Fair Work Commission: 4 yearly Review of modern awards

REPLY SUBMISSION

4 YEARLY REVIEW OF MODERN AWARDS: (AM2018/26) SOCIAL, COMMUNITY, HOME CARE AND DISABILITY SERVICES INDUSTRY AWARD 2010 - SUBSTANTIVE ISSUES

FILED ON BEHALF OF:

- **AUSTRALIAN BUSINESS INDUSTRIAL**
- **THE NSW BUSINESS CHAMBER LTD**
- **AGED & COMMUNITY SERVICES AUSTRALIA**
- **LEADING AGE SERVICES AUSTRALIA**

12 JULY 2019

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1. INTRODUCTION

1.1 This reply submission is made on behalf of:

(a) Australian Business Industrial (**ABI**);

(b) the New South Wales Business Chamber Ltd (**NSWBC**);

(c) Aged & Community Services Australia (**ACSA**); and

(d) Leading Age Services Australia Limited (**LASA**),

collectively, '**our clients**'.

1.2 Our clients have a material interest in the review of the *Social, Community, Home Care and Disability Services Industry Award 2010* (the **Award**).

1.3 This reply submission is filed in accordance with the Amended Directions of the Fair Work Commission (the **Commission**) issued on 28 June 2019 (the **Amended Directions**).

1.4 This reply submission addresses the outstanding union claims as listed in Attachment C to the Amended Directions, being claims advanced by the Health Services Union (the **HSU**), the United Voice and the Australian Services Union (the **ASU**), save that it does not address the claims relating to travel time by reason of the variation made to the Amended Directions on 11 July 2019.

2. OUR CLIENTS

2.1 ABI is a registered organisation under the *Fair Work (Registered Organisations) Act 2009* and has in excess of 4,000 members. ABI represents the interests of businesses in a variety of industries including the social, community, home care and disability services industry. Its primary role is to develop workplace policy and to shape debate on major workplace relations issues.

2.2 NSWBC is a recognised State registered association pursuant to Schedule 2 of the *Fair Work (Registered Organisation) Act 2009* and has some 18,000 members. NSWBC is the State's peak business organisation and represents all businesses from small enterprises to large corporations across a variety of industries including the social, community, home care and disability services industry.

2.3 ACSA is the leading peak body supporting church, charitable, other not-for-profit and government providers of residential care services, community care services and retirement living for older people in Australia.

2.4 LASA is the national peak body representing and supporting providers of age services across residential care, home care and retirement living. LASA's membership base is made up of private, not-for-profit, faith-based and government operated organisations providing care, support and services to older Australians.

3. LEGISLATIVE FRAMEWORK OF THE FOUR YEARLY REVIEW

3.1 The legislative framework applicable to the 4 Yearly Review has been considered in detail in *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 (**Preliminary Issues Decision**), and *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 (**Penalty Rates Decision**).

3.2 More recently, the legislative framework applicable to the 4 Yearly Review was also considered in *4 yearly review of modern awards – plain language re-drafting – standard clauses* [2018] FWCFB 4177 issued on 18 July 2018[1] and summarised in *4 yearly review of modern awards – Alpine Resorts Award* [2018] FWCFB 4984.

3.3 We rely on the summary of the applicable legal principles as set out in the reply submissions filed by our clients in this matter on 5 April 2019.[2]

3.4 We also refer to, and agree with, the summary contained in the document titled 'Legislative framework relevant to the Review' published by the Commission in this matter on 12 April 2019.[3]

[1] [2018] FWCFB 4177 at [3]-[13].
[2] See [2.1]-[2.4].
[3] Published pursuant to a Statement issued on 12 April 2019 ([2019] FWCFB 2514).

4. THE SOCIAL, COMMUNITY, HOME CARE AND DISABILITY SERVICES INDUSTRY

4.1 Our clients have previously addressed in a range of submissions the nature of the SCHCDS industry and the unprecedented change and structural reforms which various parts of the industry are currently undergoing. By way of example, we refer to:

(a) Part 3 of our reply submissions filed on 5 April 2019; and

(b) Part 3 of our submissions filed on 2 July 2019 in support of the claims being advanced by our clients in these proceedings.

4.2 We refer to and rely on those aspects of our previous written submissions in respect of the nature of the industry generally.

4.3 The SCHCDS industry is a diverse industry, both in relation to the functions of the organisations regulated by the Award and in relation to the characteristics of the work and working patterns that are required to undertake those functions.

4.4 Given the diversity of work that is regulated by the Award, it is unsurprising that there is diversity in the characteristics of the work and the working patterns that are required to deliver the various services.

4.5 In broad terms, the work arrangements regulated by the Award can be divided into two categories of work:

(a) the first type is work that is stable, consistent and certain, and where employees generally perform the work in the one work location (their primary place of work), and have relatively fixed working patterns (such as a working pattern of five days of 7.6 hour shifts performed at the same work location); and

(b) the second type is where the nature of the work, including the location, the time and the duration, is dynamic, variable and difficult to predict with any degree of certainty due to the client-driven factors that cause the working arrangements to be subject to regular change.

