



DECISION

Fair Work Act 2009
s.185—Enterprise agreement

Sundale Ltd
(AG2019/3906)

SUNDALE LTD ENTERPRISE AGREEMENT 2018 - 2021

Aged care industry

COMMISSIONER JOHNS

SYDNEY, 24 DECEMBER 2019

Application for approval of the Sundale Ltd Enterprise Agreement 2018-2021.

[1] An application has been made for approval of an enterprise agreement known as the *Sundale Ltd Enterprise Agreement 2018 - 2021* (**Agreement**). The Application was made pursuant to s.185 of the *Fair Work Act 2009* (Cth) (**FW Act**). It has been made by Sundale Ltd (**Sundale**). The Agreement is a single enterprise agreement.

[2] Sundale is principally engaged in the business of residential and community aged care. It is a community based, not-for-profit organisation that operates retirement communities, care centres and in-home care support services.

[3] If approved the Agreement:

- a) will cover:
 - i. Sundale,
 - ii. 568 employees in the following classifications:
 - A. Nurses;
 - B. Carers;
 - C. Support Workers; and
 - D. Allied Health Professionals,
 - iii. the Queensland Nurses' and Midwives Union of Employees (QNMU) and the Australian Nursing and Midwifery Federation (ANMF) (collectively the "Nursing Unions"),
 - iv. the Australian Workers Union (AWU) Queensland; and
 - v. United Voice (now the United Workers Union). (UWU).
- b) will not cover:

- i. employees with individual employment agreements who are generally working in management positions, nor
 - ii. a small number of employees working in a single childcare centre in Kilcoy Queensland whose terms and conditions of employment are governed by the Child Services Award 2010.
- c) will displace the operation of the:
- i. Aged Care Award 2010;
 - ii. Nurses Award 2010;
 - iii. Social, Community, Home Care and Disability Services Industry Award 2010;
 - iv. Health Professionals and Support Services Award 2010.

[4] 217 (38%) of the employees to be covered by the Agreement voted on its approval. 187 (86%) voted to approve the Agreement. The Agreement was made on 27 September 2019.

[5] Each of the unions were bargaining agents for the Agreement in addition to two individual employee bargaining representatives. Scott Lucas from Miles Witt Partnership, an industrial relations advocacy and advisory services to employers in private health, residential aged care and community care, was appointed as Sundale's bargaining representative.

[6] In support of the Application Sundale filed a Form F17 Employer's Statutory Declaration declared by Danielle McKenzie its Chief Executive Officer.

[7] Each of the unions filed a F18 Statutory Declaration in relation to the Application. Each of the unions gave notice, pursuant to s.183 of the FW Act that they wanted the Agreement to cover them.

[8] The AWU and the UWU support the approval of the Agreement.

[9] The Nursing Unions do not support the approval of the Agreement. In short, this is because they contend that, in respect of the employees that the Nursing Unions have coverage and will be covered by the Agreement, the Agreement does not pass the better off overall test (**BOOT**).

Assessment of the Agreement

[10] The Application was lodged on 11 October 2019.

[11] On 18 October 2019, the Fair Work Commission (**Commission**) prepared a legislative checklist assessing the Agreement (**Checklist**).

[12] On 24 October 2019, as a matter of procedural fairness, I provided the Checklist to Sundale and the bargaining representatives. I advised Sundale that I had not formed any view about the correctness of the contents of the Checklist. I invited Sundale to comment on the Checklist and or to proffer any undertakings aimed at addressing the BOOT issues it identified.

[13] I also programmed the Application for hearing on 6 December 2019.

Submissions

[14] On 7 November 2019, Sundale responded by making initial submissions and offering four undertakings. Noting that the initial submissions and undertakings did not resolve the outstanding concerns of the Nursing Unions, on 14 November 2019, Sundale filed more fulsome submissions in the following terms:

“Definition of Shift Worker

Commission’s concern

1. Clause 7.1.1(a) of the Sundale Ltd Enterprise Agreement 2018 – 2021 (Agreement) - definition of a shift worker for the purposes of the National Employment Standards (NES) in the Fair Work Act 2009 (Cth) (FW Act) - The Agreement definition of a shift worker for the purpose of the NES appears to be inconsistent with the various definitions contained in the relevant corresponding modern awards.

Applicant’s response

2. Section 87 of the FW Act provides the entitlement prescribed by NES to annual leave as being either:
 - a. Four (4) weeks of paid annual leave (section 87(1)(a) of the FW Act);
 - b. Five (5) weeks of paid annual leave if a modern award applies to the employee and defines or describes the employee as a shift worker for the purposes of the NES (section 87(1)(b) of the FW Act).
3. Section 196 of the FW Act operates to ensure that all employees who would be defined as shift workers under an applicable modern award receive the shift worker entitlement to annual leave prescribed in section 87 of the FW Act (of five (5) weeks).
4. Annual leave entitlements contained in the Aged Care Award 2010 (Clause 28), the Social, Community, Home Care and Disability Services Industry Award 2010 (Clause 31) (SCHADS Award) and the Health Professionals and Support Services Award 2010 (Clause 31.1) are the same as the NES. That is, four (4) weeks of paid annual leave increasing to five (5) weeks for employees defined as shift workers.
5. Under clause 7.1.1 of the Agreement all employees receive at least five (5) weeks annual leave. Therefore, all employees who would have received five (5) weeks annual leave if they had been working under the above-mentioned modern awards as shift workers would receive at least this under the Agreement.
6. Employees covered by the Nurses Award 2010 (Nurses Award) have a different entitlement. Under clause 31.1 of the Nurses Award employees are entitled to five (5) weeks annual leave or six (6) weeks annual leave for a shift worker. This is an additional week for both types of employees when compared with the entitlement prescribed by the NES. For all employees of the Applicant, the Agreement definition of shift worker is for the purposes of an additional (sixth (6th)) week of annual leave.

7. The Applicant concedes that there may be employees who would qualify under the Nurses Award for an additional sixth (6th) week of annual leave but who would not qualify under the definition of shift worker in the Agreement.
8. However, this modern award condition, unlike the NES entitlement, can be assessed under the Better Off Overall Test (BOOT) against above modern award conditions including wage rates. In the Agreement, these nursing employees would be paid, depending upon their classification, between 29.6% and 57.65% above the comparative rates in the Nurses Award.
9. An additional week of annual leave for an employee is equivalent to wages of 1.92%. Therefore, the above modern award wage increases that nursing employees receive under the Agreement would compensate those who may miss out on the additional week of annual leave due to the differing definitions.
10. In addition (and as outlined in the Applicant's Form F17 (F17)) the Agreement also contains the following improved conditions for employees who would otherwise be covered by the Nurses Award:
 - a. Superannuation contributions that are 0.5% above the Superannuation Guarantee Charge (see clause 5.6.3 (b) of the Agreement).
 - b. Enhanced accrual of long service leave and access to long service leave (see clauses 7.6 (b) and 7.6 (c) of the Agreement).
 - c. Higher payments for work performed on a Public Holiday (see clause 7.9.2 (c) of the Agreement).
11. These provisions would further compensate any nursing employees who would receive a lower accrual of annual leave under the Agreement.
12. The Fair Work Commission (FWC) has approved the following enterprise agreements with definitions of shift worker (for the purposes of the additional week of annual leave) that differ from the one contained in the relevant modern award:
 - a. Carinya Home for the Aged, QNU and ANMF – Nurses Enterprise Agreement 2019 (AG2019/1826) – refer to clause 32.1.
 - b. Sunnymeade and QNU – Nurses Enterprise Agreement 2019 (AG2019/2629) – refer to clause 32.1.
 - c. Beaumont Care – Nurses Enterprise Agreement 2018 (AG2018/3297) – refer to clause 30.1.
 - d. Glenella Care – Nurses Enterprise Agreement 2018 (AG2018/6002) – refer to clause 30.1.
 - e. Good Shepherd Lodge Ltd – Nurses Enterprise Agreement 2018 (AG2019/610) – refer to clause 31.1.

Definition of 'Immediate Family'

Applicant's response

13. Please see the attached undertaking.

Rates of pay for carers

Commission's concern

14. The rates of pay for carers (SACS) when incorporating the Equal Remuneration Order (ERO) into the agreement rate result in employees from level 2.1 to level

5.2 being less than the corresponding modern award rate. The Applicant has matched these rates to all of the relevant modern awards however based on the classification descriptions it would appear that these employees who engage in home care, sleepovers and 24-hour care should be entitled to the ERO.

