DECISION

Fair Work Act 2009
s.156 - 4 yearly review of modern awards

4 yearly review of modern awards – Award stage – Group 4 – *Aged Care Award 2010* – Substantive claims
(AM2018/13)

JUSTICE ROSS, PRESIDENT
DEPUTY PRESIDENT CLANCY
COMMISSIONER LEE

MELBOURNE, 26 AUGUST 2019

4 yearly review of modern awards – award stage – group 4 awards – substantive issues – Aged Care Award 2010

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1. Introduction

[1] This decision deals with a number of substantive variations to the *Aged Care Award 2010* (the Aged Care Award) sought by United Voice and the Health Services Union (the HSU). A programming Mention was held on 9 November 2018 and a Report and Directions issued on 13 November 2018. The directions were amended on 18 January 2019. Parties seeking variations were directed to file evidence and submissions in support of their claims. Submissions were subsequently filed by United Voice;[1] and HSU.[2] Neither party filed any witness evidence relating to their claims. The following parties filed submissions in reply:

- Aged and Community Services Australia and Leading Age Services Australia (Aged Care Employers);[3]
- Australian Federation of Employers and Industry (AFEI);[4] and
- Australian Business Industrial and the NSW Business Chamber (jointly ABI).[5]

[2] The matter was heard on 10 April 2019. The transcript of the proceedings are available on the 4 yearly review section of the Commission's website. A list of written submissions filed is at **Attachment A** to this decision. A summary document outlining the relevant procedural history; the claims being pursued by United Voice and the HSU; and a summary of submissions received was published on 5 April 2019. To assist the parties the Commission also published a Statement[6] on 5 April 2019 which drew attention to an Aged Care industry profile prepared by the Workplace and Economic Research section of the Commission. An additional background document providing data related to the Aged Care Award was published on 8 April 2019[7]. We return to those publications later in our decision. We turn first to the relevant procedural history.

[3] It is necessary to first say something about the Commission's task in the Review before turning to describe the Aged Care sector and the proposed variations.

2. The Review

[4] Section 156 of the *Fair Work Act 2009* (Cth) (the Act) deals with the conduct of the Review and s.156(2) provides that the Commission *must* review all modern awards and *may*, among other things, make determinations varying modern awards. In this context 'review' has its ordinary and natural meaning of 'survey, inspect, re-examine or look back upon'.[8] The discretion in s.156(2)(b)(i) to make determinations varying modern awards in a Review, is expressed in general, unqualified, terms.

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[1] United Voice submission dated 18 January 2019

[2] HSU submission dated 23 January 2019

[3] Aged Care Employers submission dated 25 March 2019

[4] AFEI submission dated 22 March 2019

[5] ABI submission dated 20 March 2019

[6] [2019] FWCFB 2249

[7] [2019] FWCFB 2383

[8] *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161 at para [38]

[5] If a power to decide is conferred by a statute and the context (including the subject-matter to be decided) provides no positive indication of the considerations by reference to which a decision is to be made, a general discretion confined only by the subject matter, scope and purposes of the legislation will ordinarily be implied.[9] However, a number of provisions of the Act which are relevant to the Review operate to constrain the breadth of the discretion in s.156(2)(b)(i). In particular, the Review function is in Part 2-3 of the Act and hence involves the performance or exercise of the Commission's 'modern award powers' (see s.134(2)(a)). It follows that the 'modern awards objective' in s.134 applies to the Review.

[6] Section 138 (achieving the modern awards objective) and a range of other provisions of the Act are also relevant to the Review: s.3 (object of the Act); s.55 (interaction with the National Employment Standards (NES)); Part 2-2 (the NES); s.135 (special provisions relating to modern award minimum wages); Division 3 (terms of modern awards) and Division 6 (general provisions relating to modern award powers) of Part 2-3; s.284 (the minimum wages objective); s.577 (performance of functions etc by the Commission); s.578 (matters the Commission must take into account in performing functions etc), and Division 3 of Part 5-1 (conduct of matters before the Commission).

[7] The modern awards objective is in s.134 of the Act:

> 134 The modern awards objective
>
> What is the modern awards objective?
>
> (1) The FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:
>
> (a) relative living standards and the needs of the low paid; and
>
> (b) the need to encourage collective bargaining; and
>
> (c) the need to promote social inclusion through increased workforce participation; and
>
> (d) the need to promote flexible modern work practices and the efficient and productive performance of work; and
>
> (da) the need to provide additional remuneration for:
>
> (i) employees working overtime; or
>
> (ii) employees working unsocial, irregular or unpredictable hours; or
>
> (iii) employees working on weekends or public holidays; or
>
> (iv) employees working shifts; and
>
> (e) the principle of equal remuneration for work of equal or comparable value; and

[9] *O'Sullivan v Farrer* (1989) 168 CLR 210 at p. 216 per Mason CJ, Brennan, Dawson and Gaudron JJ

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

(g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and

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

This is the ***modern awards objective***.

When does the modern awards objective apply?

(2) The modern awards objective applies to the performance or exercise of the FWC's ***modern award powers***, which are:

(a) the FWC's functions or powers under this Part; and

(b) the FWC's functions or powers under Part 2-6, so far as they relate to modern award minimum wages.

Note: The FWC must also take into account the objects of this Act and any other applicable provisions. For example, if the FWC is setting, varying or revoking modern award minimum wages, the minimum wages objective also applies (see section 284).

[8] The modern awards objective is to 'ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions', taking into account the particular considerations identified in ss.134(1)(a)–(h) (the s.134 considerations).

[9] The modern awards objective is very broadly expressed.[10] It is a composite expression which requires that modern awards, together with the NES, provide 'a fair and relevant minimum safety net of terms and conditions', taking into account the matters in ss.134(1)(a)–(h).[11] Fairness in this context is to be assessed from the perspective of the employees and employers covered by the modern award in question.[12]

[10] The obligation to take into account the s.134 considerations means that each of these matters, insofar as they are relevant, must be treated as a matter of significance in the decision-making process.[13] No particular primacy is attached to any of the s.134 considerations[14] and not all of the matters identified will necessarily be relevant in the context of a particular proposal to vary a modern award.

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[10] *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* (2012) 205 FCR 227 at para [35]

[11] (2017) 265 IR 1 at para [128]; *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161 at paras [41]–[44]

[12] [2018] FWCFB 3500 at paras [21]-[24]

[13] *Edwards v Giudice* (1999) 94 FCR 561 at para [5]; *Australian Competition and Consumer Commission v Leelee Pty Ltd* [1999] FCA 1121 at paras [81]-[84]; *National Retail Association v Fair Work Commission* (2014) 225 FCR 154 at para [56]

[14] *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161 at para [33]

[11] It is not necessary to make a finding that the award fails to satisfy one or more of the s.134 considerations as a prerequisite to the variation of a modern award.[15] Generally speaking, the s.134 considerations do not set a particular standard against which a modern award can be evaluated; many of them may be characterised as broad social objectives.[16] In giving effect to the modern awards objective the Commission is performing an evaluative function taking into account the matters in s.134(1)(a)–(h) and assessing the qualities of the safety net by reference to the statutory criteria of fairness and relevance.

[12] Further, the matters which may be taken into account are not confined to the s.134 considerations. As the Full Court observed in *Shop, Distributive and Allied Employees Association v The Australian Industry Group*[17] (*Penalty Rates Review*):

> 'What must be recognised, however, is that the duty of ensuring that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions itself involves an evaluative exercise. While the considerations in s 134(a)-(h) inform the evaluation of what might constitute a "fair and relevant minimum safety net of terms and conditions", they do not necessarily exhaust the matters which the FWC might properly consider to be relevant to that standard, of a fair and relevant minimum safety net of terms and conditions, in the particular circumstances of a review. The range of such matters "must be determined by implication from the subject matter, scope and purpose of the" Fair Work Act (*Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; (1986) 162 CLR 24 at 39-40).'[18]

[13] Section 138 of the Act emphasises the importance of the modern awards objective:

> **'138 Achieving the modern awards objective**
>
> A modern award may include terms that it is permitted to include, and must include terms that it is required to include, only to the extent necessary to achieve the modern awards objective and (to the extent applicable) the minimum wages objective.'

[14] What is 'necessary' to achieve the modern awards objective in a particular case is a value judgment, taking into account the s.134 considerations to the extent that they are relevant having regard to the context, including the circumstances pertaining to the particular modern award, the terms of any proposed variation and the submissions and evidence.[19]

[15] In *4 Yearly Review of Modern Awards - Penalty Rates (Hospitality and Retail Sectors) Decision* (the *Penalty Rates Decision*)[20] the Full Bench summarised the general propositions applying to the Commission's task in the Review, as follows:

> '1. The Commission's task in the Review is to determine whether a particular modern award achieves the modern awards objective. If a modern award is not achieving the modern awards objective then it is to be varied such that it only includes terms that are 'necessary to achieve

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[15] *National Retail Association v Fair Work Commission* (2014) 225 FCR 154 at paras [105]-[106]

[16] See *National Retail Association v Fair Work Commission* (2014) 225 FCR 154 at paras [109]-[110]; albeit the Court was considering a different statutory context, this observation is applicable to the Commission's task in the Review

[17] *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161

[18] Ibid at para [48]

[19] See generally: *Shop, Distributive and Allied Employees Association v National Retail Association (No.2)* (2012) 205 FCR 227

[20] [2017] FWCFB 1001

the modern awards objective' (s.138). In such circumstances regard may be had to the terms of any proposed variation, but the focal point of the Commission's consideration is upon the terms of the modern award, as varied.

2. Variations to modern awards must be justified on their merits. The extent of the merit argument required will depend on the circumstances. Some proposed changes are obvious as a matter of industrial merit and in such circumstances it is unnecessary to advance probative evidence in support of the proposed variation. Significant changes where merit is reasonably contestable should be supported by an analysis of the relevant legislative provisions and, where feasible, probative evidence.

3. In conducting the Review it is appropriate that the Commission take into account previous decisions relevant to any contested issue. For example, the Commission will proceed on the basis that *prima facie* the modern award being reviewed achieved the modern awards objective at the time it was made. The particular context in which those decisions were made will also need to be considered.

4. The particular context may be a cogent reason for not following a previous Full Bench decision, for example:

- the legislative context which pertained at that time may be materially different from the *Fair Work Act 2009* (Cth);

- the extent to which the relevant issue was contested and, in particular, the extent of the evidence and submissions put in the previous proceeding will bear on the weight to be accorded to the previous decision; or

- the extent of the previous Full Bench's consideration of the contested issue. The absence of detailed reasons in a previous decision may be a factor in considering the weight to be accorded to the decision.'[21]

[16] Where an interested party applies for a variation to a modern award as part of the Review, the proper approach to the assessment of that application was described by a Full Court of the Federal Court in *CFMEU v Anglo American Metallurgical Coal Pty Ltd (Anglo American)*: as follows:[22]

'[28] The terms of s 156(2)(a) require the Commission to review all modern awards every four years. That is the task upon which the Commission was engaged. The statutory task is, in this context, not limited to focusing upon any posited variation as necessary to achieve the modern awards objective, as it is under s 157(1)(a). Rather, it is a review of the modern award as a whole. The review is at large, to ensure that the modern awards objective is being met: that the award, together with the National Employment Standards, provides a fair and relevant minimum safety net of terms and conditions. This is to be achieved by s 138 – terms may and must be included only to the extent necessary to achieve such an objective.

[29] Viewing the statutory task in this way reveals that it is not necessary for the Commission to conclude that the award, or a term of it as it currently stands, does not meet the modern award objective. Rather, it is necessary for the Commission to review the award and, by reference to the matters in s 134(1) and any other consideration consistent with the purpose of the objective, come to an evaluative judgment about the objective and what terms should be

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21 Ibid at para [269]

22 *CFMEU v Anglo American Metallurgical Coal Pty Ltd* [2017] FCAFC 123

> included only to the extent necessary to achieve the objective of a fair and relevant minimum safety net.'

[17] In the same decision the Full Court also said: '...the task was not to address a jurisdictional fact about the need for change, but to review the award and evaluate whether the posited terms with a variation met the objective.'[23]

[18] We will apply the above principles in this decision.

3. The Aged Care Sector

[19] The Aged Care Award covers employers in the 'aged care industry' and their employees in the classifications listed in clause 14 – Minimum weekly wages of the award. The 'aged care industry' is defined in clause 3.1 of the award:

> 'means the provision of accommodation and care services for aged persons in a hostel, nursing home, aged care independent living units, aged care serviced apartments, garden settlement, retirement village or any other residential accommodation facility'

[20] There are 4 levels within the Australian and New Zealand Industrial Classification (ANZSIC) structure: division; subdivision; group; and class. Using a framework[24] developed by Fair Work Commission staff, the *Aged Care Award 2010* is 'mapped' to the Aged care residential services industry class within the ANZSIC.

[21] The information below presents an employee profile of the Aged care industry derived from the ABS Census of Population and Housing (Census). The Census is the only direct ABS data source of information on employment for this sector. The most recent Census data is from August 2016.

[22] The August 2016 Census data show that there were around 208,000 employees in the Aged care residential services industry class. Table 1 compares characteristics of employees in this industry with employees in 'all industries'.

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[23] Ibid at para [46]

[24] Preston M, Pung A, Leung E, Casey C, Dunn A and Richter O (2012) '*Analysing modern award coverage using the Australian and New Zealand Industrial Classification 2006: Phase 1 report',* Research Report 2/2012, Fair Work Australia

Table 1: Employee characteristics of Aged care industry, 2016

	Aged care industry (No.)	(%)	All industries (No.)	(%)
Gender				
Male	33 243	16.0	4 438 604	50.0
Female	174 350	84.0	4 443 125	50.0
Total	207 593	100.0	8 881 729	100.0
Full-time/part-time status				
Full-time	80 238	41.0	5 543 862	65.8
Part-time	115 610	59.0	2 875 457	34.2
Total	195 848	100.0	8 419 319	100.0
Highest year of school completed				
Year 12 or equivalent	118 649	58.1	5 985 652	68.1
Year 11 or equivalent	21 980	10.8	856 042	9.7
Year 10 or equivalent	49 471	24.2	1 533 302	17.4
Year 9 or equivalent	9374	4.6	273 180	3.1
Year 8 or below	4208	2.1	112 429	1.3
Did not go to school	535	0.3	26 356	0.3
Total	204 217	100.0	8 786 961	100.0
Student status				
Full-time student	14 611	7.1	715 436	8.1
Part-time student	11 797	5.7	491 098	5.6
Not attending	179 227	87.2	7 618 177	86.3
Total	205 635	100.0	8 824 711	100.0
Age (5 year groups)				
15–19 years	2648	1.3	518 263	5.8
20–24 years	13 347	6.4	952 161	10.7
25–29 years	19 345	9.3	1 096 276	12.3
30–34 years	20 204	9.7	1 096 878	12.3
35–39 years	17 901	8.6	972 092	10.9
40–44 years	20 827	10.0	968 068	10.9
45–49 years	25 367	12.2	947 187	10.7
50–54 years	28 717	13.8	872 485	9.8
55–59 years	28 783	13.9	740 822	8.3
60–64 years	20 523	9.9	469 867	5.3
65 years and over	9932	4.8	247 628	2.8
Total	207 594	100.0	8 881 727	100.0
Average age	44.9		39.3	
Hours worked				
1–15 hours	21 600	11.0	977 997	11.6
16–24 hours	38 964	19.9	911 318	10.8
25–34 hours	55 048	28.1	986 138	11.7
35–39 hours	44 021	22.5	1 881 259	22.3
40 hours	16 346	8.3	1 683 903	20.0
41–48 hours	7324	3.7	858 120	10.2
49 hours and over	12 543	6.4	1 120 577	13.3
Total	195 846	100.0	8 419 312	100.0

Note: Part-time work is defined as employed persons who worked less than 35 hours in all jobs during the week prior to Census night. Totals may not sum to the same amount due to non-response. For full-time/part-time status and hours worked, data on employees that were currently away from work (that reported working zero hours), were not presented. .