4.6 The first category of work can be described as the more 'centralised' areas of service provision where the particular service is made available by the business at a particular location and during specified operating hours that are determined by the business. Examples of this type of work include:

(a) community services that are provided from a fixed location - for example: community legal centres, family counselling centres, migrant support centres, health

and mental health referral centres, indigenous support centres, tenancy support centres, homelessness support centres, drug and alcohol rehabilitation support centres, social policy and advocacy centres, etc.);

(b) institutional, residential or group home services - for example: group homes that are established to provide 24 hour care to residents, with support workers employed to provide home-based care to those residents; and

(c) other services which are provided at a particular time that is determined by the service provider (i.e. the employer) - for example: a community transport service which runs to a fixed timetable or a schedule determined by the employer.

4.7 For the above types of services, the nature of the service is such that the employer can, subject to the usual commercial and market considerations, largely determine when, where and how the service is provided. Further, the nature of the work is such that the work can be organised by the employer into regular, predictable and lengthier segments of work.

4.8 As to the second category of work, this work includes the provision of individualised, customer-centric services in a non-institutional setting such as home care services or disability support services in the community.

4.9 In the disability service and home care service areas, businesses historically had a far greater level of control as to when, where and how these services were delivered. However, as a result of the NDIS and other reforms, the individual consumers (i.e. the customers, clients or 'participants') now have a greater level of choice and control over how these services are delivered to them.

4.10 To provide an example: where an employee with a disability was eligible to receive personal care services to assist him/her to get ready in the morning. Prior to the reforms, a service provider that was contracted to deliver that service would determine when the service was to be provided, and could therefore schedule that service in an efficient manner having regard to other operational factors. However, now under the NDIS or other reforms, the consumer is able to advocate for and request a time that is most suitable to him/her, which in many cases will be operationally less efficient for the service provider. This leads to the service provider having to make the following decision: provide the service at a time which is not operationally efficient for it, or decide not to provide the service.

4.11 While some of the work in the home care and disability services areas will continue to have a degree (or a large degree) of regularity and stability (e.g. a client who requires personal care

assistance in getting showered and dressed in the morning), there will still be occasions where those services will be changed or cancelled to meet the various needs of the individual.

4.12 And then there are the more variable items of support. For example, an individual with a disability who is eligible under the NDIS to receive a prescribed number of hours of support to facilitate his/her independent living skills is able to determine when they might wish to utilise those supports, which may be dependent on what they wish to do and when a particular event is on. For example, the consumer might wish to attend a football game one week on a Friday night which starts at 7pm, while the following week the football game may be on the Sunday afternoon at 2.30pm. Service providers are therefore required to be sufficiently agile to meet the needs of customers and deliver these services.

4.13 Further, the nature of this work is also often characterised by short segments of work, given that:

(a) the services provided (e.g. personal care) typically only take a short period of time to provide; and

(b) consumers tend to request shorter periods of service (to get more perceived "value" in terms of the support services they can receive).

4.14 While this is, in many respects, the typical market environment in which many businesses and industries operate, there are two significant differences in the SCHCDS industry:

(a) firstly, the prices that can be charged for certain services are in many cases regulated and fixed by the Government (or otherwise businesses are limited by the funding that is provided to deliver certain services); and

(b) secondly, most businesses in the SCHCDS industry are not-for-profit businesses with a deeply-embedded mission to support vulnerable members of the community, and so are not driven by the same commercial imperatives or motivations as other private sector businesses.

4.15 The above two factors lead to a dynamic whereby many service providers in the SCHCDS industry, when faced with the choice, will elect to provide services to consumers at a loss in order to meet the organisation's mission rather than not provide the service.

4.16 Given the diversity in the nature of the work across the industry, and the other unique characteristics of the industry, the task of striking the right balance and providing a fair and

relevant minimum safety net of terms and conditions for all Award-covered employees is no easy feat.

4.17 However, it ultimately requires a balancing exercise whereby the needs and interests of employees are balanced with the needs of employers in order to ensure a fair, sustainable and viable industry.

4.18 In this regard, it is critical that the Commission have regard to the impacts on service providers that any variation to the Award would have. There is considerable material before the Commission demonstrating that the industry is under significant financial pressure, and so any variation that is likely to further exacerbate these issues must be implemented in a way that minimises these adverse impacts.

4.19 To synthesise these observations into factual findings that the Commission is invited to make, our clients submit that the following uncontroversial findings can be made:

(a) since the Award was first introduced in 2010, the industry (or parts of it) have undergone significant and unprecedented structural change;

(b) the consumer-directed-care reforms have led to individual consumers having more choice and control over the delivery of services to them, including what, when, where, how and by whom those services are delivered;

(c) many of the care services provided to consumers in the home care and disability services sectors are for short periods of time, including for less than one hour;

(d) employers in the industry are predominantly not-for profit, mission-based businesses which are not driven by the same commercial imperatives or motivations of other private sector businesses, which leads them to make decisions based on community need rather than profitability;

(e) employers in the industry are often reliant on government funding and subject to price regulation, for which there is evidence of inadequacy of such funding in particular areas; and

(f) many service providers and the industry generally is under significant financial pressure arising from the decentralisation of the funding arrangements and the aggressive pricing models (for example, under the NDIS).

5. SUMMARY OF OUR CLIENTS' POSITION IN RELATION TO THE UNIONS' CLAIMS

5.1 The Unions' claims, if granted, would represent a truly significant alteration to the current safety net instrument.

5.2 If implemented, the changes sought by the Unions will have a significant deleterious impact on the viability of most businesses in the sector, which are already under significant pressure due to the inadequacy of the current funding models and the major structural reforms that have occurred over the last five years.