Applicant's response

15. As outlined in the F17, these employees under the Agreement would fall under Schedule E (Home Care Employees) not Schedule B (Social and Community Services (SACS) Employees) in the SCHADS Award.
16. Schedule E of the SCHADS Award covers Home Care Employees who perform a range of domestic and personal care services for aged clients in their own homes. Schedule B SACS employees provide care to 'persons with a disability in a community and/or residential setting...' (refer to clause 3.2. of the SCHADS Award).
17. Employees falling under Schedule E of the SCHADS Award were not subject to the ERO (see Equal Remuneration Case (C2010/3131) [MA000100], paragraph 4.1 per V.P Watson).
18. As detailed in the F17, the rates of pay applicable under the Agreement are superior to those provided for under Schedule E of the SCHADS Award.
19. For clarity, the lists of tasks performed by employees in Schedule E of the SCHADS Award are the same or substantively similar to tasks of the Carers (Schedule 2) and the Support Workers (Schedule 3) streams as described in the Agreement. These roles range from the provision of domestic care functions, personal care functions, supervision responsibilities, program planning and administrative functions.
20. To further clarify that these workers are performing Home Care work as prescribed by Schedule E of the SCHADS Award, and not SACS work under Schedule B of the SCHADS Award, the attached undertaking confirms that the services provided by these employees are provided to aged persons.

Sleepover Allowance

Commission's concern

21. Clause 5.5.1 (Sleepover Allowance) of the Agreement: \$46.44 per night in contrast to the award which is \$48.45 per night. The rates of pay do not appear to be high enough to withstand a reduction in this allowance.

Applicant's response

22. The Applicant undertakes to raise the Sleepover Allowance to \$48.45 in accordance with attached undertaking.

Traineeships

Commission's concern

23. Clause 8.2 (Traineeships) of the Agreement states that full-time and part-time trainees may be engaged subject to the provisions of Schedule E of the

Miscellaneous Award 2010 (Miscellaneous Award). Wages will increase in accordance with the percentage increases outlined in the Wages Tables of Schedules 2 and 3 of the Agreement. It appears however that these employees would be remunerated in line with the Miscellaneous Award and therefore not better off overall.

Applicant's response

24. As outlined in clause 8.2 of the Agreement, trainees will receive wage increases in accordance with Schedule 2 and Schedule 3 of the Agreement. Schedule 2 and Schedule 3 of the Agreement provide for wage increases effective from the first full pay periods on or after 1 October 2019, 1 October 2020 and 1 October 2021. The clear intention is to remunerate trainees in line with the Miscellaneous Award but for those employees to receive increases at the same rate as other employees under the Agreement.
25. Under Section 193(6) of the FW Act the "test time" for the purposes of the BOOT is the time when the application for approval of the Agreement was made (the date the application was lodged with the FWC). The application for approval of the Agreement was lodged on 11 October 2019. As outlined above, the first proposed wage increase under the Agreement is payable from the first full pay period on or after 1 October 2019, being 10 October 2019. This date is before the "test time". Therefore, at the "test time", trainees under the Agreement would be on a wage rate equivalent to 2.75% above that provided for in the Miscellaneous Award.

In-Service Training

Commission's concern

26. Clause 8 (In-Service Training) of the Agreement: Where the employee chooses to undertake such mandatory/ compulsory education outside of their normally rostered hours through Sundale's e-Learning system, payment will be paid at the base rate of pay for a time period based on the time allocated by Sundale for a single attempt at completing the relevant education module. Under the Award employees would be entitled to Overtime for such work. It would appear that the rates of pay for SACS employees and Aged Care employees, depending on how much training is worked and when it is worked, may not be high enough to compensate.

Applicant's response

27. Please see the attached undertaking."

[15] On 25 November 2019, (amended on 26 November 2019) the Nursing Unions made the following submissions:

1. These submissions are provided by the Australian Nursing and Midwifery Federation (ANMF or QNMU) in opposition to the application for approval of the Sundale Ltd Enterprise Agreement 2018 – 2021 (the Agreement).

2. Employees classified under the Agreement as Registered Nurses, Enrolled Nurses and Carers are members of the ANMF. The ANMF is an employee bargaining representative for those members for the Agreement.
3. The FWC cannot be satisfied that the Agreement passes the BOOT.
4. Emphasis has been added to some of the quotes in these submissions by making bold some of the words in such quotes.

The Agreement does not pass the BOOT

5. The Agreement does not make every employee covered by it better off overall than if the relevant modern award, the Nurses Award 2010 (Nurses Award), applied to those employees. The terms of the agreement outlined below are all less beneficial for all employees than those of the Nurses Award. When those less beneficial terms apply to an employee more often than seldom, those less beneficial terms will outweigh the more beneficial terms of the agreement for that employee.

Nurses Award covers Carers

6. The Nurses Award covers Sundale employees classified under the Agreement as Registered Nurses, (RNs), Enrolled Nurses (ENs) and Carers, but the Employer's F17 fails to acknowledge that the Nurses Award covers employees classified under the Agreement as Carers. Employees who are classified as carers under the Agreement are classified as Nursing Assistants under the Nurses Award. The Agreement provides in "SCHEDULE 2 – CARERS:

"In construing this Classification Structure, the following definitions shall apply: "Care Work" shall mean the performance by an employee who is a Carer (including Assistants in Nursing..."

Fixed -term employment less beneficial

7. The Agreement provides (in cl.4.1.1) for a "fixed-term" category of employment but the Award does not. Fixed-term employment under the Agreement is significantly less beneficial to an employee than full-time or part-time employment under the Award (cl.10.1) which is permanent.

Non-compounding of casual loading with penalty rates

8. The Agreement provides (in cl.4.4.4) that 'The casual loading shall not be compounded by penalties contained in this Agreement. Penalties shall be calculated on the base rate of pay, excluding the casual loading, with the casual loading component then added on to the penalty rate if payable.' The Award requires weekend, public holiday and overtime penalties to be compounded with its 25% casual loading - Australian Nursing and Midwifery Federation v Domain Aged Care (QLD) Pty Ltd T/A Opal Aged Care [2019] FWCFB 1716 at [17] - [23]. Such compounding produces an hourly rate for work on weekends, public

holidays and in overtime which is significantly higher than the non-compounding formula prescribed by the Agreement.

No redundancy pay in particular circumstances

9. The Agreement provides (in cl 4.7.1) “Where major workplace change is dealt with in accordance with clause 3.2.2 and an outcome is the termination of positions through redundancy, the provisions of this clause 4.7 will apply”. Cl. 4.7 provides for redundancy pay of up to 16 weeks’ wages, but cl. 4.7.1 means that if the employer does not comply with cl.3.2.2 (by not consulting about major workplace change as required by that subclause), then that change has not been “dealt with in accordance with clause 3.2.2” and no redundancy pay whatsoever is payable under the Agreement to employees whose employment is terminated because of redundancy.
10. The Agreement provides (in cl.4.7.6) “If Sundale obtains acceptable alternative employment for an employee and the employee accepts that alternative employment, then the provisions of clause 4.7.2 will not apply.” This is detrimental to an employee compared to the NES concerning Notice of Termination and Redundancy Pay (s.119 of the FW Act) and therefore offends s.55(4) of the FW Act. That NES does not automatically disentitle an employee to redundancy pay if alternative employment is accepted by the employee, whereas the Agreement would so disentitle.

Employees to be paid at lower paypoints due to limitations on recognition of experience

11. The Agreement provides (in cl. 5.1.1) “For the purpose of determining the rate of wages payable by reference to the Level or pay point of any employee, an employee shall be given credit for all previous continuous relevant service, provided that evidence of such service is provided within 4 weeks of engagement”. Cl.15 of the Award relevantly provides

“Progression through pay points

Progression for all classifications for which there is more than one pay point will be by annual movement to the next pay point, or in the case of a part-time or casual employee 1786 hours of experience, ...”.

12. Under the Award, an employee is entitled to be paid the base wage of the paypoint which is appropriate in recognition of all of their experience (of work in the same classification) with all of the employers the employee has had. That Award entitlement exists regardless of when the Employer receives evidence of that experience. Whereas under the Agreement, an employee is only entitled to be paid a base wage of the paypoint which is appropriate in recognition of only their continuous service, which is limited to their service with Sundale, and which excludes the employee’s experience of the relevant work with other employers.
13. Worse, that lesser entitlement only applies if evidence of such service by an employee is provided within 4 weeks of engagement. Under the Agreement, if

evidence of such service is provided more than 4 weeks after engagement, the employee is only entitled to the lowest paypoint of their classification.

Non-payment of wages where client cancels/changes appointment

14. The Agreement provides (in cl. 5.4.7) “In-Home Carers - Client’s Cancellation
 - a. Where a client cancels or changes the rostered home care service, an employee will be provided with notice of a change in roster by 5.00 pm the day prior and in such circumstances no payment will be made to the employee. If a full-time or part-time employee does not receive such notice, the employee will be entitled to receive payment for their minimum specified hours on that day.
 - b. The employer may direct the employee to make-up time equivalent to the cancelled time, in that or the subsequent fortnightly period. This time may be made up working with other consumers or in other areas of the employer’s business providing the employee has the skill and competence to perform the work.