Source: ABS, *Census of Population and Housing,* 2016

[23] As shown in Table 1, the profile of Aged care industry employees differs from the profile of employees in 'All industries' in five aspects:

- Aged care industry employees are predominately female (84.0 per cent, compared with 50.0 per cent of all employees);

- almost six in ten (59.0 per cent) Aged care industry employees are employed on a part-time or casual basis (i.e. less than 35 hours per week), compared with only 34.2 per cent of all employees;

- almost half (48.0 per cent) of Aged care industry employees work 16–34 hours per week compared with only 22.5 per cent of all employees;

- over half (54.6 per cent) of Aged care industry employees are aged 45 years and over compared with only 36.9 per cent of all employees; and

- fewer than six in ten (58.1 per cent) of Aged care industry employees completed Year 12 or equivalent compared with 68.1 per cent of all employees.

[24] Other available ABS data about the 'aged care industry' is limited.

[25] The most readily available data are at the division level (or 1-digit level) and the following data are presented at this level. The relevant division of ANZSIC is Division Q: Health care and social assistance. The subdivisions, groups and classes within the Health care and social assistance sector are set out below:

- 84 Hospitals
  - 840 Hospitals
    - 8401 Hospitals (except psychiatric hospitals)
    - 8402 Psychiatric hospitals
- 85 Medical and other health care services
  - 851 Medical services
    - 8511 General practice medical services
    - 8512 Specialist medical services
  - 852 Pathology and diagnostic imaging services
    - 8520 Pathology and diagnostic imaging services
  - 853 Allied Health Services
    - 8531 Dental services
    - 8532 Optometry and optical dispensing
    - 8533 Physiotherapy services
    - 8534 Chiropractic and osteopathic services
    - 8539 Other allied health services
  - 859 Other Health Care Services

- 8591 Ambulance services
- 8599 Other health care services n.e.c.

- 86 Residential care services
  - 860 Residential care services
    - **8601 Aged care residential services**
    - 8609 Other residential care services
- 87 Social assistance services
  - 871 Child care services
    - 8710 Child care services
  - 879 Other social assistance services
    - 8790 Other social assistance services

[26] The August 2016 Census data show that there were around 208,000 employees in the Aged care industry, which comprises around 90 per cent of employment in Residential care services and around 16 per cent of total employment in Health care and social assistance.[25]

[27] The ABS data in respect of casual employment is only available at the divisional level of the ANZSIC. The ABS defines casual employees as employees without paid leave entitlements.[26] As show in in Table 2 below, just under three-quarters of workers in Health care and social assistance were employees with paid leave entitlements in February 2019, compared with 63.2 per cent in all industries.

Table 2: Employed persons by status of employment in main job, February 2019

	Health care and social assistance		All industries
	No. ('000s)	Percentage of employment	Percentage of employment
Employee	1537.2	90.5	83.3
With paid leave entitlements	1248.0	73.5	63.2
Without paid leave entitlements	289.1	17.0	20.1
Owner manager of enterprise with employees	55.5	3.3	6.2
Owner manager of enterprise without employees	104.6	6.2	10.3
Contributing family worker	1.2	0.1	0.2
Total	**1698.4**	**100.0**	**100.0**

Note: All data are expressed in original terms.

Source: ABS, *Labour Force, Australia, Detailed, Quarterly, Feb 2019,* Catalogue No. 6291.0.55.003.

[28] As shown in Table 3 below, about 19 per cent of employees in the Health care and social assistance sector were casual employees, lower than the all industries average (24.2 per cent). Both full-time and part-time employees in Health care and social assistance were more

[25] ABS, *Census of Population and Housing,* 2016

[26] ABS, *Characteristics of Employment, Aug 2018*, Catalogue No. 6333.0, Explanatory notes

likely to be employed with paid leave entitlements. In contrast, part-time employees across all industries were more likely to be casual employees.

Table 3: Employees with and without paid leave, February 2019

	Full-time		Part-time		All employees	
	With paid leave (%)	Without paid leave (%)	With paid leave (%)	Without paid leave (%)	With paid leave (%)	Without paid leave (%)
Health care and social assistance	90.9	9.1	68.9	31.1	81.2	18.8
All industries	**88.1**	**11.9**	**47.6**	**52.4**	**75.8**	**24.2**

Source: ABS, *Labour Force, Australia, Detailed, Quarterly, Feb 2019*, Catalogue No. 6291.0.55.003.

[29] A March 2017 report published by the Australian Government – 'The Aged Care Workforce, 2016' (the 2016 Workforce Report) – provides further data on aged care sector employees. The 2016 Workforce Report reports on the findings of the 2016 National Aged Care Workforce Census and Survey conducted by the National Institute of Labour Studies, on behalf of the Australian Department of Health. The following findings are particularly relevant for present purposes:

- There are some 240,317 PAYG aged care workers in direct care roles:

  - 153,854 in residential facilities, and
  - 86,463 in home care and home support outlets.

- The characteristics of the PAYG *residential* direct care workforce were:

  - 87 per cent female;
  - median age 46 years;
  - 70 per cent are Personal Care Attendants (PCA's);
  - 78 per cent employed on a permanent and part-time basis;
  - 10 per cent are casual or contract employees (down from 19 per cent in 2012);
  - 90 per cent of workers held post-secondary qualifications. Two thirds of facilities reported that more than 75 per cent of their PCA's hold a Certificate III in Aged Care; and
  - a regular daytime shift was the most common work schedule for all direct care occupations. Rotating shift patterns were the norm for a fifth of nurses and PCA's.

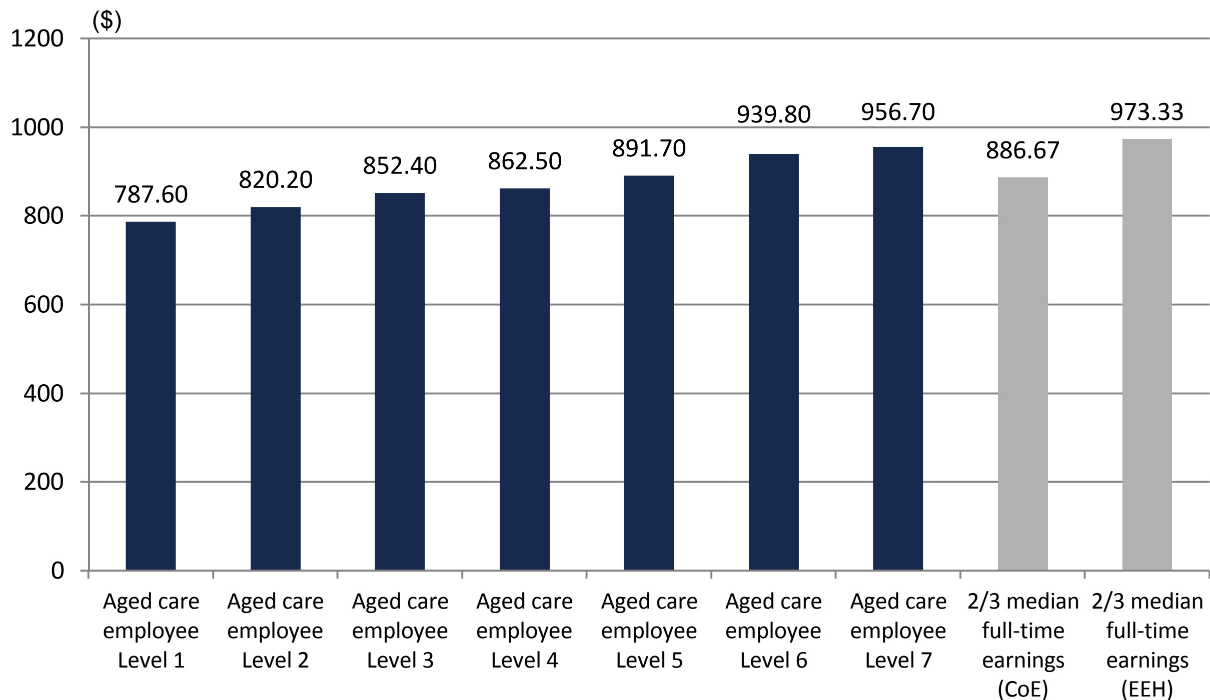
[30] We refer to other aspects of the 2016 Workforce Report later in our decision.

[31] One of the s.134 considerations which we are obliged to take into account in giving effect to the modern awards objective is 'the needs of the low paid' (s.134(1)(a)). In the *Penalty Rates Decision* the Commission determined that a threshold of two-thirds of median full-time wages provides 'a suitable and operational benchmark for identifying who is low

paid',[27] within the meaning of s.134(1)(a). There is, however, no single accepted measure of two-thirds of median (adult) ordinary time earnings. The two main ABS surveys of the distribution of earnings which are relevant are the *Characteristics of Employment Survey*[28] (the CoE) and the Survey of *Employee Earnings and Hours*[29] (the EEH).[30]

[32] The most recent data for median earnings from the CoE survey is for August 2018. Data on median earnings from the EEH Survey is only available for May 2018. Chart 1 below compares these measures of median earnings to the minimum weekly wages in the *Aged Care Award 2010* as at 1 July 2019 following the Annual Wage Review 2018–19.

Chart 1: Comparison of minimum full-time weekly wages in the *Aged Care Award 2010* and two-thirds of median full-time earnings



Note: Weekly earnings from the Characteristics of Employment Survey are earnings in the main job for full-time employees. Weekly earnings from the Survey of Employee Earnings and Hours are weekly total cash earnings for full-time non-managerial employees paid at the adult rate.

Source: MA000018; ABS, *Characteristics of Employment, Australia, August 2018*, Catalogue No. 6333.0; ABS, *Employee Earnings and Hours, Australia, May 2018*, Catalogue No. 6306.0.

[33] The data shows that the full-time weekly wage for all classifications in the *Aged Care Award 2010* was below the EEH measure of two-thirds of median full-time earnings. Most classifications were also below the CoE measure of two-thirds of median full-time earnings, except for Aged care employee Levels 5 to 7.

[34] We conclude this part of our decision by dealing with an application by ABI for leave to file two publications by an entity called 'StewartBrown'. The publications contain data

[27] [2017] FWCFB 1001 at para [166]

[28] ABS, *Characteristics of Employment, Australia, August 2017*, Catalogue No. 6333.0

[29] ABS, *Employee Earnings and Hours, Australia, May 2016*, Catalogue No. 6306.0

[30] [2017] FWCFB 1001 at [166]

relating to the financial performance of businesses in the Aged Care industry and both publications are both titled "Aged Care Financial Performance Survey Sector Report" One report is for the 2018 financial year and the second for the six months ended December 2018. The application to file the material was made late during the course of the oral hearing on 10 April 2019.

[35] In a submission filed on 12 April 2019 ABI invited us to make the following findings or conclusions having regard to the two StewartBrown publications:

1. That the current funding model for Aged care is under significant financial strain.

2. That the residential aged care sector experienced a decline in financial performance due to revenue issues in 2017/18 and in the second six months of 2018.

[36] United Voice and the HSU object to leave being granted to file the material. In summary the Union objections are:

- The qualifications and background of the authors of the reports is not apparent.
- There has been no opportunity to cross examine the authors as to the methodology of the survey underpinning the reports.
- There is no apparent reason the reports could not have been filed in accordance with the directions or at least provided before the hearing

[37] The HSU also submit that the Commission should reject what it characterises as the 'very broad, non-specific and … unsubstantiated' findings sought by ABI, based on the reports.

[38] While the date of publication is not apparent from the reports, we agree with United Voice that there appears to be no reason why this material could not have been filed in accordance with the directions or at least at some time prior to the hearing. We also acknowledge the force in the Union's submissions that they have been afforded no opportunity to cross examine the authors of the reports.

[39] The reports themselves are reasonably detailed providing an array of data said by the authors to be indicators of the financial performance of the residential aged care sector; yet in its written submission ABI only refers, by way of example, to one page of one of the reports, namely that,:

> 'for the FY18, the residential care sector experienced a significant decline in Facility Result (EBT) mainly due to expenses increasing at a much higher rate (4.7%) than revenue (1.7%). The Facility Result declined from $9.39 per bed day in FY17 to $2.37 per bed day in FY18.'

[40] We note that our attention was not drawn to the more recent report of the 6 months to December 2018, where the Facility Result has seemingly improved to $3.20 per bed day. Nor do we have any information as to why this indicator should be preferred over any of the many other indicators in the reports.

[41] Having considered the matter, we have decided not to grant leave to file the material. This material was filed at a late stage in the proceeding and the Unions have not been afforded

an opportunity to cross-examine the authors of the reports. Fairness dictates that leave to file the material be refused. We would also observe that the findings or conclusions sought to be drawn from the reports are very broad, lack specificity and ABI has not established the the causal connection between the data and the proposed findings.

[42] We now turn to the claims before us.

4. The claims

United Voice claims

[43] United Voice advanced two claims:

- a new clause 15.8 relating to a phone allowance; and
- an amendment to the Classification Definition in Schedule B.4 in respect of an Aged Care Employee–Level 4 (Personal care worker)

HSU claims

[44] The HSU are pursuing three claims:

- a new clause 15.8 relating to a phone allowance (in the same terms as United Voice's claim);
- the deletion of clause 23.2 and 29.2(c)(i) and (ii) and the insertion of wording to ensure that the casual loading is paid in addition to weekend and public holiday rates;
- the variation of clause 22.8, Broken shifts, to include a minimum engagement period.

[45] Each of the claims is opposed by the Aged Care Employers, the AFEI and ABI.

[46] Attachment A to the Report issued on 13 November 2018 confirmed that the HSU had also sought to pursue substantive claims relating to additional allowances (including a reimbursement of costs associated with a first aid certificate renewal) and an amendment to ensure that shift allowances are paid when employees are working afternoon or night duty. However, the HSU submission filed on 18 January 2019 only dealt with the three claims outlined at [44] above. Accordingly, we have proceeded on the basis that the additional claims referred to in the November 2018 Report are not being pursued by the HSU.