5.3 Already, many businesses are unable or barely able to sustain themselves and cover their operating costs.

5.4 Our clients do not have any philosophical objection to the Award providing for a 'fair and relevant' minimum safety net of terms and conditions. In this context, our clients have taken a reasonable approach to these proceedings and have either not opposed a number of claims (or aspects of certain claims), or have proffered alternative variations which rectify the particular mischief complained of by the Unions without damaging the sustainability of businesses.

5.5 The reality is that if the Award is varied in such a way that results in the labour costs of employers increasing, that variation will have a material adverse impact on employers and will threaten their sustainability and viability, unless there is some equivalent increase to the funding received by the business.

5.6 Equally, if the Award is varied in such a way that adversely affects employers' operational flexibilities, this change is likely to have a material adverse impact on the businesses' ability to deliver services to vulnerable members of the community. This will then undermine the objectives of the NDIS and other consumer-directed-care reforms and have a tangible adverse impact on the community.

5.7 While our clients oppose the vast majority of the variations that have been sought by the Unions, we acknowledge that there is a need to vary the Award in a number of areas to ensure that it meets the modern awards objective.[4]

5.8 For convenience, we set out a summary of our clients' position in relation to the Unions' claims. The reasons for these views are set out in further detail in separate sections of this submission below. However, by way of summary, our clients' position is as follows.

[4] Among the necessary variations are those that our respective clients are pursuing.

Minimum engagements

5.9 In respect of proposed changes to minimum engagements, our clients:

(a) are opposed to any change to the existing minimum engagements for casual employees;

(b) are opposed to the proposed introduction of any minimum engagement for full-time employees; and

(c) are opposed to the introduction of a uniform 3 hour minimum for all part-time employees.

5.10 However, our clients are not opposed to the introduction of minimum engagements for part-time employees, provided that:

(a) they are consistent with the existing minimum engagement periods for casual employees; and

(b) attendances for the purpose of staff meetings and training / professional development are subject to a minimum engagement of one hour.

Broken shifts

5.11 In respect of proposed changes to the broken shifts clause, our clients are opposed to the Unions' claims, save that our clients do not oppose:

(a) the introduction of a requirement that broken shifts only be worked where there is mutual agreement between the employer and individual employee; and

(b) that the existing payment under clause 25.6(b) be varied such that the applicable shift allowances be determined by either the starting time or the finishing time of the broken shift, whichever is the greater.

Overtime for part-time employees

5.12 Our clients are opposed to the proposed introduction of additional overtime entitlements for part-time employees when working agreed additional hours or when working more than 8 hours in a day.

5.13 However, our clients are not opposed to a variation that would provide a mechanism for reviewing and adjusting a part-time employee's hours of work where they are regularly working more than their guaranteed minimum number of hours. Further details of this proposition are outlined in paragraphs 8.26 to 8.29 below.

Overtime for casual employees

5.14 Our clients are opposed to the proposed changes to overtime for casual employees.

Phone allowance

5.15 Our clients are opposed to the proposed variation to the telephone allowance clause.

Clothing and uniform allowance and reimbursement

5.16 Our clients are opposed to the proposed variations in respect of clothing and uniform allowances.

Client cancellation

5.17 Our clients are opposed to the HSU's proposed variation to the client cancellation clause, and have proposed a separate variation to the client cancellation clause which we consider should be made.

Recall to work

5.18 Our clients are opposed to the proposed variation to the recall to work overtime clause, and have advanced a separate proposal to introduce a remote response duties compensation regime.

Roster changes

5.19 Our clients are opposed to the United Voice proposal in respect of roster changes.

5.20 However, our clients consider that the rostering provisions of the Award (particularly for part-time employees) require consideration to ensure they provide an appropriate balance between the interests of employees in having have sufficient certainty around working patterns, and the interests of employers in being able to continue to utilise part-time employment as a viable form of employment under the current operating environment.

5.21 This requires a consideration of the interaction between clauses 25.5(d) and 10.3(c), with a focus on ensuring that part-time employment is appropriately flexible to meet the needs of employers to prevent those terms acting as a bar to employing people on a part-time basis, and leading to a casualisation of the workforce.

6. CLAIM FOR CHANGES TO MINIMUM ENGAGEMENT PROVISIONS (S10)

The HSU claim

6.1 The HSU seek the introduction of uniform 3 hour minimum engagements into the Award for all classes of employee (full-time, part-time and casual). When considered across the various categories of employment, the claim involves:

(a) in respect of full-time employees, the introduction of a 3 hour minimum engagement in circumstances where the Award does not currently contain any minimum engagement;

(b) in respect of part-time employees, the introduction of a 3 hour minimum engagement for part-time employees, in circumstances where the Award does not currently contain any minimum engagement;

(c) in respect of casual employees working in the home care sector, an increase to the existing minimum engagement from 1 hour to 3 hours;

(d) in respect of casual employees undertaking disability services work, an increase to the existing minimum engagement from 2 hours to 3 hours;

(e) in respect of casual employees working in the crisis assistance and supported housing sector, an increase to the existing minimum engagement from 2 hours to 3 hours; and

(f) in respect of casual employees working in the family day care scheme sector, an increase to the existing minimum engagement from 2 hours to 3 hours.