15. The Nurses Award does not allow for non-payment to an employee for her/his rostered hours in the circumstances described in cl.5.4.7 of the Agreement. In the circumstances described in cl.5.4.7, the Nurses Award entitles the employee to payment for her/his rostered hours, whether or not the employer requires the employee to perform other work during some or all of those rostered hours.

Broken shifts

16. The Agreement provides (in cl. 6.3.1) “Broken Shifts - Except for EN’s and RN’s

“Broken shifts shall ...be worked One period of the shift shall be a minimum of two hours...”

17. While the Agreement requires mutual agreement for broken shifts, the Award does not allow employee to be subjected to broken shifts at all. Rather, the Award requires that ordinary hours of work are continuous, except for meal breaks (cl.21.5). The Agreement may allow the Employer to roster the employee for broken shifts without any prior agreement with the employee, and if there is no objection or complaint from the employee about being rostered for broken shifts, the Employer is likely to say the employee’s silence constitutes mutual agreement to those broken shifts, consistent with the concept of ‘acceptance’ expressed in cl. 6.4.3, discussed in paragraph 18 hereof.

18. Each broken shift requires the employee to undertake an additional return journey between their residence and their workplace, the costs of which are entirely uncompensated. The time spent by the employee in those additional journeys is unpaid.

19. Under the Agreement, there is no minimum for the other period of the shift, so that period of work may be as little as 15 minutes work, for which only 15 minutes wages would be paid.

20. Broken shifts usually involve significant disruption to an employee's family life and other aspects of their life outside work.

Less than 10 hours break between shifts

21. The Agreement provides (in cl.6.4.3) "Agreement to a break of not less than eight (8) hours is satisfied by the acceptance by an employee of their published roster." This clause creates nothing more than an illusion that an employee may have the right to choose to retain their entitlement to a 10-hour break between shifts. The Agreement does not provide any right for any employee to choose to accept or reject their published roster. Rather the agreement provides in Cl.6.5 "Employees will work in accordance with a fortnightly roster fixed by the employer." The Agreement deems the employee to have agreed to a break between shifts of less than 10 hours, even if the employee explicitly disagreed to that, or otherwise did not agree. The Award allows an 8 hour break between shifts only where the employee genuinely agrees to such a break, and such agreement does not exist unless the employee communicates that agreement to the employer before the commencement of the break.
22. Clause 6.4.3. artificially converts all requirements by the employer upon an employee to have a break between shifts of less than 10 hours into something the employee agreed to, when they did not, in fact, so agree. Clause 6.4.3 of the Agreement is a perversion of the concept of agreement.

No entitlement at all to a 10 hour break after overtime when 'sleeping over'

23. The Agreement provides (in cl.6.7.7) an entitlement similar to the Award for an employee to have a 10 hour break after overtime, or be paid double time, except that the Agreement deprives an employee of that entitlement when the employee undertakes a sleepover. An employee's sleep on a 'sleepover' is often interrupted to meet the nursing needs of the client, and all work during such sleep interruption is overtime. The Agreement does not limit the number or duration of interruptions to the employee's sleep during a sleepover. Under the Award, (cl.28.3) an employee in such circumstances is always entitled to a 10 hour break, or to payment of double-time until a 10 hour break is taken.

One week less annual leave for many shiftworkers

24. The Agreement provides (in cl. 7.1.1) "Annual leave
 - a. Not less than 6 weeks if employed on shift work where 3 shifts per day are worked over a period of 7 days per week and where an employee works over more than 2 roster periods which involves a combination of day, evening and night shifts."
25. The Award, however, provides (in cl. 31.1) "Quantum of annual leave
 - a. In addition to the entitlements in the NES, an employee is entitled to an additional week of annual leave on the same terms and conditions.

- b. For the purpose of the additional weeks annual leave provided by the NES, a shiftworker is defined as an employee who:
 - i. is regularly rostered over seven days of the week; and
 - ii. regularly works on weekends.
 - c. To avoid any doubt, this means that an employee who is not a shiftworker for the purposes of clause 31.1(b) above is entitled to five weeks of paid annual leave for each year of service with their employer, and an employee who is a shiftworker for the purposes of clause 31.1(b) above is entitled to six weeks of paid annual leave for each year of service with their employer.”
26. Employees who are regularly rostered over seven days of the week, but who do not work a combination of day, evening and night shifts over more than 2 roster periods, would be entitled to at least one less week of annual leave under the Agreement compared to the Award.
27. One week is 1.92% of a year, but the value to an employee of a week of annual leave is more than 1.92% of their base wages. Annual leave is very important to employee’s mental health and an extra week of annual leave is a significant benefit to an employee.
28. The Employer is wrong to claim that the Agreement provides base wages which are at least 29.6% above the Award base rates. The Agreement base rate for a Carer (Entry Level) is only 2.7% higher than the corresponding Award rate for a Nursing Assistant 1st year. The Agreement base rate for a Carer (Level 2.1) is only 4.4% higher than the corresponding Award rate for a Nursing Assistant Exp. Cert III.
29. The Agreement will provide less than 5 weeks leave for employees who have worked a combination of day, evening and night shifts over more than 2 roster periods, but for less than 12 months, because Cl.7.1.5 provides:
“Less than 12 months continuous shift work completedAn employee who is not a continuous shift worker but has worked as a continuous shift worker for a portion of the 12 months prior to taking annual leave or who having worked as a continuous shift worker resigns before the completion of 12 months’ service, shall be entitled to additional annual leave on a pro rata basis on the terms below, in respect of the period of work performed as a continuous shift worker:
- Provided that the following minimum number of each of the 3 types of shift have been worked:
- a. up to and including 3 months’ service – no entitlement;
 - b. from 3 months and up to but not including 6 months’ service – 5 of each shift to be worked;
 - c. from 6 months and up to but not including 9 months’ service – 10 of each shift to be worked;
 - d. from 9 months and up to but not including 12 months’ service – 15 of each shift to be worked.”

One hour shifts for Carers doing In-Home work

30. The Agreement provides [in cl. 7.9.2(b)] “The minimum engagement as stated in subclause (a) above shall not apply to Carers doing In-Home work where, in accordance with Clauses 4.3 and 4.4, one hour minimum shall be payable.” The agreement would allow the Employer to roster all of the shifts of a Carer doing In-Home for just one hour each and without the employee’s agreement, and for the employee to be paid only one hours’ wages per day. Under the Award, however, the rostering arrangements applicable to the guaranteed minimum hours of work per fortnight must be agreed between the employee and the employer. The union is unaware of any members who have that Award entitlement (or similar) agreeing to one or more shifts of only one hour.

No overtime penalties paid for training in overtime

31. The Agreement provides (in cl. 8.1.2) ”Where Sundale identifies the education and associated competency as mandatory/compulsory, attendance at such education will be paid at the base rate of pay, Where the employee chooses to undertake such mandatory/compulsory education outside of their normally rostered hours through Sundale’s e-Learning system, payment will be paid at the base rate of pay for a time period based on the time allocated by Sundale for a single attempt at completing the relevant education module.”
32. The Agreement similarly provides (in cl. 8.1.6) “Where Sundale provides prior approval for an employee to attend such workshops, conferences or seminars, Sundale will pay the appropriate base rate of pay.” In cl. 8.1.6, “prior approval” by the employer includes an instruction or direction by the employer to attend or participate in workshops, conferences or seminars. Under the Award, an employee who is expected by their employer to do anything, including attending training, is entitled to be paid at overtime rates if such work is done in overtime.
33. The Employer has offered a s.190 undertaking to pay overtime rates for “in-service training conducted outside of the normal rostered hours of employees.” Training provided by the Employer itself may be “in-service training“ but much of the training mentioned in cl.8.1.2 and 8.1.6 is provided by other organisations and is not “in-service training” and therefore not subject to the undertaking concerning “in-service training”.

Unrostered work

34. Also, the undertaking implies the Employer is able to require employees to attend or participate in training outside of the normal rostered hours of employees, but the Employer could not do so because training is work and cl. 6.5 provides; ““Employees will work in accordance with a fortnightly roster fixed by the employer.” The Agreement does not allow for any unrostered work, except for recall work performed whilst on call (cl. 5.4.10) which provides a minimum payment as for three hours work.

Unpaid training

35. The Agreement provides (in cl. 8.1.3) "... Where the employee is not successful in achieving competency in the second attempt, any subsequent education and competency assessment will be in the employee's unpaid time." The Agreement contains no limits as to how many competencies the Employer may require an employee to achieve.
36. An employee to whom the Award applies is entitled to be paid for all service, including training and any second attempt at achieving a competency sought by the employer.