(i) Phone allowance

[47] The Aged Care Award does not contain any allowance or mechanism for an employee directed to maintain a mobile phone for work purposes to be reimbursed for the costs associated with the use of that phone for work purposes. United Voice and the HSU seek to insert a new clause 15.8 into the Aged Care Award as follows:

15.8 Phone allowance

> Where the employer requires an employee to use a mobile phone for the purpose of being on call, for the performance of work duties, to access their work roster or for other work purposes, the employer will either:
>
> (i) provide a mobile phone and cover the cost of any subsequent charges; or
>
> (ii) refund the cost of purchase and the subsequent charges on production of receipted accounts.[31]

[48] The case put by United Voice in support of its claim amounted to little more than a series of propositions:

1. The Work undertaken by a number of classifications in the Aged Care Award takes place outside of an aged care facility: 'In the case of personal care workers and recreational/lifestyle activities officers, a significant, if not all, of the work will take place remotely from the employer's principal place of business or office.'
2. A mobile phone is a 'tool of trade' for Aged Care Award workers.
3. A number of comparable modern awards[32] contain telephone allowances: 'albeit these allowances do not reflect the current ubiquity of mobile 'smart' phone use and their status now as work tools … and reflect what was the then state of affairs at the time of award modernisation namely widespread landline phone usage'[33]
4. An employee should receive some compensation in circumstances where they are directed by their employer to use a 'tool of trade':

   > 'The principle that an employee should be reimbursed where an employer requires that the employee have access to a telephone for work is of continuing relevance and should form part of the modern award safety net where mobile phones have become tools of trade and an employee is directed to use one for work. More generally, the established principle that the modern award system generally provides some compensation to an employee when the employer directs that a particular tool of trade is used is relevant.'[34]

[49] As we have mentioned, the HSU advanced a claim in the same terms, but United Voice clearly took the lead role in seeking to advance a merit case in support of the claim. The HSU supported the submissions of United Voice and the proposed wording in relation to a telephone allowance term.[35] The HSU submit that the term proposed is necessary to meet the modern awards objective. In relation to the s.134 considerations, the HSU submits that award-reliant employees should not have to purchase and maintain a mobile phone which is used for work purposes at their own cost and contend that s.134(1)(a) is relevant in this regard[36] and that mobile phones can assist in enabling efficient and productive performance of work (s. 134(1)(d)).[37] As to s.134(1)(g) and the need to ensure 'a stable and sustainable modern award system', the HSU submits that as mobile phone use is becoming ubiquitous

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[31] Ibid at para 7

[32] See clause 18.11 of the *Health Professionals and Support Services Award 2010*; clause 16.5 of the *Medical Practitioners Award 2010* and clause 20.6 of the *Social, Community, Home Care and Disability Services Industry Award 2010*)

[33] United Voice submission dated 18 January 2019, at [10]

[34] Ibid, at [18]

[35] Ibid at [6]

[36] Ibid at [8]

[37] Ibid at [9]

and relied upon in the performance of work, it is appropriate that a modern award include a provision for a mobile phone allowance.[38]

[50] The material before us on smart phone and mobile phone ownership in Australia shows that:

- approximately 83 per cent, or 15.97 million Australian adults, already have a smart phone; and
- approximately 96 per cent, or 18.57 million Australian adults, own a mobile phone.[39]

[51] This data suggests that it would be highly unusual for someone working in the aged care sector to not already own a mobile phone.

[52] The Unions did not file any evidence in support of their claim for a Mobile Phone allowance. The documentary material referred to in United Voice's submissions is confined to the following:

(i) a Working Paper on 'Attraction, Retention and Utilisation of the Aged Care Workforce' prepared for the Aged Care Workforce Strategy Taskforce dated 19 April 2018 (Workforce Working Paper);

(ii) the Productivity Commission Inquiry Report into 'Caring for Older Australians' dated 28 June 2011 (PC Report);

(iii) data regarding landline telephone and smart phone usage in Australia; and

(iv) a media article on the 'gig' economy.

[53] The Workforce Working Paper and the PC Report are general in nature; neither publication (or indeed any of the materials referred to by United Voice) contain any specific consideration of mobile phone usage of employees in the aged care industry. In short, there is no evidence supporting the factual premises underpinning the claim. While there is evidence of widespread mobile phone and smart phone ownership throughout Australia, (see [50] above), the Unions have failed to adduce any evidence of for example:

(i) the extent to which employees covered by the Aged Care Award are required to use their personal mobile phone for work purposes;

(ii) the costs incurred by such employees in using their mobile phones for work purposes; and

(iii) the proportion of work-related versus private usage by employees of mobile phones.

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[38] Ibid at [10]

[39] Australian Communications and Media Authority, Communications Report 2017-2018, p.33 (30 November 2018)

[54] On 5 April 2019, United Voice made an application[40] seeking to file three witness statements in this matter which had been previously filed in the review of the *Social, Community, Home Care and Disability Services Industry Award 2010* (SCAHDS Award) matter (AM2018/26), in relation to a claim for a mobile telephone allowance in the SCHADS Award. United Voice submitted that there is 'substantial and sufficient similarity between the work performed by the 3 witnesses and work performed under the Aged Care Award'[41]. The various employer parties disputed this proposition.[42] We dismissed the application on the basis that we were not persuaded that the witness evidence which was sought to be adduced was relevant to the Aged Care Industry and the present proceedings.[43] We provided United Voice a further opportunity to file evidence from employees in the Aged Care sector, however it declined to do so.

[55] As to the telephone allowance provisions in other awards, the research section of the Commission has identified 17 modern awards that currently contain a telephone allowance.[44] An extract of each of the relevant clauses is at **Attachment B**. Only one of these terms – clause 18.6 of the *Real Estate Industry Award 2010* deals with mobile phone use and that term was inserted in that award by consent.

[56] In addition to the propositions set out earlier (at [48] above) United Voice also relied on two broad assertions:

- the suggestion that there is a gendered undervaluation of the work of employees in the aged care sector; and
- the work is precarious and low paid.

[57] As to the first matter, Mr Bull advanced the following submission on behalf of United Voice:

> 'It is also a sector which is predominantly female and the broad characterisation within the general, if you like, collection of considerations that comprise the modern award objective that there is a - the gendered profile sector can suggest that there is a gendered undervaluation of the work which is of some relevance. It is a consideration that just sits there.'[45]

[58] It is difficult to know what to make of this submission as it is expressed in such diffident terms and, in any event, no evidence was adduced in support of the asserted undervaluation. As set out in Table 1 (see [22] above), Aged Care industry employees are predominately female (84 per cent compared to 50 per cent of all employees), hence it may be

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[40] United Voice, F1 application and witness statements, 5 April 2019

[41] United Voice, F1 application and witness statements, 5 April 2019 at para 5

[42] AFEI, Aged and Community Services Australia and Leading Age Services Australia correspondence, 8 April 2019

[43] Transcript, 10 April 2019 at PN124

[44] *Air Pilots Award 2010, Aircraft Cabin Crew Award 2010, Airservices Australia Enterprise Award 2016, Animal Care and Veterinary Services Award 2010, Contract Call Centres Award 2010, Health Professionals and Support Services Award 2010, Marine Towage Award 2010, Market and Social Research Award 2010, Medical Practitioners Award 2010, Nurses and Midwives (Victoria) State Reference Public Sector Award 2015, Ports, Harbours and Enclosed Water Vessels Award 2010, Real Estate Industry Award 2010, Social, Community, Home Care and Disability Services Industry Award 2010, Stevedoring Industry Award 2010, Telecommunications Services Award 2010; Victorian Local Government (Early Childhood Education Employees) Award 2016; Victorian Local Government Award 2015*

[45] Transcript, 10 April 2019 at PN143

said that the potential of gendered undervaluation of the award minimum wage rates warrants examination.

[59] Any claim to increase modern award minimum wages based on the proposition that the existing wage rates are the product of a gendered undervaluation of the relevant work can be the subject of an application under ss.156(3) or 157(2) of the Act. As the Full Bench observed in the *Equal Remuneration 2015 Decision*[46]*:*

> 'The modern awards regime in the FW Act therefore involves the establishment of minimum wages which take into account work value. If it is considered that the minimum rate for any classification in a modern award does not properly take into account the value of the work performed by employees in that classification - that is, that the work is 'undervalued' by the modern award - then an application may be made to the Commission in the circumstances prescribed by ss.156(3) or 157(2) by an employer, employee or organisation covered by the relevant modern award, or an organisation that is entitled to represent the industrial interests of one or more employers or employees covered by the modern award, to vary that modern award to rectify the perceived undervaluation.
>
> . . .
>
> We see no reason in principle why a claim that the minimum rates of pay in a modern award undervalue the work to which they apply for gender-related reasons could not be advanced for consideration under s.156(3) or s.157(2). Those provisions allow the variation of such minimum rates for 'work value reasons', which expression is defined broadly enough in s.156(4) to allow a wide-ranging consideration of any contention that, for historical reasons and/or on the application of an indicia approach, undervaluation has occurred because of gender inequity. There is no datum point requirement in that definition which would inhibit the Commission from identifying any gender issue which has historically caused any female-dominated occupation or industry currently regulated by a modern award to be undervalued. The pay equity cases which have been successfully prosecuted in the NSW and Queensland jurisdictions and to which reference has earlier been made were essentially work value cases, and the equal remuneration principles under which they were considered and determined were likewise, in substance, extensions of well-established work value principles. It seems to us that cases of this nature can readily be accommodated under s.156(3) or s.157(2). Whether or not such a case is successful will, of course, depend on the evidence and submissions in the particular proceeding.'[47]

[60] If United Voice is contending that the minimum wages rates in this award undervalue the work to which they apply for gender-related reasons then it should make such an application. The proper fixation of minimum award wages is an important issue and deserves more consideration than merely being used as a throw away line in support of an ostensibly unrelated claim.

[61] As to the second matter, on the basis of the data presented in Chart 1 it can be reasonably inferred that employees covered by the Aged Care Award who are paid at the relevant minimum award rate are 'low paid' within the meaning of s.134(1)(a).

[62] In ensuring that the Aged Care Award, together with the NES, provides a fair and relevant minimum safety net of terms and conditions we are obliged to take into account (among other things) the 'needs of the low paid' (s.134(1)(a)). The fact that the employees

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[46] [2015] FWCFB 8200

[47] Ibid, at paras [274] and [292]

who are the subject of this claim are 'low paid' is relevant to this consideration, but is not, in and of itself, a sufficient consideration to warrant the variation of the award in the terms sought. The claim must be justified on its merits.

[63] The proposition that 'the work is precarious' was not the subject of any elaboration. We assume it is a reference to the incidence of casual employment. We note that part-time employment is regulated by clause 10.3 of the Aged Care Award and that there is no claim before us to vary that provision.

[64] The 2016 Workforce Report suggests that the proportion of aged care employees engaged on a casual or contract basis has *fallen* in recent years and amounts to 10 per cent of all the residential direct care workforce. We acknowledge that this is not an insignificant proportion but a generalised assertion that the work performed by the employees who are the subject of a mobile telephone allowance claim is 'precarious' is not a substitute for a merit based argument in support of the claim.

[65] In addition to the paucity of evidence and the absence of cogent merit arguments in support of the claim there are a range of issues arising from the drafting of the proposed award term. These deficiencies are detailed in ABI's submission[48] and we need not repeat all of them here; it suffices to set out one of the deficiencies identified:

> 'the clause does not require an employer to reimburse an employee for only the work-related costs associated with the use of a mobile phone. It requires the employer to cover all costs, both up-front costs and "subsequent charges". This is plainly unreasonable.
>
> In practice, if the claim was to be successful, an employee could be required by their employer to use their mobile phone once per week to check their work roster, and the employer would automatically be obliged to cover both the purchase costs of the mobile device and the subsequent charges relating to the device. There would be nothing preventing the employee from taking out the most expensive mobile phone plan, using it virtually exclusively for personal use, and requiring the employer to foot the bill.'[49]

[66] We agree with the above submission. United Voice's attempts to respond to the identified deficiencies in the drafting of the proposed term were unconvincing. Mr Bull's concession that the proposed term 'may need some finessing' was a masterly understatement given the poorly structured nature of the proposed term.

[67] We would add that the claim fails to come to grips with the problem of disaggregating the work related and private use proportions of costs associated with mobile phone use. This is a particular problem given the nature of some of the mobile phone plans in the market. Counsel for ABI encapsulated the problem, in these terms:

> 'If someone has a $99 plan and its 2 gig of data and unlimited calls and the employee makes 10 calls that month, how do you apportion the cost?'[50]

[68] In summary, the case put by United Voice was unsupported by evidence, lacked rigour and failed to establish the requisite merit to warrant the variation proposed. Further, the formulation of the proposed clause was deficient in numerous respects and reflected the lack

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[48] See ABI submission, 20 March 2019 at paras 3.14 – 3.21

[49] ABI submission, 20 March 2019 at paras 3.20 – 3.21

[50] Transcript 10 April 2019 at [514]

of care and effort that characterised the case put on behalf of United Voice. We are not satisfied that it is necessary to vary the Aged Care Award in the manner proposed in order to achieve the modern awards objective.

(ii) Amendment to classification definition of personal care worker level 4

[69] United Voice seeks to amend the dot point in B4 of the current classification definition of the aged care worker level 4, which reads: 'In the case of a Personal care worker, is required to hold a relevant Certificate III qualification', to read:

> 'In the case of a personal care worker, **holds** a relevant certificate III qualification <u>or possesses equivalent knowledge and skills gained through on-the-job training</u>.'

[70] The proposed variation alters the relevant threshold from circumstances where an employee is 'required' to hold a relevant Certificate III qualification, to circumstances where they hold a relevant qualification irrespective of whether the work they perform requires that level of qualification.

[71] United Voice submit that the purpose of the claim is 'to ensure appropriately qualified personal care workers are classified in accordance with their qualifications rather than in accordance with managerial prerogative to make the qualification a requirement'.[51] In support of this submission Mr Bull, on behalf of United Voice made the following assertion during the course of oral argument:

> 'So there are apparently loads of people sitting on level three with certificate III qualifications and they don't progress and I would say as a matter of merit that is an inappropriate way to structure a classification structure because it is actually dealing with choices made by the employer, not things in relation to the work. That is what a classification structure should really be about. That's just a sort of, I suppose, conceptual or fundamental problem with these words which appear innocuous. That apparently is the practical effect of them. If you accept our variation there will actually be recognition. There will be a threshold. Currently there is no threshold. It's entirely at the discretion of the employer as to whether they require this particular qualification.'[52]

[72] United Voice rely on the 'National Aged Care Workforce Consensus 2016'[53] and contend that there are skills shortages in the aged care sector and that these shortages are likely to worsen due to demographic changes and increase in demand. It refers to the Productivity Commission's report of 2011, 'Caring for Older Australians'[54] and submits that unless wages increased substantially in the aged care sector, skills shortages would be 'prevalent and damaging'. United Voice submits that the amendment it seeks will assist in creating skills related career paths and will deal with skill shortages and retention in the aged care sector.[55]

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[51] United Voice submission dated 18 January 2019 at para 33

[52] Transcript 10 April 2019 at para [240]

[53] Isherwood, Mavromaras, Moskos and Wei, Attraction, Retention and Utilisation of the Aged Care Workforce, working paper prepare for the Aged Care Workforce Strategy Taskforce, 19 April 2018, University of Adelaide, page 25

[54] Productivity Commission, Caring for Older Australians, Overview Report, No.53, 28 June 2011, Commonwealth of Australia, at page XLI

[55] United Voice submission dated 18 January 2019 at para 53

[73] United Voice also points to the similarity between the level 3 home care worker in the SCHADS Award and the level 4 personal care worker classification in the Aged Care Award. In this regard United Voice relies on the following observation by the Award Modernisation Full Bench, on 25 September 2009:

> '[105] Home care employees covered by the exposure draft provide care and support for aged persons or persons with a disability in their own home. The Aged Care Award 2010 also covers the provision of care for aged persons in their home. Whether this draft modern award or the Aged Care Award 2010 covers a particular employee will depend on the industry of the employer.
>
> [106] The wage rates and classification definitions for home care employees are based on the federal Home and Community Care Award 2001. The wage rate for a certificate III qualified home care employee (grade 3) is the same rate as for a similarly qualified aged care employee (level 4) in the Aged Care Award 2010.'