6.2 The only area of the existing Award which the HSU do not seek to disturb is in relation to casual employees in the social and community services sector who do not perform disability services work. Otherwise the claim impacts every other category of employee.

6.3 In support of the variation, the HSU note that the Award does not presently contain any minimum engagements for part-time employees.

6.4 The submissions advanced in support of the variation are summarised as follows:

(a) first, the HSU submit that the existing protection for part-time employees at clause 10.3(c) is inadequate, has "little relevance", and is not "observed" or "honoured";[5]

[5] HSU submission at [26]

(b) second, where employees (such as disability support workers and home care workers) perform work at different or various locations on any given day (or throughout the course of the day), those employees make a "greater investment of time and effort" for the performance of each shift;[6]

(c) third, it is commonplace within the industry that employees are rostered to perform very short shifts;[7]

(d) fourth, it is commonplace that those very short shifts are interspersed with unpaid breaks in which employees are required to travel between clients;[8] and

(e) fifth, the majority of workers in the industry are employed on Award rates only.[9]

6.5 We address this claim below.

Recent consideration of minimum engagements: The Casual and Part Time Employment decision

6.6 Minimum engagement provisions across the modern awards system were recently the subject of detailed consideration by a Full Bench of the Commission as part of the common issues Casual and Part-Time Employment proceedings.[10]

6.7 Those proceedings primarily concerned a claim by the ACTU for the introduction of, *inter alia*, uniform 4 hour minimum engagements for both part-time and casual employees in approximately 108 modern awards. The SCHCDS Award was one of the awards covered by the ACTU claim.

6.8 In its decision of 5 July 2017 (the ***Casual and Part Time Employment Decision***)[11], the Full Bench rejected the ACTU claim in relation to 4 hour minimum engagements.[12] However, the Bench formed the provisional view that a 2 hour minimum engagement provision should be introduced for casual employees in respect of modern awards that contained no minimum engagement period for casual employees.[13] The Bench rejected the ACTU claim altogether in respect of minimum engagements for part-time employees.

[6] Ibid at [28]
[7] Ibid at [29]
[8] Ibid
[9] Ibid at [30]
[10] AM2014/196 and AM2014/197
[11] [2017] FWCFB 3541
[12] Ibid, at [407]
[13] Ibid, at [408]

6.9 Given that the SCHCDS Award already contained minimum engagement provisions for casual employees, the *Casual and Part Time Employment Decision* did not impact the SCHCDS Award in respect of minimum engagements.

6.10 Notwithstanding the above, the reasoning in the *Casual and Part Time Employment Decision* remains relevant. In their decision, the Full Bench considered the history and case law authorities on award minimum engagements, and made the following observations:

(a) modern awards contain a range of different minimum daily engagement periods for casual and part-time employees;[14]

(b) minimum engagement periods in awards have developed in an ad hoc fashion rather than having any clear founding in a set of general principles;[15]

(c) the issue of minimum engagements did not receive any systematic consideration during the award modernisation process which led to the establishment of the modern awards;[16]

(d) the award modernisation process largely preserved the predominant provisions concerning minimum engagements contained in pre-reform awards;[17]

(e) existing award minimum engagement provisions generally derive from provisions in pre-reform awards which were in most cases likely formulated by the agreement of the award parties;[18]

(f) where such pre-reform award minimum engagement provisions were derived by agreement of the award parties, it can be presumed that in doing so the parties took into account the circumstances of the industries in which they operated that prevailed at the time;[19] and

(g) in particular modern awards, it is clear that that the minimum engagement periods were intended to meet the peculiar circumstances of special types of work or workers. [20]

[14] At [404]
[15] At [399]
[16] At [346]
[17] At [402]
[18] At [404]
[19] Ibid
[20] Ibid

6.11 As to the rationale of minimum engagement provisions, the Full Bench observed at [399]:

> ...their fundamental rationale has essentially been 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).

6.12 However, the Full Bench then observed that there are a number of "important countervailing considerations" that need to be taken into account in establishing award minimum engagement requirements, namely:

(a) longer minimum engagement periods may prejudice those persons who wish to and can only work for short periods of time because of family, study or other commitments, or because they have a disability;

(b) the need for and length of a minimum engagement period may vary from industry to industry, having regard to differences such as in rostering practices and whether there are broken shifts;

(c) an excessive minimum engagement period may cause employers to determine that it is not commercially viable to offer casual engagements or part-time work, which may prejudice those who desire or need such work; and

(d) a minimum daily engagement period for part-time employees might not need to be as long as for casual employees, because part-time employees are likely to enjoy the greater security of a guaranteed number of weekly hours of work.[21]

6.13 The considerations outlined above should be taken into account and applied when dealing with the present claim.

[21] At [403]

6.14 The ultimate conclusions of the Full Bench in respect of the ACTU's claim for model 4 hour minimum engagement provisions for part-time and casual employees appears at paragraphs [407]-[408], the relevant aspects of which are extracted as follows:

