

Fair Work Commission
Four Yearly Review of Modern Awards
Social, Community, Home Care and Disability Services Industry Award
Matter No: AM2014/285 and AM2018/26

**SUBMISSIONS OF HEALTH SERVICES UNION – FOUR YEARLY REVIEW –
SUBSTANTIVE ISSUES**

OVERVIEW

1. These submissions are made by the Health Services Union (HSU), in accordance with the Directions of President Ross, dated 13 November 2018.
2. The *Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Act 2018* was assented to on 11 December 2018. That Act repealed the parts of the *Fair Work Act 2009* (FW Act) providing for the conduct of 4 yearly reviews of modern awards. However, Schedule 4, Application and transitional provisions, of that Act preserved the operation of the relevant provisions in the FW Act in respect of reviews of modern awards conducted as part of 4 yearly reviews of modern awards, if such review was commenced, but not completed, prior to 1 January 2018.
3. The present review was commenced by the FWC in February 2014. Accordingly, the review may continue pursuant to the provisions of the FW Act notwithstanding their repeal.

4. The task of the Fair Work Commission (**FWC**) in conducting the present review is to review the *Social, Community, Home Care and Disability Services Industry Award (the Award)* by reference to the modern awards objective in s.134. That section provides:

What is the modern awards objective?

(1) The FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:

(a) relative living standards and the needs of the low paid; and

(b) the need to encourage collective bargaining; and

(c) the need to promote social inclusion through increased workforce participation; and

(d) the need to promote flexible modern work practices and the efficient and productive performance of work; and

(da) the need to provide additional remuneration for:

(i) employees working overtime; or

(ii) employees working unsocial, irregular or unpredictable hours; or

(iii) employees working on weekends or public holidays; or

(iv) employees working shifts; and

(e) the principle of equal remuneration for work of equal or comparable value; and

(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.

HSU Claims

5. The HSU makes claims for variation of the Award to ensure that it achieves the modern awards objective by:
- a) providing that all employees, whether full-time, part time or casual are entitled to a minimum engagement of three hours in all sectors covered by the award (clause 10; Exposure Draft (**ED**) clauses 8-11) – S10;

- b) varying the broken shifts clause to ensure that broken shifts can only be worked by agreement and short shifts are not broken (clause 25.6; ED clause 13.6) – S35;
- c) amending the “Travelling, transport and fares” clause, to ensure that employees are compensated appropriately for the cost of travel required to perform their duties – (clause 20.5; ED 16.3(c)) - S19;
- d) varying the overtime clause to ensure it applies to all employees, including part-time and casual employees, when working beyond their rostered hours, and that overtime is paid for shifts greater than 8 hours (clause 28.1(b); ED clause 18.1(b)) – S50;
- e) ensuring that casual loading is paid in addition to weekend and public holiday rates (clause 10.4(b); ED clause 11.2) – S13, S48;
- f) amending the telephone allowance to reflect the requirement to have a mobile phone for work-related purposes (clause 20.6; ED clause 16.3(d)) – S19;
- g) amending the uniform allowance to ensure that a uniform is provided or an allowance is paid; and providing a new entitlement for replacement of damaged clothing (clause 20.2; clause 16.3(a)) – S19;
- h) amending the existing first aid allowance to provide for payment of an allowance for first aid certificate renewal and CPR training (clause 20.4; ED clause 16.2) – S19;
- i) deleting the 24-hour care clause (clause 25.8; ED clause 13.8) – S43;
- j) varying the recall to work provisions to ensure that workers who respond to work calls or emails out of hours receive compensation for the performance of such work (clause 20.9; ED clause 16.2(d)) – S22;
- k) varying the cancellation provisions to ensure that adequate notice is given to home care workers of changes of shift as a consequence of client changes or cancellations (clause 25.5(f); ED clause 13.5(g)) – S29;
- l) amending the Sleepover clause to ensure appropriate facilities are provided (clause 25.7; ED 13.7) – S38.