[74] ABI oppose United Voice's claim and submits that 'classifying an employee based on their qualification, without any reference to the duties they are required to perform, is problematic' and 'would have the likely effect of having two employees who perform identical duties being entitled to different minimum wages merely because one employee possesses a qualification which the other does not possess, in circumstances where the work does not require the person to use or possess the qualification'. It is contended that this would lead to 'perverse and unfair outcomes' that are likely to be inconsistent with the principle of equal remuneration for work of equal or comparable value[56]

[75] AFEI contend that the change sought is substantive and that United Voice has failed to advance a cogent merit argument supported by probative evidence.[57] AFEI oppose the variation as it would 'reduce the incentive for specified employees to obtain a qualification deemed relevant for the role within the existing classification structure' and 'would cause confusion and inconsistency in the classification of personal care workers'.[58]

[76] The Aged Care Employers submit that the claim should be dismissed as United Voice has not established a merit case sufficient to warrant the variation proposed and nor has it led any evidence of employees graded below a level 4 who holds a certificate III qualification and utilises their qualification in their work as a personal care worker.[59] The Aged Care Employers contend that the proposed variation will increase employment costs; has no regard to the requirement that the work value be assessed by reference to the level of skill or responsibility involved in doing the work; and would result in employees being paid differently despite performing the same work, simply because one employee possesses a qualification that is not required.[60]

[77] Aged Care Employers also contend that there are various practical issues associated with United Voice's claim.[61]

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[56] Ibid at paras 6.6 – 6.11

[57] AFEI submission dated 22 March 2019 at para 1.26

[58] AFEI submission at para 1.25

[59] Aged Care Employers submission dated 25 March 2019 at paras 30-31

[60] Ibid at para 25

[61] Ibid at para 27

[78] The arguments advanced in support of the claim may be broadly consolidated into two points:

(i) An assertion that there are 'loads of people' who possess a certificate III qualification and use that qualification in their work as a personal care worker but are graded well below a level 4.[62]

(ii) The amendment will assist in creating a skills related career path and deal with skills shortages.[63]

[79] As to point (i), no evidence was called to support the assertion that there were 'loads of people' on classification level 3 with Certificate III qualifications and the proposition was challenged by the Aged Care Employers.[64]

[80] As to point (ii) the 2016 Workforce Report examined the formal education of the aged care workforce and concluded as follows:

> 'Examining the educational attainments of Personal Care Attendants (PCAs) further, we see that around two-thirds have a Certificate III in Aged Care (67 per cent in 2016), which is considered to be the standard qualification for working in this occupation. This proportion has stayed constant since 2012, and going back since 2003. In contrast, the proportion of PCAs with a Certificate IV in Aged Care has steadily increased from 8 per cent in 2003 to 20 per cent in 2012 and 23 per cent in 2016.
>
> Residential aged care direct care workers with a disability related qualification (this question was asked for the first time in 2016) are mainly PCAs and Allied Health workers. For PCAs, this qualification is most typically a Certificate III in Disability. Allied Health workers show no concentration in any specific type of disability related qualification. Note that workers can hold more than one qualification type and there can be overlap where Certificate IV holders also have a Certificate III.'[65]

[81] A high proportion of Personal Care Attendants (PCAs) in the residential direct care workforce, and Community Care Workers (CCWs) in the home care and home support direct care workforce, have a Certificate III qualification, as shown by Table 6 below.

Table 6:[66] Certificate III qualifications: PCAs and CCWs 2016

	PCA's	CCW's
Certificate III in Aged Care	67.4	50.9
Certificate III in Home & Community Care	12.0	26.6

[82] The relatively high (and constant) proportion of PCAs who hold a Certificate III qualification and the steady increase over time in the proportion of PCAs who hold a

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62 United Voice submissions at [50] and Transcript 10 April 2019 at para [240]

63 United Voice submission at para [53]

64 Ibid at paras [323] – [326]

65 Ibid at page 21

66 2016 Workforce Report, Tables 3.12 and 5.12

Certificate IV qualification does not support United Voice's contention that the variation proposed is necessary to support skill acquisition.

[83] We accept the submission advanced by ABI, and others, that it is an established feature of the classification structures in modern awards that 'an employee should be classified based on the skills and experience of the employee, and the nature of the duties that the employee is required to perform.'[67] As ABI put it:

> 'While qualifications are of course relevant, implementing hard-and-fast rules that automatically deem a particular employee to be of a particular classification based on their holding a qualification, without any reference to the duties they are actually required to perform, is problematic and goes against the overall system of classifying employees and would lead to unreasonable outcomes.'[68]

[84] The submission put is consistent with an observation by a Full Bench of the AIRC in *Re: Hospitality Industry (General) Award 2010*:

> 'The basic concept that employees who have obtained and utilise relevant skills in their work should have those skills recognised and paid for within the classification structure is well established. It was an element of the structural efficiency principle of the late 1980's which was directed, amongst other things, to "establishing skill-related career paths which provide an incentive for workers to continue to participate in skill formation.'[69] (Emphasis added)

[85] We note, as contended by United Voice, that there does appear to be a relationship between the level 4 personal care worker classification under the Aged Care Award and a level 3 home care worker under the SCHADS Award. The first pay point for a level 3 home care worker is $837.40 per week (the same as a level 4 personal care worker under the Aged Care Award) and the classification for this position at schedule E 3.5 of this award and notes:

> 'Indicative but not exclusive of the qualifications required in this level is an accredited qualification to the position at the level of Certificate 3 and/or knowledge and skills gained through on-the-job training commensurate with the requirements of the work in this level.'

[86] During the course of the hearing on 10 April 2019, we sought submissions as to whether it would be appropriate to adopt the language in Schedule E.3.5 of the SCHADS Award into the Aged Care Award. In response, ABI did not oppose such a variation provided that the formulation adopted contained the following elements:

(i) that the employee holds the qualification; and

(ii) that the qualification is relevant to the role performed by the employee; and

(iii) that the employee utilises the skills and knowledge derived from the qualification competencies in the performance of their work.

[87] To the extent that the Commission was minded to broaden the relevant part of the Level 4 classification definition in the Aged Care Award to encompass employees who do not hold a certificate III qualification but who possess equivalent knowledge and skills, ABI

[67] ABI submission at para 6.6

[68] Ibid, at para 6.7

[69] [2009] AIRCFB 967 at para [33]

submitted that the language in Schedule E.3.5 of the SCHADS Award 'would appear to be appropriate, subject to one caveat', namely the inclusion of the following Note:

> *Note: Any dispute about the classification of a particular employee may be referred to the Fair Work Commission in accordance with clause 9 of this Award. The Fair Work Commission may require an employee to demonstrate to its satisfaction that the employee utilises the requisite skills and knowledge, and that these are relevant to the work the employee is doing.*

[88] ABI note that this form of language appears at clause 3 of the *Hospitality Industry (General) Award 2010* under the definition of "appropriate level of training" and submitted such a Note would be an appropriate inclusion, in the event that the Commission was minded to adopt the language in Schedule E.3.5 or something similar.

[89] In relation to the proposition that the classification definition should encompass employees who do not hold the relevant qualification but who 'possess equivalent knowledge and skills gained through on-the-job training', ABI noted that this type of formulation is not an uncommon feature of classification structures in other modern awards and appears in a number of comparable awards. Schedule E.3.5 of the SCHADS Award is one of a number of such examples. [70]

[90] It is our *provisional* view that there is merit in deleting the last dot point in B4 of the current classification definition for an aged care worker level 4 and replacing it with the following:

> 'In the case of a personal care worker, holds a relevant Certificate 3 qualification (or possesses equivalent knowledge and skills) and uses the skills and knowledge gained from that qualification in the performance of their work.'

[91] We would also propose the insertion of a general note at the commencement of the classification definitions, as follows:

> Note: Any dispute about the classification of a particular employee may be referred to the Fair Work Commission in accordance with clause 9 of this award.'

[92] The proposed variation would better align the classification with level 3 in the SCHADS Award and more accurately depicts the qualification and skills required at this level. We also note that the formulation proposed is consistent with the interpretation of the current definition advanced by counsel for the Aged Care Employers:

> 'We say that's not the proper interpretation of the classification structure. We say that the words "is required" does not mean whether or not the employer requires it. We say that a proper construction is whether the nature of the role and the duties requires the qualification. Because the classifications are all about the nature of the work, the duties that are being undertaken and so when read properly in that context, the phrase there is talking about whether or not the nature of the work requires the qualification.'[71]

[93] We will invite submissions on our *provisional* view.

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[70] See, for example, Schedule B.1.4 of the *Health Professionals and Support Services Award 2010*; Schedule B.1.4 of the *Children's Services Award 2010*

[71] Transcript 10 April 2019 at para [531]

(iii) Casual loading is paid in addition to weekend and public holiday rates

[94] The HSU claim seeks to increase the rates of pay of casual employees who work on weekends and public holidays.

[95] Clause 23 of the Aged Care Award sets out the rate of pay for employees working ordinary hours on a Saturday or Sunday. The rate for Saturday is time and a half (150 per cent) and the Sunday rate is time and three quarters (175 per cent). The weekend penalty rates apply to all employees (ie full time, part-time and casuals). In respect of casual employees clause 23.2 provides that these rates are 'in substitution for and not cumulative upon the casual loading'. In other words, casual employees receive the same weekend penalty rates as full time and part-time employees, but do not receive the 25 per cent casual loading.

[96] A similar position pertains in relation to public holiday penalty rates. Clause 29.2 provides that such work is paid at 250 per cent of the ordinary rate of pay; for casual employees this payment replaces 'any casual loading otherwise payable under the award': clause 29.2(c)(ii).

[97] The HSU seek to vary clauses 23 and 29 of the Aged Care Award as follows:

> **23. Saturday and Sunday work**
>
> 23.1 Employees whose ordinary working hours include work on a Saturday and/or Sunday, will be paid for ordinary hours worked between midnight on Friday and midnight on Saturday at the rate of time and a half, and for ordinary hours worked between midnight on Saturday and midnight on Sunday at the rate of time and three quarters. These extra rates will be in substitution for and not cumulative upon the shift premiums prescribed in clause 26—Shiftwork.
>
> ~~23.2 Casual employees will be paid in accordance with clause 23.1. The rates prescribed in clause 23.1 will be in substitution for and not cumulative upon the casual loading prescribed in clause 10.4(b).~~
>
> 23.2 A causal employee who works on a weekend will be paid the following rates:
>
>> (a) between midnight Friday and midnight Saturday – 175% of the ordinary hourly rate; and
>>
>> (b) between midnight Saturday and midnight Sunday – 200% of the ordinary hourly rate.
>
> 23.3 The rates prescribed in clause 23.2 will be in substitution for and not cumulative upon the causal loading prescribed in clause 10.4(b).[72]
>
> **29.2 Payment for working on a public holiday**
>
> . . .
>
> **(c) Casual employees**

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[72] HSU submission dated 23 January 2019 at page 6

~~(i) A casual employee will be paid only for those public holidays they work at the total rate of 250% for hours worked.~~

~~(ii) Payments under clause 29.2(c)(i) are instead of and replace any casual loading otherwise payable under this award.~~

(i) A casual employee will be paid only for those public holidays they work at 275% of the ordinary hourly rate for hours worked.

(ii) The rates prescribed in clause 29.2(c)(i) will be in substitution for and not cumulative upon the casual loading prescribed in clause 10.4(b) and weekend rates prescribed in 23.2.

(iii) Payments under this clause are instead of any addition rate for shift or weekend work which would otherwise be payable had the shift not been a public holiday.[73]

[98] The HSU submits that 'there is no basis for casual employees to have to forgo the casual loading for weekend and public holiday penalty rates'. The essence of the submission put is that the casual loading and penalty rates serve different purposes and hence both should be paid. The HSU relies on passages from the *Penalty Rates Decision* and, in particular, the discussion in that case of the 'default approach' adopted by the Productivity Commission (the PC) in the *Productivity Commission Inquiry Report: Workplace Relations Framework* (the PC Final Report).

[99] In opposing the claim ABI contended that the HSU ignored the relevant historical background to clause 23.2 of the Aged Care Award and in particular that a claim in the same terms was previously the subject of an application to vary the Aged Care Award by the Liquor, Hospitality and Miscellaneous Union (now United Voice), which was considered by a Full Bench in 2010. AFEI advanced a similar submission.

[100] Both ABI and AFEI submit that the HSU has not advanced any cogent reason for the Commission to depart from the previous Full Bench decision and on that basis the claim should be dismissed.

[101] The Aged Care Employers submit that in the absence of probative evidence, the Commission cannot be satisfied the Aged Care Award needs to be varied to meet the modern awards objective and accordingly the claim should be dismissed.[74]

[102] The Aged Care Employers acknowledge the HSU's reference to the 'default approach' identified in the *Penalty Rates Decision*[75] but submit that the HSU has failed to refer to an important qualification contained in the Productivity Commission Report and quote the Penalty Rates Full Bench at [1719]:

> '[t]he wage regulator should make the presumption that casual penalty rates should fully take account of the casual loading, but should not adopt that principle without closely considering its impacts on such workers.'[76]

[103] We return to the Productivity Commission Report shortly.

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[73] Ibid, at page 7

[74] Aged Care Employers submission in reply dated 25 March 2019 at para 45

[75] Ibid, at para 38

[76] Ibid at para 39; [2017] FWCFB 1001

[104] We turn first to ABI's contention that we should not depart from the 2010 Full Bench decision which inserted the current clause 23.2 into the Aged Care Award.

[105] At the time it was made (in April 2009) clause 23.2 of the Aged Care Award was in the following terms:

> 'Casual employees who work less than 38 hours per week will not be entitled to payment in addition to any casual loading in respect of their employment between midnight on Friday and midnight on Sunday.'

[106] On 28 October 2009, the LHMU made an application to vary clause 23.2 of the Aged Care Award to entitle casual employees to both the casual loading and the applicable weekend or public holiday penalties when working at those times. In the alternative, the LHMU sought a variation to provide that casual employees who work less than 38 hours per week would be entitled to weekend penalty rates rather than the casual loading.

[107] Employer parties involved in the proceeding opposed the primary claim but a number of employers did not oppose the LHMU's alternate claim.

