[2019] FWCFB 6067

DECISION

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

4 yearly review of modern awards—Group 4—*Social, Community, Home Care and Disability Services Industry Award 2010*—Substantive claims

(AM2018/26)

JUSTICE ROSS, PRESIDENT
DEPUTY PRESIDENT CLANCY
COMMISSIONER LEE

MELBOURNE, 2 SEPTEMBER 2019

4 yearly review of modern awards – award stage – group 4 awards – substantive issues – Social, Community, Home Care and Disability Services Industry Award 2010

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Attachments

ABBREVIATIONS

ABI	Australian Business Industrial and the New South Wales Business Chamber
Act	Fair Work Act 2009 (Cth)
ADHC	Aging Disability and Home Care
AFEI	Australian Federation of Employers and Industries
Ai Group	Australian Industry Group
ANZSIC	Australian and New Zealand Industrial Classification
ASU	Australian Services Union
Business SA	South Australian Chamber of Commerce and Industry T/A Business SA
Census	The ABS Census of Population and Housing
CoE	Characteristics of Employment Survey
Commission	The Fair Work Commission
EEH	Survey of Employee Earnings and Hours
ERO	Equal Remuneration Order
HSU	Health Services Union
NES	National Employment Standards
NDIS	National Disability Insurance Scheme
NDS	National Disability Services
PC Final Report	Productivity Commission Inquiry Report: Workplace Relations Framework
Review	4 yearly review of modern awards
UV	United Voice

ABBREVIATIONS - Awards

Aged Care Award 2010	Aged Care Award
Hospitality Industry (General) Award 2010	Hospitality Award
Registered and Licensed Clubs Award 2010	Clubs Award
Registered and Licensed Clubs Award 2010, *Restaurant Industry Award 2010* and the *Hospitality Industry (General) Award 2010*	Collectively, the Hospitality Awards
Restaurant Industry Award 2010	Restaurant Award
Social, Community, Home Care and Disability Services Industry Award 2010	SCHADS Award

1. Introduction

[1] This decision deals with a number of claims for substantive variations to the *Social, Community, Home Care and Disability Services Industry Award 2010* (the SCHADS Award) as part of the 4 yearly review of modern awards (the Review).

[2] On 3 April 2019 we issued a Statement[1] addressing correspondence that had been received from the Australian Industry Group (Ai Group) and Australian Business Industrial (ABI). In short, that correspondence dealt with whether or not it would be appropriate to proceed with all of the claims in hearings scheduled to commence on 12 April 2019. The Statement provided a list of claims which we considered could be progressed with the first tranche of hearings and those matters were dealt with at a Mention before the President at 1.00 pm on 3 April 2019. A transcript of the Mention is available on the Commission's website.

[3] We issued a Statement[2] on 8 April 2019 confirming that the first part of the proceedings would deal with the following claims:

- S44A – deletion or variation to 24 hour care clause;
- S40 – consequential variation to the sleepover clause (arising from the deletion of the 24 hour care clause (S44A));
- S47 – variation to excursions clause;
- S51 – variation to overtime clause; and
- S57 – variation to public holidays clause.
- S19 – first aid certificate renewal;
- S43 – deleting the 24 hour care clause; and
- S48 – Saturday and Sunday work (casual employees receiving casual loading in addition to Saturday and Sunday rates).

[4] A list of the remaining claims is at **Attachment A**. Those claims will be the subject of a hearing in October 2019.

[5] The matter was heard on 15 – 17 April 2019. The transcript of the proceedings are available on the 4 yearly review section of the Commission's website. A summary document was published on 12 April 2019 outlining the relevant procedural history, the claims being pursued by United Voice (UV), the Australian Services Union (ASU) and the Housing Services Union (HSU) and a summary of submissions received.

[6] It is necessary to first say something about the Commission's task in the Review before turning to describe the sectors covered by the SCHADS Award and the proposed variations.

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[1] Statement – [2019] FWCFB 2207.

[2] [2019] FWCFB 2324.

2. The Review

[7] 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'.[3] The discretion in s.156(2)(b)(i) to make determinations varying modern awards in a Review, is expressed in general, unqualified, terms.

[8] 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.[4] 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.

[9] 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).

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

> **SECTION 134 THE MODERN AWARDS OBJECTIVE**
>
> *What is the modern awards objective?*
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> 134(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:
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> (a) relative living standards and the needs of the low paid; and
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> (b) the need to encourage collective bargaining; and
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> (c) the need to promote social inclusion through increased workforce participation; and
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> (d) the need to promote flexible modern work practices and the efficient and productive performance of work; and
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> (da) the need to provide additional remuneration for:
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> (i) employees working overtime; or

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

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

(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

(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).

[11] 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).

[12] The modern awards objective is very broadly expressed.[5] 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).[6] Fairness in this context is to be assessed from the perspective of the employees and employers covered by the modern award in question.[7]

[13] 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

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

[6] (2017) 265 IR 1 at [128]; *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161 at [41]–[44].

[7] [2018] FWCFB 3500 at [21]-[24].

decision-making process.[8] No particular primacy is attached to any of the s.134 considerations[9] and not all of the matters identified will necessarily be relevant in the context of a particular proposal to vary a modern award.

[14] 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.[10] 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.[11] 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.

[15] 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*[12] (*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).'[13]

[16] 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.'

[17] 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.[14]

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

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

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

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

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

[13] Ibid at [48].

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

[18] In *4 Yearly Review of Modern Awards - Penalty Rates (Hospitality and Retail Sectors) Decision* (the *Penalty Rates Decision*)[15] 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 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.
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> 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.
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> 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.
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> 4. The particular context may be a cogent reason for not following a previous Full Bench decision, for example:
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> - 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.'[16]

[19] 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:[17]

> '[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

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[15] [2017] FWCFB 1001.

[16] Ibid at [269].

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

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

[20] 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.'[18]

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

3. Social, Community, Home Care and Disability Services Industry Award 2010

3.1 General

[22] The SCHADS Award covers employers in the following sectors:

- crisis assistance and supported housing;
- social and community services (including social work, recreational work, welfare work, youth work or community development work, including organisations which primarily engage in policy advocacy or representation on behalf of organisations carrying out such work and the provision of disability services including the provision of personal care and domestic and lifestyle support to a person with a disability in a community and/or residential setting including respite centre and day services);
- home care (the provision of personal care, domestic assistance or home maintenance to an aged person or a person with a disability in a private residence); and
- family day are (the operation of a family day care scheme for the provision of family day care services),

and their employees in the classifications listed in Schedules B to E of the award.

[23] There are 4 levels within the Australian and New Zealand Industrial Classification (ANZSIC) structure: division, subdivision, group and class. Using a framework[19] developed

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[18] Ibid at [46].

[19] 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.

by Fair Work Commission staff, the SCHADS Award is 'mapped' to the Other residential care services and Other social assistance services industry classes within the ANZSIC.

[24] The information below presents an employee profile of the Social, community, home care and disability services sector from the Census of Population and Housing (Census). The ABS Census of Population and Housing (Census) is the only direct ABS data source with information on employment for this sector. The most recent Census data is from August 2016.

[25] The August 2016 Census data show that there were around 168 000 employees in the Social, community, home care and disability services industry. Table 1 compares characteristics of employees in this industry with employees in 'all industries'.

Table 1: Employee characteristics of Social, community, home care and disability services industry, 2016

	Social, community, home care and disability services industry		All industries	
	(No.)	(%)	(No.)	(%)
Gender				
Male	43 797	26.1	4 438 604	50.0
Female	123 996	73.9	4 443 125	50.0
Total	167 793	100.0	8 881 729	100.0
Full-time/part-time status				
Full-time	79 233	49.7	5 543 862	65.8
Part-time	80 213	50.3	2 875 457	34.2
Total	159 446	100.0	8 419 319	100.0
Highest year of school completed				
Year 12 or equivalent	103 982	62.8	5 985 652	68.1
Year 11 or equivalent	16 679	10.1	856 042	9.7
Year 10 or equivalent	34 586	20.9	1 533 302	17.4
Year 9 or equivalent	6174	3.7	273 180	3.1
Year 8 or below	3460	2.1	112 429	1.3
Did not go to school	590	0.4	26 356	0.3
Total	165 471	100.0	8 786 961	100.0
Student status				
Full-time student	8068	4.8	715 436	8.1
Part-time student	13 367	8.0	491 098	5.6
Not attending	145 005	87.1	7 618 177	86.3
Total	166 440	100.0	8 824 711	100.0
Age (5 year groups)				
15–19 years	1797	1.1	518 263	5.8
20–24 years	10 990	6.5	952 161	10.7
25–29 years	16 707	10.0	1 096 276	12.3
30–34 years	17 663	10.5	1 096 878	12.3
35–39 years	16 515	9.8	972 092	10.9
40–44 years	18 998	11.3	968 068	10.9
45–49 years	21 055	12.5	947 187	10.7
50–54 years	21 977	13.1	872 485	9.8
55–59 years	20 345	12.1	740 822	8.3
60–64 years	14 098	8.4	469 867	5.3

	Social, community, home care and disability services industry		All industries	
	(No.)	(%)	(No.)	(%)
65 years and over	7657	4.6	247 628	2.8
Total	167 802	100.0	8 881 727	100.0
Average age	44.0		39.3	
Hours worked				
1–15 hours	20 995	13.2	977 997	11.6
16–24 hours	25 650	16.1	911 318	10.8
25–34 hours	33 569	21.1	986 138	11.7
35–39 hours	42 488	26.6	1 881 259	22.3
40 hours	17 614	11.0	1 683 903	20.0
41–48 hours	8372	5.3	858 120	10.2
49 hours and over	10 755	6.7	1 120 577	13.3
Total	159 443	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

[26] The profile of Social, community, home care and disability services industry employees differs from the profile of employees in 'All industries' in four aspects:

- Social, community, home care and disability services industry employees are predominately female (73.9 per cent, compared with 50.0 per cent of all employees);
- around half (50.3 per cent) of Social, community, home care and disability services industry employees are employed on a part-time or casual basis (i.e., less than 35 hours per week), compared with 34.2 per cent of all employees;
- around half (50.7 per cent) of Social, community, home care and disability services industry employees are aged 45 years and over, compared with 36.9 per cent of all employees; and
- fewer than two-thirds (62.8 per cent) of Social, community, home care and disability services industry employees have completed Year 12 or equivalent, compared with 68.1 per cent of all employees.

[27] Interested parties were invited to comment on the data set out in this part of our decision. In a submission dated 17 May 2019, the NDS notes that the industry profile set out above draws on census data for employees working in the 'other residential care services' and 'other social assistance services' industry classes and that the use of this data is consistent with the approach taken by the Commonwealth in its submissions of 18 November 2010 in the ERO case for social and community service workers (C2010/3131). In that submission the Commonwealth also pointed to a number of limitations to this approach but despite these limitations concluded that it provided a reasonable basis for estimating the size and

characteristics of the sector.[20] The NDS notes that no party disputed the approach taken by the Commonwealth in its ERO submission, regarding the size and characteristics of the sector and submits:

> 'The estimate of employment in the current industry profile published by FWC is a similar order of magnitude to that of estimates provided by the Commonwealth government in the equal remuneration case.
>
> By using data for the same industry clauses as was used in submissions for the equal remuneration case, the same limitations of precisely defining the sector identified by the Commonwealth will also apply.
>
> NDIS concludes that the approach taken in the Industry Profile results in a reasonable estimate of the likely size of the sector.'[21].

3.2 Survey of the members of the employer organisations

[28] During the course of these proceeding a draft survey instrument was prepared by the Commission to elicit information relating to some of the matters before us. A copy of the draft survey instrument was published on the Commission's website and interested parties were provided an opportunity to file written submissions regarding its contents. The survey questions were finalised in consultation with the interested parties.

[29] The survey was administered via an online survey platform which was 'open' for the 5 week period from 18 May 2019 until 19 June 2019. Participation in the survey was limited to members of the parties in the proceeding. The survey was *not* designed to be representative of *all* enterprises employing workers covered by the SCHADS Award.

[30] The survey was sent to about 2980 enterprises[22] and 854 provided a complete response (an approximate response rate of just under 30 per cent).

[31] A report setting out the survey results was published by the Commission's research section on 26 June 2019 and parties were given an opportunity to file written submissions on the content of the report and the survey results. Submissions were filed by AFEI, AiGroup, ASU and UV. ABI filed a submission in reply. The submissions were the subject of oral argument at a hearing on 16 July 2019.