Trainees base rates all below the Award

37. The Agreement provides (in cl. 8.2) "Full-time and part-time trainees may be engaged subject to the provisions of Schedule E of the Miscellaneous Award 2010. Wages will increase in accordance with the percentage increases outlined in the Wages Tables of Schedules 2 and 3."
38. Schedule 2 of the Agreement provides wage rates for Carers but it contains no wage rates for Trainees. Cl. 8.2 does not say the date upon which any wage increases are payable to trainees. At the test time, the Agreement would entitle a trainee to only the Award rate (i.e. Schedule E of the Miscellaneous Award 2010). The Agreement's vague provision for wage increases for trainees "in accordance with the percentage increases outlined in the Wages Tables of Schedules 2 and 3" does not make any of those wage increases payable to trainees on any particular date and therefore none of those wage increases are payable at the test time (11/10/2019), if at all. The Agreement would not make any trainee better off in their base wage or overall.
39. The Nurses Award does not provide for different wages and conditions of employment for trainees, whether by reference to Schedule E of the Miscellaneous Award 2010 or otherwise. A trainee to whom the Nurses Award applies is entitled to no lesser wages or conditions of employment than a non-trainee in the same Award classification.
40. (deleted in 26 November submissions).
41. The Employer's F17 does not mention trainees in its classification translation table.

Base wages – one rate is 24 cents/hour lower than the Award

42. The table below shows the base hourly wages at the test time for employees with a relevant Certificate III who are classified under the Award as a Nursing Assistant and who are classified under the Agreement as a Carer, with the respective amounts of experience shown:

Awards – Relevant classifications for employees with a Cert III		Experience	Sundale Agreement – Carer		Difference
Nurses Award Nursing Assistant, Exp. Cert III	\$22.70	less than 3 months exp	Entry	\$22.46	- 24 cents
Aged Care Award - Aged care employee—level 4 (Personal care worker grade 3)					
SCHCADS Award - Home care employee level 3, Pay point 1 (certificate 3)					
Nurses Award - Nursing Assistant, Exp. Cert III	\$22.70	3-12 months exp or less than 1976 hours F-T or 1200 hours P- T	Level 1.1	\$23.36	+ 66 cents
Aged Care Award - Aged care employee—level 4 (Personal care worker grade 3)					
SCHCADS Award - Home care employee level 3, Pay point 1 (certificate 3)					

43. A Carer with a Certificate III is entitled to less than 66 cents per hour more than the Award base rate if the Carer is full-time and has more than 3 months but less than 1976 hours of experience [Agreement Level 1.1 base wage is \$23.36 /hour and the Awards base rate is \$22.70.

Lesser Laundry Allowance

44. (deleted in 26 November submissions)

45. The Laundry Allowance provided by the Award is 32 cents/shift whereas the Agreement 5.71 cents/hour. Whenever an employee works a shift of less than 5.75 hours, s/he would be entitled to a lesser payment of Laundry Allowance under the Agreement than under the Award.

Conclusion

46. It is for the Applicant to satisfy FWC that the application for approval of the Agreement meets the requirements of the Act; there must be no presumption, rebuttable or otherwise, that an agreement passes the BOOT or meets any of the requirements of the Act. Therefore, there is no onus upon the Union to adduce evidence that the Agreement does not meet the requirements of the Fair Work Act.
47. In light of these submissions, the FWC cannot be satisfied that the Agreement would make every RN, EN and Carer covered by it better off overall than if the Nurses Award (which covers those employees) applied to them. Accordingly, the FWC cannot approve the Agreement.”

[16] On 2 December 2019, Sundale responded to the submission of the Nursing Unions in the following terms:

1. “These submissions are made on behalf of the Applicant Sundale Limited (Sundale) in support of the application for approval of the Sundale Limited Enterprise Agreement 2018-2021 (Sundale Agreement) under section 185 of the Fair Work Act 2009 (FW Act) and in reply to submissions made by the Australian Nursing and Midwives Federation (ANMF) provided on Tuesday, 26 November 2019.
2. Sundale relies upon submissions filed on 7 November 2019 in accordance with the directions made by the Commission on 24 October 2019.
3. Sundale rejects the contention that the agreement fails the better off overall test (BOOT) as applied pursuant to section 186(2)(d) and as defined in section 193(1) FW Act.

ANMF’s incorrect application of comparator ‘relevant modern award’ pursuant to section 193 FW Act

4. The ANMF incorrectly characterises employees performing ‘care’ work or ‘carers’ under the Sundale Agreement as ‘Nursing Assistants’ covered by the Nurses Award 2010 (Nurses Award).
5. The Nurses Award does not cover the care workers described under the Sundale Agreement.
6. The sole basis for the ANMF contention, is the inclusion in the definition of “Carers” in schedule 2 of the Sundale Agreement of the following words:
“Care Work” shall mean the performance by an employee who is a Carer (including Assistants in Nursing ...”
7. The term “Assistants in Nursing” is not a description or a term to be found in the Nurses Award. No explanation is offered by the ANMF submissions as to why or how the inclusion of that term in this Agreement in some way constitutes all

- “Carers” as being “Nursing Assistants” within the definition of “Nursing Assistants” as contained in the Award.
8. As explained in the affidavit of John Hayward filed in the Fair Work Commission (the Commission), the use of the now redundant expression “Assistant in Nursing” in the context of this Agreement is explained as being referable only to an historical or legacy title which is continued to be used in a case of 12 long-standing employees who previously worked (since before 2010) in a role that bore that title. Those employees sought to retain that title despite a significant change in their duties (along with all other Carer employees at Sundale) and despite the fact that they no longer perform the role previously described as an Assistant in Nursing. There are a total of 296 Carers, including those 12 employees, employed across all Sundale sites and covered by the Sundale Agreement.
 9. In context, the term “Assistant in Nursing” when used in the Agreement is simply a reference to a group of 12 employees who are said to be included in the definition of Carers, not because they are a different classification with different roles or duties, but for the sole reason that they are known on-site by that “courtesy” title, which has no implications for the duties they perform.
 10. A Nursing Assistant is described under the Nurses Award and is confined to employees who work:
‘under the direct control and supervision of a registered or enrolled nurse and whose employment is solely to assist a registered nurse or an enrolled nurse in the provision of nursing care to persons.’
Nursing care is described in Schedule B of the Nurses Award as:
 - ‘giving assistance to a person who, because of a disability, or is unable to maintain their bodily needs without frequent assistance;
 - carrying out tasks which are directly related to the maintenance of a person’s bodily needs where that person, because of the disability, is unable to carry out those tasks for themselves; and/or
 - assisting a registered nurse to carry out the work described in B.5.
 - For the purposes of this Award, nursing care also includes care provided by midwives.’
 11. The Sundale Agreement defines employees covered by that agreement as those for ‘whom classifications and rates of pay are prescribed in Schedules 1, 2, 3, 4 and 5’ of the Sundale Agreement (clauses 1.3 and 1.4.1(e)).
 12. Employees providing care work perform the functions described in Schedule 2 of the Sundale Agreement.
 13. Relevantly, as described in Schedule 2, care workers are:
 - a. not restricted to performing ‘nursing care’ as defined;
 - b. not limited to the ‘direct control and supervision of a registered or enrolled nurse’; and
 - c. not employed solely to assist registered or enrolled nurses.
 14. The distinction between a care worker and a Nursing Assistant was articulated by Deputy President Asbury (and confirmed on appeal of the Full Bench) in *QNU v Uniting Church in Australia Property Trust and Wesley Mission* [2015] FWC 1388. D.P Asbury found:
“...
[393] At a further risk of stating the obvious, the term “personal carer” refers to an employee who provides care that is personal to or relates to the person of a resident. On the plain meaning of the term “personal care” such duties include:

bathing and showering; brushing hair; dental care; showering; putting on hearing aids and glasses; dressing and undressing residents; applying creams such as moisturisers or barrier creams to their skin; putting hats and sunscreen on residents so that they may go outdoors; feeding residents unable to feed themselves; giving residents drinks so that they are hydrated; changing continence aides; and making beds. These are personal care tasks that that would be performed in any setting in which aged persons were accommodated and are also tasks that can be described as daily living tasks. These tasks can be described as care duties and are not solely nursing tasks...'