[108] The Full Bench summarised the LHMU's submission in support of its primary claim in these terms:

> 'The LHMU submitted that casual employees should continue to receive weekend penalty rates in addition to the casual loading on the basis that the relevant award-based transitional instruments provide for such payments. It made available a survey of relevant awards to support its position. On the basis of this material the LHMU submitted that casual employees who work less than 38 hours per week will lose all penalty rates for Saturday and Sunday work. The impact varies between South Australia and Western Australia. It is argued that in South Australia the minimum decreases for casual employees are 30% on Saturday and 50% on Sunday.
>
> The LHMU submitted that if the modern award remains in its present form, casual employees will be preferred over part-time and full-time employees for weekend employment. It also contended that the casual loading was fixed to compensate for annual leave, sick leave and public holidays and was not intended to compensate for penalty rates.'[77]

[109] The Full Bench rejected the LHMU's primary claim and adopted the Union's alternative position, for the following reasons:

> 'Having regard to the weight of regulation in this area, in particular the incidence of some form of penalty payment to casuals for weekend work, we think the LHMU has made out a strong case for change. Nevertheless the position under the relevant award-based transitional instruments is by no means uniform. In particular we note that in many of those instruments the casual loading is lower than the loading in the modern award. In the circumstances we consider that it would be fair to adopt the LHMU's alternative position, and make provision for casual employees to receive the relevant weekend penalty rates in substitution for the casual loading. We will vary the award accordingly in terms of the draft in Appendix A2 to the LHMU application. In light of this conclusion we reject the claim for special transitional provisions in South Australia and Western Australia.'[78]

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[77] [2010] FWAFB 2026 at paras [52]-[53]

[78] Ibid, at para [59]

[110] ABI's submission in respect of this decision is encapsulated at paragraphs 5.27 to 5.29 of its written submission of 20 March 2019:

> 'As the above demonstrates, a six-member Full Bench of the AIRC considered the appropriate entitlements for casual employees when working on weekends and public holidays in the context of the variation application that was made by the LHMU on 28 October 2009.
>
> The Full Bench granted the union's claim in the alternative, and in so doing observed that it would result in a "fair" outcome for casual employees working on weekends and public holidays.
>
> In the absence of a compelling case, the Commission should not depart from the previous Full Bench decision.'

[111] As noted earlier (at [15]) in the *Penalty Rates Decision* the Full Bench observed[79] that while it is appropriate to take account of previous decisions relevant to a contested issue arising in the Review it is necessary to consider the context in which those decisions were made. The particular context may be a cogent reason for not following a previous Full Bench decision and gave the following examples to illustrate the point:

- the legislative context which pertained at that time may be materially different from the Act;
- the extent to which the relevant issue was contested and, in particular, the extent of the evidence and submissions put in the previous proceeding will bear on the weight to be accorded to the previous decision; or
- the extent of the previous Full Bench's consideration of the contested issue. The absence of detailed reasons in a previous decision may be a factor in considering the weight to be accorded to the decision.

[112] In determining the weight to be afforded to the 2010 Full Bench decision relied on by ABI and AFEI, three important contextual considerations are relevant.

[113] First, in a Statement made on 26 June 2009 in relation to variations to modern awards, the Award Modernisation Full Bench said:

> 'Applications to vary the substantive terms of modern awards will be considered on their merits. It should be noted, however, that the Commission would be unlikely to alter substantive award terms so recently made after a comprehensive review of the relevant facts and circumstances including award and NAPSA provisions applying across the Commonwealth. Normally a significant change in circumstances would be required before the Commission would embark on a reconsideration.'[80] (emphasis added)

[114] In the 2010 decision relied on by ABI and the AFEI, the Full Bench applied the above approach in considering the applications before it.

[79] [2017] FWCFB 1001 at para [269]

[80] [2009] AIRCFB 645 at para [3]

[115] Second, it is apparent from the decision itself and in particular the passage set out above (at [113]**)** that the central consideration that led the Full Bench to reject the LHMU's primary claim and adopt its alternative position were:

- The weight of regulation in this area, in particular the incidence of some form of penalty payment to casuals for weekend work; and
- The fact that the position under the relevant award-based transitional instruments was by no means uniform.

[116] It is apparent from the decision that the Full Bench gave no consideration to the principle of neutrality (which informed the PC's 'default approach' and to which we return shortly).

[117] Finally, it is also significant that the relevant legislative context has changed since the 2010 Full Bench decision, in that s.134(1)(da) has subsequently been inserted into the Act. We return to the terms of s.134(1)(da) shortly.

[118] Having regard to these contextual considerations, and contrary to the submissions of ABI and AFEI, we do not propose to accord significant weight to the 2010 Full Bench decision. We now turn to the relevant aspects of the PC Final Report and the *Penalty Rates Decision.*

[119] The PC Final Report was published by the Productivity Commission on 30 November 2015 following an inquiry into the 'Workplace Relations Framework' arising from a request made by the Commonwealth Government pursuant to Parts 2 and 3 of the *Productivity Commission Act 1998* (Cth).[81] Weekend penalty rates are considered in Chapters 10, 13, 14, 15 and Appendix F of the report.

[120] The consideration of penalty rates in the PC Final Report was limited to penalty rates that apply to the hospitality, entertainment, retail, restaurant and café industries, referred to as the HERRC industries in the report.

[121] In relation to weekend penalty rates the central recommendation in the PC Final Report (Recommendation 15.1) was that the Commission should, as part of its current award review process:

- set Sunday penalty rates that are not part of overtime or shiftwork at the higher rate of 125 per cent and the existing Saturday award rate for permanent employees in the HERRC industries;
- set weekend penalty rates to achieve greater consistency between the HERRC industries, but without the expectation of a single rate across all of them; and
- investigate whether weekend penalty rates for casuals in the HERRC industries should be set so that casual penalty rates on weekends would be the sum of the casual loading and the revised penalty rates applying to permanent employees, with the principle being that there should be a clear rationale for departing from this.[82]

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[81] PC Final Report at p. v

[82] Ibid at p. 497

[122] The last point is of particular interest in the context of the matter before us. At Appendix F.3 of the PC Final Report, the PC notes that there are three basic models for calculating penalty rates for casuals and concludes that the 'default approach' is 'the optimal approach'.[83] Under the default method the casual loading is added to the penalty rate applying to a permanent employee. The 'default method' is the approach sought to be implemented by the HSU in these proceedings and we return to it shortly.

[123] As noted by the Aged Care Employers, the PC urged that care be taken in changing casual penalty rates:

> 'However, a major proviso is that the current regulated pay levels set for casual employees are 'rough and ready' and may not take into account the generally lower average skills and experience of those employees. Were this to be true, achieving parity in the employer costs of employing casuals compared with permanent employees might only have the appearance of 'equal pay for equal work' and would disadvantage the employment of casuals. That would be unfortunate given that casual jobs are an important vehicle for gaining entry to the labour market for the disadvantaged, the young, and those needing flexible working arrangements. In that context, the wage regulator should make the presumption that casual penalty rates should fully take account of the casual loading, but should not adopt that principle without closely considering its impacts on such workers.'[84] (emphasis added)

[124] The above statement may be broken up into two propositions:

1. The current regulated pay levels are 'rough and ready' and may not take into account the generally lower average skills and experience of those employees.

2. If proposition 1 is true, then achieving parity in the cost of employing casuals would disadvantage the employment of casuals. This would be unfortunate because casual jobs are an important vehicle for gaining entry to the labour market for the disadvantaged, the young and those needing flexible working arrangements.

[125] The first proposition, as it pertains to Aged Care, is plainly wrong. The classification structure in the Aged Care Award is competency based and requires employees to be classified according to their skill level (see Schedule B). We note that the prescription of a lower rate of pay for a level 1 employee reflects the fact that such an employee has 'less than three months work experience in the industry and performs basic duties'.

[126] The first proposition provides the premise for the second proposition, that is, the PC's observation that parity 'would disadvantage the employment of casuals'. So much is clear from the use of the expression 'were this to be true'. As the premise is false the latter observation lacks any foundation.

[127] The *Penalty Rates Decision* determined that the existing Sunday penalty rates in certain awards did *not* achieve the modern awards objective, the effect of that decision was, relevantly, to reduce Sunday penalty rates to 150 per cent for full-time and part-time employees and to 175 per cent for casual employees.

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[83] Ibid at p. 1125

[84] Ibid at p. 497

[128] The Full Bench in the *Penalty Rates Decision* noted the references in the PC Final Report to the interaction between penalty rates and casual loadings[85] and said:

> '[337] The PC Final Report argued that, in order for employers to be indifferent or neutral (at the margin) in choosing between a permanent and casual employee, the 'default' method should be preferred. As we observe later, the casual loading is paid to compensate casual employees for the nature of their employment and the fact that they do not receive the range of entitlements provided to full-time and part-time employees, such as annual leave, personal/carer's leave, notice of termination and redundancy benefits.
>
> [338] For our part we would observe that the 'default' approach is also consistent with one of the considerations we are required to take into account in determining whether a modern award satisfies the modern awards objective, in that it provides a casual loading that is simple and easy to understand, consistent with s.134(1)(g) of the FW Act.'[86]

[129] And later in the decision the Full Bench said:

> '[1711] Casual loadings and weekend penalty rates are separate and distinct forms of compensation for different disabilities. Penalty rates compensate for the disability (or disutility) associated with the time at which work is performed.
>
> [1712] The casual loading is paid to compensate casual employees for the nature of their employment and the fact that they do not receive the range of entitlements provided to full-time and part-time employees, such as annual leave, personal carer's leave, notice of termination and redundancy benefits.
>
> [1713] Importantly, the casual loading is *not* intended to compensate employees for the disutility of working on Sundays.
>
> [1714] **…** we have a preference for what the Productivity Commission calls the 'default' approach to the interaction of casual loadings and weekend penalties. Under this approach, the casual loading is *added* to the applicable weekend penalty rate when calculating the Saturday and Sunday rates for casuals.'

[130] Importantly, the Full Bench went on to *apply* the default approach in varying the Sunday penalty rates in Hospitality[87], Retail[88] and Pharmacy Awards[89]; the weekend penalty rates in the Fast Food Award[90] and the public holiday penalty rates in the Hospitality and Retail Awards. As to the last matter the Full Bench said:

> 'The PC Final Report sets out the three methods currently used for determining the rate of pay for casual employees in the modern awards relevant to the penalty rates case. Each method arrives at a different rate of pay for casual employees during times when weekend penalty rates apply. The method preferred by the Productivity Commission is the 'default' approach where the casual loading is always set as a percentage of the ordinary/base wage (and not the ordinary wage plus the penalty rate). The rate of pay for a casual employee is therefore always 25 percentage points above the rate of pay for non-casual employees.

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[85] (2017) 265 IR 1 at paras [333] – [337]

[86] Ibid at paras [337] – [338]

[87] [2017] FWCFB 1001 at paras [887] – [897]

[88] Ibid at paras [1704] – [1715]

[89] Ibid at paras [1878] – [1883]

[90] Ibid at paras [2034] – [2035]

The PC Final Report argued that, in order for employers to be indifferent or neutral (at the margin) in choosing between a permanent and casual employee, the 'default' method should be preferred.

The 'default' method proposed by the Productivity Commission also provides a casual loading that is simple and easy to understand, consistent with s.134(1)(g) of the FW Act.

In our view, the casual loading should be *added* to the public holiday penalty rate when calculating the public holiday rate for casual employees. We propose to adopt the Productivity Commission's 'default' approach. Accordingly, the public holiday rate for casual employees in the *Hospitality and Retail Awards* will be 25 + 225 = 250 per cent.' (footnotes omitted)

[131] The SDA subsequently made an application to vary the Saturday (and evening work) rates for casuals in the *General Retail Industry Award 2010.* A Full Bench granted the SDA's claim noting that:

'In our view the current casual rates for Monday to Friday evening work and Saturday work lack logic and merit.

In the context of the Retail Award casual loadings and penalty rates are separate and distinct forms of compensation for different disabilities. Penalty rates compensate for the disability (or disutility) associated with the time at which work is performed. The casual loading is paid to compensate casual employees for the nature of their employment and the fact that they do not receive the range of entitlements provided to full-time and part-time employees, such as annual leave, personal carer's leave, notice of termination and redundancy benefits. Importantly, the casual loading is *not* intended to compensate employees for the disutility of working evenings or on Saturdays.

We note that the Full Bench in the *Penalty Rates Decision* adopted what the PC calls the 'default' approach to the interaction of casual loadings and Sunday penalties. The Full Bench *added* the casual loading to the Sunday penalty rate, such that the new Sunday rate for casual employees is 175 per cent, that is a 50 per cent penalty rate plus the 25 per cent casual loading. The same approach is apposite to the matters before us.

We also note that in the context of award modernisation, an application was made by employers to vary a provision of the *Fast Food Award 2010* to limit the payment of Saturday penalty rates to full-time and part-time employees.[91] In rejecting that claim, the Full Bench stated:[92]

'It is a common feature of awards generally including awards in the restaurant industry that casual employees receive relevant loadings in addition to casual loadings.'

This conclusion was referred to with approval by the Full Bench in the *Casuals Case* which observed:[93]

'...the Full Bench did not consider that the casual loading compensated for the disabilities associated with evening or weekend work or that those disabilities did not apply to casual employees equally to full-time and part-time employees'…

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[91] [2010] FWAFB 379

[92] Ibid at para [24]

[93] Ibid at para [670]

In substance, the submission put by the SDA is that the current penalty rates are neither fair nor relevant. In short, the existing penalty rates for casuals working evenings (Monday to Friday) and on Saturdays are not fair and proportionate to the disability experienced by casual employees working at these times. We agree.'[94]

[132] In short, the *Penalty Rates Decision* expressed 'a preference' for the PC's 'default approach' and the Full Bench in the *General Retail Industry Award Case* applied that approach and increased the penalty rates for casuals working evenings (Monday to Friday) and on Saturdays. As mentioned earlier, the 'default approach' is explained at Appendix F.3 of the PC Final Report. In essence the default approach calculates the penalty wage rate for casuals as:

$$\textit{Penalty wage} = \textit{Base wage} \times \frac{(\textit{casual loading} + \textit{Penalty rate})}{100}$$

[133] The PC's rationale for the adoption of the 'default approach' as the 'optimal approach' is explained at page 496 of the PC Final Report:

> 'The conflation of the casual loading and the premium rate for weekend work can hide the anomalous treatment of weekend rates for casuals in some awards. In principle, a wage system should not favour the employment of a person with identical competencies over another, yet this occurs in some awards for weekend work …
>
> For neutrality of treatment, the casual loading should be *added* to the penalty rate of a permanent employee when calculating the premium rate of pay over the basic wage rate for weekend work. This would make an employer indifferent, at the margin, between hiring a permanent employee over a casual employee…
>
> Achieving neutrality would require that penalty rates for casual employees would rise on Saturday's for some awards.'[95]

[134] Importantly, the principle of neutrality of treatment which underpins the PC's default approach had also been adopted by the AIRC (a predecessor tribunal to the Commission) in considering the appropriate quantum of the casual loading. In the *Re Metal, Engineering and Associated Industries Award 1998 – Part 1* (the *Metals Casual Decision)*[96] an AIRC Full Bench increased the casual loading in the *Metal Engineering and Associated Industries Award 1998 – Part 1*, an antecedent of the *Manufacturing and Associated Industries and Occupations Award 2010*, from 20 per cent to 25 per cent, and in so doing made the following observation:

> 'We have sought in our detailed reasoning in this case to develop a rationale about casual employment and its particular incidents that may be capable of application, with such changes as are necessary to other types of employment. In setting each condition we have given weight to the desirability of *not* producing different standards or reflecting preference for one type of employment over another.'[97] (emphasis added)

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[94] [2018] FWCFB 5897 at paras [227] – [231] and [262]

[95] Ibid at p. 496

[96] (2000) 110 IR 247

[97] Ibid at p320, at para [200]

[135] The approach adopted by the AIRC Full Bench is even more apparent in the following extract, earlier in the same decision:

> 'The Commonwealth submitted that the loading should be so calculated as to make the choice between casual and "permanent" employees broadly cost neutral … we consider that the proposition does crystallise what should be an important objective in calculating and fixing the loading. A logical and proper consequence of providing for casual employment with the incidents currently attached to it is that, so far as the award provides, it should not be a cheaper form of labour, nor should it be made more expensive than the main counterpart types of employment.'[98]

[136] We would also note that in the course of addressing the PC's 'default approach' in the present proceedings counsel for ABI acknowledged, properly so, that 'there's some force to it'.[99]

[137] In our view the principle of neutrality of treatment, which underpins the PC's 'default approach' and informed the *Metals Casual Decision*, is a sound industrial principle and, absent some compelling countervailing consideration, should generally be applied.