[32] UV and the ASU contended that the survey was 'methodologically flawed principally because of the manner in which the sample was constructed'.[23] The short point put was that the survey was of members of various employer organisations and that there was no way of knowing whether the membership of those organisations was representative of all employers covered by the SCHADS Award.

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[20] Australian Government submissions in matter C2010/3131, 18 November 2010.

[21] NDS Submissions 17 May 2019 at [16] – [18].

[22] This figure is an approximation as it may include organisations that are members of more than one party to the matter and may have been sent the survey more than once.

[23] Mr Bull transcript 16 July 2019 at [18].

[33] We accept that on the material before us the survey results cannot be said to be representative of all employers covered by the SCHADS Award and, accordingly, the results cannot properly be extrapolated to the relevant population. That said, the Survey Results are the best evidence available to us in respect of certain issues. In particular, the results provide an indication of the utilisation of 24 hour shifts and the pattern of engagement of casual employees amongst a substantial number of employers covered by the SCHADS Award.

[34] It seems to us that the Survey Results are particularly relevant to the claim by the HSU to delete the 24 hour care clause and the Union claims to increase the rates of pay payable to casual employees when working overtime and on weekends and public holidays.

[35] The HSU proposed that the 24 hour care clause be deleted on the basis that the 24 hour provision is unclear and rarely used.[24]

[36] The HSU also advanced witness evidence about people's direct experience within parts of the industry and particular geographical areas as to the use of the 24 hour care clause. But that evidence is limited to the direct experiences of the witnesses concerned and cannot be taken as evidence of what takes place in every award covered business.

[37] The Survey Results show that around one in ten enterprises (11.2 per cent) that responded to the Survey used 24 hours shifts in the one year period between 1 March 2018 and 1 March 2019.[25] This supports a finding that 24 hour care shifts are used in the industry.

[38] Further, as pointed out by AFEI:

> 'Given that 24 hour shift provisions only apply to home care employees, the 11.2% of all respondents using 24 hour shifts could be as high as one third of all home care respondents.'[26]

[39] In addition, of those providers that do use the 24 hour care clause, the Survey Results show that on average the number of times they rostered a home care employee to work a 24 hour shift was 304 per year. [27] Hence, while not every employer uses the clause, those who do utilise 24 hour shifts do so regularly.

[40] The HSU is also seeking variations to clause 26, Saturday and Sunday work, and clause 34, Public Holidays, to ensure that casual employees receive the casual loading *in addition to* the relevant penalty rates. Further, UV is seeking to amend clause 28 to ensure that casual employees who work overtime are paid the casual loading *in addition to* overtime rates.

[41] The Survey Results show that in the 4 week period from 4 to 31 March 2019, around three-quarters (75.4 per cent) of enterprises that responded to the survey employed casual employees that were covered by the SCHADS Award (Chart 7). Of the enterprises that employed casual employees in that 4 week period, one quarter had casual employees that worked in excess of 38 hours per week or 76 hours per fortnight (Chart 8). Around three-

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[24] HSU Submissions of 15 February 2019, at paragraph 64.

[25] Page 11.

[26] AFEI written submission 3 July 2019 at [11].

[27] AM2018/26, Survey – SCHADS Award, 2019, Question 14

quarters of enterprises (76.4 per cent) responded that casual employees worked on a Saturday during this period, and around seven in ten enterprises (69.9 per cent) responded that casual employees worked on a Sunday.

[42] We also accept that the Survey Results demonstrate that the proposed variations advanced by the HSU and UV in respect of casual employees would materially increase the rates of pay payable to casual employees when working overtime, on weekends, and on Public Holidays.

[43] Indeed UV acknowledged that there appears to be a high utilisation of casual labour by some respondents.[28]

3.3 Are SCHADS Award reliant employees low paid?

[44] 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 Case* 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',[29] 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*[30] (the CoE) and the Survey of *Employee Earnings and Hours*[31] (the EEH).[32]

[45] The most recent data for median earnings is for August 2018 from the ABS Characteristics of Employment (CoE) survey. Data on median earnings are also available from the Survey of the EEH for May 2018. Using the CoE survey data the operational benchmark for identifying the 'low paid' is $886.67 per week. Using the EEH data the figure is $973.33.

[46] In addition to the minimum rates set out in clause 15 and 16 of the SCHADS Award some employees covered by the award (SACS classification 2-8 and Crisis accommodation classification 1-4) are entitled to equal remuneration payments pursuant to the Equal Remuneration Order (ERO) that commenced on 1 July 2012. The cumulative effect of the award minimum rates and the ERO payments is set out in a joint submission filed by AFEI, ASU and NDS on 21 May 2019.

[47] Based on this data, a proportion of employees covered by the SCHADS Award may be regarded as 'low paid' within the meaning of s.134(1)(a).

4. The SCHADS Sector and the NDIS

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[28] Transcript at [114].

[29] [2017] FWCFB 1001 at [166].

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

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

[32] [2017] FWCFB 1001 at [166].

[48] The social, community, home care and disability services industry is undergoing structural change by reason of reforms that have been (and continue to be) implemented across the country.

[49] The key features of the National Disability Insurance Scheme (the NDIS) and the similar reforms in the home care sector have been detailed in materials filed in the course of the review of the SCHADS Award, including in:

- Cortis, Natasha, Working under the NDIS: Insights from a survey of employees in disability services (Report prepared for HSU, ASU and UV, June 2017);
- Cortis, Natasha et al, Reasonable, necessary and valued: Pricing disability services for quality support and decent jobs (SPRC Report 10/17, June 2017);
- McKinsey & Company, Independent Pricing Review: National Disability Insurance Agency (Final Report, February 2018);
- National Disability Services, Australian Disability Workforce Report (Report, February 2018);
- National Disability Services, State of the Disability Sector Report (Report, 2018).
- Productivity Commission, National Disability Insurance Scheme (NDIS) Costs (Costs Position Paper June 2017);
- Productivity Commission, National Disability Insurance Scheme (NDIS) Costs (Study Report, October 2017);
- Australian Government Department of Health, The Aged Care Workforce, 2016, March 2017;
- NDIS Price Guide for Victoria, 1 July 2018; and
- NDIS 2018-2019 Price Guide Updates Summary.

[50] The two main reforms are the NDIS and the introduction of 'Consumer Directed Care' for home care packages. Other similar reforms are also taking place in respect of State and Territory funding models. Broadly speaking, these reforms involve a move away from a block funding model to an individualised funding model whereby individual consumers receive a tailored, individualised care plan (with individualised funding), under which consumers have a greater ability to choose how care services are provided to them (including what, when, where, and by whom those services are provided).

[51] The aged care industry is comprised of residential aged care (covered by the Aged Care Award 2010) and home care, which is covered by the SCHADS Award. In the non-residential aged care sector, there are two main programs under which services are delivered: the Commonwealth Home Support Program (CHSP), and the Home Care Packages (HCP) Program. Entry to the system is though My Aged Care operated by the Federal Government. The system is designed, regulated and funded by the Federal Government.

[52] In the home care sector, Federal Government reforms announced in 2012 created Consumer Directed Care (CDC). CDC is a service delivery model designed to give more choice and flexibility to consumers, by allowing individuals to have more control over the types of care and services they access and the delivery of those services (including who delivers the services and when).

[53] CDC was first piloted as a model of care in 2010-11 and from July 2015, all Home Care Packages must be delivered on a CDC basis.

[54] Prior to the introduction of CDC, Home Care Packages were provided as a bundled set of services relatively tightly-specified by government. Availability of Commonwealth funding for these services had been capped by the allocation of funded "places" to a limited group of approved providers (as provided for in the Aged Care Act 1997), by the funding levels prescribed and by a cap on consumer fees.

[55] Home Care Packages are generally available to older persons who need coordinated services to help them to stay in their home, and to younger persons with a disability, dementia or other special care needs that are not met through other specialist services.

[56] The NDIS was established under the *National Disability Insurance Scheme Act 2013* with the objectives of:

(a) supporting the independence and social and economic participation of people with disability;

(b) providing reasonable and necessary supports, including early intervention supports, for participants;

(c) enabling people with disability to exercise choice and control in the pursuit of their goals and the planning and delivery of their supports;

(d) facilitating the development of a nationally consistent approach to the access to, and the planning and funding of, supports for people with disability; and

(e) promoting the provision of high quality and innovative supports to people with disability.

[57] The NDIS supports people under the age of 65 who have a permanent and significant disability. Under the NDIS, individual consumers (eligible 'participants') have greater choice and control over how their services are delivered, which includes control over what services are provided to them, when those services are provided, where those services are provided, and by whom those services are provided. Participants have the ability to choose their service providers, and to terminate their service arrangements at their discretion.

[58] Each participant's supports are set out in a 'NDIS Plan' which is developed by the National Disability Insurance Authority (NDIA) in consultation with the individual participant. Service providers do not have any control over, or input into, the NDIS Plans. NDIS Plans specify a 'global' funding amount for different categories of 'fixed' and/or 'flexible' supports, but typically do not specify details of how or when those supports are to be provided.

[59] Participants then typically enter into a service agreement with one or more service providers for the delivery of services outlined in their NDIS Plan.

[60] On 1 May 2019 we issued Directions[33] inviting the parties to comment on whether they took issue with the observations made about the NDIS at paragraphs [554] and [630] – [633] of the Full Bench decision in the Part time employment and casual employment proceedings issued on 5 July 2017.[34] The relevant passages from that decision are set out below:

> '[554] The NDIS, broadly speaking, funds persons with disability directly, rather than via disability services organisations, and thereby allows persons with disability and their carers to purchase the support services they need in accordance with individualised NDIS plans. This has meant that persons with disability are able to exercise a far greater level of choice and control over how, when, where and by whom their disability support services are delivered. ABI contends that the NDIS is radically changing the disability support services sector, in that employers have lost a large degree of control over when work is required to be performed, and accordingly require much greater flexibility in the allocation of working hours to part-time employees so that they can operate in a way which is responsive to client demand. Absent such flexibility, ABI contends that there is a substantial risk that the workforce in the sector, which will need to expand significantly in order to meet the demand for individualised services generated by the NDIS, will become casualised. The ABI claim was supported by Jobs Australia, which is a national peak body of non-profit organisations that assist disadvantaged people into work.
>
> …
>
> [630] We have earlier briefly described the concept of the NDIS. Participants in the scheme (and their carers) are required to prepare a NDIS plan in conjunction with the National Disability Insurance Agency (NDIA) which, in an itemised way, sets out their support needs and the way in which these support needs are to be met. Supports may be fixed – that is, regularly required at a fixed time each day or week – or be flexible, which means the participant has scope to rearrange the supports to suit themselves within the overall budget. In the early trial phase, these plans were prepared in a highly prescriptive format, but by the time of hearing they had become far less so. An example plan that was provided to us[35] set out the basic details of the participant and his/her immediate support persons and lifestyle, the participant's goals for the plan, and the supports to be provided. The supports were identified under the headings of transport to access daily activities; assistance with daily life at home and in the community, education and at work; supported independent living; improved daily skills; assistive technology; improved living arrangements; and improved life funding. Specific supports were identified in the example plan under each heading, and an annual budget (for the period 15 June 2016 to 14 June 2017) set out for each support item. For some items, a maximum number of hours of a particular service per week or per year were specified. The example plan required each identified support to be purchased as described, and prohibited swaps from one item to another. The items in the plans are budgeted for in accordance with a "*NDIS Price Guide*" issued by the NDIA. In pricing items, the NDIA has been aggressive in trying to set the absolute minimal cost so as to control the cost to government of the NDIS as a whole. Labour costs are calculated by reference to the SCHCDSI Award.
>
> [631] Once the plan is prepared, the majority of participants who are self-managed (as distinct from having their plans managed by a support agency) may then "*buy*" the services budgeted for in the plan from providers which are registered with the NDIA (although the actual

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[33] Directions 1 May 2019, at [14] – [16].

[34] [2017] FWCFB 3541.