6. The HSU submits that the proposed amendments provide for the safety net of terms and conditions established in the Award to be fair and relevant and thereby enable the Award to meet the modern awards objective.
7. Annexed to these submissions are **draft orders** with the HSU's proposed variations.

HSU Evidence

8. The HSU relies on the evidence of a number of witnesses in support of its claims. The HSU has filed, along with these submissions, witness statements of:
 - a) Dr. Fiona Macdonald, Senior Research Fellow and Australian Research Council Discovery Early Career Research Award Fellow at the School of Management, RMIT University;
 - b) Mark Farthing, Senior Policy Advisor for the Health Services Union (**HSU**) Victoria No. 2 Branch;
 - c) James Eddington, Legal and Industrial Officer at HSU Tasmanian Branch;
 - d) William Elrick, Area Organiser for the Health Services Union (**HSU**) Victoria No. 2 Branch;
 - e) Rob Sheehy, Manager Aged Care and Disabilities at the Health Services Union NSW/ACT/QLD Branch;
 - f) Christopher Friend, Bargaining Officer at the Health Services Union NSW/ACT/QLD Branch;
 - g) Pamela Wilcock, Community Care worker for Hammond Care on the Central Coast of NSW;
 - h) Heather Waddell, Community Care worker for Hammond Care in Nowra (NSW);
 - i) Thelma Thames, Support Worker employed by Uniting (NSW)
 - j) Bernie Lobert, Disability Support Worker (Victoria).
9. The HSU also relies on the following research papers and reports, which have been filed along with these submissions:

- a) Cortis, Natasha, *Working under the NDIS: Insights from a survey of employees in disability services* (Report prepared for Health Services Union, Australian Services Union and United Voice, June 2017), Social Policy Research Centre, University of New South Wales, Sydney.
- b) Cortis, Natasha et al, *Reasonable, necessary and valued: Pricing disability services for quality support and decent jobs* (SPRC Report 10/17, June 2017), Social Policy Research Centre, University of New South Wales, Sydney.
- c) McKinsey & Company, *Independent Pricing Review: National Disability Insurance Agency* (Final Report, February 2018)
- d) National Disability Services, *Australian Disability Workforce Report* (Report, February 2018).
- e) National Disability Services, *State of the Disability Sector Report* (Report, 2018).
- f) Productivity Commission, *National Disability Insurance Scheme (NDIS) Costs* (Study Report, October 2017), Canberra.
- g) Australian Government Department of Health, *The Aged Care Workforce, 2016*, March 2017, Canberra.
- h) NDIS Price Guide for Victoria, 1 July 2018.
- i) NDIS 2018-2019 Price Guide Update Summary

OVERVIEW OF INDUSTRY

10. The Award covers employees falling within its classifications in the following sectors:

- a) crisis assistance and supported housing sector;
- b) social and community services sector;
- c) home care sector;
- d) family day care scheme sector;

11. The two largest sectors are the social and community services sector and the home care sector, which include, respectively, disability support work (including such work provided under the National Disability Insurance Scheme) and aged care and dementia care delivered in the home.

12. Casual workers made up about 42% of the disability support workforce as at September 2017¹. Of the permanent workforce of disability support workers, part-time work is the dominant, and increasing, mode of employment, rising from about 65% of the permanent workforce in September 2015 to 81% in September 2017². Over that same period, the average weekly hours per worker have decreased from about 26 to about 20 hours per week.
13. Similar trends are evident in the home care sector of the aged care workforce.
14. The approach of providing aged care in the home is growing in scope in part due to an increasing preference amongst aged persons for such care, which is reflected in both policy and funding arrangements. In 2016, some 86,000 workers (or 66% of the home care and home support aged care workforces) were employed in direct care roles, or which some 72,000 were community care workers³.
15. In the period since the establishment of the Award, there has been an increase in the proportion of direct care workers employed for fewer hours⁴.
16. The pattern of increasing use of part-time workers (evident in respect of both the above sectors) is not one which is evident across the labour market in general⁵.
17. The evidence of the HSU shows that a concern about getting enough hours of work is a significant one amongst both part-time and casual workers employed under the Award, who are amongst some of the lowest paid members of the workforce. Those concerns, and the above workforce trends are relevant when the Commission comes to consider the degree of flexibility currently available to employers under the Award, and the appropriate safety net for such workers.