[138] The application of such a principle in this case would weigh in favour of making the variation sought by the HSU unless the 25 per cent casual loading in the Aged Care Award contains some element of compensation for weekend work. In our view it does not.

[139] It is apparent from the *Metals Casual Decision* that the 25 per cent casual loading determined in that matter did not contain any element of compensation for weekend work. So much is clear from the concluding part of that decision (footnotes omitted):[100]

> 'For the reasons we have given in the preceding sections, we are satisfied that paid leave; long service leave; and a component covering differential entitlement to notice of termination of employment and employment by the hour effects, should constitute the main components to be assessed in determining casual loading for the Award.
>
> 197 In the table below, we have attempted a comparison of the relative annual costs to the employer. It is expressed as working days paid for. It covers three main types of ordinary hours, day work employment for certain components. We have included in the calculation also a progressive ratio of what we estimate to be the relative advantage of a full-time worker in days paid for over a casual employee.'

Working Days Paid Comparison

Component	**Days**	**Full-Time**	**Fixed Term**	**Casual**
Total working days:	260	260	260	260
Less days not worked: public holidays: Less days sick/personal: leave average use	(10) (6)			250 244
RATIO A				106.5%
Vested entitlements payable on completion of 260 days Leave:	(20)		280	244

[98] Ibid at p307, at para [157]

[99] Transcript 10 April 2019 at para [629]

[100] (2000) 110 IR 247 at pp 318-319, paras [196]-[197]

Leave Loading:	(3.5)	283.5	283.5	244
RATIO B				116.6%
Vested contingent benefits Accrued leave: Long service leave	(4) (4.3)	287.5 291.8	283.5 283.5	
RATIO C				119.6%
Notice of termination and employment by the hour effects: Contingent benefit applicable to employment terminated on las day of work	(1 week notice or payment in lieu)	296.8	283.5	244
RATIO D **OR**		 291.8	 283.5	121.6% 231.8
Short time worked or paid hours differential determent: Norm for casual working hours in industry = 36.1 hours per week ie 95% of 38 hour standard)				
RATIO E				125.88%

[140] In a Statement[101] issued on 12 September 2008 the Award Modernisation Full Bench decided to adopt 'a general standard of 25 percent for the casual loading' in all exposure drafts. A number of employer bodies subsequently submitted that the Commission should not adopt a standard casual loading or that if it did so 25 percent was too high. The Award Modernisation Full Bench gave further consideration to this issue in a Decision[102] issued on 19 December 2008, in which it confirmed its previous statement and adopted a standard 25 per cent casual loading, noting that:

> '[49] In 2000 a Full Bench of this Commission considered the level of the casual loading in the *Metal, Engineering and Associated Industries Award 1998* (the Metal industry award).[103] The Bench increased the casual loading in the award to 25 per cent.[104] The decision contains full reasons for adopting a loading at that level. The same loading was later adopted by Full Benches in the pastoral industry.[105] It has also been adopted in a number of other awards. Although the decisions in these cases were based on the circumstances of the industries concerned, we consider that the reasoning in that case is generally sound and that the 25 per cent loading is sufficiently common to qualify as a minimum standard.
>
> [50] In all the circumstances we have decided to confirm our earlier indication that we would adopt a standard casual loading of 25 per cent. We make it clear that the loading will compensate for annual leave and there will be no additional payment in that respect. Also, as a general rule, where penalties apply the penalties and the casual loading are both to be calculated on the ordinary time rate.'

[141] The Metal Industry 25 per cent casual loading is now the standard across all modern awards. The casual loading for award/agreement free employees is all set at 25 per cent.

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[101] [2008] AIRCFB 717 at para [20]

[102] [2008] AIRCFB 1000

[103] Print T4991, (2001) 105 IR 27

[104] Ibid

[105] The *Pastoral Industry Award 1998*, PR930781, 30 April 2003 and the *Woolclassers Award 1999*, PR952585, 20 October 2004

[142] In the course of these proceedings, counsel for the Aged Care Employers did not disagree with the proposition that the casual loading and weekend penalty rates 'deal with different things'.[106] We agree. It is clear from clause 10.4(b) of the Aged Care Award that the 25 per cent casual loading is 'paid instead of the paid leave entitlements accrued by full time employees' and there is no suggestion in the award that the casual loading contains any element of compensation for weekend work; nor did any party in the proceedings contend that it did.

[143] We now turn to deal with the s.134 considerations.

[144] Section 134(1)(a) requires that we take into account 'relative living standards and the needs of the low paid'. A threshold of two-thirds of median full-time wages provides a suitable benchmark for identifying who is 'low paid', within the meaning of s.134(1)(a). As shown in Chart 1, most classifications covered by the Aged Care Award are 'low paid'.

[145] The 'needs of the low paid' is a consideration which weighs in favour of the variation proposed by the HSU.

[146] Section 134(1)(b) requires that we take into account 'the need to encourage collective bargaining'. An increase in the payments for casuals working on weekends and public holidays is likely to increase the incentive for employers to bargain, but may also create a disincentive for employees to bargain. It is also likely that employee and employer decision-making about whether or not to bargain is influenced by a complex mix of factors, not just the level of penalty rates in the relevant modern award. Section 134(1)(b) speaks of 'the need to *encourage* collective bargaining'. We are not persuaded that an increase in the payments for casuals doing weekend work would '*encourage* collective bargaining', it follows that this consideration does not provide any support for a change to those rates.

[147] Section 134(1)(c) requires that we take into account 'the need to promote social inclusion through increased workforce participation'. Obtaining employment is the focus of s.134(1)(c). On the material before us, the impact of the variations proposed by the HSU on total employment is not likely to be significant. We regard this consideration as neutral.

[148] It is convenient to deal with the considerations ss.134(1)(d) and (f) together.

[149] As we have mentioned, s.134(1)(f) is not confined to a consideration of the impact of the exercise of modern award powers on 'productivity, employment costs and the regulatory burden'. It is concerned with the impact of the exercise of those powers 'on business'.

[150] AFEI submitted that:

> 'The effect of HSU's claim, if accepted, will increase costs and <u>restrict employer flexibility in making recruitment decisions that best suit the needs of the organisation.</u>'[107] (emphasis added)

[151] It is self-evident that if the rates payable to casuals for weekend and public holiday work were increased then employment costs would increase. This consideration tells against an increase in casual rates. However, as mentioned earlier (at [29] above) the 2016 Workforce

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[106] Transcript 10 April 2019 at paras [391] – [397]

[107] AFEI submission 22 March 2019 at para 1.34.2

Report suggests that only 10 per cent of workers in the residential direct care workforce are 'casual or contract workers' (down from 19 per cent in 2012). As the data relates to both casuals *and* contract workers the proportion of employees who are casuals is likely to be less than 10 per cent.

[152] The low utilisation of casual employees suggests the cost impact of varying the Aged Care Award in the manner proposed is not likely to be substantial. As to the assertion by AFEI that such a variation would 'restrict employer flexibility in making recruitment decisions', we would observe that the link between the asserted impact on recruitment decisions was not the subject of any elaboration in the AFEI's submission (or any evidence) and it is not readily apparent to us.

[153] We accept that the variations proposed will increase employment costs and to the extent that full time or part-time permanent employees are substituted for casuals, the changes may reduce flexibility.

[154] Section 134(1)(da) requires that we take into account the 'need to provide additional remuneration' for, relevantly, 'employees working on weekends or public holidays' and was the subject of a number of observations by the Full Bench in the *Penalty Rates Decision*, relevantly for present purposes: [108]

> 'The expression 'additional remuneration' in the context of s.134(1)(da) means remuneration in addition to what employees would receive for working what are normally characterised as 'ordinary hours', that is reasonably predictable hours worked Monday to Friday within the 'spread of hours' prescribed in the relevant modern award. Such 'additional remuneration' could be provided by means of a penalty rate or loading paid in respect of, for example, work performed on weekends or public holidays. Alternatively, additional remuneration could be provided by other means such as a 'loaded hourly rate'.[109]
>
> …
>
> Section s.134(1)(da) is a relevant consideration, it is *not* a statutory directive that additional remuneration must be paid to employees working in the circumstances mentioned in paragraphs 134(1)(da)(i), (ii), (iii) or (iv). Section 134(1)(da) is a consideration which we are required to take into account. To take a matter into account means that the matter is a 'relevant consideration' in the *Peko-Wallsend*[110] sense of matters which the decision maker is bound to take into account. As Wilcox J said in *Nestle Australia Ltd v Federal Commissioner of Taxation*:
>
>> 'To take a matter into account means to evaluate it and give it due weight, having regard to all other relevant factors. A matter is not taken into account by being noticed and erroneously disregarded as irrelevant'.[111]

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[108] [2017] FWCFB 1001 at paras [192] and [195]-[196]

[109] For example, clause 27.1 of the *Hospitality Industry (General) Award 2010* provides that non-managerial employees may, by agreement between the employer and employee, be paid an annual salary of at least 25% or more above their minimum weekly wage times 52. Such an annualised salary relieves the employer of the requirement to pay penalty rates and overtime, provided the employee is not disadvantaged

[110] *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24

[111] (1987) 16 FCR 167 at 184; cited with approval by Hely J in *Elias v Federal Commissioner of Taxation* (2002) 123 FCR 499 at [62] and by Katzmann J in *Construction, Forestry, Mining and Energy Union v Deputy President Hamberger* (2011) 195 FCR 74 at [103]

> Importantly, the requirement to take a matter into account does not mean that the matter is necessarily a determinative consideration. This is particularly so in the context of s.134 because s.134(1)(da) is one of a number of considerations which we are required to take into account. No particular primacy is attached to any of the s.134 considerations. The Commission's task is to take into account the various considerations and ensure that the modern award provides a 'fair and relevant minimum safety net'.

[155] The casual loading in the Aged Care Award does not already compensate casual employees for working on weekends and public holidays. Further, it seems to us that permanent and casual employees are likely to experience similar levels of disutility associated with working on weekends and on public holidays. This supports the proposition that the penalty rates for working at those times should be the same for permanent and casual employees and is a factor which ways in favour of the variations proposed by the HSU.

[156] The considerations in s.134(1)(e), (g) and (h) are not relevant in the present context. No party contended to the contrary.

[157] The central issue in these proceedings is whether the existing penalty rates for casual employees who work on weekends and public holidays provide a 'fair and relevant minimum safety net'.

[158] In substance, the submission put by the HSU is that the existing rates for casuals working on Saturdays, Sundays and public holidays are not fair and proportionate to the disability experienced by casual employees working at these times. We agree.

[159] The modern awards objective is to 'ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions', taking into account the particular considerations identified in sections 134(1)(a)–(h). We have taken into account those considerations, insofar as they are relevant to the matter before us, and have decided to vary the Aged Care Award in the manner proposed by the HSU. We deal with the transitional arrangements associated with these increases later in our decision.

(iv) Amending the broken shifts clause to provide for a minimum engagement period

[160] The HSU seeks to vary clause 22.8 of the Aged Care Award to ensure that the minimum engagement requirement in clause 27.7(b) applies to each part of the broken shift, as follows:

> **22.8 Broken shifts**
>
> With respect to broken shifts:
>
> (a) Broken shift for the purposes of this clause means a shift worked by a casual or permanent part-time employee that includes breaks (other than a meal break) totalling not more than four hours and where the span of hours is not more than 12 hours.
>
> (b) A broken shift may be worked where there is mutual agreement between the employer and employee to work the broken shift.
>
> c) Payment for a broken shift will be at ordinary pay with penalty rates and shift allowances in accordance with clauses 25—Overtime penalty rates and 26—

Shiftwork, with shift allowances being determined by the commencing time of the broken shift.

(d) All work performed beyond the maximum span of 12 hours for a broken shift will be paid at double time.

(e) An employee must receive a minimum break of 10 hours between broken shifts rostered on successive days.

(f) Each portion of the shift must meet the minimum engagement requirements in 22.7(b).[112]

[161] Clause 22.7(b) provides:

‘**22.7 Minimum engagements**

… (b) Permanent part-time and casual employees will receive a minimum payment of two hours for each engagement.’

[162] The effect of the proposed variation would be that casual and part-time employees working a broken shift must receive a minimum payment of two hours for each portion of the broken shift.

[163] The HSU contends that the proposed variation ‘represents a clarification rather than a substantive change to the Award’.[113]

[164] As to the merits of the proposed variation, the HSU submits that the minimum engagement provisions in clause 22.7 ‘are meaningless if they can be disregarded when broken shifts apply’. It submits that ‘an employee who comes into work for part of a broken shift makes the same sacrifices as an employee who comes into work for a non-broken shift, such as time spent travelling to and from work’.[114]

[165] As to the s.134 considerations, the HSU submits that ss.134(1)(a) and (da)(ii) are relevant and that the amendment ‘would prevent unscrupulous employers from exploiting part-time and casual workers by scheduling very short broken shifts, meaning employees could earn little pay for short, broken shifts worked over a long span of hours’.[115] The HSU also submits that the consideration in s.134(1)(g) is relevant ‘as the proposed amendment ensures that the broken shift provision is consistent with the minimum engagement provision under the Aged Care Award, thereby ensuring that the Aged Care Award is clear, simple and easy to understand’.[116] On this basis, the HSU contends that the amendment is necessary for the Aged Care Award to meet the modern awards objective.

[166] ABI and AFEI reject the HSU’s characterisation of the proposed variation as a ‘clarification rather than a substantive change’.

[167] ABI contends that the proper interpretation of clause 22.8 is that the minimum payment provision in clause 22.7(b) applies to ‘broken shifts generally and not to each portion

[112] HSU submission 23 January 2019 at para 11

[113] Ibid, at para 13

[114] Ibid at para 14

[115] Ibid at para 17

[116] Ibid at para 16

of a broken shift'.[117] ABI submits that this construction is supported by the decision of the Award Modernisation Full Bench of 23 March 2010 in the Aged Care Award 2010.[118] In the *March 2010 decision* the Full Bench considered a claim by the Liquor, Hospitality and Miscellaneous Union (LHMU, now United Voice) to include minimum engagement provisions from the pre-reform WA Aged Care Award (the *Private Hospital and Residential Aged Care (Nursing Homes) Award 2002*) in the Aged Care Award on a transitional basis. The pre-reform award provided a minimum engagement of three hours for all employees and expressly included a minimum engagement of two hours for each part of a broken shift. The Full Bench rejected this claim.[119] ABI submit that the fact that the AIRC considered and rejected a claim that sought to include in the Aged Care Award a minimum engagement for each portion of a broken shift supports its contention that the Aged Care Award minimum engagement term does not apply to each portion of a broken shift.[120]

[168] ABI submits that the HSU claim represents a substantive departure from the current Award position and it would materially alter the existing minimum payment obligations where employees undertake broken shifts.[121]

[169] It is convenient to deal with the *March 2010 decision* here. As noted earlier (at [15] and [111], it is appropriate to take account of previous decisions relevant to a contested issue, but it is necessary to consider the context in which those decisions were made.