[35] Exhibit 255.

payment is made by the NDIA to the provider in accordance with the plan and the NDIS Price Guide). There is no obligation to obtain all the services in a plan from a single provider, so a participant may have multiple service providers. The participant, once he or she has chosen the provider of a specific service, will then enter into a service agreement with the provider. We were provided with an example of a service agreement,[36] which included the following provisions of significance:

- the provider was required to "Work with you the Participant to provide supports that suit your needs and at the times preferred by you" (underline added) and to "Consult with you regarding decisions about how your supports are provided";
- the participant was required to keep the provider "informed of any changes to my support need which may impact on the supports they provide";
- in relation to payment for the services provided, "The NDIA sets the prices to be claimed for each support item and [the provider] may choose to accept or decline the provision of certain support items if the price set does not cover business operating costs";
- in relation to variations to the participant's plan, "The Participant and/or their Plan nominee is responsible for informing [the provider] when their NDIA Plan has been reviewed and/or modified in any way ... [the provider] requires this information so your Service Agreement can be reviewed and modified to ensure it reflects the most current supports you require [the provider] to provide";
- the participant was requested to inform the provider at the time of developing or reviewing the Service Agreement if they intended using multiple service providers "to ensure that sufficient support hours and funds are available as per the Service Agreement" and "Failure to provide this information may result in over-use of certain supports and impact on [the provider's] ability to claim for supports provided";
- in relation to cancellations of supports by the participant, "We understand that situations may occur that mean participants need to change or cancel support. When this happens, it is appreciated if participants provide at least 24 hours notice to reduce any impact on business... Should the Participant not provide 48 hours notice of his or her inability to participate in the service, [the provider] will be entitled to claim from NDIA for payment of such Service... When cancellations or 'no shows' exceed 8 times per year, [the provider] must notify the NDIA so that consideration can be made to review the plan"; and
- in relation to termination of the service agreement by either party, a minimum of 4 weeks' notice was required, and "*If the participant chooses to cease services or engages the services of another provider without giving the agreed notice, an early exit payment will be charged of up to 4 weeks*"

[632] Until mid-2016, the NDIS was implemented in various trial areas throughout the country. The full implementation rollout began in July 2016, but it is not expected to be completed until 2019. It is expected that the total number of participants in the NDIS will increase to about 460,000 by 2019, about 20 times the number of participants in 2016. Many of the new participants will not be living in institutionalised care or group homes with regimented support demands, but will require supports that are shorter in duration and more flexible in order to undertake work, education and social activities. The number of registered providers is also expected to increase significantly. In 2016 there were over 2,000 registered providers, the large majority of which had not been disability support providers prior to the advent of the NDIS.

[36] Exhibit 230.

> [633] At the time of hearing, according to data collected and benchmarked by NDS, there were about 26,000 disability support workers in Australia, of which 23% were full-time, 35% were part-time, 37% were casual, and 6% were on fixed-term contracts. This workforce is predominantly female. It was estimated in 2011 that the workforce would have to double by the time of full implementation of the NDIS. There was some evidence that some employers had increased the usage of casuals in order to meet the work demands of the NDIS, against their preference to employ mainly permanent part-time employees, mainly because of the variability associated with the one-on-one attendances which are a new industry feature introduced as part of the NDIS.'

[61] Comments on the above passages were made by:

- ABI on 19 May 2019[37] and 3 June 2019;[38]
- NDS on 17 May 2019;[39]
- HSU on 17 May 2019;[40]
- UV on 17 May 2019;[41]
- ASU on 17 May 2019;[42] and
- AFEI on 22 May 2019.[43]

[62] ABI confirmed that its clients broadly agree with the observations made at paragraphs [554] and [630] – [633] of the Full Bench decision.[44] As to the description in [631] of the way in which participants are able to access services, ABI notes that the description is accurate but states its understanding that the terms of Service Agreements, and the way in which those terms are enforced, vary across operators.[45]

[63] In relation to the observations about client cancellations at [631], ABI notes that the most recent NDIS Price Guide provides a 'limited ability' to charge participants for cancelled services' and that under the current rules:

(i) providers are not permitted to charge a cancellation fee where a participant cancels a scheduled service and provides notice of cancellation prior to 3pm the day before the scheduled service;

(ii) providers are permitted to charge up to 90% of the agreed price for a cancelled scheduled appointment where the service is cancelled after 3pm the day before the scheduled service (however a provider may only charge a cancellation fee against a

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[37] ABI submission 19 May 2019 at 4.1 – 4.4

[38] ABI reply submission 3 June 2019 at 4.1 – 4.6

[39] NDS submission 17 May 2019 at 32 - 42

[40] HSU submission 17 May 2019 at 2 - 29

[41] UV submission 17 May 2019 at 1 - 26

[42] ASU submission 17 May 2019 at 30 - 36

[43] AFEI submission 22 May 2019 at 26 - 36

[44] ABI submission 19 May 2019 at 4.2

[45] Ibid at 4.3.

> participant plan up to 12 times per year for personal care and community access supports, following which the NDIA will require the provider to demonstrate they are taking steps to actively manage cancellations).[46]

[64] The NDS submits that the observations of the Part time and Casual Employment Full Bench were accurate at the time they were made and remain 'broadly relevant' in 2019, however, since the 2017 Full Bench observations the NDIS has continued to grow and has undergone some operational changes.[47] Similarly, AFEI notes that since 2017 there have been several developments in the composition of the disability services industry and its workforce.[48]

[65] The HSU and UV take issue with some of the observations made in the extracted passages from the Part time and Casual Employment decision, in particular the reference in [554] to the ABI's contention that 'employers have lost a large degree of control over when work is required to be performed, and accordingly require much greater flexibility in the allocation of working hours to part-time employees so that they can operate in a way which is responsive to client demand'.

[66] We accept, as the HSU submits, that [554] is simply a summary of ABI's claim and its characterisation of how the NDIS operates; it does not represent the concluded view of the Full Bench on the operation of the NDIS. So much is clear from [636], [639] and [640] of the Full Bench decision which effectively repudiates ABI's characterisation of how the NDIS operates, in particular:

> '[636] The evidence makes it clear that there remains considerable uncertainty as to how the NDIS will operate and what will be the pattern of service demand from participants once the NDIS is fully implemented …
>
> [639] The basic elements of the NDIS lend themselves to reasonably predictable workforce planning. Many of the forms of support that are funded in individualised NDIS plans are … regular and predictable …
>
> [640] … we consider it unlikely that the market for disability support services which the NDIS is establishing will give participants the degree of market power that some of the employer witnesses implicitly suggested it would.'

[67] The HSU also takes issue with a number of the other observations made in the extracted passages. We accept that a number of the observations made by the Part time and Casual Employment Full Bench have (understandably enough, given the passage of time) been overtaken by events as the NDIS continues to evolve. We have not found it necessary to address each of the issues raised by the HSU as we need not resolve each of the contested matters in order to deal with the claims before us. As AFEI put it: 'To provide a comprehensive account of the operation and nature of the NDIS more recently, would be a substantial exercise'.[49] Such an exercise is not necessary in the context of these proceedings. For present purposes we would simply make the following observations:

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[46] Ibid at 4.4 and see page 18, *NDIS Price Guide New South Wales, Queensland, Victoria, Tasmania* (Valid from: 1 February 2019)

[47] NDS submission 17 May 2019 at 33-34

[48] AFEI submission 22 May 2019 at [26] – [36]

[49] AFEI submission 22 May 2019 at [28]

1. The NDIS may be characterised as a move from a block funded welfare model of support to a fee-for-service market based approach.[50]

2. The initial roll out targets for the NDIS have not been met. The NDS submits that the current rate of roll out is about 75 per cent of the level originally planned in 2011 and that the rollout will extend 'well into 2019-20 and is unlikely to be completed before then'.[51] Similarly, the HSU submits 'The rollout targets have not been met and it can be expected that the rollout will continue well into 2020'.[52]

3. According to the NDIA Quarterly Report, as at 31 March 2019:

   - there were 277,155 NDIS participants, of whom 85,489 were receiving support for the first time;
   - the total number of registered providers was 20,208, of whom 57 per cent (11,418) were 'active' as at 31 March 2019, meaning that they had claimed a payment from the NDIA for delivering a service. 45 per cent of the total number of providers were individual/sole traders.[53]

4. The NDS (2019), Australian Disability Workforce Report of July 2018 notes that:

   - 48 per cent of disability support workers are permanent (full time or part time) and 46 per cent are casual
   - the trend towards casualisation is not universal across the sector and is more prevalent in small and medium organisations and absent in large organisations.[54]

5. The NDS has developed a data metrics tool called 'Workforce Wizard', to assist disability organisations track workforce trends. This was the source of the data referred to by the Part time and Casual Employment Full Bench at [633] of its July 2017 decision. Since the NDS July 2018 Workforce Report the NDS has obtained data from the 'Workforce Wizard' for the December 2018-19 quarter (including from 187 organisations comprising 41,119 workers in the disability and allied health sectors), which shows that:

   - the average proportion of casual employment increased from 40.9 per cent in September 2015 to 45.2 per cent in December 2018 (but has remained at around 45 per cent since September 2017, with the exception of the September 2018 quarter, at 47.3 per cent).

   Based on this data the NDS submits that:

   'While disability service providers are hiring more casual workers, the trend towards increased casual employment since 2015 appears to have stabilised.'[55]

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[50] Productivity Commission Study Report, October 2017, National Disability Insurance Scheme (NDIS) Costs, p8.

[51] NDS submission 17 May 2019 at [35].

[52] HSU submission 17 May 2019 at [27].

[53] Ibid at [28]; AFEI submission 22 May 2019 at [32].

[54] NDS (2018) Australian Disability Workforce Report July 2018 at p6.

[55] NDS submission 17 May 2019 at [41].

[68] ABI submits that aspects of the sector are under significant financial strain and that a 'regular complaint' of service providers in the disability services sector is the inadequacy of the NDIS pricing system.[56]

[69] ABI contends that the legitimacy of this concern has been borne out in a range of studies, including in the Final Report of the Independent Pricing Review commissioned by the NDIA and published by McKinsey & Company dated February 2018.[57] Amongst a range of findings, the Final Report of the Independent Pricing Review found:[58]

> (a) "signals that concerning" in the attendant care market, including a "significant proportion of providers that currently have unprofitable operating models"; and
>
> (b) while some providers have operating models that are profitable at the current price points, "many are struggling, particularly traditional providers delivering attendant care supports", which is attributable to a combination of factors, including:
>
> (i) higher overheads;
>
> (ii) challenges in adapting to unit pricing and NDIA systems improvement opportunities;
>
> (iii) lower utilisation of workers; and
>
> (iv) higher labour costs.

[70] Ai Group (and other employer parties) also advanced submissions regarding the cost pressures on employers in the sector, the lack of profitability and the potential adverse impact of granting the Unions' claims.

[71] In response, the HSU led evidence from Mr Mark Farthing, a senior policy adviser for HSU Victoria No. 2 Branch[59] regarding some recent additional funding allocated to the NDIS. On 18 April 2019 the HSU wrote to the Commission attaching a media release dated 30 March 2019 by the Hon Paul Fletcher MP, Minister for Families and Social Services referred to in the course of Mr Farthing's evidence (the Media Release).

[72] In a Statement[60] issued on 23 April 2019 we provided an opportunity for parties to file a short written submission in response to the material filed by the HSU. Ai Group subsequently filed a submission in response to that material.

[73] The Media Release announces an increase to price limits for therapy, attendant care and community participation under the NDIS, effective 1 July 2019. According to the Media Release these price increases 'will inject more than $850 million into the NDIS market in 2019-20. The Media Release also states:

> 'Minister for Families and Social Services, Paul Fletcher, and Assistant Minister for Social Services, Housing and Disability Services, Sarah Henderson said the new prices include a

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[56] ABI submission 5 April 2019 at 4.11.

[57] McKinsey & Company, Independent Pricing Review: National Disability Insurance Agency (Final Report, February 2018).

[58] Ibid, p.5.

[59] Exhibit HSU3 and Transcript at [1581] – [1646].

[60] [2019] FWC 2756.

> minimum increase of almost $11 per hour for therapists and up to a 15.4 percent price increase to the base limit for attendant care and community participation.
>
> We are committed to the development of a vibrant disability services market that enables NDIS participants to have genuine choice and control over the services and supports they need," Mr Fletcher said.
>
> We have consulted widely with participants, providers and the sector to inform and implement these changes.
>
> These changes form part of the National Disability Insurance Agency's (NDIA) annual price review to update prices that reflect market trends, costs in wages and other influences. It also responds to regular monitoring of markets and responding to emerging issues.
>
> These processes have identified the need to increase prices for attendant care and community participation and we are responding to that.
>
> Substantial increases to the hourly rates for therapy also follow a comprehensive review of the price control arrangements and other market settings for therapy services through December 2018 to March 2019.
>
> These price increases are part of an overarching pricing strategy and commitment to review and respond to pricing evidence as required, and will encourage the development of a disability services market of appropriate size, quality and innovation," Mr Fletcher said.'[61]

[74] As noted in Ai Group's submission, the Media Release contains little detail about the specific price increases to be implemented and only refers to attendant care, community participation and therapists. Ai Group also points to some inconsistencies between Mr Farthing's evidence and the Online NDIA material. At paragraph 5 of its submission, Ai Group says:

> 'Further, we continue to hold the concerns previously expressed about the funding currently afforded to providers in the industry, the implications that the insufficiency of that funding has had and continues to have on providers (and in turn, on their clients) and the extent to which those implications would be exacerbated if the various unions' claims were granted. The material here presented by the HSU does not cause us to demur from that position.'