[409] While the definition of "nursing care" in the Nurses Award 2010 is broad and reflects aspects of personal care, that definition must be seen in the context of an Award that is occupationally based and which restricts the classification of "Nursing Assistant" to an employee who is under the direct control and supervision of a RN or EN and employed solely to assist a Registered or Enrolled Nurse in the provision of nursing care. This is consistent with my view of the construction of the 2013 Nursing Agreement with respect to the assignment or delegation of tasks by RNs and ENs.¹

15. Sundale has negotiated agreements with its employees and unions including the ANMF on four occasions since 2007 resulting in the:
 - a. Sundale Garden Village Collective Agreement (Nurses) 2007(2007 Sundale Agreement);
 - b. Sundale Garden Village Carer and Support Employees Collective Agreement 2008 (2008 Sundale Agreement);
 - c. Sundale Garden Village Enterprise Agreement 2009-2012 (2009 Sundale Agreement);
 - d. Sundale Limited Enterprise Agreement 2013-2015 (2013 Sundale Agreement);
 - e. Sundale Limited Enterprise Agreement 2016-2018 (2016 Sundale Agreement).
16. The 2007 and 2008 Sundale agreements were separate agreements for 'nursing' and 'support' employee agreements respectively. These agreements contained separate classifications for 'assistants-in-nursing' (in the 2007 Sundale Agreement) and carers (in the 2008 Sundale Agreement).
17. An 'assistant in nursing' was defined in the 2007 Agreement as 'an employee who is solely required to assist in the performance of nursing duties under the supervision of a Registered Nurse or an enrolled nurse.'²
18. In the 2009 Sundale Agreement, nursing and support workers were combined in the one agreement. The specific definition and classification of 'assistant-in-nursing' was removed and subsumed within the broader definition of 'carer'.³
19. The 2009 Sundale Agreement defined 'carer' as follows:
 - 1) "Care Work" shall mean the performance by a team member who is a: Personal Care Worker, In Home Carer, Assistant in Nursing or Allied Health Assistant of any or any number of the following duties or functions in or in connection with the provision of accommodation or services:
Section 19.01 The provision to, or in respect of, an Elder/client of one or more of the following:

¹ see also paragraphs [384] to [427]

² See clause 3.1 .1 (i) Sundale Garden Village Collective Agreement(Nurses) 2007

³ See clause 1.6.12 Sundale Gard Village Enterprise Agreement 2009-2012

- a) Assistance with activities of daily living, including:
 - (i) bathing, showering or personal hygiene;
 - (ii) toileting;
 - (iii) dressing or undressing;
 - (iv) mobility;
 - (v) transfer;
 - (vi) meals and refreshments;
 - (vii) sensory communication or the fitting of sensory communication aids.
 - b) A special diet where required.
 - c) Assistance with self administration of medication subject to legal restrictions on the provision of such services.
 - d) Rehabilitative support, where the Elder/client contracts a short term illness.
 - e) Where required, basic treatment such as assistance with eye drops, back rubs, dressings, and the like, subject to legal restrictions on the provision of such services.
 - f) Long term emotional support and direct supervision for an Elder/client diagnosed as suffering from a form of dementia or a functional psychotic condition.
 - g) Emotional support to a Elder/client suffering from an emotional needs condition such as grief or depression;
 - h) Assistance in the delivery of physiotherapy, occupational therapy, hydrotherapy, massage therapy or other therapies generally included as allied health services.
- 2) Completion of necessary documentation concerning the above, within the limits of the team member's skill and qualifications.
 - 3) Necessary observation and assessment of the Elder/client and reporting on same within the limitation of the team member's skill and qualification.
20. The 2013 Sundale Agreement continued this definition of 'carer', which is significantly broader than the definition of "Assistant in Nursing" or "Nursing Assistant". As part, however of the application for approval of the 2013 Sundale Agreement and acknowledging that the classification description in that agreement described personal carers and did not make separate provision for the more limited Assistant-in-Nursing role, the Fair Work Commission accepted an undertaking from Sundale that employees who had been appointed Assistants-in-Nursing would have their positions preserved while they remained employed in that role.
21. That undertaking dated 24 April 2014 is attached to the 2013 Sundale Agreement approved by the Fair Work Commission and attached to these submissions for ease of reference. The undertaking was not repeated in the 2016 agreement, nor was there any definition in that agreement for a calling described as an "Assistant in nursing", which term was included within the definition of "Carer" with no different prescription of duties.
22. Since the 2009 Sundale Agreement, Sundale has not had a defined classification for 'assistant nurse'; 'nursing assistant' or 'assistant-in-nursing'. A classification limited to 'an employee who is solely required to assist in the performance of nursing duties under the supervision of a Registered Nurse or an

enrolled nurse’’⁴ was replaced in 2009 by the carer role with broader capacity to perform duties consistent with requirements of an aged care facility and the requirements of home care as defined the industry specific Aged Care Award 2010 (Aged Care Award) and Social Community Home Care and Disability Services Award 2010 (SCHCDSI Award).

23. The definition of ‘carer’ as indicated in paragraph 9 has been repeated in each subsequent agreement.
24. Sundale has not sought for the agreement to cover ‘Nursing Assistants’ as defined by the Award since the Award commenced and it is not the intention of Sundale to engage employees in this limited category under this agreement.
25. To the extent that it causes confusion, the expression ‘Assistants in Nursing’ in the first paragraph of Schedule 2 may be disregarded and deleted.

Fixed term employment less beneficial

26. The applicable awards, namely the Aged Care Award, Nurses Award and SCHCDSI Award, contain no prohibition against fixed term employment. The categories of full-time or part-time employment under clause 10 of the Nurses Award are not necessarily permanent at all, and may well be for a fixed term, so long as all the benefits attaching to either full-time or part-time employment are observed during that term.
27. Fixed term employment is a legitimate means by which aged care operators can address short term needs including project work and to comply with National Employment Standards concerning replacement staff for parental leave in additional to other periods of leave for incumbent staff.
28. Fixed term employees will enjoy all of the benefits of the Sundale Agreement for the term of their employment.

Non-compounding of casual loading with penalty rates

29. The decision of ANMF v Domain Aged Care (Queensland) Pty Ltd trading as Opal Aged Care [2019] FWCFB 1716 (Opal Aged Care decision) will apply only to registered nurses and enrolled nurses in the Sundale Agreement.
30. Carers, as indicated, are covered by the Aged Care and SCHCDSI awards. Both of these awards provide casual loading clauses which reflect the clause contained in the Sundale Agreement.
31. In accordance with the wages rate comparison contained in the Schedule, registered and enrolled nurses will be paid weekly ordinary rates between 30-48% above Nurses Award rates (depending on classification). Therefore, any work performed on a casual basis will be remunerated at a level well in excess of applicable award remuneration taking into consideration the effect of the Opal Aged Care decision.

No redundancy pay in particular circumstances

32. The ANMF has adopted a particularly narrow and obtuse reading of clause 4.7.1. It remains the case that, notwithstanding the ANMF’s comments, in circumstances where major workplace change results in termination of positions

⁴ See clause 3.1 .1 (i) Sundale Garden Village Collective Agreement(Nurses) 2007

through redundancies, provision of redundancy pay of up to 16 weeks is mandated.

33. To the extent that this remains unclear, Sundale is prepared to provide the following undertaking:
‘Sundale Limited undertakes that it will interpret and apply clause 4.7.1 of the Sundale Enterprise Agreement 2018-2021 as if clause 4.7.1. reads “where major workplace change occurs under clause 3.2 and an outcome is the termination of positions through redundancy the provisions of clause 4.7 will apply”.’
34. In relation to the criticism of clause 4.7.6, Sundale maintains that, practically, the effect of the clause is the same as the National Employment Standards. If, however, this is a cause for concern, Sundale is prepared to provide an undertaking in the following terms:
Sundale Ltd undertakes that it will interpret and apply clause 4.7.6 of the Sundale Enterprise Agreement as if that clause reads:
‘4.7.6 Alternative employment
If Sundale obtains acceptable alternative employment for an employee, section 120 of the Fair Work Act will apply.’
[Employees to be paid at lower paypoints due to limitations on recognition of experience]
35. In relation to clause 5.1.1, the ANMF’s concerns are misplaced. Clauses 5.1.1 and 5.1.2 do not preclude an employee from providing details of relevant experience. The clause simply indicates that such experience should be provided within four weeks of engagement. This is not an unreasonable request given, in clause 5.1.2, employees will be notified at the time of their engagement that this is required. The provision of the relevant information within four weeks is not a condition precedent to obtaining recognition of previous service.
36. The term ‘continuous service’ plainly does not and cannot mean service with Sundale, as the clause itself expressly refers to “all previous continuous relevant service”, the details of which are to be provided after engagement. The word ‘continuous’ is plainly not confined to service with Sundale. If required by the Commission, Sundale would provide necessary undertakings to clarify the meaning of the clause.

Non-payment of wages where client cancels/changes appointment

37. The ANMF’s concerns about this clause are misplaced. Clause 5.4.7 is entirely consistent with the applicable award provision contained in clause 25.5(f) of the SCHCDSI Award.
38. Similarly, the ANMF’s concerns about clause 6.3.1 are misconceived. The clause does not (as stated in the title) apply to ENs and RNs and, therefore, only has application to Carers, who are not covered by the Nurses Award.
39. The clause is entirely consistent with the operative Award, namely clause 25.6 of the SCHCDSI Award. Further, the Award provides a capacity for the employer to require an employee to work a broken shift provided there is compliance with clause 25.5 of that Award.
40. The Sundale Agreement requires the agreement of the individual employee.