> *[407] While a 4 hour minimum daily engagement might under some awards represent an appropriate balancing of the competing considerations to which have earlier referred, we do not consider that it can be adopted on the across-the-board basis proposed by the ACTU. That would not in all awards meet the modern awards objective in s.134, because we consider that it might have the counter-productive result of reducing workforce participation and social inclusion, and also because under some awards it may inhibit flexible modern work practices and the efficient and productive performance of work. The ACTU's claim for a standard 4 hour minimum engagement for casual and part-time employees is therefore rejected.*
>
> *[408] However, we do consider, having regard to those same competing considerations, that it is necessary for modern awards to contain some form of minimum engagement period for casual employees in order to avoid their exploitation in order to meet the modern awards objective. The modern awards listed in Attachment G contain no minimum engagement period at all. We have reached the provisional view that such awards should be varied to include a 2 hour minimum engagement period for casuals. However we will provide interested parties an opportunity to provide further submissions concerning this proposition.*

6.15 While the *Casual and Part Time Employment Decision* is of course relevant to the current proceedings, that decision does make it clear that ultimately the task of considering minimum engagements in modern awards needs to be undertaken having regard to the particular characteristics of the industry covered by the award.

6.16 We now turn to an award-specific consideration of minimum engagement provisions for the SCHCDS industry.

Background to minimum engagements in the SCHCDS industry

6.17 While there may not have been a systematic consideration of minimum engagement periods during the award modernisation process, the issue certainly was considered in detail during the course of the AIRC making of the SCHCDS Award.

6.18 During that process, a number of party draft Awards were submitted to the AIRC for consideration. For example:

(a) Jobs Australia submitted a draft *Social, Community and Employment Services Award 2010* on 24 July 2009 which was proposed to have a broader coverage including the labour market assistance industry, and which proposed a four hour minimum engagement for full-time employees and a two hour minimum engagement for part-time, casual and sessional employees;[22]

(b) AFEI submitted a draft *Social and Community Services Employees Award 2010* which proposed a two hour minimum engagement for part-time and casual employees, and no minimum engagement for full-time employees;[23] and

(c) the ASU submitted a draft *Social, Community, Disability and Employment Services Industry Award 2010* which proposed a three hour minimum engagement for casual employees, and no minimum engagement for full-time or part-time employees.[24]

6.19 When the Exposure Draft was published on 25 September 2009, it contained a three hour minimum engagement for casual employees, and no minimum engagement for the other categories of employment.[25]

6.20 Following the publication of the Exposure Draft, a considerable volume of submissions was then received by the AIRC which addressed the proposed three hour minimum engagement for casual employees. Put simply, employers and employer parties forcefully objected to a proposed three hour minimum engagement, particularly in relation to the home care and disability sectors.

6.21 For example, the Aged Care Employers (consisting of our clients, ACSA and LASA) submitted that the casual minimum engagement should be reduced from three hours to one hour in respect of home care employees.[26] The Aged Care Employers submitted:

> [9] The concept of a three hour minimum payment to a casual employee is foreign to many home and community care projects and services. It will be unfunded.
>
> [10] It will also be contrary to client needs and schedules. In many cases clients only require less than one hours assistance with medication administration, or early morning or evening care/assistance. The flow-on effect of a three hour minimum payment is that employers will be forced to juggle and change client schedules (against client wishes) so as to ensure the full three hour payment is allocated to a

[22] See clause 21.7.
[23] See clauses 10.2 and 10.3.
[24] See clause 10.4(c).
[25] See 10.4(c) of the Exposure Draft, published 25 September 2009.
[26] Submission of Aged Care Employers, 19 October 2009 at [2].

client and/or working time. Given that the home and community care industry relies so heavily on achieving client satisfaction as a measure of its effectiveness, it is wholly inappropriate to impose three hour minimum starts on both providers and their clients. A one hour minimum is consistent with sector and client needs and Clause 10.4(c) must be amended accordingly. Such an outcome has already been determined in respect of homecare employees under the Aged Care Award.

6.22 ABI also lodged a submission raising similar concerns in its submission of 19 October 2009:

> 24. Sub-clause 10.4 provides for a minimum start of three hours for casuals. This condition creates an impediment to the flexibility demanded by the industry, and is problematic for the reasons that follow.
>
> 25. Many of the services provided by this industry, including but not limited to, respite and home-care services, are carried out by casual employees. The flexibility associated with casual work is a critical feature attracting many employees to the industry.
>
> 26. The nature of the services provided vary. However, there is typically strong demand for assistance at the beginning and end of the day. For example, many clients require assistance getting ready before school and/ or work and preparing for bed in the evenings. The nature of this care would not typically require three hours.
>
> 27. Nor, in most cases, can the same employee provide this type of home assistance to more than one (or perhaps two clients who are geographically close) because clients cannot be left unable to start (or finish) their day well into the morning (or night).
>
> 28. Further, the three hour minimum requirement contained in the Exposure Draft is inconsistent with a number of programmes common to the industry. These include (but are not limited to):
>
> - Attendant Care - support provided to people with a physical disability to meet the requirements of their personal care needs. This is limited to a maximum of 35 hours per week and divided roughly into 5 hours per day - usually 2-3 hours in the morning with either 2 x 1 hour shifts at other times of the day or 1x 2 hour shift in the evening;

- Veterans Homecare - provision of a maximum of 6 hours per week in personal care, with domestic assistance and respite that is usually provided in 1 or 2 hours shifts;
- Commonwealth Respite for Carer's - allocation of regular 1 to 2 hours shifts to support a family member who is the primary carer for someone elderly or with a disability;
- HomeCare NSW - provision of 1 and 2 hours shifts to provide domestic assistance, personal care or respite for the frail elderly or those with a disability.