[75] The difficulty with the position put by the various employer parties as to the financial operation of the NDIS is that it reflects their view *prior to* the recent substantial injection into the pricing model. While Ai Group maintains its previously expressed concern, that submission is little more than an assertion of 'concerns'. No employer participant in the NDIS gave evidence in the proceedings regarding the financial impact of the claims before us; nor did any employer party seek to adduce any material modelling the financial impact of the Union claims. We are left in the somewhat unsatisfactory position that:

- the previous studies on the costs and profitability in the sector are dated and fail to account for the changes introduced on 1 July 2019;
- while the magnitude of the recent budgetary injection was substantial, little detail has been provided on the implementation and impact of the changes; and
- there appear to be some inconsistencies between Mr Farthing's evidence and the Online NDIA material.

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[61] HSU submission 18 April 2019.

[76] We deal later with the extent to which the NDIS funding arrangements are relevant to the determination of the claims before us.

5. The Claims

5.1 Overview

[77] UV and the HSU both seek the deletion of clause 25.8, which deals with 24 hour care, and seek a consequential variation to clause 25.7, which deals with 'sleepovers'.

[78] In addition, UV is pursuing two other claims:

- the deletion of clauses 28.1(b)(iv)(A) and (B), the effect of which is to ensure that casual employees who work overtime are paid the casual loading *in addition to* overtime rates; and
- a variation to clause 34.2, Payment for working on a public holiday.

[79] The HSU is pursuing three other claims:

- a variation to clause 20.4, First aid allowance;
- a variation to clause 26, Saturday and Sunday work, to ensure that casual employees receive the casual loading *in addition to* the Saturday and Sunday rates prescribed in that clause; and
- the insertion of a new term, clause 34.2(c) to ensure that casual employees who work on a public holiday receive the casual loading in addition to the public holiday penalty in clause 34.2(a).

[80] The ASU is seeking to insert a new allowance for employees who use community language skills during the course of their employment.

[81] In their submission of 18 February 2019,[62] the ASU confirmed that they would not be pressing their claim relating to the coverage clause of the SCHADS Award. During the course of the proceedings UV advised it would not be pursuing its claim to vary clause 25.9, Excursions, to provide that time off in lieu of overtime would be calculated at the overtime rate.[63]

[82] A list of the witnesses called by the interested parties is set out at **Attachment B**.

[83] Each of the claims is opposed by the various employer interests.

5.2 The 24 hour care clause

[84] As we have mentioned, UV and the HSU seek to delete clause 25.8 which provides as follows:

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[62] ASU submission, 18 February 2018.

[63] Transcript 15 April 2019 at [146]-[148].

25.8 24 hour care

This clause only applies to home care employees.

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

(b) The employee will normally have the opportunity to sleep during a 24 hour care shift and, where appropriate, a bed in a private room will be provided for the employee.

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

[85] The Unions also seek a consequential amendment to clause 25.7(a) as follows:

25.7 Sleepovers

(a) A sleepover means when an employer requires an employee to sleep overnight at premises where the client for whom the employee is responsible is located (including respite care) ~~and is not a 24 hour care shift pursuant to clause 25.8 or an excursion pursuant to clause 25.9.8~~.

[86] UV submits that clause 25.8 of the SCHADS Award requires an employee to work for a 24-hour period whilst only being paid for a maximum of eight hours.[64] It further submits that the entire duration of a 24 hour care engagement is considered 'work' and employees should be appropriately remunerated.[65] UV contends that employees should rely on the provisions of the Sleepover clause at 25.7 of the SCHADS Award. Clause 25.7 provides that employees will receive an allowance and payment for time worked during a sleepover. UV submits that this clause is far more appropriate than the 24 hour care clause, which provides no payment for the sleepover portion of the shift.[66]

[87] UV submits that s.62(1) of the Act, which relates to an employee's maximum working hours and s.62(2) which provides that an employee may refuse to work additional hours if the request is unreasonable, are relevant to the determination of its claim.

[88] Section 62(3) of the Act sets out some considerations to determine whether a request or direction to work additional hours is reasonable. One consideration highlighted by UV is 'whether the employee is entitled to receive overtime payments, penalty rates or other compensation for, or a level of remuneration that reflects an expectation of, working additional hours'.

[89] UV submits that the 24 hour care shift clause creates situations where employees are effectively liable to work in excess of the notional hours attributed to their engagement.[67] It

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[64] Ibid at [35]–[36.]; UV submission 4 February 2019 at [8], p3.

[65] Ibid at [23]–[24].

[66] UV submission, 4 February 2019 at [40].

[67] UV submission 4 February 2019 at [20].

further submits that when an employee is directed to undertake a 24 hour care shift there is also a contingent request by the employer that the employee perform additional hours of work in emergency situations or according to the care needs of clients for which they are not remunerated. UV submits that these hours may be considered additional hours in terms of s.62 and that while s.62 does not deal with intra-day durations of work, the fact that the clause allows unreasonable intra-day durations of work which are 'in a practical sense non-negotiable' is a relevant merit consideration.[68]

[90] As to s.62(2), UV submit that where a 24 hour care shift falls late in the weekly roster cycle, it is likely that an employee will be effectively compelled to work greater than 38 hours and that clause 25.8 does not provide a means for employees to refuse to work the additional hours. [69]

[91] UV also contends that Division 2, Part 2-9 of the Act is also relevant, in particular clause 25.8 may breach s.323 in that it permits an employer to require an employee to work for a 24 hour period but does not require the employer to pay the employee in full for the performance of the work. [70]

[92] Finally, UV also submits that clause 25.8 does not meet the modern awards objective[71] in that it is not consistent with s.134(1)(d) as the remuneration provided for the unsocial nature of the work is too low[72] and the clause does not promote 'social inclusion though increased workforce participation' (s.134(1)(d)).[73] UV further submits that the clause is 'inflexible, inefficient and not conducive to productivity', contrary to s.134(1)(d) of the modern awards objective.[74]

[93] The HSU also seeks the deletion of the 24 hour care clause from the SCHADS Award.[75] It submits the clause is unclear and rarely used, and that extended periods of care should be dealt with in accordance with other provisions in the SCHADS Award.[76] The HSU submit the clause does not meet the modern awards objective and provides for remuneration at a discounted rate during a period where an employee is required to be available for work.

[94] The HSU submit the 24 hour care clause leaves employees open to exploitation as:

- it does not compensate employees for the entire time they are required to be available for the performance of duties. In accordance with the principle "*they also serve who only stand and wait*",[77] where an employee is required by the employer, they should be compensated for that as work;

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[68] UV submission, 15 February 2019 at [20].

[69] Ibid at [22].

[70] Ibid at [30].

[71] Ibid at [31].

[72] Ibid at [32].

[73] Ibid at [34].

[74] Ibid.

[75] HSU Submission, 15 February 2019 at [5].

[76] Ibid at [64] – [66].

[77] Ibid at [65].

- it does not specify what would happen if an employee works more than 8 hours in a 24 hour period;
- the sleepover clause provides that a sleepover span must be a continuous period of eight hours, and that if an employee's sleep is interrupted and they are required to perform work, they are required to be paid overtime rates;
- there is no provision for the employee to be provided a continuous number of hours for sleep or what happens if the employee's sleep is broken;
- it provides that a bed in a private room will be provided 'where appropriate' but it is not clear when it would not be appropriate for an employee working a 24 hour shift to not be provided with a bed.

[95] In summary, the submissions advanced in support of the deletion of clause 25.8 are as follows:

- the clause is unclear, in that it provides no certainty regarding the hours of work of an employee or the sleeping arrangements to be applied;
- the clause is rarely used;
- the entire engagement is 'work' and should be remunerated as such;
- the clause does not adequately compensate employees, or provides for remuneration at a "discounted rate", for the time they are required to be available for work;
- the clause may breach s.323 of the Act because it permits an employer to require an employee to work for a 24 hour period but does not require the employer to pay the employee in full for that work;
- the clause creates situations where an employee is effectively liable to work in excess of the notional hours attributed to the engagement, and the hours that such engagements will 'require' the employee to work are not foreseeable; and
- leaving employees for lengthy periods on duty dealing with complex interpersonal matters is problematic.

[96] ABI, NDS and AFEI oppose the claims to delete clause 25.8 and the consequential amendment to clause 25.7.

[97] In its submission in reply of 5 April 2019, ABI deals with the relevant award history and refers to a number of pre-reform awards which contained 24 hour care provisions.[78] It submits that up until these proceedings, aside from a variation by ASU in 2012 to clarify that the clause only applies to home care employees, the clause has operated without any controversy and that the clause facilitates the provision of a valuable service to elderly Australians who are in receipt of home care services. ABI submits the award should continue to facilitate the delivery of such a service and that the deletion of the 24 hour care clause would be a significant step which would have adverse implications for the relevant community who receive care in their home.[79]

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[78] ABI submission 5 April 2019 at 6.5 – 6.17.

[79] Ibid at 6.44.

[98] In the course of its submissions, ABI observed that there may be a lack of clarity in respect of some aspects of the operation of the current clause: the clause is silent as to what happens when an employee is required to work more than 8 hours of work; the lack of certainty about the hours of work of an employee; and that the clause is unclear regarding aspects relating to sleeping.[80] In particular, ABI acknowledges that the clause does not specify what happens where an employee is required to perform more than 8 hours' work during a 24 hour care shift and notes that there is a degree of tension in the provision in that an employee is required to be available for duty for a 24 hour period and yet an employee is required to provide a total of no more than eight hours of care during the period. ABI submits that although an employee is not required to perform any more than 8 hours' work there may be occasions where additional work (if an employee agrees to perform it) is required which would be regulated by the overtime provisions.

[99] ABI also accepts that the current clause does not expressly provide that employees will be provided with "a safe and clean space to sleep" but it is not aware the absence of any wording has raised an issue.[81] However, if the Commission found the existing term ambiguous and that clarification of its operation would be beneficial, ABI would not be opposed to the clause being varied as long as the substance of the clause is not altered and consistent with s.134(1)(g) of the Act. During the course of oral argument Mr Scott, on behalf of ABI, indicated that his clients would not oppose the following amendments to the 24 hour care clause:

- the language in clause 25.7(c) being inserted into the 24 hour care clause;
- to the extent that an employee is required to perform more than 8 hours work then that work being treated as overtime and is paid in accordance with clause 28; and
- with an amendment to the effect that a broken shift can only be worked by agreement with the employee.[82].

[100] The NDS opposes the deletion of the 24 hour care provision and submits that the ambiguity in the clause may be addressed by an amendment so as to provide that the 55% loading is payment for any additional work required of up to 2 hours, with overtime payable for all work performed beyond that amount.[83] NDS contends that such a variation would be preferable to deleting a clause that facilitates the provision of a type of support that is of value to aged and disabled people in certain circumstances.

Consideration

[101] We reject the HSU's contention that the 24 hour care clause is 'rarely used'.[84] As mentioned earlier, the Survey Results show that around one in ten enterprises (11.2 percent) that responded to the Survey used 24 hour shifts between 1 March 2018 and 1 March 2019 and that of those providers that use the 24 hour care clause, on average, rostered a home care employee to work a 24 hour shift 304 times per year. We find that 24 hour care shifts are used

[80] Ibid at 6.22 – 6.30.

[81] Ibid at 6.28.

[82] Transcript at [1997] – [2000].

[83] NDS submission 5 April 2019 at [24].

[84] HSU Submissions of 15 February 2019 at paragraph 64.

in the industry and, further, while only a minority of employers used the 24 hour care clause, those who do utilise the clause do so regularly.

[102] Given the history and the current utilisation of the 24 hour care clause, we think it is appropriate to adopt a cautious approach to the claim that the clause should be deleted.