Less than 10 hours’ break between shifts

41. The ANMF's concerns expressed in paragraph 21 are misplaced. The provision 6.4.3 plainly gives employees the right to not agree to a published roster consistent with the requirement for agreement contained in the Award. Clause 6.5 is a simple statement that an employer is responsible for formulating rosters, and is clearly subject to the terms of clause 6.4.3. In providing for agreement as being constituted by acceptance of a roster, the Sundale Agreement does no more than make express provision for the manner in which employees may express or manifest their agreement, to remove any uncertainty. Express communication of actual agreement may not be necessary in many circumstances, and the clause simply provides for this convenience. It in no way prevents an employee from expressing disagreement, which would negative any possible presumption of consent.
42. If thought necessary by the Commission, Sundale will provide any necessary undertaking to ameliorate any concerns.
43. In relation to the sleepover provision, the ANMF's concerns are without foundation. The sleepover provisions (contained in clauses 5.4.1 and 5.4.2) only apply to home carers. The applicable Award is the SCHCDSI Award. The SCHCDSI Award includes a sleepover provision in clause 25.7. The terms of that award provision are reflected in clause 6.7.7.
44. Clause 5.4.1 (g) provides that in circumstances where a registered or enrolled nurse is required to do a sleepover, they do so on the basis that it is a normal shift and are paid accordingly.

One week less annual leave for many shift workers

45. As indicated in our previous submissions, all 'care' workers are covered by the SCHCDSI Award and the Aged Care Award.
46. Under these Awards, employees are entitled to a maximum of four weeks' annual leave and five weeks if they are shift workers (this replicates the entitlement contained in the National Employment Standards section 87).
47. Sundale workers under the Sundale Agreement receive a minimum of five weeks' annual leave and six weeks if those employees are 'shift workers' as described in clause 7.1 of the Sundale Agreement.
48. It is only, therefore, registered or enrolled nurses who, under the Nurses Award, would be entitled to 6 weeks' annual leave if they fall within the definition of shift worker as defined in that award, who may receive more than 5 weeks but less than the 6 weeks' annual leave because they do not fall within the 'shift worker' definition contained within the Sundale Agreement.
49. It is already conceded that the definition of shift worker in the Sundale Agreement is narrower than the definition contained in the Nurses Award. The definition is, however, more specific and less ambiguous than the award entitlement.
50. Additionally, as indicated in the wages rate comparison contained in the Schedule, enrolled and registered nurses are paid wage rates which are between 30% and 48% more when compared with the Nurses Award. The offset of these 30% to 48% increases against the 2% equivalent (in terms of annual wages) of an extra week's annual leave is more than enough to satisfy the BOOT.
51. The suggestion that the Sundale Agreement provides less than five weeks' leave for some employees, is simply incorrect.

52. As specified in clause 7.1, all employees receive five weeks' leave. What the ANMF's submissions deal with is those employees who do not work a full 12 month period as a shift worker. They are given credit for a proportion of the work as a shift worker in addition to the five weeks' that they receive, that is, they are paid the appropriate proportion of the sixth week of annual leave, in addition to the guaranteed five weeks. The ANMF's criticism is misconceived.

One hour shifts for carers doing in home work

53. The one hour shift minimum for casual carers performing in home work is as contained within clause 10.4(c)(ii) the SCHCDSI Award.
54. There are no minimum engagements in the Social Community Home Care and Disability Services Industry Award 2010 Award for part time employees, but the Sundale Agreement clause 4.3.3 states that regardless of any mutually agreed one hour minimum engagements in home care, part time employees must be paid their guaranteed fortnightly hours.
55. The ANMF's reference to guaranteed minimum hours is a reference to the Nurses Award entitlement for part-time employees. Again the ANMF's claim is misconceived.
56. No overtime penalties paid for training and overtime
57. This is addressed in the undertaking provided. For clarity Sundale will pay employees for training as if they were working performing normal duties.
58. The term in-service training is not limited to training provided by the employer itself but as the term 'in-service training' is defined in clause 1.6.7 of the Sundale Agreement.

Unrostered work

59. The ANMF's objection is again specious as any training will be rostered in the nature of normal work, and paid accordingly, unless the training is undertaken as overtime outside the roster, in which case it will also be paid as if it was auditor work undertaken as overtime.
60. As indicated in Clause 8.2 of the Sundale Agreement provisions concerning traineeships do not apply to enrolled or registered nurses.
61. Clause 8.2 of the Sundale Agreement simply repeats the provisions of both the Aged Care Award (clause 20.1) and the SCHCDSI Award (clause 19.1) and provides for rates for trainees.
62. Clause 8.2 further provides for increases to those rates to occur when increases occur for other employees under the Sundale Agreement, ensuring that at the date the Sundale Agreement was made trainees were paid more than under Schedule E to the Miscellaneous Award 2010 and that trainees are better off.

Base wages

63. The ANMF's figures comparing the Sundale Agreement to Award rates were incorrect when first provided in submissions on 26 November 2019.
64. The revision provided by the ANMF on 27 November 2019 is also incorrect.
65. The test time as defined in section 193(6) FW Act was the date of the application for approval, namely 11 October 2019. The applicable test rates are therefore

those payable under the proposed Sundale Agreement following the Sundale Agreement's first pay increase on 1 October 2019.

66. The applicable differences between the Sundale Agreement Carer classifications Entry level and level 1.1 when compared with the Award are:

Aged Care Award 2009 at 11 October 2019	Award hourly rate	Sundale Agreement at 11 October 2019	Sundale Agreement hourly rate	% difference
Award level 1	\$20.73	Agreement Entry level	\$22.4602	+8.35%
Award level 2	\$21.58	Agreement Level 1.1	\$23.3630	+8.26%

67. Instead of using the proper comparator the ANMF's submission seeks to make the specious comparison of an Entry Level rate contained in the Sundale Agreement with the Experienced Level (holding a Certificate III) from the Nurses Award.
68. Not only is this the wrong comparator Award, it is also obviously a comparison at the wrong level. A plain reading of the classification descriptors for Carers in the Sundale Agreement provides that Certificate III is not required until Sundale Agreement Level 2.
69. This is conceded by the ANMF in paragraph 28 of their submissions (albeit while using the wrong rate).
70. The comparator be the level at which certificate III is required as follows:

	Aged Care Award at 11 October 2019	Sundale Agreement at 11 October 2019	% difference
Aged Care Award level 4; and Sundale Agreement Level 2	\$22.70	\$24.36	+7.3%
Nurses Award 'experienced level'; and Sundale Agreement Level 2	\$22.70	\$24.36	+7.3%

Lesser allowances

71. The ANMF has failed to apply the correct rate for on call allowances. As expressed in clause 5.4 of the Sundale Agreement, on call allowances increase

- with wage increases contained in the agreement. The on call allowance is \$39.03 compared with the award allowance of \$38.81.
72. The ANMF mistakenly refers to a uniform allowance. As uniforms are provided (Sundale Agreement clause 5.4.5) no uniform allowance applies. In addition, employees are paid a laundry allowance (5.7 cents per hour worked or 45.6 cents per 8 hour shift) to maintain the uniform.
 73. This is compared to the laundry allowance of 32 cents per shift provided in the Aged Care Award when the uniform allowance is paid.
 74. Given the Sundale Agreement pay rates, all of which are in excess of the relevant awards rates as detailed in the Schedule, this issue should not be a determining BOOT factor.

Evidence

[17] In support of its submissions Sundale filed and served an Affidavit sworn by its Human Resources Manager, John Hayward. Mr Hayward's evidence was as follows:

1. "I am the Human Resources Manager for Sundale Ltd (Sundale).
2. I originally commenced work for Sundale in September 2007 and worked until December 2014.
3. I resumed work for Sundale in July of this year.
4. I am currently working in the capacity as acting Human Resources Manager while the organisation undergoes a restructure and until these positions are confirmed as permanent.
5. I have been provided with a copy of submissions by the Australian Nurses and Midwives Federation (ANMF) dated 25 November 2019, and provided to Sundale on 26 November 2019.
6. I refer specifically to the contention by the ANMF contained in paragraph 6 of those submissions that the Nurses Award 2010 covers Sundale employees classified as 'Carers'.
7. I am aware that the Nurses Award 2010 (Nurses Award) does not contain a classification for 'Carer', but does provide a classification for 'Assistant Nurse'.
8. I understand that the definition of an 'Assistant Nurse' under the Nurses Award is an employee:
'Other than one registered with the Nursing and Midwifery Board of Australia or its successors or one who is in training for the purpose of such registration, who is under the direct control and supervision of a Register to an Enrolled Nurse and whose employment is solely to assist an RN or EN in the provision of nursing care to persons.'
9. I understand also that in the Nurses Award 'Nursing Care' is also defined as meaning:
'Giving assistance to a person who, because of a disability, is unable to maintain their bodily needs without frequent assistance;
Carrying out tasks which are directly related to the maintenance of a person's bodily needs where that person, because of disability, is unable to carry out those tasks for themselves; and/or
Assisting a registered nurse carry out the work described in V.5.
For the purposes of this Award, the nursing care also includes care provided by midwives.'