29. The ABI draft [consisting of a one hour minimum engagement for casual employees] restores the necessary flexibility with respect to casual employment.

6.23 A flood of other submissions were received which also raised the same or similar concerns with a proposed three hour casual minimum engagement. Without being exhaustive, these included submissions from the following interests:

(a) AFEI;[27]

(b) Business SA;[28]

(c) the Attendant Care Industry Association of NSW Inc;[29]

(d) the Disability Trust;[30]

(e) the Hills District Nursing Service;[31]

(f) Mamre Association Inc;[32]

(g) the Queensland Community Services Employers' Association (QCSEA) Inc;[33]

(h) Interchange Respite Care (NSW) Inc;[34]

(i) Spinal Cord Injuries Australia;[35]

[27] Submission dated 16 October 2009
[28] Submission dated 16 October 2009.
[29] Submission dated 14 October 2009.
[30] Submission of 15 October 2009; further submission of 16 November 2009.
[31] Submission dated 16 October 2009.
[32] See http://www.airc.gov.au/AIRISYS/isysquery/0fcad409-7bbd-4587-b3de-251415418e46/21/doc/Mamre_social_ED.pdf#xml=http://www.airc.gov.au/AIRISYS/isysquery/0fcad409-7bbd-4587-b3de-251415418e46/21/hilite/
[33] Submission of 16 October 2009.
[34] Submission of 15 October 2009.

(j) WorkAbility;[36]

(k) the Catholic Commission for Employment Relations;[37]

(l) the Victorian Hospitals' Industrial Association;[38]

(m) Lifeline Community Care Queensland;[39] and

(n) Disability Alliance.[40]

6.24 The issue of minimum engagements for casual employees was also subject to further consideration and oral submissions during a Full Bench hearing on 5 November 2009, as recorded on transcript.

6.25 Finally, there is clear evidence that the issue of minimum engagement periods for casual employees was specifically considered at the time the Award was made. In the decision of *Award Modernisation* [2009] AIRCFB 945, the Full Bench specifically referred to minimum engagement provisions for casual employees, and observed at [83] that:

> [83] The minimum period of engagement for casuals has been altered to take into account the different sectors of this industry...

6.26 While there is an absence of detailed reasoning in *Award Modernisation* [2009] AIRCFB 945 behind the Full Bench's decision to set the casual minimum engagements in the manner they did, the only rational conclusion available is that the Full Bench was persuaded by the submissions put by the employer parties.

6.27 Ultimately, the reasons which were advanced by employer parties during the award modernisation process in support of short minimum engagement periods remain just as relevant today, if not more so following the implementation of consumer directed care reforms. We rely on the matters raised in those submissions.

6.28 There is no proper basis to depart from the conclusions reached by the Full Bench when the Award was made.

6.29 We now address the HSU's proposal in respect of full-time and part-time employees.

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[35] Submission dated 14 October 2009.
[36] Submission dated 13 October 2009.
[37] Submission of 16 October 2009.
[38] Submission of 16 October 2009.
[39] Submission dated 19 October 2009.
[40] Submission of 15 October 2009.

Proposal for a 3 hour minimum engagement for part-time employees

6.30 When the Award was made, the AIRC decided not to provide minimum engagements for part-time employees. This is despite, as addressed above, the fact that the issue of minimum engagements received considerable focus during the making of the Award.

6.31 The issue of minimum engagements for part-time employees (or lack thereof) was then the subject of re-consideration by the Commission during the 2 yearly review of the Award. In those proceedings, the ASU sought the introduction of a 3 hour minimum engagement for part-time employees across all streams of the Award.

6.32 In support of their application, the ASU submitted that the absence of a minimum engagement period for part-time employees was at odds with both the "critical mass" of relevant pre-reform awards as well as the position provided for other employees under the Award.

6.33 However, in the Commission's decision of 27 June 2013[41], VP Watson dismissed the application and relevantly held that:

> [19] It is clear that in common with many other awards, the AIRC deliberately did not insert a minimum engagement period for part-timers in this award. It was obviously influenced by the variable position under predecessor awards. In my view the introduction of a minimum engagement period for part-time employees as part of this review would require a strong case that evaluated the impacts on employees and employers across the various sectors covered by the award. The application fails to meet this standard.

6.34 The above aspect of the VP Watson Decision was not challenged by the ASU on appeal.

6.35 While the Commission rejected the application for minimum engagements for part-time employees during the 2 yearly review process, it is relevant that the Commission decided to grant another of the ASU's claims relating to part-time employees.

6.36 VP Watson granted the ASU's claim for the insertion of a provision that is now clause 10.3(c) of the Award, which imposes an obligation on employers to agree with part-time employees in writing on an agreed pattern of work (including number of hours to be worked, the days on which work is to be performed, and the starting and finishing times on each day) which can then only be varied by written agreement.