[103] We acknowledge there are deficiencies in the 24 hour care clause. As submitted by the HSU (and effectively conceded by ABI and the NDS) the clause lacks clarity and fails to address some important matters regarding the practical operation of the clause. In addition to the matters mentioned at [97] to [99] above we would add that the mechanism whereby an employee may refuse to work more than 8 hours when on a 24 hour care shift is unclear.

[104] Despite these deficiencies it is our *provisional* view that the clause be retained. That said, the existing clause does not provide a fair and relevant minimum safety net; it requires amendment.

[105] We propose the following process to address the issues raised:

1. The interested parties are to confer with respect to the amendments to be made to the clause to ensure that it achieves the modern awards objectives.
2. The discussions between the parties will be facilitated by Commissioner Lee and a conference will be convened shortly for that purpose.
3. Arising out of the discussions and conferences a Joint Report will be prepared setting out the extent of agreement and any remaining matters in dispute (Note: in the event that the parties are unable to reach a substantial measure of agreement we will revisit our *provisional* view regarding the proposed deletion of the term).
4. Interested parties will be given an opportunity to make submissions in relation to the Joint Report and in support of their preferred position.
5. We will list the matter for further oral hearing, if we decide that is the appropriate course.

5.3 The claims relating to casual employees

(i) Overtime payments

[106] UV seeks to amend clause 28 to ensure that casual employees who work overtime are paid the casual loading *in addition to* overtime rates.

[107] The SCHADS Award currently provides that casual employees are paid overtime rates for all time worked in excess of 38 hours per week, 76 hours per fortnight or 10 hours per day. However, clause 28.1(b)(iv) provides that the overtime rates payable to casuals

> '… will be in substitution for and not cumulative upon;
>
> …
>
> (b) the casual loading prescribed in clause 10.4(b).'

[108] UV seeks the following variation to clause 28.1(b)(iv):

28.1 Overtime rates

…

(b) Part-time employees and casual employees

(i) All time worked by part-time or casual employees in excess of 38 hours per week or 76 hours per fortnight will be paid for at the rate of time and a half for the first two hours and double time thereafter, except that on Sundays such overtime will be paid for at the rate of double time and on public holidays at the rate of double time and a half.

(ii) All time worked by part-time or casual employees which exceeds 10 hours per day, will be paid at the rate of time and a half for the first two hours and double time thereafter, except on Sundays when overtime will be paid for at the rate of double time, and on public holidays at the rate of double time and a half.

(iii) Time worked up to the hours prescribed in clause 28.1(b)(ii) will, subject to clause 28.1(b)(i), not be regarded as overtime and will be paid for at the ordinary rate of pay (including the casual loading in the case of casual employees).

(iv) Overtime rates payable under this clause will be in substitution for and not cumulative upon the shift premiums prescribed in clause 29—Shiftwork and are not applicable to ordinary hours worked on a Saturday or a Sunday~~:~~

(A) the shift premiums prescribed in clause 29—Shiftwork; and

~~(B) the casual loading prescribed in clause 10.4(b), and are not applicable to ordinary hours worked on a Saturday or a Sunday.~~

[109] The current arrangements in the SCHADS Award relating to the payment for overtime for casuals were the result of an Appeal Decision[85] from a decision of VP Watson[86] during the Transitional Review. In the Appeal Decision the Full Bench found errors in the Vice President's determination of a claim by the ASU regarding overtime for casuals and proceeded to re-determine that issue. The relevant extracts from the Appeal Decision are follows:

'[37] We consider that the case for an award provision for overtime for casual employees is a strong one. The analyses advanced by the parties concerning the position pertaining in the pre-existing awards and instruments which were replaced by the SCHCDS Award firmly establish that, predominantly, casual employees were entitled to overtime penalty rates for any overtime worked, regardless of when it was worked. Applying the approach generally taken by the award modernisation Full Bench, whereby the most common provisions to be found in the pre-existing awards and instruments were usually adopted unless there was some good reason to the contrary, this should have led to a result whereby the SCHCDS Award contained an overtime penalty rates regime for casual employees as well as full-time and part-time employees.

[38] This did not occur. The Full Bench award modernisation decision which led to the making of the SCHCDS Award did not give any consideration to the pre-existing position

[85] [2014] FWCFB 379.

[86] [2013] FWC 4141.

with respect to overtime penalty rates for casual employees, did not state any rationale for a departure from that pre-existing position, and indeed did not deal with the issue at all. Therefore we can only conclude that the absence of overtime provisions applicable to casual employees in the SCHCDS Award was an oversight.

…

[41] The result of the omission of overtime penalty rates for casual employees, we find, is that the SCHCDS Award does not achieve the modern awards objective in s.134 because it does not provide a fair and relevant minimum safety net of terms and conditions for casual employees, and that the SCHCDS Award suffers from an anomaly arising from the award modernisation process conducted under Part XA of the Workplace Relations Act 1996 and is thereby not operating effectively. It will be necessary therefore to remedy this by varying the SCHCDS Award to provide for overtime penalty rates for casual employees whenever overtime is worked.

[42] There remains the question of what form that variation should take. The critical question here is whether any overtime penalty rates for casual employees should be in addition to or in substitution for the casual loading. This is a difficult question to resolve. The position which applied in the pre-existing awards and instruments in this respect was somewhat mixed. No clearly predominant position emerges. The question of whether there is a proper basis for the payment of the casual loading in addition to overtime penalty rates was not argued at the level of general principle in this case, and in any event the confined interests of the parties which appeared and made submissions in this appeal means that it is not an appropriate vehicle to decide this issue on a general basis.

…

[44] In all the circumstances we think a conservative approach is called for. We have decided to vary the SCHCDS Award to provide for a regime for overtime penalty rates which operates in substitution for the payment of the casual loading. The variation we will make will accordingly largely reflect the alternative award variation advanced by the respondents. The provision of overtime penalty rates for casual employees, even without the addition of the casual loading, will be a significant benefit for those casuals who work overtime, and will equalise the overtime cost of full-time, part-time and casual employees. The variation is, we consider, appropriate to remedy the issue of casual employees not being entitled to overtime rates which this review of the SCHCDS Award has identified, having regard to the modern award objective in s.134.

[45] We emphasise that nothing in this decision is intended to foreclose further consideration in the four yearly review process to be conducted under s.156 of the Fair Work Act as to whether, under the SCHCDS Award, the casual loading should be payable in addition to weekend and overtime penalty rates. The four yearly review process, which will involve the review of all modern awards, may result in general and authoritative consideration of this issue at the level of industrial principle. If so, that would provide a sound basis to revisit the issue in relation to the SCHCDS Award.'

[110] In support of its claim UV relies on the *Penalty Rates Decision* and to the references to the views of the Productivity Commission concerning the interaction of penalty rates and the casual loading:

'In some awards, penalty rates for casual employees fail to take into account the casual loading, which distorts the relative wage cost of casuals over permanent employees on weekends (and particularly Sundays). The wage regulator should reassess casual penalty rates

> on weekends, with the goal of delivering full cost neutrality between permanent and casual rates on weekends, unless clearly adverse outcomes can be demonstrated. This would imply that casual penalty rates on weekends would be the sum of the casual loading and the penalty rates applying to permanent employees.'[87]

[111] UV relied on what the Productivity Commission described a 'default approach' whereby:

> '… 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.'[88]

[112] UV submits that in the *Penalty Rates Decision* the Commission expressed a preference for the default approach generally whenever it reduced or altered rates in relation to the modern awards subject to the review[89] and submits that the default approach is consistent with s.134(1)(g) of the modern award objective, which requires that modern awards are 'simple, easy to understand, stable and [provide a] sustainable system for Australia that avoids unnecessary overlap of modern awards'.[90] Further, UV relies on s.134(1)(da)(iii) which deals with the need to provide additional remuneration for employees working unsocial hours and submits that this provision lends support for the casual loading being an additional amount paid when any penalty or loading applies to work at an unsocial time. It contends that subsuming the casual loading into other penalties and loadings also means that a casual employee is not compensated for the disutility associated with working unsociable hours. [91]

(ii) Saturday and Sunday work; Public Holidays

[113] The HSU seeks to vary clause 26 – Saturday and Sunday work and clause 34.2 – Payment for working on a public holiday, to ensure that casual employees receive the casual loading *in addition to* the rates for Saturday and Sunday work, and for working on public holidays.

[114] As to clause 26, the HSU seeks the following variation:

> **26. Saturday and Sunday work**
>
> 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 double time. These extra rates will be in substitution for and not cumulative upon the shift premiums prescribed in clause 29—Shiftwork ~~and the casual loading prescribed in clause 10.4(b),~~ and are not applicable to overtime hours worked on a Saturday or a Sunday.

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[87] Ibid at [333]

[88] Ibid at [335]

[89] Ibid

[90] Ibid at [333]-[338]

[91] UV submission, 15 February 2019 at para [161]

> **26.1** (a) Casual employees will receive their casual loading in addition to the Saturday and Sunday rates at clause 26.
>
> (b) The rates are:
>
> (i) in substitution for and not cumulative upon the shift premiums prescribed in clause 29 – Shiftwork; and
>
> (ii) not applicable to overtime worked on a Saturday or Sunday.

[115] In relation to public holiday payments the HSU seeks:

> **34.2 Payment for working on a public holiday**
>
> (a) An employee required to work on a public holiday will be paid double time and a half of their ordinary rate of pay for all time worked.
>
> (b) Payments under this clause are instead of any additional rate for shift or weekend work which would otherwise be payable had the shift not been a public holiday.
>
> (c) A casual employee will be paid the casual loading under clause 1.4(b) in addition to the public holiday penalty at clause 34.2(a).

[116] In support of its proposed variations the HSU submits that payment of the casual loading in addition to any overtime, weekend and public holiday penalty is consistent with the function of the casual loading, being to compensate employees for the paid leave entitlements available to permanent employees, and with the "default approach" discussed by the Full Bench in the *Penalty Rates Decision*.[92] It submits this approach is simple and easy to understand (see s.134(1)(g) of the Act).

[117] In particular, the HSU relies on the consideration in the *Penalty Rates Decision* of the purposes of penalty rates and casual loadings in the context of the *Hospitality Industry (General) Award 2010*[93] (Hospitality Award) and its finding that the casual loading should be added to the Sunday penalty rate because clause 13.1 of the Award makes clear that "*the casual loading is not intended to compensate employees for the disutility of working on Sunday*."[94] The HSU submit that clause 10.4(b) of the SCHADS Award is "relevantly identical" and that it is clear the casual loading is paid in substitution for the leave entitlements otherwise available to permanent employees, not to compensate for any other aspect of the work or its performance.

[118] The Employer parties oppose the UV and HSU claims relating to casual employees.

[119] Ai Group submits that a proper foundation for the Unions' claims has not been made out and they should be dismissed. In addition to its submissions regarding s.138 and the s.134 considerations (at [188] – [189] of Ai Group submissions of 8 April 2019) Ai Group advances three broad lines of argument in support of its position:

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[92] [2017] FWCFB 1001 at [338].

[93] Ibid at [889] – [891].

[94] Ibid at [896].

- the Commission should have regard to the NDIS funding arrangements;
- the Unions' claims simply seek to relitigate matters ventilated in the Transitional Review; and
- the adoption of the PC's 'default approach' in the *Penalty Rates Decision* was in the context of a small number of awards and did not constitute a general and authoritative consideration of the issue at the level of industrial principle.

[120] We return to each of these arguments shortly.

[121] ABI, the NDS, Business SA and AFEI also advanced submissions opposing the Union's casuals claims and rely on:

- the relevant award history (and in particular the Transitional Review decisions referred to above);
- the absence of evidence in support of the claims; and
- the impact upon businesses covered by the SCHADS Award.

[122] As to the last point, the NDS submit that granting the claim would:

> 'significantly increase the wage cost for the provision of a wide range of social services, including disability support, for employers, who are largely dependent on government funding or, in the case of the NDIS, a fixed price over which they have no control. The result is likely to be a reduction in services to vulnerable members of the community'.[95]

[123] As can be seen there is a significant degree of overlap between the arguments advanced by Ai Group and those put by the other Employers. As mentioned, Ai Group advances three broad lines of argument and we now turn to deal with those arguments.