10. I am aware that Sundale does not engage employees under this definition. All employees are engaged under the classification 'Carer' contained within the current Sundale Ltd Enterprise Agreement 2016-2018.
11. I am aware that in approximately 2010, when Sundale moved from a staffing model which included Assistants in Nursing (which was a term derived from the pre-existing awards), that some staff members' preference was to retain the title of Assistant in Nursing despite them performing the role of Carer.
12. I am aware that Sundale has allowed these Carers to retain this title as what is effectively a courtesy title. That title has no implications for the work which they perform, as all Carers (including those who have been permitted to retain the title of assistant in nursing) are engaged, rostered and perform the work described under the Carer classification description found within the Sundale Ltd Enterprise Agreement 2016-2018, which description is replicated in the Sundale agreement currently before the Commission for approval.
13. I have caused a search of Sundale records to be made to confirm how many Sundale employees have retained the title of "Assistant in Nursing". Sundale currently employs 12 individuals, of a total 296 Sundale employees working as Carers across its facilities, who retained this title. All 12 employees are based at the James Grimes Care Centre and have been working at that facility since before 2010. Sundale has not appointed any employee to the role of "Assistant in Nursing" since the beginning of 2010.
14. Despite these employees retaining the title of "Assistant in Nursing", they continue to work as Carers as described in the Sundale Ltd Enterprise Agreement 2016-2018.
15. There are no employees at Sundale who work in the role of Nursing Assistant as described in the Nurses Award.
16. All of the facts and circumstances herein deposed to are within my own knowledge and belief save as are deposed to from information only and my means of knowledge and sources of information appear on the face of this my affidavit."

Applicable legislation

[18] The FW Act prescribes the matters about which the Commission must be satisfied for approval of an enterprise agreement. Part 2 – 4, subdivision B, s.186 sets forth what it describes as the "general requirements" to be satisfied where the Commission is called upon to approve an agreement. That section provides in part as follows:

“When the FWC must approve an enterprise agreement—general requirements

Basic rule

(1) If an application for the approval of an enterprise agreement is made under subsection 182(4) or section 185, the FWC must approve the agreement under this section if the requirements set out in this section and section 187 are met.

Requirements relating to the safety net etc.

(2) The FWC must be satisfied that:

...

(d) the agreement passes the better off overall test.

The phrase “*genuinely agreed*” as employed in s 186(2)(a) is defined in s 188.”

[19] Section 193 of the FW Act provides the framework for assessing the BOOT as follows:

“Subdivision C—Better off overall test

193 Passing the better off overall test

When a non-greenfields agreement passes the better off overall test

(1) An enterprise agreement that is not a greenfields agreement *passes the better off overall test* under this section if the FWC is satisfied, as at the test time, that each award covered employee, and each prospective award covered employee, for the agreement would be better off overall if the agreement applied to the employee than if the relevant modern award applied to the employee.

...

Test time

(6) The *test time* is the time the application for approval of the agreement by the FWC was made under subsection 182(4) or section 185.”

[20] Section 190 of the FW Act provides a mechanism for the Commission to accept undertakings to satisfy its concerns with s.191 providing the effect of such undertakings:

“190 FWC may approve an enterprise agreement with undertakings

Application of this section

(1) This section applies if:

(a) an application for the approval of an enterprise agreement has been made under subsection 182(4) or section 185; and

(b) the FWC has a concern that the agreement does not meet the requirements set out in sections 186 and 187.

Approval of agreement with undertakings

(2) The FWC may approve the agreement under section 186 if the FWC is satisfied that an undertaking accepted by the FWC under subsection (3) of this section meets the concern.

Undertakings

(3) The FWC may only accept a written undertaking from one or more employers covered by the agreement if the FWC is satisfied that the effect of accepting the undertaking is not likely to:

- (a) cause financial detriment to any employee covered by the agreement; or
- (b) result in substantial changes to the agreement.

FWC must seek views of bargaining representatives

(4) The FWC must not accept an undertaking under subsection (3) unless the FWC has sought the views of each person who the FWC knows is a bargaining representative for the agreement.

Signature requirements

(5) The undertaking must meet any requirements relating to the signing of undertakings that are prescribed by the regulations.

191 Effect of undertakings

(1) If:

- (a) the FWC approves an enterprise agreement after accepting an undertaking under subsection 190(3) in relation to the agreement; and
- (b) the agreement covers a single employer;

the undertaking is taken to be a term of the agreement, as the agreement applies to the employer.

(2) If:

- (a) the FWC approves an enterprise agreement after accepting an undertaking under subsection 190(3) in relation to the agreement; and
- (b) the agreement covers 2 or more employers;

the undertaking is taken to be a term of the agreement, as the agreement applies to each employer that gave the undertaking.”

The BOOT

[21] An enterprise agreement that is not a greenfields agreement passes the BOOT if the Commission is satisfied, as at the test time, that each award covered employee, and prospective award covered employee, would be better off overall if the agreement applied than if the relevant modern award applied.

[22] The BOOT considers the terms that are more beneficial and less beneficial to employees in an agreement, compared to the terms in the relevant modern award.

[23] The BOOT is not applied as a line by line analysis. It is a global test requiring consideration of advantages and disadvantages to award covered employees and prospective award covered employees. The application of the BOOT therefore requires the identification

of the terms of an Agreement which are more beneficial to employees when compared to the relevant modern award, and the terms of an Agreement which are less beneficial and then an overall assessment of whether an employee would be better off under the Agreement.⁵

[24] The Commission must be satisfied that each award covered employee and each prospective award covered employee would be better off overall if the agreement applied to the employee than if the relevant modern award applied to the employee.⁶

[25] The question posed by the BOOT is not whether each employee is better off under the Agreement compared to their particular existing working arrangements but whether they are better off overall if the Agreement applied rather than the relevant modern award.⁷

[26] An agreement may pass the test even if some award benefits have been reduced as long as overall those reductions are more than offset by the benefits of the agreement.⁸

[27] The Commission needs to be satisfied that, weighing the agreement provisions as a whole with those in the award, an employee is better off overall.⁹

Consideration

[28] On 4 December 2019, the Nursing Unions advised that they did not require Mr Hayward for cross-examination. All parties then consented to the Application being decided “on the papers”. Consequently, the Notice of Listing for 6 December 2019, was vacated.

Issues raised by the Commission

Definition of shiftworker

[29] I accept the submission of Sundale that, on a proper reading of the Agreement, all employees receive at least five weeks annual leave. A potential issue only arises in relation to employees covered by the *Nurses Award 2010* as the wording in the modern award differs from the wording in the Agreement. However, in respect of those employees the proper application of the BOOT means that I am satisfied relevant employees are better off overall.

Definition of immediate family

[30] I note the proposed undertaking (undertaking number 3) relating to the definition of immediate family. The issue is resolved.

Carer rates of pay

⁵ *Re Armacell Australia Pty Ltd* [2010] FWAFB 9985 (Giudice J, Acton SDP, Lewin C, 24 December 2010) at para. 41, [(2010) 202 IR 38].

⁶ *Hart v Coles Supermarkets Australia Pty Ltd and Bi-Lo Pty Limited T/A Coles and Bi Lo* [2016] FWCFB 2887 (Watson VP, Kovacic DP, Roe C, 31 May 2016) at para. 6.

⁷ *Re Australia Western Railroad Pty Ltd T/A ARG – A QR Company* [2011] FWAA 8555 (Williams C, 14 December 2011) at para. 5.

⁸ *Ibid.*, at para. 8.

⁹ *National Tertiary Education Industry Union v University of New South Wales* [2011] FWAFB 5163 (Harrison SDP, Sams DP, Deegan C, 10 August 2011) at para. 47, [(2011) 210 IR 244].

[31] I note the proposed undertaking (undertaking number 4) incorporating the words “two aged persons”. That undertaking puts beyond doubt that the relevant employees under the Agreement fall under schedule E (Home Care Employees) of the SCHCDSI Award. Those employees were not subject to the Equal Remuneration Order.

Sleepover Allowance

[32] I note the proposed undertaking (undertaking number 2) increasing the Sleepover Allowance to \$48.45. The issue is resolved.

Traineeships

[33] Noting the submission by Sundale about the timing of the lodgement of the Agreement and the first proposed wage increase (which predated it) I accept that trainees under the Agreement are better off overall when compared with the *Miscellaneous Award*.

In service training

[34] I note the proposed undertaking (undertaking number 1) in relation to the payment of applicable overtime for training. The issue is resolved.

Issues raised by the Nursing Unions

Nurses Award covers Carers

[35] A consequence of the Nursing Unions not requiring Mr Hayward for cross-examination is that his evidence is uncontroverted. It is the only evidence before the Commission about the work undertaken by employees described as “Assistants in Nursing”. The term “Assistants in Nursing” is an historical hangover from an earlier time and now only applies to a group of 12 employees based at the James Grimes Care Centre and who were employed at the facility before 2010. “Nursing Assistants” are covered by the *Nurses Award 2010*. Properly applying the correct modern award comparator these employees are better off overall. There is no need for Sundale to otherwise correct or amend Schedule 2 where it refers to “Assistants in Nursing”.

