

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

Matter Number: AM2018/26

Document: Submissions pursuant to Fair Work Commission Statement dated 3 September 2021

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1. On behalf of the employer parties, the Australian Industry Group ('AiG') filed joint employer submissions in response to four questions posed by the Fair Work Commission ('FWC') in its Statement dated 6 September 2021.¹
2. Question 2 is "*Should the SCHADS Award permit an afternoon or night shift to be broken in accordance with clause 25.6? (Noting that it is common ground that clause 25.6 only applies to social and community services employees when undertaking disability services work and home care employees)*".
3. AFEI supports the joint employer response to question 2,² but seeks to amplify AFEI's response which is that the Social, Community, Home Care and Disability Services Industry Award 2010 ('the Award') *does* permit an afternoon or night shift to be broken in accordance with clause 25.6 of the Award and *should* continue to do so. In accordance with principles for Award interpretation with the historical context as detailed in the joint employer submissions (including reading Part 5 – Hours of Work and Related matters, with context and the rule against surplusage, which is explained below), the Award does provide for shiftwork as broken shifts.
4. AFEI acknowledges that the question of whether shift workers can work broken shifts has been the subject of controversy in these proceedings, and that if clause 29.4 is read in isolation then it would appear to preclude shift workers from performing broken shifts. Nonetheless, AFEI would not oppose an amendment to the Award pursuant to the modern awards objective to ensure that the Award is simple to understand.³
5. Clause 25.6(b) of the Award provides for the payment for a broken shift to 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".
6. Clause 29-Shiftwork refers to three different shifts being afternoon shift, night shift and public holiday shift.⁴ Notably, an afternoon and night shift, as defined by clause 29.2 of the Award, defines these shifts as shifts that are worked outside the ordinary span of hours.⁵
7. The payment of "*shift allowances in accordance with clause 29-Shiftwork, with shift allowances being determined by the finishing time of the broken shift*"⁶ in the broken shift provision of the Award reflects an *amendment* to the general application of clause 29.2.
8. If clause 29.4 were to be interpreted as prohibiting shift work from being broken, this could have significant consequences including but not limited to restricting the ordinary hours of broken shifts to day work only, and could prevent the working of broken shifts on a public holiday shift.⁷

¹ Paragraph 2, Fair Work Commission Statement dated 6 September 2021 [2021] FWCFB 5545.

² Joint Employer submissions filed on 17 September 2021 at paragraphs 36 – 67.

³ Section 134(g), Fair Work Act 2009 (Cth).

⁴ Clause 29.2 of the Award.

⁵ Clause 25.2 of the Award provides that the ordinary span of hours for a day worker is "between 6:00am to 8:00pm". Clause 29.2(a) defines an afternoon shift as "any shift which finishes after 8.00 pm and at or before 12 midnight" and clause 29.2(b) defines a night shift as "any shift which finishes after 12 midnight or commences before 6.00 am".

⁶ Clause 25.6(b) of the Award.

⁷ Clause 29.2(c) defines a public holiday shift as "any time worked between midnight on the night prior to the public holiday and midnight of the public holiday.

9. Clause 25.6(b) of the Award is specific and must be given meaning and effect. It would be contrary to the rule against surplusage⁸ to construe clause 29.4⁹ in such a way that the words as expressed in cl. 25.6(b) becomes superfluous or insignificant.
10. The Award should continue to provide for broken shifts to be worked as shift work, including afternoon, night and public holiday shifts.
11. Finally, modern awards that provide for the working of broken shifts do not typically limit the working of those shifts to day workers only. If broken shifts were not permitted for shift workers, then it logically flows that employers could be limited in the hours they can offer to employees on a particular day as a result of the minimum break between shifts requirement.¹⁰

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⁸ Constructions involving superfluity should be avoided: *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355 at 382 [71] per McHugh, Gummow, Kirby and Hayne JJ; [1998] HCA 28, citing *The Commonwealth v Baume* [1905] HCA 11; (1905) 2 CLR 405 at 414 per Griffith CJ.

⁹ Clause 29.4 provides "Shifts are to be worked in one continuous block of hours that may include meal breaks and sleepover."

¹⁰ Clause 25.4(a) provides "An employee will be allowed a break of not less than 10 hours between the end of one shift or period of work and the start of another".