[41] [2013] FWC 4141

6.37 In granting that variation, VP Watson considered the absence of minimum engagement provisions as a particularly influential factor leading to his decision. In the decision, VP Watson held:

> [20] That part of the application seeking a requirement that part-time arrangements be agreed in writing prior to commencing employment is a common award provision. It requires employees to be given clear information as to the basis of their employment when they are engaged. I consider that the case for such a clause is strong, especially when there is no award minimum engagement period. In my view the concerns of the employers can be allayed by standard procedures that comply with the clause, such as those that have been developed for employers covered by similar provisions in other awards. I will make this change prospective to allow employers to prepare for the change. If significant practical problems emerge an appropriate variation can be sought. I will insert the clause sought by the ASU with effect from 1 August 2013. [emphasis added]

6.38 It follows from the reasoning of VP Watson that if minimum engagements for part-time employees were to be inserted into the Award, the case for maintaining clause 10.3(c) is weakened, and should be reconsidered.

6.39 This is the case now, particularly given the submissions that have been advanced by the HSU as to the operation of clause 10.3(c).[42] For example, the HSU assert that clause 10.3(c) "appears to have little relevance", despite the HSU opposing a claim advanced by some of our clients in the Casual and Part-Time Employment proceedings to vary clause 10.3(c) for that very reason.

6.40 In our submission, any proposal to introduce a minimum engagement for part-time employees should not occur without a contemporaneous review and reconsideration of clause 10.3(c).

6.41 Another matter should also be noted. To the extent that the Commission is minded to introduce minimum engagements for part-time employees, the observation of the Full Bench in the *Casual and Part Time Employment Decision* at [403] is relevant. There, the Full Bench observed:

[42] See HSU submission at [26].

a minimum daily engagement period for part-time employees might not need to be as long as for casual employees, because part-time employees are likely to enjoy the greater security of a guaranteed number of weekly hours of work.

6.42 This observation is of course applicable to the SCHCDS Award, where part-time employees have the security of permanent employment, guaranteed hours, and a pre-agreed pattern of work as per clause 10.3(c).

Our clients' position in relation to minimum engagements for part-time employees

6.43 It is notable that the HSU acknowledge that it is "commonplace within the industry that employees are rostered to perform very short shifts".[43] This is of course true. Indeed, it is a fundamental feature of the industry, brought about by the fact that customers (particularly in the home care and disability services sectors) require care services of a short duration to assist them to undertake basic activities such as showering, cooking, medication prompting, getting dressed, etc.

6.44 Given that many of these services involve a short engagement of anywhere between 30 minutes and 2 hours, employers are required to effectively bundle a series of different customer service engagements together in order to 'build' a longer shift for employees. It is of course in the employer's interest to build a shift that is attractive to those employees who do not require or desire the flexibility of shorter shifts (as some employees do).

6.45 This is particularly challenging in regional and rural and remote areas where there is a lack of scale or where clients are geographical dispersed. The reality is that in some cases, it is simply not possible to bundle multiple separate customer engagements together to create a three hour shift.

6.46 This fundamental feature of the industry is precisely the reason why the Commission should not introduce a three hour minimum engagement. If a three hour minimum engagement was to be implemented, it would have a very significant adverse impact on employers. It will also seriously disadvantage members of the community who access services from these employers, as employers would not be prepared to continue delivering support services of a short duration, which is contrary to the objectives of the NDIS and other consumer directed care initiatives. It will also adversely affect employees who prefer short shifts to accommodate their other family, caring or study commitments.

[43] Ibid at [29]

6.47 In summary, our clients are not opposed to the introduction of minimum engagement provisions for part-time employees, subject to two conditions:

(a) they reflect the existing minimum engagements for casual employees; and

(b) there be a one hour minimum engagement applied for casual and part-time employees where they are required to attend staff meetings and training / professional development.

6.48 That is, our clients would not be opposed to:

(a) a one hour minimum engagement for part-time home care employees;

(b) a two hour minimum engagement for part-time employees undertaking disability services work;

(c) a two hour minimum engagement for part-time employees in the crisis assistance and supported housing sector; and

(d) a two hour minimum engagement for part-time employees in the family day care scheme sector; and

(e) a three hour minimum engagement for part-time employees in the SACS sector (excluding disability services).

6.49 We now turn to full-time employees.

Proposal for a 3 hour minimum engagement for full-time employees

6.50 Put simply, there is no merit basis for the introduction of a minimum engagement period in respect of full-time employees.

6.51 Under the current terms of the Award, full-time employees must be engaged to work 38 hours per week or an average of 38 hours per week, and the way in which those hours can be worked are conditioned by a range of requirements, including that:

(a) shifts must not exceed eight hours each, or up to 10 hours by agreement;

(b) the employee must be free from duty for not less than two full days in each week or four full days in each fortnight or eight full days in each 28 day cycle; and

(c) the employee must be given a break of not less than 10 hours between the end of one shift or period of work and the start of another.

6.52 That being the case, the prospect of full-time employees performing shifts of a short duration would be very remote, and there is certainly no evidence at all before the

Commission that would support a finding that full-time employees are affected by unreasonably short shifts.

6.53 Further, even if there was such evidence (which is denied), the fact of the employee having a guarantee of 38 hours' work and pay per week eliminates or satisfactorily ameliorates any adverse impact.

6.54 The claim should be dismissed.

7. CLAIMS TO VARY THE BROKEN SHIFTS PROVISION (S35, S36, S37)

7.1 There are various claims on foot in respect of clause 25.6 of the Award.

7.2 While there is a degree of overlap between the three Union claims, each of the Union claims is different, as summarised below.