THE HSU'S CLAIMS

18. The HSU's claims, and its arguments in support of its claims are dealt with in turn below.

Minimum Engagement – clause 10; ED clauses 8-11

¹ p11, National Disability Services, *Australian Disability Workforce Report* (Report, February 2018)

² p22, National Disability Services, *Australian Disability Workforce Report* (Report, February 2018)

³ p69, Australian Government Department of Health, *The Aged Care Workforce, 2016*, March 2017, Canberra

⁴ Ibid, p70

⁵ p28, National Disability Services, *Australian Disability Workforce Report* (Report, February 2018)

19. The HSU seeks a minimum engagement of three hours for all workers.
20. The Award presently provides no minimum engagement for full-time and part-time employees in any of the sectors it covers. This issue is of particular concern for part-time workers. The provisions regarding rostering and span of hours mean this issue is of less import for full-time workers.
21. For casual employees, minimum engagement depends on the sector in which they work. For home care workers, the minimum engagement is one hour. For SACS employees (except disability support workers) the minimum is three hours. For all other casual employees it is two hours (clause 10.4; ED clause 11.3).
22. The union contends that the minima in respect of casual workers are inadequate (except in respect of SACS workers who are not disability support workers).
23. The rationale for minimum engagement periods is:

“to ensure that the employee receives a sufficient amount of work, and income, for each attendance at the workplace to justify the expense and inconvenience associated with that attendance by way of transport time and cost, work clothing expenses, childcare expenses and the like. An employment arrangement may become exploitative if the income provided for the employee’s labour is, because of very short engagement periods, rendered negligible by the time and cost required to attend the employment. Minimum engagement periods are also important in respect of the incentives for persons to enter the labour market to take advantage of casual and part-time employment opportunities (and thus engage the consideration in paragraph (c) of the modern awards objective in s.134)”.⁶

24. It is striking (and counter-intuitive), having regard to that rationale, that the least protection by way of minima in respect of casual employees, applies to home care and disability support workers, about whom it might reasonably be concluded the expense and inconvenience associated with each shift of work is greatest. It is also striking that no minimum engagement applies in respect of part-time employees.
25. The question of minimum engagement periods did not receive any systematic consideration in the award modernisation process⁷, and the *Casual and Part-Time Employment Case* rejected the adoption of a consistent minimum across awards⁸. Having regard to the changes in the industries covered by this Award since modernisation: the marketisation of service delivery, the proliferation of part-time

⁶ *Casual and Part-Time Employment Case* [2017] FWCFB 3541 at [399]

⁷ *Ibid*, at [402]

⁸ *Ibid*, at [406]

employment on decreased hours (as set out above), and the evidence as to working arrangements in the industry, it is timely for the Commission to consider the issue.

26. Part-time employees are strictly entitled, under clause 10.3(c) to have an agreed written pattern of hours and days of work. However, that obligation appears to have little relevance, with the requirement either not being observed, or honoured, or not operating due to the existence of enterprise agreements with contrary provision⁹. At the time of engagement employees are least able to advocate for a fair pattern of hours. In any event, the evidence before the Commission will show that in the particular circumstances of much of the industry operating under the present Award, clause 10.3(c) does not operate (as would be wished) to ameliorate the unfairness associated with the absence of fair minimum engagement periods for part-time employees, disability support workers and home care workers.
27. Whilst the Award envisages part-timers have set patterns of work, they are commonly asked to work, and do in fact perform, work additional to their agreed hours¹⁰. Given the trends of increasing numbers of workers performing increasing numbers of hours the evidence points to a level of underemployment within the industry, leaving employees with less bargaining power. The absence of any penalty or loading associated with the performance of additional hours by part-timers creates a structural incentive to enter arrangements with part-timers with less hours than are likely to be required, and to use part-time employees like a pool of casual workers.
28. It is a common feature of employment, particularly amongst disability support workers and home care workers, that employees are not performing work at the same location every day. Rather, their work locations are the homes of their clients and/or the communities in which the employer's client lives. Those locations change a number of times during the course of the day. Employees may not therefore count on travelling the same route to and from the workplace on every work day, have any certainty about how long travel will take and may not practicably, rely on public transport to travel to and from work and between clients. Employees are either explicitly required to provide their own vehicle to travel between work locations (and to transport clients) or are compelled by the nature of the work to provide such vehicle themselves. The mental burden of planning and navigating such trips should not be gainsaid. This feature of the work warrants particular consideration when the minimum engagement period is