[124] First, Ai Group submits that when determining claims to enhance terms and conditions in the SCHADS Award the Commission should in these proceedings

> 'have regard to the funding arrangements applying to employers covered by the Award. This is because the funding arrangements under the NDIS currently impose limitations on the price that can be charged by providers to their clients for their services. This places an inherent limitation on the capacity of employers to recover any additional costs flowing from variations to the Award. Additionally, it appears that the terms of approved participant plans place further limitations on the extent to which employers are able to claim additional amounts (for example, because plans limit the purpose or "support" for which certain funding can be used).'[96]

[125] Ai Group submits that 'the inherent connection between the Award and government funding has long been accepted by the Commission'.[97]

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[95] NDS Submissions 5 April 2019 at [46].

[96] Ai Group submission in reply 8 April 2019, at [159].

[97] Ai Group submission 8 April 2019 at [153].

[126] Two authorities are relied on in support of this proposition.

[127] The first is the *Equal Remuneration Case*[98] in which the Commission said:

> '[272] We accept that there is widespread reliance on government funding and that because of the pervasive influence of funding models any significant increase in remuneration which is not met by increased funding would cause serious difficulties for employers, with potential negative effects on employment and service provision.'

[128] We note that in that matter the Commission ultimately made an Equal Remuneration Order broadly reflecting the outcome agreed by the applicants and the Commonwealth, supported by a commitment from the Australian Government to meeting its share of the financial burden flowing from the decision. But the Commission's order was not contingent on the increase in employment costs being fully funded, as is apparent from the Full Bench's second decision in that matter:

> 'The Commonwealth has given a commitment to fund its share of the increased costs arising from the proposals. While some state governments are opposed, no government has indicated it will be unable to fund its share. On the other hand there are significant risks which need to be considered. For example, there will be an impact on employers in relation to programmes and activities that are not government funded. As a number of the opponents of the proposals pointed out, any order we make has the potential to affect employment levels and service provision where costs cannot be recovered. We are also concerned about the effect on the finances of a number of states. We have decided that in the circumstances these risks can be satisfactorily addressed by an extension to the length of the implementation period.'[99]

[129] Ai Group contends that the current funding levels are insufficient to cover the cost associated with providing disability services and that the recently announced increase in NDIS funding from 1 July 2019 will not be sufficient to address employers' existing difficulties with operating under the scheme. In this context, Ai Group submits that the material demonstrates that:

> '• a substantial number of employers are unable to make a profit under the current funding arrangements;
>
> - the limited funding is having adverse consequences for the extent and quality of services provided by employers. This in turn has consequences for employment opportunities; and
> - the limited funding is having adverse consequences for the extent to which employers are able to provide career progression and training to their employees. This again has consequences for service delivery.'[100]

[130] It is submitted that the grant of the Unions' claims will serve only to exacerbate the existing concerns voiced by employers about their viability under the scheme and their ability to continue to provide services to persons with a disability. If the Award were varied as

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[98] [2011] FWAFB 2700.

[99] *Equal Remuneration Order* [2012] FWAFB 1000 at [65].

[100] Ibid, at [160].

sought by the Unions, employers will be faced with substantial additional costs for which there is no funding and no scope to recover from those who need and access their services.[101]

[131] Ai Group's submission in respect of this issue is encapsulated at paragraph 163 of its written submission of 8 April 2019:

> 'The operation of the NDIS and the constraints it places on employers covered by the Award should, in our respectful submission, form the cornerstone of the Commission's consideration of the impact of the Unions claims on employers. Such a consideration necessarily leads to the inevitable conclusion that employers cannot and should not be saddled with the additional employee entitlements sought by the Unions in these proceedings.'[102] (emphasis added)

[132] In our view the proposition advanced by Ai Group overstates the extent to which the NDIS funding arrangements are relevant to the determination of the claims before us. Further, as we note at [75] above, the position put about the impact of the recent budgetary injection amounts to little more than an assertion, unsupported by direct evidence or modelling.

[133] As mentioned earlier, it is the modern awards objective which is central to our consideration of the claims. 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 s.134 considerations. The importance of the modern awards objective is emphasised by the terms of s.138.

[134] The proposition advanced by Ai Group seeks, in essence, to elevate one set of considerations – the impact on business and employment costs – above all others. So much is clear from the submission that the constraints placed on employers by the operation of the NDIS should 'form the cornerstone' of our consideration of the proposed variations leading to 'the inevitable conclusion' that the claims be dismissed.

[135] We reject the proposition advanced. The obligation to take the s.134 considerations into account means that *each of these matters*, insofar as they are relevant, must be treated as a matter of significance in the decision making process. And, as we have mentioned, no particular primacy is attached to any of the s.134 considerations.

[136] We accept that the impact of granting the claims on business and on employment costs is a relevant consideration and weighs against making the variations proposed by the Unions. But we reject the notion that the constraints placed on employers by the NDIS funding arrangements should be given determinative weight.

[137] In the context of the provision of social services where employers are largely dependent on government funding, or, in the case of the NDIS, a fixed price, we are cognisant of the fact that significant unfunded employment cost increases may result in a reduction in services to vulnerable members of the community – a point made by the NDS. But such outcomes are a consequence of current funding arrangements, which are a matter for Government. Further, as we have mentioned earlier (at [75] above) the evidence as to the

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[101] Ibid, at [162].

[102] Ibid, at [163].

impact of the recent budgetary increase to the NDIS is somewhat unsatisfactory. Nor was there much consideration given to the extent to which the impact of an increase in casual overtime work and work on weekends and public holidays may be ameliorated by the utilisation of part time and full time employees.

[138] The Commission's statutory function is to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net. It is not the Commission's function to make any determination as to the adequacy (or otherwise) of the funding models operating in the sectors covered by the SCHADS Award. The level of funding provided and any consequent impact on service delivery is a product of the political process; not the arbitral task upon which we are engaged.

[139] We recognise that it may take time for a funding arrangement to adapt to a change in circumstances, such as an increase in employment costs occasioned by a variation to the award safety net. Such matters can be addressed by appropriate transitional arrangements.

[140] We would also observe that the approach advocated by Ai Group would result in employees covered by the SCHADS Award effectively subsidising the level of services delivered by the NDIS (and other government funded social services) through lower minimum terms and conditions of employment than warranted by a merits based assessment of the claims before us taking account of *all* of the relevant s.134 considerations. Such a 'subsidy' would operate in circumstances where a significant number of these employees are low paid.

[141] If, as the employer parties suggest, the NDIS pricing arrangements are underpinned by flawed assumptions and do not reflect the practicalities of providing services to participants or adequately compensate providers for their labour costs, this is a matter for Government to address, as the funder of the services. Such factors do not provide justification for a distortion of the Commission's statutory functions in setting the award safety net.

[142] The Commission's statutory function should be applied consistently to all modern award employees, while recognising that the particular circumstances that pertain to particular awards may warrant different outcomes. The fact that a sector receives government funding is not a sound basis for differential treatment. Further, given the gendered nature of employment in many government funded sectors such differential treatment may have significant adverse gender pay equity consequences.

[143] The impact upon business and employment costs of any proposed variation is one of a number of considerations to be taken into account. In the context of the matters before us we are not persuaded that such considerations should be given determinative weight.

[144] In its second line of argument, Ai Group contends that the issue of weekend penalty rates and overtime payments for casuals was considered by the Commission in the Transitional Review and that:

> 'The unions' claims simply seek to re-litigate the matters ventilated in the two year review. They have not pointed to any justification for departing from the Full Bench's decision

> regarding overtime or the Vice President's decision regarding weekend penalty rates. They have not presented any evidence or material that might justify a different approach.'[103]

[145] Similar arguments are advanced by ABI and other employer organisations. We have earlier set out some of the extracts from the decision relied upon (see [109] above).

[146] Ai Group submits that the Transitional Review Appeal Bench that heard and determined the ASU's claim expressly considered whether the casual loading should be payable to casual employees in addition to overtime rates and observed that:

> (i) the position which applied in the pre-existing awards and instruments in this respect was somewhat mixed. No clearly predominant position emerges from a review of those instruments;[104]
>
> (ii) the variations made in the two year review to expand the entitlement to overtime rates presented a significant benefit to casual employees;[105] and
>
> (iii) a conservative approach was appropriate in all the circumstances.[106]

[147] Ai Group advances the following submission in respect of the Appeal Decision:

> 'These aspects of the Full Bench's reasoning are not directly referable to what has on many occasions been described as the limited scope of the two year review. That is, the Full Bench's reasoning does not appear to be encumbered or confined by the narrower scope of the review. Accordingly, in our submission, although the decision was made in a different legislative context, in the circumstances that is not a cogent reason for not following the decision.'[107]

[148] As noted earlier (see [18]), while it is appropriate to take account of previous decisions relevant to a contested issue arising in the Review, the context in which those decisions were made may provide cogent reasons for not following a previous Full Bench decision. Three important contextual considerations are relevant in determining the weight to be afforded to the decisions relied upon by Ai Group:

> (i) The decisions relied on were made in the context of the Transitional Review which was more limited in scope than the Review. The proposition advanced by Ai Group – that the Full Bench's reasoning does not appear to be encumbered or confined by the narrower scope of the Transitional Review – is unpersuasive. The Full Bench's observations must necessarily be confined within the parameters of the jurisdiction it was exercising.
>
> (ii) It is apparent from the decisions relied upon that neither the Member at first instance nor the Appeal Bench gave any proper consideration to the principle

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[103] Ibid, at [185].

[104] *Re Australian Municipal, Administrative and Clerical Services Union* [2014] FWCFB 379 at [42].

[105] Ibid, at [44].

[106] Ibid.

[107] Ai Group submission in reply 8 April 2019, at [182].

of neutrality (which informed the Productivity Commission's default approach adopted in the *Penalty Rates Decision* and to which we shall return shortly).

(iii) It is also significant that the relevant legislation has changed since the decisions relied upon, in that s 134(1)(da) has subsequently been inserted into the Act. We will return to the terms of s 134(1)(da) shortly.

[149] Having regard to these contextual considerations we do not propose to give significant weight to the Transitional Review decisions relied upon by Ai Group (and the other employer bodies).

[150] The third line of argument advanced by Ai Group is directed at the Unions' reliance on the *Penalty Rates Decision*, specifically, the Commission's decision to require the payment of the casual loading in addition to weekend penalty rates in certain awards. Ai Group submit the following in response:

> (a) Whilst the term 'default approach' is referenced by the unions and was referenced by the Commission in the Penalty Rates Decision, the proposition that the casual loading be paid in addition to weekend and overtime penalty rates is not in fact the default approach adopted in the awards system. The term (i.e. 'default approach') is one that was simply coined by the PC for the purposes of its report. Quite appropriately, in our submission, a consistent approach does not in fact appear across the modern awards system.
>
> (b) The issue of whether casual employees are entitled to the casual loading in addition to weekend penalty rates or overtime is one that must be considered on an award-by-award basis. There may be a number of reasons why, in the instance of a particular award, the 'default approach' is not appropriate. Ultimately the matter is one that must be considered by the Commission by reference to the legislative constraints imposed by ss.134(1) and 138. This will necessarily involve a range of considerations including the capacity of employers to absorb the relevant additional employment costs. The history of the award entitlements may also be relevant.
>
> (c) The adoption by the Commission of the PC's 'default approach' in the context of a small number of awards where the Commission decided to reduce Sunday penalty rates does not constitute "general and authoritative consideration of [the] issue at the level of industrial principle", as contemplated by the Full Bench that heard the ASU's appeal. Accordingly, the basis for revisiting the issue, as contemplated by that Full Bench, does not arise.

[151] Contrary to AI Group submission, the Productivity Commission's 'default approach' has been adopted as a matter of general industrial principle.

[152] The relevant aspects of the PC Final Report and the *Penalty Rates Decision* are set out in our recent decision in relation to the substantive claims regarding the Aged Care Award 2010[108] (the 2019 Aged Care Decision). We adopt that analysis and, in particular, we endorse the conclusion at [137],:

> 'In our view the principle of neutrality of treatment, which underpins the Productivity Commission's 'default approach' and informed the Metals Casuals Decision, is a sound

[108] [2019] FWCFB 5078 st [119] – [137].

> industrial principle and, absent some compelling, countervailing consideration, should generally be applied.'

[153] The application of such a principle to the present matter weighs in favour of the UV claim regarding casual employee overtime rates and the HSU claims regarding the payments to casuals for weekend and public holiday work. A countervailing consideration would be if the 25 percent casual loading in the SCHADS Award contains some compensation for overtime, weekend work or working on public holidays. In our view it does not. It is clear from clause 10.4(b) of the SCHADS Award that the 25 percent 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 working overtime; or weekend work; or for working on public holidays.