[170] The LHMU's claim which was the subject of the *March 2010 Decision* related to transitional provisions in circumstances where the Award Modernisation Full Bench had already given specific consideration to the range of matters that might be dealt with in transitional provisions and decided to limit them to: minimum wages, casual and part-time loadings, Saturday, Sunday, public holiday, evening and other penalties and shift allowances. Indeed the Award Modernisation Full Bench had already rejected a suggestion that transitional provisions be included for hours of work provisions.[122]

[171] Further, it is apparent from the decision itself that the Full Bench rejected the claim because it had decided to limit the range of matters which were to be the subject of transitional arrangements. The decision gives no indication that the Full Bench had considered the merits of the broken shift provision, or its interpretation. So much is apparent from the following extracts from the *March 2010 decision*:

> '[25] We deal next with the LHMU claim relating to minimum period of engagement. The WA aged care award provides a minimum shift length of three hours and this appears to be the minimum period of engagement for all employees. A split shift under the WA aged care award may be a minimum of two hours for each part of the shift. The modern award provides a minimum period of four hours for full time employees and two hours for part time and casual employees, other than homecare employees.
>
> [26] The LHMU contends that this change will impact on nearly all employees engaged in aged care in Western Australia and will result in a loss of income. It submitted that the

[117] Ibid at para 4.14

[118] [2010] FWAFB 2026

[119] Ibid at paras 4.15 – 4.16

[120] Ibid at para 4.17

[121] Ibid at para 4.22

[122] [2009] AIRCFB 800 at paras [25] – [29]

provisions in the WA aged care award should be included in the modern award on a transitional basis

[27] The change is opposed by CCIWA and ACSWA.

[28] This part of the application must be seen in the context of the Commission's task of selecting or devising the most appropriate provisions for modern awards having regard to the provisions in a wide range of award-based transitional instruments. That task involved the exercise of judgment to reach a fair result overall. In its submission, ACSWA referred to the hours of work provisions and stated that the provisions of the modern award may cost its members a little more. It said: "Again it's a national system and we accept that there will be swings and roundabouts".

[29] We have decided not to alter the earlier decisions concerning transitional arrangements and therefore this aspect of the application is also rejected.' (emphasis added)

[172] Contrary to ABI's submission, the *March 2010 decision* provides no support to its construction of clauses 22.7 and 22.8; it is silent on the question

[173] It is unnecessary to resolve the dispute about the proper interpretation of these provisions as it is evident to us that there is at least a degree of ambiguity about the interaction between the two award terms. The important issue is to determine the claim as a matter of merit.

[174] ABI rejects the HSU's contention that there are 'unscrupulous' practices or 'exploitation' of employees due to the current broken shift provisions[123] and submits that 'broken shifts are a necessary and very important feature of the industry, even more so given the recent changes to client care models'.[124] ABI submit that broken shifts 'provide a mechanism for employers to provide a greater number of hours to employees on any given day, in circumstances where the employer is are unable to provide a consecutive block of work'[125] and 'that broken shifts mitigate the disutility of otherwise working short shifts by giving employees a greater number of hours' work on a given day'.[126]

[175] AFEI submit that the proposed variation should be rejected as the HSU have failed to put forward a sufficient merit case supported by probative evidence.[127] AFEI contends that the proposed variation would increase the regulatory burden on employers with the potential to increase wage costs for employers. AFEI further submit that it is inconsistent with the following modern awards objective considerations:

- the need to promote flexible modern work practices and the efficient and productive performance of work; and

[123] Ibid at para 4.18

[124] Ibid at para 4.19

[125] Ibid at para 4.20

[126] Ibid at para 4.12

[127] Ibid at para 1.42

- the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden.[128]

[176] AFEI also submits that adopting the HSU interpretation would result in part-time and casual employees receiving payment for at least two hours per broken shift engagement, when in reality attendance can take under an hour of the employee's time and that: 'the proposed variation can therefore be substantially in excess of the time actually required for the employee to perform the work'.[129] It is convenient to note here that such an outcome is the very purpose of a minimum engagement term.

[177] The Aged Care Employers submit that in the absence of probative evidence directed at demonstrating the facts supporting the proposed variation, the claim should be dismissed.[130] They also submit that 'one of the presently unknown issues is the impact of consumer directed care and the new quality standards upon any business imperatives to seek employees' agreement to work broken shifts'.[131]

[178] We begin our consideration of the HSU's claim by noting that broken shifts are not common in the Aged Care Sector.

[179] The 2016 Workforce Report provides some data relating to work schedules. Table 4[132] below presents work schedules by occupation for the *residential* direct care workforce.

Table 4: Work schedule of the residential direct care workforce, by occupation: 2007, 2012 and 2016 (per cent)

Work Schedule	**Nurse**			**PCA**			**Allied Health**		
	2007	**2012**	**2016**	**2007**	**2012**	**2016**	**2007**	**2012**	**2016**
A regular daytime shift	57.1	64.9	61.2	50.6	50.8	50.6	95.6	92.0	93.8
A regular evening shift	12.5	8.3	8.8	14.0	14.3	15.0	0.4	2.2	0.7
A regular night shift	5.8	3.9	3.8	5.3	5.1	5.0	0.2	0.0	0.0
A rotating shift	16.2	14.5	19.0	19.7	19.5	19.5	1.7	2.2	1.4
Split shift	0.5	0.5	0.3	0.6	1.1	0.8	0.2	0.5	0.1
On call	0.6	1.0	0.6	1.3	1.5	1.5	0.4	0.7	0.3
Irregular schedule	5.1	5.2	5.3	6.7	6.4	6.5	1.1	1.2	2.1
Other	2.1	1.6	0.9	1.8	1.3	1.1	0.4	1.0	1.5
Total	**100**	**100**	**100**	**100**	**100**	**100**	**100**	**100**	**100**

Source: Survey of residential workers.

[128] AFEI submission dated 22 March 2019 at para 1.41

[129] Ibid at para 1.40

[130] Ibid at para 37

[131] Aged Care Employers submission dated 25 March 2019 at para 35

[132] Table 3.17 from *The Aged Care Workforce, 2016*, at page 25

[180] It is apparent from Table 4 that split shifts are relatively uncommon and the incidence of such shifts has declined over time, for all occupations. Between 2007 and 2012 there was a marked change in the types of shifts worked, with a move towards employing more nurses on regular shifts rather than rotating ones (a change that was also observed in previous years between 2003 and 2007). This trend appears to have been reversed in 2016, with the proportion of nurses working a regular daytime shift having fallen to 61 per cent, accompanied by a corresponding rise in the proportion working a rotating shift (19 per cent in 2016 up from 15 per cent in 2012). The work schedules of PCAs and Allied Health workers do not seem to be changing over time with most of the shifts that are not regular daytime shifts being worked by PCAs and with close to all Allied Health workers working regular daytime shifts.

[181] The above data is consistent with the response by counsel for the Aged Care Employers to questions from the Commission as to how clause 22.8 works in practice:

> 'As best as we've been able to ascertain it's not particularly prevalent in residential care facilities and certainly not in a regular basis, but rather where broken shifts are worked on an informal basis to meet ad hoc arrangements rather than being of some sort of standing arrangement that you always work these particular shifts.'[133]

[182] In considering the merits of the claim, it is useful to look first at the rationale for minimum engagement provisions in modern awards.

[183] The question of minimum engagement terms did not receive any systematic consideration during the award modernisation process which led to the current modern awards and largely preserved the predominant provisions concerning minimum engagements contained in pre-reform awards.[134] As explained by the Full Bench in *Re Victorian Employers' Chamber of Commerce and Industry*:[135]

> 'The Award Modernisation Full Bench of the Australian Industrial Relations Commission (**AIRC**) did not address the question of minimum engagements in any of its decisions and statements made in connection with the award modernisation process. This is because minimum engagements did not emerge as a significant issue during that process. Minimum periods of engagement have been a common feature of State and Federal awards for a very long period. The rationale for minimum periods of engagement is one of protecting employees from unfair prejudice or exploitation. Given the time and monetary cost typically involved in an employee getting to and from work, it has long been recognised that employees, especially casual employees, can be significantly prejudiced if a shift is truncated by the employer on short notice (as would otherwise be lawful in a typical casual engagement) or the employee can be pressured into accepting unviable short shifts in order to retain access to longer shifts. The inclusion of a minimum engagement period in a modern award invariably reflected the fact that such provisions were to be found in a sufficient proportion of the pre-reform awards and NAPSAs that are operated within the coverage of the modern award.' (emphasis added)

[184] Similar observations were made by the Full Bench in the *Metals Casual Decision.*[136]

> 'the minimum income from a casual engagement determines whether or not people who rely on social security or who have children will accept the job. Travel costs, child care expenses

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[133] Transcript 10 April 2019 at para [476]

[134] See [2017] FWCFB 3541 at para [402]

[135] [2012] FWAFB 6913 at para [12]

[136] (2000) 110 IR 247 at para [126]

> erode savagely any earnings. Any reduction in the expected length of a daily engagement has a severe impact on an already disadvantaged employee, and most heavily so for intermittent casual workers. The difficulties in balancing the requirements of the social welfare Newstart program with an offer of casual work are often too great to make the job worth the extra trouble'

[185] The Full Bench in the *Casuals and Part-time Employment Decision,*[137] observed that the rationale for minimum engagement periods in modern awards was as follows:

> 'to ensure that the employee receives a sufficient amount of work, and income, for each attendance at the workplace to justify the expense and inconvenience associated with that attendance by way of transport time and cost, work clothing expenses, childcare expenses and the like. An employment arrangement may become exploitative if the income provided for the employee's labour is, because of very short engagement periods, rendered negligible by the time and cost required to attend the employment. Minimum engagement periods are also important in respect of the incentives for persons to enter the labour market to take advantage of casual and part-time employment opportunities (and thus engage the consideration in paragraph (c) of the modern awards objective in s.134.'[138]

[186] The short point to be extracted from the decisions referred to is that minimum periods of engagement protect employees from exploitation by ensuring that they receive a minimum payment for each attendance at their workplace in order to justify the cost and inconvenience of each such attendance.

[187] The interpretation of clause 22.8 advanced by ABI and AFEI would allow a casual or part-time employee to be engaged to perform work on two or more occasions in a day and an engagement may be for less than an hour. Indeed there would be no minimum duration for an individual engagement provided the sum of the engagements (or broken shifts) on a particular day exceed 2 hours in total. It seems to us that such an outcome is antithetical to the purpose of a minimum engagement term, such as clause 22.7 in the Aged Care Award.

[188] We note that ABI (and AFEI) point to a number of what are said to be 'safeguards' in relation to the use of broken shift, namely:

1. Broken shifts can only be worked by casual and permanent part-time employees.
2. A broken shift can only be worked where the employee agrees to work the broken shift.
3. The breaks within a broken shift cannot total more than four hours.
4. The span of hours of a broken shift cannot exceed 12 hours.
5. Part-time employees have the certainty of their pattern of work having been agreed in advance (in writing), including the number of hours to be worked each week, the days of the week to be worked, and the starting and finishing times of each day.

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[137] [2017] FWCFB 3541

[138] Ibid at para [399]

6. The existing minimum engagement provisions ensure that employees receive a minimum payment of two hours' pay when working a broken shift.[139]

[189] We are not persuaded these 'safeguards' are adequate and nor do we consider that in its current form, clause 22.8 is a fair and relevant safety net term. The fact that broken shifts can only be worked by 'mutual agreement' does not provide sufficient protection, particularly for casual employees.

[190] It is relevant to note that the Full Bench in the *2017 Casual and Part-time Employment decision* considered (and rejected) an Ai Group proposal to vary the *Fast Food Industry Award 2010* to allow an employer and a casual employee to agree on an engagement of less than the 3 hour minimum provided in clause 13.4 of that award. In rejecting the claim the Full Bench said:

> 'The actual award variation advanced by the Ai Group may be criticised in the same way as the NRA proposal was criticised by Vice President Watson in his 2010 decision – namely that it "does not address the balance that is required with award provisions of this type to provide reasonable safeguards for employees against unfair engagement practices". The general concept of casual employees agreeing to reduced minimum engagement periods is itself problematic, since the continued engagement of casuals at all is dependent upon them agreeing to the terms of each engagement (subject only to any applicable award obligations binding on the employer). Ai Group's proposed provision does not require any minimum engagement period to be agreed in substitution for the standard 3 hour period at all, meaning that it would facilitate the complete removal of minimum engagement periods and thus open the door to the exploitation of casual employees.'[140]

[191] Later in that decision, the Full Bench rejected the proposition that provisions which allow employees, voluntarily and at their initiative, to work additional hours at ordinary rates would represent a tangible benefit for employees, noting that:

> 'Where a casual is engaged on a daily basis, the employer has the capacity under any facilitative provision, to dictate the terms of engagement, so that any employee who did not volunteer in writing to work additional hours at ordinary time rates would not be engaged.'[141]

[192] Further, in the *Modern Awards Review 2012 – Award Flexibility Decision*[142] the Full Bench rejected applications which sought to include minimum engagement periods within the scope of the model flexibility term:

> 'We are not persuaded that it is appropriate to include 'minimum engagement periods' within the scope of the model flexibility term. As we have noted these provisions relate to minimum wages and for many employees are an important aspect of the modern award safety net. As Vice President Watson observed in Secondary School Students case:
>
> > "There is a long history of minimum engagement periods for part time and casual employees providing protection for employees from employer expectations of

[139] Ibid at para 4.21. Also see ABI's submission of 12 April 2019 at paras 11 to 22

[140] [2017] FWCFB 3541 at para [686]

[141] Ibid, at para [754]

[142] [2013] FWCFB 2170

> working short periods where the cost and inconvenience of attending the workplace outweighs the benefits received from the engagement."[143]

Any variation to minimum engagement periods in modern awards should only be by application to vary the relevant modern award or by enterprise agreement. This will ensure that the variation is subject to appropriate scrutiny. It is not appropriate to permit such variations by IFAs, which are effectively self-executing. In our view, the inclusion of such terms within the scope of the model flexibility term would not be consistent with the modern awards objective.'[144]

[193] To the extent that clause 22.8 permits casual and part-time employees to be engaged (and paid for) for a portion of a broken shift which is less than 2 hours it does not provide a fair safety net.

[194] In relation to the s.134 considerations:

- the 'needs of the low paid' (s.134(1)(a)) weighs in favour of the proposed variation;
- the variation of the clause in the manner proposed by the HSU would not 'encourage collective bargaining', it follows that the consideration in s.134(1)(b) does not provide any support for the variation;
- as to ss.134(1)(d) and (f), we accept that the variation proposed by the HSU may have an adverse effect on business – it is likely to increase costs and reduce flexibility. But the extent of the adverse impact is not likely to be substantial as the material before us suggests that split shifts are relatively uncommon and the incidence of such shifts has declined over time; and
- the consideration in s.134(1)(da)(e)(g) and (h) are not relevant.