⁹ Waddell [6]; Wilcock [3] – [4]; Thames [1], [9], [11]; Eddington [25]; Friend [11] – [14]

¹⁰ Friend [20]; Wilcock [4]; Thames [21] – [22]

considered. Relative to workers attending the same workplace every time, the above workers make a greater investment of time and effort for the performance of each shift.

29. The evidence to be called by the HSU will show it is commonplace within the industry for employees to be “rostered” to perform very short shifts – sometimes less than an hour, and often corresponding with the period of an appointment with a client of the service – interspersed with unpaid breaks between such periods of work/appointments. During the break in shift employees are required to travel (sometimes considerable distances) between clients in their own vehicles.
30. The impact of those practices is compounded by the fact that within the industry the majority of workers are employed on Award rates only. Few workers receive above Award rates as a consequence of contractual arrangements or enterprise agreements. For the small cohort of workers covered by enterprise agreements, rates of pay exceed Award minimum rates only modestly. In effect, the *minimum* rates in the Award are *paid rates*.
31. Workers are accordingly spending many hours, and travelling considerable distances, in pursuance of their employment, only to be paid minimum award rates in respect of part only of the overall time expended.
32. The absence of appropriate minimum engagement provisions means that the Award fails to provide a fair and relevant minimum safety net of terms and conditions for the employees it covers. Those workers are some of the lowest paid and vulnerable workers in the modern award system – those performing care work for vulnerable clients including the elderly, those with dementia or people with disabilities, in their homes.
33. The HSU’s proposed variation to the award provides for a minimum engagement of three hours for all employees. The utility of the provision would be defeated if shifts of the minimum period were able to be broken. To make a minimum engagement clause effective in the circumstances of the industry, broken shifts should not be available for the minimum engagement.

Broken shifts - clause 25.6; ED clause 13.6

34. The broken shift clause in the Award applies only to social and community services employees undertaking disability services work and home care employees.
35. The only current restraint on the utilisation of broken shifts is that the shift may not span more than 12 hours (cl 25.6(a)).
36. Such provision is manifestly open to exploitation when it operates in the absence of a minimum engagement provision (as is the case for part-time workers), or where there are short minima (as is the case for casual employees).
37. Under the existing provisions, a home care worker could be required to work two blocks of one hour (or less) broken by a period of 10 hours. The capacity to have more than one break during the shift can mean that an employee may be required to work three or more separate periods of work over the course of many hours in order to generate a reasonable amount of earnings. The evidence of the HSU's witnesses shows that a disturbing trend has emerged in the industry for disability support workers and home care workers to have their shifts "broken" by the time between successive clients, meaning that they are paid for a proportion only of the time that is expended in performing the work required by their employer. That circumstance also leaves some employees in the invidious position of deciding whether to incur the costs of driving home and back to the next client in the "break", or to endure stretches of dead or waiting time in the vicinity of the next client's house during the course of the day¹¹.
38. The broken shift clause should contain provisions to prevent exploitation of employees.
39. The relevant restrictions should be:
- a) that the shift may only be broken once and not multiple times;
 - b) that the minimum period of engagement should be applied to each period of work in a broken shift; and
 - c) that the employee is paid, as if working, for the time necessary to travel between clients required to be undertaken during any break in the shift.