[154] In the context of the SCHADS Award, the casual loading and the penalty rates associated with overtime, weekend and public holiday work are separate and distinct forms of compensation. Penalty rates compensate for the disutility associated with the time at which work is performed (or the working of additional hours). 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 working overtime or for weekend work and public holiday work.

[155] We also note that the application of overtime rates to casuals was the subject of recent detailed consideration by a Full Bench in the Casual and Part time employment common issues.[109] In its decision of 5 July 2017 that Full Bench granted UV's application to vary the *Registered and Licensed Clubs Award 2010* (Clubs Award), *Restaurant Industry Award 2010* (Restaurant Award) and the Hospitality Award (collectively, the Hospitality Awards) to establish that casual employees be paid overtime penalty rates in circumstances where the employees have worked in excess of 38 hours per week or 10 hours per day.

[156] In deciding to vary the Hospitality Awards the Full Bench made the following observations:

- In establishing the modern Hospitality Award, the Restaurant Award and the Clubs Award as part of the award modernisation process, the AIRC Full Bench does not appear to have given explicit consideration to the justification for the exclusion of casual employees from the benefit of overtime penalty rates provisions. The provisions of the modern Hospitality Award were primarily derived from the pre-reform federal *Hospitality Industry - Accommodation, Hotels, Resorts and Gaming - Award 1998*, which excluded casual employees from overtime penalty rates. Because no party contended that there should be a change to that position, the issue was not given any consideration.[110]

- The lack of any contest about and consideration of the casuals overtime issue in the award modernisation, and the detailed evidentiary case now presented, provides a

[109] [2017] FWCFB 3541.

[110] Ibid, at [539].

> cogent basis to now review the issue. It is also significant that the legislative context has changed, in that paragraph (da) was added to the modern awards objective in s.134(1) after the award modernisation process was completed.[111]

[157] At [548] – [549] of its decision the Full Bench sets out its conclusions:

> '[548] We are satisfied, having regard to the matters we are required to take into account under s.134(1), that a fair and relevant minimum safety net for casual employees covered by the 3 awards in question requires that casual employees receive the benefit of overtime penalty rates. On the basis of the factual conclusion we have set out, it is apparent that casual employees who work long hours in the course of a day or a week are subject to significant disabilities. Those disabilities are essentially the same as those applying to permanent employees who work lengthy hours and receive overtime penalty rates for doing so. We see no good reason for the different treatment of casual employees, nor was any convincing rationale for this advanced by any interested employer party. These are matters bearing particularly upon the consideration in s.134(1)(da)(i), which we have accordingly assigned particular weight in reaching our conclusion.
>
> …
>
> [549] Overtime penalty rates serve the dual purpose of compensating employees for disabilities of that nature and establishing a disincentive for employers to require particular employees to work long hours. Employers in the industry sectors in question may be able avoid the cost of overtime penalty rates by adopting rostering systems and practices which ensure that no single employee is commonly required to work excessive hours, and in that sense the introduction of penalty rates need not cause significant additional cost burdens for employers. That is relevant to the consideration in s.134(1)(f), which we have taken into account as not being adverse to the proposition that a fair and relevant safety net should provide for casual overtime penalty rates.'[112]

[158] It is apparent that some casual employees covered by the SCHADS Award are working overtime hours. As mentioned earlier, the Survey Results show that in the 4 week period from 4 to 31 March 2019, around three-quarters (75.4 per cent) of enterprises that responded to the survey employed casual employees that were covered by the SCHADS award. Of the enterprises that employed casual employees in that 4 week period, one quarter had casual employees that worked in excess of 38 hours per week or 76 hours per fortnight. Around three-quarters of enterprises (76.4 per cent) responded that casual employees worked on a Saturday during this period, and around seven in ten enterprises (69.9 per cent) responded that casual employees worked on a Sunday.

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

[160] 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).[113] As

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[111] Ibid, at [545].

[112] Ibid, [548] - [549].

[113] [2017] FWCFB 1001 at [166].

mentioned earlier a significant proportion of employees covered by the SCHADS Award may be regarded as 'low paid' within the meaning of s 134(1)(a).

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

[162] Section 134(1)(b) requires that we take into account 'the need to encourage collective bargaining'. An increase in the payments for casuals working overtime and on weekends and public holidays may 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 working overtime and on weekend and public holidays would '*encourage* collective bargaining', it follows that this consideration does not provide any support for a change to those rates.

[163] 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 limited material before us, the impact of the variations proposed by the Unions on total employment is not likely to be significant. We regard this consideration as neutral.

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

[165] Section 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'.

[166] It is self-evident that if the rates payable to casuals for working overtime and for weekend and public holiday work were increased then employment costs would increase. This consideration tells against an increase in casual rates. However, there may be scope to ameliorate the cost impact of the claims by the substitution of casual labour for part time and full time employees.

[167] 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.

[168] Section 134(1)(da) requires that we take into account the 'need to provide additional remuneration' for, relevantly:

> '(i) employees working overtime; or …
>
> (iii) employees working on weekends or public holidays; …'

[169] The casual loading in the SCHADS Award does not adequately compensate casual employees for overtime work or for working on weekends and public holidays. Further, permanent and casual employees are likely to experience similar levels of disutility associated with working overtime and on weekends and 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 weighs in favour of the variations proposed by UV and the HSU.

[170] The considerations in s.134(1)(e) and (h) are not relevant in the present context. No party contended to the contrary. Further, we regard s.134(1)(g) as a neutral consideration.

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

[172] In substance, the submission put by the Unions is that the existing rates for casuals working overtime and for work on Saturdays, Sundays and public holidays are not fair and proportionate to the disutility experienced by casual employees for performing such work. We agree.

[173] 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 SCHADS Award in the manner proposed by the Unions. We deal with the transitional arrangements associated with these variations later in our decision.

5.4 Community language skills allowance

[174] The ASU seeks to insert a new clause 20.10 to provide for a community language allowance to remunerate employees when they use a language other than English in the course of their duties. The new clause is set out below:

20.10 Community Language and Signing Work

20.10.1 Employees using a community language skill as an adjunct to their normal duties to provide services to speakers of a language other than English, or to provide signing services to those with hearing difficulties, shall be paid an allowance in addition to their weekly rate of pay.

20.10.2 A base level allowance shall be paid to staff members whose language skills are required to meet occasional demands for one-to-one language assistance. Occasional demand means that there is no regular pattern of demand that necessitates the use of the staff members language skills. The base level rate shall be paid as a weekly all purposes allowance of $45.00.

20.10.3 The higher level allowance is paid to staff members who use their language skills for one-to-one language assistance on a regular basis according to when the skills are used. The higher level rate shall be paid as a weekly all purposes allowance of $68.00.

20.10.4 Such work involves an employee acting as a first point of contact for non-English speaking service users or service users with hearing difficulty. The employee identifies the resident's area of inquiry and provides basic assistance, which may include face-to-face discussion and/or telephone inquiry.

20.10.5 Such employees convey straightforward information relating to services provided by the employer, to the best of their ability. They do not replace or substitute for the role of a professional interpreter or translator.

20.10.6 Such employees shall record their use of community language skills.

20.10.7 Where an employee is required by the employer to use community language skills in the performance of their duties

a) the employer shall provide the employee with accreditation from a language/signing aide agency

b) The employee shall be prepared to be identified as possessing the additional skill(s)

c) The employee shall be available to use the additional skill(s) as required by the employer.

20.10.8 The amounts at 20.10.2 and 20.10.3 will be adjusted in accordance with increases in expense related allowances as determined by the Fair Work Commission.[114]

[175] The Employer parties oppose the claim.

[176] After the completion of the oral hearing the following additional material was filed in relation to this clause:

- Submission filed by National Disability Services on 17 May 2019;
- Submission filed by Australian Services Union on 17 May 2019;
- Submission filed by Health Services Union on 17 May 2019;
- Submission filed by United Voice on 17 May 2019;
- Submission filed by Australian Business Industrial and NSW Business Chambers and others on 19 May 2019;
- Submission filed by Australian Federation of Employers and Industries on 22 May 2019;
- Joint submission filed by the Australian Services Union and Australian Industry Group on 17 May 2019;
- Submission in reply filed by Australian Business Industrial and NSW Business Chambers and others on 3 June 2019; and
- Submission in reply filed by Australian Services Union on 4 June 2019

[177] We do not propose to determine the ASU's claim at this time. A Background Paper will be prepared summarising the submissions, evidence and other material before us and we will issue a Statement setting out how we propose to finalise our consideration of this claim.

[114] ASU draft determination, 9 November 2018.

5.5 *First aid certificate renewal claim*

[178] The HSU seeks to vary the existing first aid allowance to provide for payment of an allowance for first aid certificate renewal and CPR training.[115] Clause 20.4 of the SCHADS Award currently provides:

> **20.4 First aid allowance**
>
> **(a) First aid allowance—full-time employees**
>
> A weekly first aid allowance of 1.67% of the standard rate per week will be paid to a full-time employee where:
>
> (i) an employee is required by the employer to hold a current first aid certificate; and
>
> (ii) an employee, other than a home care employee, is required by their employer to perform first aid at their workplace; or
>
> (iii) a home care employee is required by the employer to be, in a given week, responsible for the provision of first aid to employees employed by the employer.
>
> **(b) First aid allowance—casual and part-time employees**
>
> The first aid allowance in 20.4(a) will apply to eligible part time and casual employees on a pro rata basis on the basis that the ordinary weekly hours of work for full-time employees are 38.

[179] The HSU seeks to vary clause 20.4 to insert a new paragraph (c) as follows:

> **(c) First aid refresher**
>
> (i) Where an employee is required to maintain first aid certification, the employer will pay the full cost of the employee updating their first aid certification by:
>
> a. reimbursing the employee's registration and attendance expenses; or
>
> b. paying the registration and attendance costs.
>
> (ii) Attendance at first aid refresher courses will be work time and paid as such.

[180] In support of its claim the HSU contends that many employees engaged in disability support or home care roles are required to hold a current first aid certificate in their roles[116] and, further, even when not explicitly required, the holding of such qualification is likely to benefit employers as employees are better equipped to deal with a medical emergency. It submits that where an employee is required to maintain their first aid certification, they should be entitled to reimbursement of the costs of maintaining the certification by their employer.

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[115] HSU Submission, 15 February 2019, [5]

[116] Ibid at [63]

[181] Four witnesses called by the HSU gave evidence relating to this claim. This evidence is extracted below:

- Robert Sheehy, an employee of HSU NSW said:

> 'The cost of renewing first aid certificates is an issue commonly raised with me and my organisers by member.'[117]

- William Elrick, an organiser with HACSU Victoria said:

> 'The cost of renewing first aid qualifications is something that is often raised by members a an issue. First Aid and CPR are essential to work in disability services. Without a first aid certificate, an employee can't work this sector. Costs vary depending on the training provider, but, for example, St John Australia charges $159 for a one day refresher course for those who hold a current first aid certificate less than 2 years old, and $75 for a CPR course.'[118]

- Thelma Thames, a support worker employed by an aged care provider said:

> 'I hold a first aid certification. My employer pays or us to do the training through Red Cross. First aid is essential or employees doing the work we do. I used to be an enrolled nurse so I have some nursing experience. That training comes in handy when working with clients.'[119]

- Bernie Lobert, a disability support worker said:

> 'As a disability support worker you are required to have a current first aid certification, otherwise you can't get work. You need a CPR update every year and a new first aid certificate every three years. It costs approximately $100 or the first aid training once every three years, and $60 for the CPR training once a year. That works out to a cost to the employee of roughly $90 dollars a year.'[120]

[182] The evidence to the cost was summarised by counsel for the HSU in the course of closing argument, as follows:

> 'I think the evidence in the material about the cost of a course is that it's in the territory of a hundred to $150 to do that sort of training each year.'[121]

[183] The evidentiary case advanced by the HSU falls well short of what would be required to persuade us to grant the claim. There is simply no probative evidence that establishes:

- the prevalence of employees covered by the Award being required to retain current first aid certificates;

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[117] Exhibit HSU4 at [17].

[118] Exhibit HSU6 at [45].

[119] Exhibit HSU1 at [23].

[120] Exhibit HSU2 at [22].

[121] Transcript at [1948].

- what (if any) training or refresher training is required in order for an employee to hold a current first aid certificate;
- the duration of such training;
- the frequency with which such training must be undertaken in order to retain a current first aid certificate (if at all);
- whether the fees payable differ between different training providers; or
- any other amounts payable to attend such training.