[195] The modern awards objective is to 'ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions', taking into account the particular considerations identified in paragraphs 134(1)(a)–(h). We have taken into account those considerations, insofar as they are relevant to the matter before us, and have decided to vary the Aged Care Award in the manner proposed by the HSU.

5. Conclusion and Transitional Arrangements

[196] In summary, we have decided to:

- reject the claim for a phone allowance;
- vary the rates of pay of casual employees who work on weekends and public holidays (subject to the views we express below about transitional arrangements) in the manner proposed by the HSU; and

[143] [2011] FWA 3777 at para [40]

[144] Ibid at paras [141]-[142]

- vary clause 22.8 to ensure that casual and part-time employees working a broken shift receive a minimum payment of two hours for each portion of the broken shift.

[197] We have also expressed the *provisional* view that dot point B4 of the current definition of the classification aged care worker level 4 be replaced with the following:

> 'In the case of a personal care worker, holds a relevant Certificate 3 qualification (or possesses equivalent knowledge and skills) and uses the skills and knowledge gained from that qualification in the performance of their work.'

[198] We have also proposed the insertion of a general note at the commencement of the classification definitions, as follows:

> Note: Any dispute about the classification of a particular employee may be referred to the Fair Work Commission in accordance with clause 9 of this award.'

[199] We now turn to consider the appropriate transitional arrangements in respect of our decision to vary the rates of pay of casuals working on weekends and public holidays.

[200] In the *Penalty Rates – Transitional Arrangements decision*[145] the Full Bench made the following observation about the determination of transitional arrangements:

> 'the determination of appropriate transitional arrangements is a matter that calls for the exercise of broad judgment, rather than a formulaic or mechanistic approach involving the quantification of the weight accorded to each particular consideration.'[146]

[201] The Full Bench went on to observe that the following matters were relevant to its determination of transitional arrangements in relation to the *reduction* of penalty rates.

(i) The statutory framework: any transitional arrangements must meet the modern awards objective and must only be included in a modern award to the extent necessary to meet that objective. The Full Bench also noted that it must perform its functions and exercise its powers in a manner which is 'fair and just' (as required by s.577(a)) and must take into account the objects of the Act and 'equity, good conscience and the merits of the matter' (s.578).

(ii) Fairness is a relevant consideration, given that the modern awards objective speaks of a '*fair* and relevant minimum safety net'. Fairness in this context is to be assessed from the perspective of both the employees *and* employers covered by the modern award in question.[147] The Full Bench said "while the impact of the reductions in penalty rates on the employees affected is a plainly relevant and important consideration in our determination of appropriate transitional arrangements, it is not appropriate to 'totally subjugate' the interests of the employers to those of the employees."[148]

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[145] [2017] FWCFB 3001

[146] Ibid at para [142]

[147] Ibid at paras [117] – [119]

[148] Ibid at para [148]

[202] We adopt the above observations and propose to apply them to the matter before us. It is our *provisional* view that the increase in the weekend and public holiday penalty rates for casuals should be phased in as follows:

	Saturday	**Sunday**	**Public holidays**
	(% of ordinary rate, inclusive of casual loading)		
1 December 2019	160	185	260
1 July 2020	175	200	275

6. Next Steps

[203] A draft variation determination setting out the variations we propose to make and reflecting our *provisional* view as to the variation of dot point B4 of the aged care worker level 4 and the transitional arrangements for the increase in the weekend and public holiday penalty rates for casuals, is at Attachment C. Interested parties are to file any submissions in relation to the draft variation determination (including our *provisional* views) by **4pm on Friday 20 September 2019**. Any reply submissions by **4pm on Friday 4 October 2019**. Any issues in contention will be the subject of a hearing on **Monday 14 October 2019 at 9:30am**. All submissions to AMOD@fwc.gov.au.

PRESIDENT

Appearances:

S Bull and N Dabarera for United Voice

R Liebhaber for the Health Services Union of Australia

B Miles of Counsel for the Aged Care Employers

K Scott and M Tiedeman for Australian Business Industrial and the New South Wales Business Chamber

S Lo for Australian Federation of Employers and Industry

J Field for Leading Aged Services Australia

A Wade for Aged and Community Services Australia

Hearing details:

Sydney
2019
10 April

Final written submissions:

Australian Business Industrial and NSW Business Chamber, 12 April 2019.

Aged & Community Services Australia, 12 April 2019.

Australian Business Industrial and NSW Business Chamber, 12 April 2019.

United Voice, 23 April 2019.

Health Services Union, 23 April 2019.

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ATTACHMENT A – Written submissions

Health Services Union	15 October 2018
Health Services Union	9 November 2018
Health Services Union	23 January 2019
United Voice	15 October 2018
United Voice	18 January 2019
United Voice – F1 application to admit certain witness statements	5 April 2019
In Reply	
Australian Business Industrial and the NSW Business Chamber	21 March 2019
Australian Federation of Employers and Industries	23 March 2019
Aged Care Employers	25 March 2019
Final	
Australian Federation of Employers and Industries	8 April 2019
Australian Business Industrial and NSW Business Chamber	12 April 2019 (Stewartbrown) 12 April 2019 (Supplementary)
Aged & Community Services Australia	12 April 2019
United Voice	23 April 2019
Health Services Union	23 April 2019

ATTACHMENT B – List of Awards re Mobile/Telephone Allowance provision submissions

1. *Air Pilots Award 2010 [MA000046]*
   19.6

   (a) Where an employer requires a pilot to have a telephone at their residence the employer will pay any cost of installation or transfer plus rental (in the case of aerial application operations, only half the rental) and the cost of all business calls. This provision will operate only in respect of one installation per pilot at any one base. The provision of a mobile telephone will satisfy this requirement.

   (b) Where the employer does not require a pilot to have a telephone the employer will pay the cost of all business calls made on a pilot's personal telephone plus in the case of full-time or part-time pilots, 50% of rental costs.

2. *Aircraft Cabin Crew Award 2010 [MA000047]*

   C.1.10 Telephone allowance

   Where an employer requires a regional cabin crew member to have a telephone or paging service, the employer must reimburse the employee the cost of installation or transfer for one telephone or pager at any one base. The employer must also reimburse the employee 50% of the rental charge of that telephone or pager.

3. *Airservices Australia Enterprise Award 2016 [MA000141]*
   12.17 Telephone reimbursement

   (a) Where an employee is required to provide out of hours advice to Airservices or is nominated as a contact point for out of hours advice and is not provided with a telephone by Airservices, the employee is entitled to reimbursement of telephone expenses up to 240 local calls per annum and other work-related calls as substantiated by the employee.

4. *Animal Care and Veterinary Services Award 2010 [MA000118]*
   16.1 Veterinary surgeons

   The following provisions apply only to veterinary surgeons:

   (a) Communication systems

   (i) Where an employer requires an associate to use a communication system, the employer must reimburse the associate for the cost of purchasing such equipment, unless the employer elects to provide the system. The employer must meet the system's running costs for practice usage or provide an allowance to cover such costs.

(ii) Where an associate is required to perform on call duty, a communication system will be provided in accordance with clause 16.1(a)(i) so that the associate is able to remain available without being restricted to one location, provided such location is:

- within effective communication zones at all times; and

- within reasonable access to the practice location.

5. *Contract Call Centres Award 2010 [MA000023]*
20.3 Telephone allowance

(a) Where an employee does not have a telephone, modem or broadband connection and, at the written request of the employer, the employee is required to have such equipment, the employer must reimburse the cost of purchase, installation and rental.

(b) Where an employee makes telephone calls in connection with the business on their private telephone at the direction of the employer, the employer must reimburse the cost of such calls. Provided that the employer may request details of all such calls claimed by the employee.

6. *Health Professionals and Support Services Award 2010 [MA000027]*

18.11 Telephone allowance

Where the employer requires an employee to install and/or maintain a telephone for the purpose of being on call, the employer will refund the installation costs and the subsequent rental charges on production of receipted accounts.

7. *Marine Towage Award 2010 [MA000050]*

14.2 Reimbursement and expense related allowances

(c) Telephone allowance

(i) An employee who is required by their employer to telephone for orders will be entitled to be reimbursed an amount of $166.03 per annum.

(ii) The employer will reimburse full installation costs of a new service and pay transfer costs on one occasion during an employee’s period of service.

8. *Market and Social Research Award 2010 [MA000030]*

17.1 Reimbursement and expense related allowances

(c) Telephone allowance

If an employer requires in writing that an employee have a private telephone as part of the employee's work duties, the employer will reimburse:

(i) the cost of rental and all telephone calls made as part of the employee's work duties; and

(ii) the cost of the installation if the employer has required in writing that the employee install a private telephone for use in connection with the employer's business.

8. *Medical Practitioners Award 2010 [MA000031]*

16.5 Telephone allowance

Where the employer requires an employee to install and/or maintain a telephone for the purpose of being on call, the employer will refund the installation costs and the subsequent rental charges on production of receipted account(s).

9. *Nurses and Midwives (Victoria) State Reference Public Sector Award 2015 [MA000125]*

14.5 Telephone allowance

Where an employer requires an employee to install and/or maintain a telephone for the purposes of being on call, the employer shall refund the installation costs and subsequent three-monthly rental charges on production of receipted accounts.

11. *Ports, Harbours and Enclosed Water Vessels Award 2010 [MA000052]*
14.18 Waiting orders

An employee who is required by their employer to telephone for orders will:

(a) if an employee has a telephone installed at their home, be paid the annual rental of such telephone plus 16.51% of the standard rate per year for calls necessarily incurred by the employee for ringing for such orders. If the employee is required by their employer to have a phone installed, the installation fee will be paid by the employer; or

(b) an off-duty employee required to ring for orders other than on a phone provided totally or in part by the employer, will receive an allowance of 0.42% of the standard rate for each call.

12. *Real Estate Industry Award 2010 [MA000106]*
18.6 Mobile telephone allowance

(a) Where the employer requires the employee to use the employee's own mobile phone in the course of employment and:

(i) the mobile telephone is provided under a mobile phone plan from a telecommunications provider, the employer and employee must agree in writing on the amount of reasonable reimbursement payable by the employer to the employee for the use of the employee's mobile phone in the course of employment provided that such reimbursement must not be less than 50% of the cost of the employee's monthly mobile phone plan, up to a maximum monthly phone plan of $100; or

(ii) the mobile phone is a pre-paid mobile phone, the employer and employee must agree in writing on the amount of reasonable reimbursement payable by the employer to the employee for the use of the employee's pre-paid mobile phone.

(b) Without limiting an agreed method of payment for reimbursement, an employee's salary in excess of the minimum weekly wage may be inclusive of reimbursement providing the reimbursement component of the salary is identified in the agreement.

(c) The mobile phone allowance under cause 18.6(a) is payable during the entire period of employment, except when the employee is on any period of leave either paid or unpaid.

(d) If requested, the employee must provide the employer with a copy of the mobile phone plan associated with the mobile telephone to be used by the employee in the course of employment.

(e) If the employee enters into a new mobile phone plan or arrangement with a telecommunications provider entitling the employee to a different allowance under this sub-clause, the new allowance will become payable from the first full pay period after the date the employee provides the employer with a true copy of the new mobile phone plan.

13. *Social, Community, Home Care and Disability Services Industry Award 2010 [MA000100]*

20.6 Telephone allowance

Where the employer requires an employee to install and/or maintain a telephone for the purpose of being on call, the employer will refund the installation costs and the subsequent rental charges on production of receipted accounts.

14. *Stevedoring Industry Award 2010 [MA000053]*

14.5 Telephone allowance

Where an employer requires an employee to telephone for allocation or cancellation or to be available for contact by telephone, the employer will pay each employee 1.36% of standard rate per week as a telephone allowance.

15. *Telecommunications Services Award 2010 [MA000041]*

17.1 All streams

The allowances in this clause do not apply for all purposes of the award unless specifically stated.

(b) Telephone allowance

(i) Where an employee does not have a telephone, modem or broadband connection and, at the written request of the employer, the employee is required to have such equipment, the employer must reimburse the cost of purchase, installation and rental.

(ii) Where an employee makes telephone calls in connection with the business on their private telephone at the direction of the employer, the employer must reimburse the cost of such calls. Provided that the employer may request details of all such calls claimed by the employee.

16. *Victorian Local Government (Early Childhood Education Employees) Award 2016 [MA000150]*

15.2 Reimbursement of expenses

(a) All reasonable expenses incurred by an employee at the direction and prior approval of the employer, including out of pocket expenses, course fees and materials, telephones, accommodation, travelling expenses and the cost of special protective clothing, incurred in connection with the employee's duties will be paid or reimbursed by the employer.

17. *Victorian Local Government 2015 [MA000132]*

15.6 Reimbursement of expenses

(a) All reasonable expenses incurred by the employee at the direction of the employer, including out-of-pocket expenses, course fees and materials, telephones, accommodation, travelling expenses and the cost of special protective clothing, incurred in connection with the employee's duties will be paid by the employer and, where practicable will be included in the next pay period.

ATTACHMENT C – Draft variation determination

MA000018 PRXXXXXX

DRAFT DETERMINATION

Fair Work Act 2009
s.156 - 4 yearly review of modern awards

(AM2018/13)

AGED CARE AWARD 2010
[MA000018]

Aged care industry

JUSTICE ROSS, PRESIDENT
DEPUTY PRESIDENT CLANCY
COMMISSIONER LEE

MELBOURNE, XX XXXX 2019

4 yearly review of modern awards – award stage – group 4 awards – substantive issues – Aged Care Award 2010.

A. Further to the decision [2019] FWCFB XXXX issued by the Fair Work Commission, the above award is varied as follows:

1. By inserting clause 22.8(f) as follows:

    (f) Each portion of the shift must meet the minimum engagement requirements in clause 22.7(b).

2. By deleting clause 23.2 and inserting the following:

    23.2 A causal employee who works on a weekend will be paid the following rates:

    (a) between midnight Friday and midnight Saturday – 175% of the ordinary hourly rate; and

    (b) between midnight Saturday and midnight Sunday – 200% of the ordinary hourly rate.

3. By inserting a new clause 23.3 and inserting the following:

23.3 The rates prescribed in clause 23.2 will be in substitution for and not cumulative upon the causal loading prescribed in clause 10.4(b).

4. By deleting clause 29.2(c) and inserting the following:

(c) Casual employees

(i) A casual employee will be paid only for those public holidays they work at 275% of the ordinary hourly rate for hours worked.

(ii) The rates prescribed in clause 29.2(c)(i) will be in substitution for and not cumulative upon the casual loading prescribed in clause 10.4(b) and weekend rates prescribed in clause 23.2.

(iii) Payments under this clause are instead of any addition rate for shift or weekend work which would otherwise be payable had the shift not been a public holiday.

5. By inserting a notation after the title of Schedule B-Classification Definitions as follows:

Note: Any dispute about the classification of a particular employee may be referred to the Fair Work Commission in accordance with clause 9 of this award.’

6. By deleting the last dot point in clause B.4 and inserting the following:

- In the case of a Personal care worker, holds a relevant Certificate III qualification (or possesses equivalent knowledge and skills) and uses the skills and knowledge gained from that qualification in the performance of their work.

7. By updating cross-references accordingly.

B. This determination come into operation from XX XXXX 2019. In accordance with s.165(3) of the *Fair Work Act 2009* these items do not take effect until the start of the first full pay period that starts on or after XX XXXX 2019.

PRESIDENT

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