¹¹ Eddington [20] – [22], [31]-[32]; Sheehy [7] – [9]; Friend [47] – [48]; Waddell [11]-[12]; Thames [15]; see also McDonald et al, Wage theft, underpayment and unpaid work in marketized social care (2018) Vol 29(1), Economic and Labour Relations Review, 80-96, at p88.

Travelling, transport and fares – (clause 20.5; ED 16.3(c))

40. The Award currently provides that an employee required or authorised by their employer to use their motor vehicle in the course of their duties is entitled to be reimbursed at a rate of \$0.78 per kilometre.
41. The evidence of the HSU discloses that disability support workers and home care workers are as a matter of course required to travel considerable distances during the course of their working days in order to perform their work for their employers, particularly in regional areas. The evidence suggests employers regard the travel to the first client and from the final client of the day as not travel which occurs in the course of the employee's duties. If that were correct, there would be a perverse incentive for employers to schedule the furthestmost clients at the start and finish of each day. The evidence indicates this approach is already being taken by some employers. Such travel is a fundamental part of the duties performed by those workers. It is necessary in order to perform the principal caring duties, and well exceeds the usual travel engaged in by employees to and from their workplaces.
42. The HSU's evidence demonstrates that the existing broken shift provision in the Award, combined with the absence of minimum shifts for part-time workers, enables employers to engage employees to perform a series of periods of work over the course of a day, with the expectation that the "break" in the shift will be used to travel on to the next client. Where such arrangements are utilised, workers are required to travel significant distances in the course of a day, on their own time, and in many cases, because the travel is not regarded as occurring in the course of duties because it occurs during a break in the shift, without any compensation.¹²
43. Dr Macdonald and her fellow authors dealt with these trends in the article annexed to her witness statement: *Wage theft, underpayment and unpaid work in marketized social care* (2018) Vol 29(1), Economic and Labour Relations Review, 80-96. In that article, the authors analyse the impact of marketisation of the provision of disability support care in Australia in light of international experience, and consider the efficacy of labour market regulation in protecting the low paid workers engaged in social care. The article notes the greater demands for flexibility, for shorter working hours and travel between multiple locations associated with the NDIS. Unpaid travelling time formed a

¹² Eddington [20] – [22]

significant part of the working days of many of the disability workers analysed in the article.

44. It is no part of the modern awards objective to have employees incurring substantial costs for the benefit of the employer without recompense. The Award should be amended accordingly.

Overtime - clause 28.1(b); ED clause 18.1(b)

45. The way in which overtime functions under the Award for part-time employees does not meet the Modern Award Objective, which recognises (at s.134(da)), the need to provide additional remuneration for employees working overtime; or employees working irregular or unpredictable hours.

46. Part-time employees only receive payment of the overtime rate for hours which exceed 10 in any shift, 38 in a week or 76 in a fortnight. Part-time employees should be entitled to overtime for work beyond their rostered hours. The absence of any penalty associated with the performance of such work creates a structural incentive to underestimate the hours of work required of a part-time employee at the time of engagement and/or rostering, and to utilise part-time workers like a pool of casual employees. The evidence above suggests the increasing tendency towards engagement of part-time employees in both home care and disability support work, with such employees working less hours.

47. Overtime for casual and part-time workers should be paid for shifts longer than 8 hours rather than 10. Work performed by carers in private homes and in the community providing personal or domestic assistance for elderly clients or clients with a disability is both physically and mentally taxing,¹³ which is compounded by the (often unrecognised and unpaid) travel involved in the performance of the work. During long shifts there may be little opportunity, or appropriate facility, for workers to take proper breaks and rest.¹⁴

Casual loading - clause 10.4(b); ED clause 11.2

48. Casual loading should be paid in addition to any overtime, weekend and public holiday penalty. That approach is consistent with the function of casual loading, which is to

¹³ Thames [6] – [7]; Lobert [21]

¹⁴ Thames [13] – [17]

compensate casual employees for the paid leave entitlements available to permanent employees which are forgone by reason of their less secure position. It is consistent with the “default approach” discussed by the Full Bench in the *Penalty Rates Decision* [2017] FWCFB 1001 (at [338]), which has the advantage of being simple and easy to understand, consistent with s134(1)(g).