[184] Given the paucity of the Unions' evidentiary case, the Commission is unable to even estimate the potential cost of the claim.

[185] Further, the HSU's submissions failed to adequately address the s.134 considerations and give scant attention to s.138.

[186] Given the absence of a cogent merit argument it would be patently unfair to impose a new unquantified financial obligation on employers.

[187] We are not satisfied that the variation proposed is necessary to ensure that the SCHADS Award achieves the modern awards objective. The evidence adduced in support of the claim is very limited and is insufficient to establish the requisite merit for the claim to succeed.

[188] We note ABI's alternate submission that consideration be given to introducing a requirement requiring employers to reimburse employees for the time and cost associated with maintaining their first aid certification but that such a requirement be limited to employees who are designated as first aid officers to provide first aid to fellow employees at their workplace. This proposal can be the subject of further discussion between the parties. The Commission is available to facilitate such discussions if requested to do so.

5.6 Variation to public holidays clause

[189] UV seek to vary clause 34.2(c) of the Award as follows:

> **34.2 Payment for working on a public holiday**
>
> (a) An employee required to work on a public holiday will be paid double time and a half of their ordinary rate of pay for all time worked.
>
> (b) Payments under this clause are instead of any additional rate for shift or weekend work which would otherwise be payable had the shift not been a public holiday.
>
> (c) Rosters must not be altered for the purpose of avoiding public holiday entitlements under the Award and the NES.

[190] UV cites ss.114 and 116 of the Act and submits that employers are altering the rosters of part-time employees to avoid the payment of public holiday rates. UV contends that the variation proposed is consistent with the modern awards objective, primarily in ensuring that the SCHADS Award is 'fair and relevant' and provides that part-time employees do not receive less pay than they are entitled to.

[191] The 'highpoint' of UV's evidentiary case was in the witness statement of Robert Sheehy an employee with HSU NSW Branch, who said:

> '20. Our branch has run a number of disputes for members where employer have altered rosters to avoid paying employees public holiday entitlements.
>
> 21. It's not uncommon for employers to change the roster shortly before a public holiday, with the consequence that the employee is not paid for that day. For example, an employee may work every Monday but will be taken off that Monday for the two week period where the public holiday falls. Often employers will cite client cancellation as the reason for changing an employee's roster.'

[192] No evidence was provided as to any dispute notified to the Commission in respect of the issue to which the proposed variation is directed.

[193] UV effectively conceded[122] that no cogent evidence was advanced in support of the proposition that employers were systematically altering rosters to avoid public holiday entitlements. The submission put amounted to little more than an assertion by UV that 'some of our members have reported having their rosters changed in a manner inconsistent with clauses 8A and 10.3 of the Award'.[123]

[194] We are not satisfied that the variation proposed is necessary to ensure that the SCHADS Award achieves the modern awards objective. The Award already prescribes the circumstances in which rosters may be altered and changes may be made to set patterns of work and UV has failed to adduce probative evidence of systemic abuse of these provisions. The claim is rejected.

6. Conclusion and Transitional Arrangements

[195] In summary, we have decided to:

- set out a process for addressing the lack of clarity and other deficiencies in the 24 hour care clause;
- vary the rates of pay of casual employees who work overtime and on weekends and public holidays (subject to the views we express below about transitional arrangements);
- defer consideration of the ASU's claim for a community language skills allowance;
- reject the first aid certificate renewal claim; and
- reject UV's claim to vary the public holiday clause.

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

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[122] Transcript at [337].

[123] Transcript [328] – [340].

[197] In the *Penalty Rates – Transitional Arrangements decision*[124] 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.'[125]

[198] 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.[126] 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."[127]

[199] 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	210	260
1 July 2020:	175	225	275

[200] It is our *provisional* view that the increase in overtime rates for casuals be operative from 1 December 2019.

[201] A draft variation determination reflecting our *provisional* views is set out at Attachment D.

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[124] [2017] FWCFB 3001.

[125] Ibid at para [142].

[126] Ibid at paras [117] – [119].

[127] Ibid at para [148].

7. Next Steps

[202] Interested parties are to file any submissions in relation to the *provisional* views set out at [200] and [201] above and the draft variation determination by **4pm on Friday 20 September 2019**. Any reply submissions are to be filed by **4pm on Friday 4 October 2019. A**ny issues in contention will be the subject of a hearing on **Monday 14 October 2019 at 2pm**. All submissions are to be sent to AMOD@fwc.gov.au.

[203] A mention will be held shortly in relation to the programming and materials relating to the second stage of these proceedings.

PRESIDENT

Appearances:

Mr Robson for the Australian Services Union with G South

Ms L Doust for the Health Services Union with Ms R Liebhaber

Ms N Dabarera for United Voice with Ms Bolton

Mr B Ferguson for the Australian Industry Group with Ms R Bhatt

Mr K Scott for Australian Business Industrial and the New South Wales Business Chamber; Aged and Community Services Australia and Leading Age Services Australia with Ms Tiedman

Ms M Pegg for National Disability Services

Ms N Shaw for Australian Federation of Employers and Industry

Hearing details:

Sydney
2019
15, 16 and 17 April

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ATTACHMENT A – Outstanding Claims

UV claims:

S2 – variation to ensure the payment of travel time for home care workers
S2A – variation to the clothing and equipment allowance
S3 – variation to the rosters clause
S19A – paid travel time
S21 – variation to telephone allowance
S37 – Broken shifts
S49 – variation to correct a cross-referencing error
Minimum engagements

HSU claims:

S16 – Amendments to various classification criteria
S19 and S20A – Phone allowance, travel allowance and damaged clothing allowance
S22 – On call and recall allowance
S24 – Payment of wages
S28 and S32 – Variation to ordinary hours of work and rostering clauses
S29 – Variation to client cancellation provisions
S35 – Deletion or variation of broken shifts clause
S38 – Amendments to sleepover clause
S45 – Excursions (new entitlement to additional annual leave for employees engaged in excursions)
S50 – Variation to overtime clause
S54 – Variation to shift work clause

ASU claims:

S36 – Variation to broken shifts clause

ABI claims:

S5 – variation to include a 'remote response payment'
S23 – On call allowance
S25 – ordinary hours of work
S29 – client cancellation
S53 – recall to work overtime

ATTACHMENT B – Oral Evidence and Witness list

Tab	Exhibit No.	Tendered by	Witness Statements and TN's
1.	**ASU1**	**ASU**	Witness statement of **Dr. Ruchita** dated 14 February 2019 (with amendments)
			PN525 – PN540: Examination in chief by ASU (Mr Robson)
			PN540 – PN585: Cross-examination by ABI & NSW BC (Mr Scott)
2.	**ASU2**	**ASU**	Witness statement of **Ms Nadia Saleh** dated 14 February 2019 (with amendments)
			PN591 – PN597: Examination in chief by ASU (Mr Robson)
			PN597 – PN633: Cross-examination by Ai Group (Mr Ferguson)
			PN635 – PN643: Re-examination by ASU (Mr Robson)
3.	**ASU3**	**ASU**	Witness statement of **Ms Natalie Lang** dated 18 February 2019 (with amendments)
			PN647 – PN652: Examination in chief by ASU (Mr Robson)
			PN654 – PN700: Cross-examination by Ai Group (Mr Ferguson)
4.	**ASU4**	**ASU**	Witness statement of **Mr Lou Bacchiella** dated 13 February 2019 (with amendments)
			PN702 – PN714: Examination in chief by ASU (Mr Robson)
			PN716 – PN758: Cross-examination by Ai Group (Mr Ferguson)
			PN759 – PN776: Cross-examination by ABI & NSW BC (Mr Scott)
			PN778 – PN790: Re-examination by ASU (Mr Robson)
5.	**Ai Group 1**	**AiG**	**Community Language Allowance Scheme Handbook 2018** – Multicultural NSW; NSW Government
			PN687 – PN695: Examination by Justice Ross
6.	**HSU1**	**Health Services Union**	Witness statement of **Thelma Thames** dated 15 February 2019
			PN1408: HSU (Ms Doust) – paragraphs 20 to 22 not to be read for the present purposes
			PN1417, PN1426 – PN1429: Ai Group (Mr Ferguson) – objection to paragraph 15
			PN1430: Ai Group (Mr Ferguson) – objection to paragraph 16

Tab	Exhibit No.	Tendered by	Witness Statements and TN's
			PN1434: Ai Group (Mr Ferguson) – objection to paragraph 19
7.	**HSU2**	**Health Services Union**	Witness statement of **Mr Bernie Lobert** dated 15 February 2019
			PN1410: HSU (Ms Doust) – paragraphs 18 to 21 not to be read for the present purposes
8.	**HSU3**	**Health Services Union**	Witness statement of **Mr Mark Farthing** dated 15 February 2019 (with amendments)
			PN1581 – PN1601: Examination in chief by HSU (Ms Doust)
			PN1603 – PN1631: Cross-examination by ABI & NSW BC (Mr Scott)
			PN1635 – PN1645: Re-examination by HSU (Ms Doust)
			PN1648 – PN1651: Ai Group (Mr Ferguson) sought leave to have the witness recalled in the event that something fell out of the update re the budget point
9.	**HSU4**	**Health Services Union**	Witness statement of **Mr Robert Sheehy** dated 15 February 2019
			PN1668: No cross-examination required by ABI & NSW BC (Mr Scott)
10.	**HSU5**	**Health Services Union**	Witness statement of **Mr James Eddington** dated 15 February 2019 (with amendments)
			PN1668: No cross-examination required by ABI & NSW BC (Mr Scott)
11.	**HSU6**	**Health Services Union**	Witness statement of **Mr William Elrick** dated 15 February 2019
			PN1668: No cross-examination required by ABI & NSW BC (Mr Scott)

ATTACHMENT C – draft variation determination

MA000100 PRXXXXXX

DRAFT DETERMINATION

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

4 yearly review of modern awards—Group 4—*Social, Community, Home Care and Disability Services Industry Award 2010*—Substantive claims

(AM2018/26)

JUSTICE ROSS, PRESIDENT
DEPUTY PRESIDENT CLANCY
COMMISSIONER LEE

MELBOURNE, XX OCTOBER 2019

4 yearly review of modern awards – award stage – group 4 awards – substantive issues – Social, Community, Home Care and Disability Services Industry Award 2010.

A. Further to the decision [2019] FWCFB 6067 issued by the Fair Work Commission, the above award is varied as follows:

1. By deleting the words "and the casual loading prescribed in clause 10.4(b)" in clause 26.

2. By numbering the paragraph in clause 26 as 26.1

3. By inserting clause 26.2 as follows:

26.2 Casual employees will receive their casual loading in addition to the Saturday and Sunday rates at clause 26.1.

4. By inserting clause 26.3 as follows:

26.3 The rates are in substitution for and not cumulative upon the shift premiums prescribed in clause 29—Shiftwork and are not applicable to overtime worked on a Saturday and Sunday.

5. By inserting clause 26.4 as follows:

26.4 A casual employee who works on a weekend will be paid the following rates:

(a) From 1 December 2019 to 30 June 2020

(i) Between midnight Friday and midnight Saturday – 160% of the ordinary hourly rate (inclusive of the casual loading); and

(ii) Between midnight Saturday and midnight Sunday – 210% of the ordinary hourly rate (inclusive of the casual loading).

(b) From 1 July 2020

(i) Between midnight Friday and midnight Saturday – 175% of the ordinary hourly rate (inclusive of the casual loading); and

(ii) Between midnight Saturday and midnight Sunday – 225% of the ordinary hourly rate (inclusive of the casual loading).

6. By deleting clause 28.1(b)(iv) and inserting the following:

(iv) Overtime rates payable under this clause will be in substitution for and not cumulative upon the shift premiums prescribed un clause 29—Shiftwork and are not applicable to ordinary hours worked on a Saturday.

7. By inserting clause 34.2(c) as follows:

(c) A casual employee will be paid the casual loading under clause 10.4(b) in addition to the public holiday penalty at clause 34.2(a).

8. By inserting clause 34.2(d) as follows:

(d) Casual employees from 1 December 2019 to 30 June 2020

(i) A casual employee will be paid only for those public holidays they work at 260% of the ordinary hourly rate for hours worked (inclusive of the casual loading).

9. By inserting clause 34.2(e) as follows:

(e) Casual employees from 1 July 2020

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

10. By updating cross-references accordingly.

B. This determination comes 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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