Industry Award 2010* (the Award).

[2] The following reflects the position of the parties following the conference on 7 November 2019.

[3] On 8 November 2019, ABI, NSWBC, ACSA and LASA (ABI) confirmed their position in respect of which variations should be made to the 24-hour care clause (ABI's preferred draft). This is found at Annexure A to this report. National Disability Services also confirmed that they are supportive this position. ABI have indicated that the wording of clause 25.8 (e) will require further consideration to ensure it works in accordance with clause 28.1, noting that clause 28 of the Award does not provide overtime rates for casuals.

[4] On 8 November 2019, Australian Federation of Employers and Industry (AFEI) confirmed its position as follows:

- AFEI agree to retain the current Award terms set out at clauses 25.8(a) and 25.8(d) of ABI's preferred draft (which are identical to clauses 25.8(a) and 25.8(c) of the Award);
- AFEI are in support of clauses 25.8(b), 25.8(c) of ABI's preferred draft;
- AFEI are not in support of clause 25.8(e) of ABI preferred draft (which addresses the requirement to pay at overtime rates per clause 28.1 of the Award); and

- AFEI are not in support of clause 31.2(b) of ABI preferred draft (which addresses the payment of an additional week’s annual leave for an employee who regularly works 24-hour care shifts).

[5] AFEI’s position is for clause 25.8(e) of ABI’s preferred draft to be varied consistent with the draft below. For ease of reference, the differences in the AFEI position to ABI’s preferred draft are underlined below:

*“If the employee is required to and the employee performs more than eight hours’ work during a 24 hour care shift, all work performed by the employee in excess of eight hours per shift shall amount to accrual of time that the employee will be entitled to take off:*

*(i) within the period of 3 months after the overtime is worked; and*

*(ii) at a time or times within that period of 3 months agreed by the employee and employer”*

[6] On 13 November 2019, the United Workers Union and Health Services Union of Australia filed a joint position setting out the Unions’ preferred draft of the clause (Unions’ preferred draft) which is found at Annexure B to this report. The clause is largely at odds with ABI’s preferred draft, however there are four areas of apparent agreement:

- The Unions indicate that clause 25.8(a) of the ABI preferred draft reflects the terms of the current Award provision and do not propose any amendment to this clause;
- The Unions agree that it is appropriate that a 24-hour care shift should only be worked by agreement as per 25.8(b) of ABI’s preferred draft;
- The Unions indicate that clause 31.2(a) of the ABI preferred draft reflects the terms of the current Award provision and do not propose any amendment to this clause; and
- The Unions agree that employees who regularly work 24-hour care shifts should be classified as a shift worker for the purposes of the NES. For clarity, the Unions propose that ‘regularly’ is defined within sub-clause 31.2(b) as follows:

*“For the purposes of this sub clause, an employee will regularly work 24 hour care shifts if the employee works four or more 24 hour care shifts during the yearly period in respect of which their annual leave accrues;”*



COMMISSIONER

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## Annexure A: ABI Preferred Draft

### 25.8 24 hour care

This clause only applies to home care employees.

(a) A **24 hour care** shift requires an employee to be available for duty in a client's home for a 24 hour period. During this period, the employee is required to provide the client with the services specified in the care plan. The employee is required to provide a total of no more than eight hours of care during this period.

(b) An employer may only require an employee to work a 24 hour care shift by agreement.

(c) The employee will normally have the opportunity to sleep during a 24 hour care shift and, employees will 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.

(d) The employee engaged will be paid eight hours work at 155% of their appropriate rate for each 24 hour period.

(e) If the employee is required to perform more than eight hours' work during a 24 hour care shift, that work shall be treated as overtime and paid in accordance with the overtime provisions at clause 28.1. An employer and employee may utilise the TOIL arrangement in accordance with clause 28.2.

(f) An employee may refuse to work more than 8 hours' work during a 24 hour care shift in circumstances where the requirement to work those additional hours is unreasonable.

### 31.2 Quantum of leave

For the purpose of the NES, a shiftworker is:

(a) an employee who works for more than four ordinary hours on 10 or more weekends during the yearly period in respect of which their annual leave accrues; or

(b) an employee who regularly works 24 hour care shifts in accordance with clause 25.8;

and is entitled to an additional week's annual leave on the same terms and conditions.

## **Annexure B: Unions' preferred draft**

*This clause only applies to home care employees.*

- (a)** *A 24 hour care shift requires an employee to be available for duty in a client's home for a 24 hour period. During this period, the employee is required to provide the client with the services specified in the care plan. The employee is required to provide a total of no more than eight hours of care during this period.*
- (b)** *For the purposes of this clause, "care" shall mean the performance of any task that assists a client with daily living.*
- (c)** *An employer may only require an employee to work a 24 hour care shift by agreement.*
- (d)** *During a 24 hour care shift, the employee will be afforded the opportunity to sleep for a continuous period of eight hours (the "sleep break") during a 24 hour care shift and will be provided with:*

  - (i) a separate and securely lockable room with a peephole or similar in the door, a bed and a telephone and internet connection in the room; and*
  - (ii) a bed, bedside lamp and clean linen;*
  - (iii) access to food preparation facilities; and*
  - (iv) access to appropriate temperature control and*
  - (v) free board and lodging.*
- (e)** *The sleep break shall not commence earlier than 10pm and shall not finish later than 7am.*
- (f)** *An employee required to work a 24 hour care shift will be paid the sleepover allowance prescribed by clause 25.7.*
- (g)** *In the event that:*

  - (i)** *the sleep break is interrupted by the client for any reason, whether to deliver services specified in the care plan or not; or*
  - (ii)** *the employee is otherwise required to provide more than eight hours of care;*

*the employee shall be paid double time for the period of such interruption or the provision of such care, with a minimum payment of one hour.*
- (h)** *In addition to the above, for each 24 hour period, the employee will be paid:*

  - (i) 16 hours at 155% of their appropriate rate and;*
  - (ii) three meal allowance payments prescribed by clause 20.3.*
- (i)** *An employee who regularly works 24 hour care shifts during the yearly period in respect of which their annual leave accrues will be deemed to be a shiftworker for the purpose of entitlement to annual leave pursuant to the NES.*
- (j)** *For each 24 hour care shift, the employee will be treated for all purposes as having performed 24 ordinary hours of work.*

- (k) *An employee will be allowed, at their election, a break of not less than 10 hours between the end of one 24 hour care shift and the start of another period of work.*

### **31.2 Quantum of leave**

*For the purpose of the NES, a shiftworker is:*

- (a) *an employee who works for more than four ordinary hours on 10 or more weekends during the yearly period in respect of which their annual leave accrues; or*
- (b) *an employee who regularly works 24 hour care shifts in accordance with clause 25.8 (for the purposes of this sub clause, an employee will regularly work 24 hour care shifts if the employee works four or more 24 hour care shifts during the yearly period in respect of which their annual leave accrues)*

*and is entitled to an additional week's annual leave on the same terms and conditions*