49. The Full Bench in the *Penalty Rates Decision* noted, in considering the *Hospitality Award*, the distinct purposes of penalty rates and casual loadings, observing that:

[889] *As we have mentioned, the [Productivity Commission] Final Report makes reference to the interaction of penalty rates and casual loadings and concludes that:*

‘For neutrality of treatment, the casual loading should be added to the penalty rate of a permanent employee when calculating the premium rate of pay over the basic wage rate for weekend work.’

[890] *There is considerable force in the Productivity Commission’s conclusion.*

[891] *Casual loadings and weekend penalty rates are separate and distinct forms of compensation for different disabilities. Penalty rates compensate for the disability (or disutility) associated with the time at which work is performed.*

50. The Full Bench went on to hold that under the *Hospitality Industry (General) Award*, casual loading should be added to the Sunday penalty rate, because clause 13.1 in that award, concerning casual loading, did not state that the loading was intended to compensate employees for Sunday work. The Full Bench found that:

[895] *The distinct purpose of the casual loading is made clear from clause 13.1 of the Hospitality Award: ‘The casual loading is paid as compensation for annual leave, personal/carer’s leave, notice of termination, redundancy benefits and other entitlements of full-time or part-time employment’*

[896] *Importantly, the casual loading is not intended to compensate employees for the disutility of working on Sundays.*

[891] *In our view, the casual loading should be added to the Sunday penalty rate when calculating the Sunday rate for casual employees. We propose to adopt the Productivity Commission’s ‘default’ method. Accordingly, the Sunday rate for casual employees in the Hospitality Award will be 25 + 150 = 175 per cent.*

51. Clause 10.4(b) of the Award is relevantly identical to the corresponding provision in the *Hospitality Award*. It provides that: *‘A casual employee will be paid per hour calculated at the rate of 1/38th of the weekly rate appropriate to the employee’s classification. In addition, a loading of 25% of that rate will be paid instead of the paid leave entitlements accrued by full-time employees.*

52. It is clear from the terms of the clause that the casual loading is paid in substitution for the leave entitlements otherwise available to permanent employees and does not operate to compensate for any other aspect of the work, or its performance, including the inconvenient or unsociable time at which the work is performed.

53. For casual employees covered by the Award, the loss of a client or of a regular engagement presents an ongoing threat to the security of their employment and hours of work. Such employees take steps such as working more than one job in the industry to hedge against that risk.¹⁵

54. Clause 28.1(b)(iv), (see clause 18.1(b), exposure draft) provides that: *'Overtime rates payable under this clause will be in substitution for and not cumulative upon:*

(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.

55. Clause 26 provides:

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.'

56. Clause 34.2 provides that:

(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.

57. The HSU contends against the adoption of the above clauses in those terms, to the extent they operate to subsume casual loading within other penalties.

¹⁵ Lobert [17]

58. Neither overtime rates, weekend penalties, nor public holiday penalties are designed to compensate casual workers for the loss of leave entitlements. Casual employees should not be denied such compensation because they receive a payment in respect of another feature of the work.

Telephone allowance - clause 20.6; ED clause 16.3(d)

59. The current telephone allowance clause – as worded in both the exposure draft and current award – is outdated. The language of the clause refers to a landline telephone. The Commission would safely conclude that the vast bulk of employees now have mobile phones and that they are available to them during the course of their work.

60. Employers frequently require or expect care workers to be contactable by mobile phone when performing their duties. Employees commonly need to use smart phones to check their rosters, make notes on clients, take photographs, log onto company apps or portals, call ambulances or supervisors in emergencies, as well as answer calls about their availability for shifts, often at the last minute.¹⁶ Any employees required to use a phone for work in this way should receive a telephone allowance which reflects the cost of maintaining and using such mobile phone. Employees required to use a smart phone should be reimbursed for the cost of purchasing one if such purchase is necessary.