Fixed-term employment less beneficial

[36] The Nursing Unions complained that the fixed term category of employment under the Agreement is significantly less beneficial to employee than full-time or part-time employment under the Award. Other than making that assertion the less beneficial nature of the category is not otherwise explained by the Nursing Unions. Fixed term employment, as opposed to ongoing employment, is a common occurrence used by employers to legitimately serve a particular need (for example a maternity leave position).

[37] Employees engaged on a fixed term basis receive the same terms and conditions of employment as a full-time or part-time employee. When properly classified fixed term employees lose the benefit of protection from unfair dismissal, but are otherwise treated the same. I’m not satisfied that fixed term employment under the Agreement is significantly less

beneficial to employees when compared to full-time or part-time employment under the Award.

Non-compounding of casual loading with penalty rates

[38] Noting the rate comparisons for both registered and enrolled nurses I'm satisfied that they will be better off overall when compared with the modern award even taking into consideration the decision in *Opal Aged Care*.

No redundancy pay in particular circumstances

[39] I do not accept that the reading of Clause 4.7.1 advanced by the Nursing Unions is the proper reading of that clause. Enterprise agreements are beneficial instruments and the Agreement would not be read so narrowly.

[40] Notwithstanding, Sundale has proffered additional undertakings to make clear the entitlement relating to redundancy that will put the issue beyond doubt. The undertakings are useful suggestions and Sundale is invited to provide the same in a consolidated undertaking document.

Employees to be paid at lower paypoints due to limitations on recognition of experience

[41] Because an enterprise agreement is a beneficial instrument, I do not accept that, as it is presently drafted, the Agreement would properly be interpreted as limiting the recognition of experience. Notwithstanding, Sundale has proffered additional undertakings to make clear the entitlement that will put the issue beyond doubt. The undertakings are useful suggestions and Sundale is invited to provide the same in a consolidated undertaking document.

Non-payment of wages where client cancels/ changes appointments

[42] The proper comparator for carers is the SCHCDSI Award. The Agreement terms are consistent with that modern award.

Broken shifts

[43] I accept that there is some disutility associated with working broken shifts, particularly for employees with family and or carer responsibilities. However, that does not mean that I am satisfied that employees are not better off overall.

Less than 10 hours' break between shifts

[44] Because an enterprise agreement is a beneficial instrument, I do not accept that, as it is presently drafted, the Agreement would be interpreted in such a way that employees are denied the genuine opportunity for a ten hour break. Notwithstanding, Sundale has proffered an additional undertaking to make clear the entitlement that will put the issue beyond doubt. The undertakings are useful suggestions and Sundale is invited to provide the same in a consolidated undertaking document.

No entitlement at all to a ten hour break after overtime when 'sleeping over'

[45] The proper comparator for carers is the SCHCDSI Award. The Agreement terms are entirely consistent with that modern award.

One week less annual leave for many shift workers

[46] The issue of many shift workers receiving one week less annual leave is dealt with above in answer to the issues raised by the Commission.

One hour shifts for Carers doing In-home work

[47] The proper comparator for carers is the SCHCDSI Award. The Agreement terms are consistent with that modern award.

No overtime penalties for training in overtime

[48] The undertaking provided by Sundale when considered with the operation of the Agreement addresses the concern raised by the Nursing Unions.

Unrostered work

[49] On a proper reading of the Agreement the implication contended for by the Nursing Unions is not to be found in the Agreement.

Unpaid training

[50] If the training is mandatory or compulsory it cannot be unpaid. When considered in context of the entirety of clause 8.1 providing for “In-service Training”, I do not read Clause 8.1.3 of the Agreement as offending against that principle. Notwithstanding, Sundale is invited to provide an undertaking to put the issue beyond doubt.

Trainees base rates all below the Award

[51] By reason of the operation of Clause 8.2 and the Agreement as a whole (including the benefits it contains) I am satisfied that the relevant employees are better off overall.

Base wages

[52] Noting the submission by Sundale about the timing of the lodgement of the Agreement and the first proposed wage increase (which predated it) I accept that employees under the Agreement are better off overall.

Lesser laundry allowance

[53] A proper application of the BOOT means that I am satisfied that the employees are better off overall. While a line by line analysis is useful in identifying which modern award conditions need to be ‘compensated for’, the fact that there is a diminution in one entitlement does not mean that overall, employees are not better off. In any case, I am not persuaded that the Nursing Unions have correctly identified less beneficial terms in relation to on call allowances and the laundry allowance.

Conclusion

[54] Sundale has provided written undertakings. A copy of the undertakings is attached in **Annexure A**. In its 2 December 2019 submissions Sundale proffered other undertakings. Those undertakings are more in the nature of “in the avoidance of doubt” type provisions. Each would be of assistance in confirming the meaning of the relevant clauses.

[55] I am satisfied that the undertakings, together with the proffered undertakings, will not cause financial detriment to any employee covered by the Agreement and that the undertakings, together with the proffered undertakings, will not result in substantial changes to the Agreement.

[56] Consequently, I invite Sundale to file in the Commission consolidated undertakings incorporating those already given and those proffered. Once provided, those undertakings can be taken to be a term of the Agreement once it is approved.

[57] Subject to the filing of the consolidated undertakings referred to above, I am satisfied that each of the requirements of ss.186, 187, 188 and 190 as are relevant to this application for approval have been met.

[58] The Nursing Unions, the AWU and the UWA being bargaining representatives for the Agreement, have given notice under s.183 of the Act that they want the Agreement to cover them. In accordance with s.201(2), I note that the Agreement covers these organisations.

[59] Subject to the consolidated undertakings being provided before **5 pm on 30 December 2019**, the Agreement is approved and, in accordance with s.54 of the Act, will operate from 31 December 2019. The nominal expiry date of the Agreement is 31 December 2021.



COMMISSIONER

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Annexure A



IN THE FAIR WORK COMMISSION

FWC Matter No.: AG2019/3906 Sundale Ltd Enterprise Agreement 2018 - 2021

Applicant: Sundale Ltd

Application: Section 185 – Application for approval of a single enterprise agreement

Undertaking- Section 190

I, Danielle Mackenzie, Chief Executive Officer of Sundale Ltd give the following undertakings with respect to the Sundale Ltd Enterprise Agreement 2018 – 2021 ("the Agreement"):

I have the authority given to me by Sundale Ltd to provide these undertakings in relation to the application before the Fair Work Commission.

1. That in-service training (as described in Clause 8.1 of the Agreement) which is conducted outside of the normally rostered hours of employees will be paid at the applicable overtime rates as outlined in Clause 6.7 of the Agreement. Furthermore, references in Clause 8.1 of the Agreement to in-service training that is conducted outside of normally rostered hours being paid at the base rate of pay will have no effect.
2. The rate of the Sleep Over Allowance as described in Clause 5.4.1 of the Agreement and outlined in Schedule 5 of the Agreement shall be \$ 48.45 as at 30 September 2019. Furthermore, references in Schedule 5 of the Agreement to the Sleep Over Allowance rate as at 30 September 2019 being \$ 46.44 shall have no effect.
3. The Agreement shall incorporate the definition of immediate family as outlined in Section 12 of the Fair Work Act 2009. Furthermore, the definition of immediate family as outlined in Clause 1.6.5 of the Agreement shall have no effect.
4. That the first paragraph of Schedule 2 of the Agreement shall incorporate the words "to aged persons" after the words "the provision of accommodation or care services".
5. That the first paragraph of Schedule 3 of the Agreement shall incorporate the words "to aged persons" after the words "Catering, Laundry, Housekeeping, Grounds, Maintenance and Administration".

Signature
Danielle Mackenzie

5.11.19

Date

RETIREMENT COMMUNITIES CARE CENTRES IN-HOME CARE CHILD CARE REHABILITATION HOUSING

T. 07 5441 0700 F. 07 5441 4233 E. info@sundale.org.au
A. Sundale Garden Village, 35 Doolan Street, Nambour Q 4560 | PO Box 5202 SCMC, Nambour Q 4560

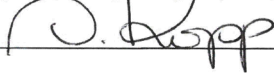
ABN 33 436 160 489
ACN 164 270 946



www.sundale.org.au


I have read, understand and agree with the undertakings provided by the employer

Sue Kropp, Employee Bargaining Representative

Signature  5/11/2019

I have read, understand and agree with the undertakings provided by the employer

Richard Frost, Employee Bargaining Representative

Signature  5/11/2019

I have read, understand and agree with the undertakings provided by the employer

For Australian Workers' Union

Signature _____ / / 2019

I have read, understand and agree with the undertakings provided by the employer

For United Voice

Signature  7/11/2019

I have read, understand and agree with the undertakings provided by the employer

For Queensland Nurses' and Midwives Union and the Australian Nursing and Midwifery Federation

Signature _____ / / 2019