Uniform allowance and damaged clothing allowance - clause 20.2; clause 16.3(a)

61. Clause 20.2 of the Award provides for payment of an allowance for uniforms and their laundering. The reality of work in the industry, particularly for home carers and disability support workers, is that employees are not provided with uniforms, but wear their own clothes to work, which are at risk of being soiled or damaged in the course of their duties¹⁷.

62. The award should include a damaged clothing allowance, which takes into account that employees' clothing will frequently become damaged, soiled or worn given the nature of the work they do. Where such damage occurs, upon provision of proof of the damage, employees should be compensated at the reasonable replacement value of the damaged or soiled item of clothing.

¹⁶ Thames [23]; Waddell [33] – [34]; Wilcock [22] – [23]; Lobert [18] – [20]

¹⁷ Wilcock [11]; Waddell [36]

First aid certificate renewal - clause 20.4; ED clause 16.2

63. The evidence shows many employees engaged in disability support or home care roles are required to hold a current first aid certificates in their roles. Even where such qualification is not explicitly required, the holding of such qualification is likely to be beneficial for the employer in that the employee is better equipped to deal with a medical emergency. Where an employee is required to maintain their first aid certification, that they should be entitled to be reimbursed the costs of maintaining their certification by their employer.

24 hour care - clause 25.8; ED clause 13.8

64. The 24 hour care clause is unclear and rarely used. It should be removed, and extended periods of care dealt with in accordance with the provisions otherwise in the Award.

65. The clause leaves employees open to exploitation as:

- a) it does not compensate employees for the entire time they are required to be available for the performance of their duties. It is a fundamental principle of employment law that *“they also serve who only stand and wait”*. Where an employee is required by the employer and is not free to get on with their own chosen activities, they should be compensated for that as work;
- b) it does not specify what would happen if an employee works more than 8 hours in a 24 hour period;
- c) the sleepover clause provides that a sleepover span must be a continuous period of eight hours, and provides that if an employee’s sleep is interrupted and they are required to perform work, they are required to be paid overtime rates;
- d) there are no provisions under this clause for the employee to be provided a continuous number of hours for sleep, or what happens if the employee’s sleep is broken;
- e) 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 such a bed.

66. The clause does not meet the modern award objective. It provides for remuneration at a discounted rate during a period where an employee is required to be available for work.

Cancellation - clause 25.5(f); ED clause 13.5(g)

67. The Award enables home care workers to have their shifts cancelled or changed at 5.00 p.m. the day before a rostered shift without the employer being required to pay wages in respect of that cancelled shift.¹⁸ The brevity of the notice has the capacity to be disruptive for employees seeking to arrange other responsibilities around work commitments.

68. The capacity to cancel on such terms undermines the entitlement of part-time workers to regular and guaranteed days and hours of work. Employees should receive greater notice than that currently provided.

Recall to Work Overtime - clause 20.9; ED clause 16.2(d)

69. The Award provides (at clause 20.9) for payment of an on call allowance for employees who are required to be available for recall to duty.

70. Clause 28.4 regulates the payment for when an employee is recalled to work. Where an employee is recalled to work overtime after leaving the work, the employee is paid for a minimum of two hours work at the appropriate rate for each recall, but must be released if the work is completed within that period.

71. The award does not clearly identify whether employees required to perform additional work without attending the place of work are entitled to compensation. Many employees are now able to perform valuable work for the employer outside the employer's premises connecting remotely with employer systems. Such work should be compensated appropriately.

72. The HSU contends the Award should be amended to make clear that employees required to perform work out of hours should be compensated, with a minimum payment of one hour attached to such work.

¹⁸ Waddell [16] – [21]; Thames [11]

Sleepover – clause 25.7; ED clause 13.7

73. The clause should be amended to ensure appropriate facilities are provided when employees are required to perform a sleepover shift. Such shifts are compensated modestly.
74. The HSU initially foreshadowed a claim for review of the rate paid, as well as other substantive amendments, in respect of the performance of such shifts. No such claim is currently pressed, however, the HSU anticipates it will likely advance such a claim outside the scope of the 4-Year review process in future, and reserves its rights in that respect.

15 February 2019