The HSU claim (S35)

7.3 The HSU seek to materially vary the broken shifts provision (clause 25.6) of the Award. The proposal involves varying the existing clause in at least six respects:

(a) firstly, they seek to limit the clause to part-time and casual employees, thereby preventing full-time employees from being permitted to work broken shifts;

(b) secondly, they seek to impose a limit of one break per broken shift;

(c) thirdly, they seek to introduce a requirement that broken shifts only be worked where there is mutual agreement between the employer and individual employee

(d) fourth, they seek to introduce a requirement that each portion of a broken shift be subject to the proposed 3 hour minimum engagement;

(e) fifth, they seek that travel time between broken shifts be treated as time worked and be paid at the appropriate rate; and

(f) sixth, they propose that the shift allowances be determined by either the starting time or the finishing time of the broken shift, whichever is the greater.

7.4 This reply submission does not deal with the travel time aspects of the HSU's claim.

The United Voice claim (S37)

7.5 The United Voice seek a different variation to clause 25.6, which involves two main components:

(a) firstly, they seek to impose a limit of two portions to a broken shift; and

(b) secondly, they seek a variation to the way in which the existing loading is determined.

The ASU claim (S36)

7.6 The ASU seek the introduction of a 15 percent loading to be paid when employees work a broken shift. The loading is expressed to be payable not in respect of each hour worked during a broken shift, but in respect of the entire duration of the broken shift from

commencement of the first portion of work to the cessation of the final portion of work (inclusive of breaks).

7.7 Further, the loading is proposed to be payable in addition to the existing requirement that penalty rates and shift allowances in accordance with clause 29 be payable, with shift allowances being determined by the finishing time of the broken shift.

Grounds relied upon by the Unions in support of the proposed variations

7.8 In relation to the HSU claim, the grounds relied upon in support of the variations are summarised as follows:

(a) firstly, the HSU assert that the broken shifts provision is "manifestly open to exploitation" in the absence of appropriate minimum engagement provisions;[44]

(b) secondly, the capacity for multiple breaks during a broken shift can result in:

(i) employees having to undertake work on a non-consecutive basis over an extended period of time in order to generate a reasonable amount of earnings;[45]

(ii) employees being paid only for a proportion of the time that is expended in performing the work required by the employer;[46] and

(iii) employees can endure stretches of "dead" time waiting time during the course of the day.[47]

7.9 In relation to the United Voice claim, the grounds relied upon in support of their claim include:

(a) that it is common for employers to only provide employees with a few paid hours of work in several broken shifts over a long span of hours;[48]

(b) that the impact of broken shifts on employees is compounded by other "issues" within the Award, including the lack of minimum engagements for part-time employees, and the practice of some employers requiring employees to travel to the next work location during unpaid break periods;[49]

[44] HSU submission at [36]
[45] Ibid at [37]
[46] Ibid
[47] Ibid
[48] United Voice submission at [114]
[49] Ibid at [115]

(c) a submission that broken shifts are disruptive to the lives of employees;[50] and

(d) a submission that the current method of calculating shift premiums is anomalous and results in employees not receiving adequate additional remuneration for working shifts.[51]

7.10 In relation to the ASU claim, the rationale for the proposed 15 percent loading is said to be to compensate employees for the "disutility" or "disability" associated with working broken shifts.[52] The ASU also submit that:

(a) the existing clause provides employers with "exceptional" rostering flexibility without significant restriction or compensation;[53]

(b) other features of the Award contribute to provide for significant rostering flexibility with little restriction;[54]

(c) the broken shifts provision in the Award is out of sync with broken shift provisions in other Awards.[55]

7.11 Our clients' response to these Union claims is set out as follows.

Background to the broken shifts clause

7.12 Under the current Award, clause 25.6 provides for certain types of work[56] to be undertaken on a non-consecutive basis.

7.13 Clause 25.6(b) currently provides for broken shifts to be paid at "ordinary pay with penalty rates and shift allowances in accordance with clause 29—Shiftwork, with shift allowances being determined by the finishing time of the broken shift".

7.14 The effect of clause 25.6(b) is that employees working broken shifts are shiftworkers for the purposes of the Award and receive the applicable shift loading in respect of the broken shift.

7.15 There is a very clear and compelling basis for the Award to permit the working of broken shifts. Due to the nature of the work being undertaken by support workers, there is a very clear pattern of service/labour demand whereby customers wish to receive services for a

[50] United Voice submission at [126]
[51] Ibid at [147] to [148]
[52] ASU submission at [18]
[53] Ibid at
[54] Ibid at [23]
[55] Ibid at [31] to [32]
[56] Clause 25.6 only applies to employees in the home care stream and employees in the social and community services stream when undertaking disability services work.

short period of time in the morning, and then again for a short period in the evening. There is also evidence that supports a third peak in demand around midday.

7.16 Accordingly, the broken shifts clause allows employees to provide services on a non-continuous basis to meet customer demand. Absent such a provision, employees would not be able to be given the same number of hours' work, or alternatively employers will not be able to meet customer needs, which is inconsistent with the consumer directed care reform agenda.

Consideration of the broken shifts clause during the 2 yearly review

7.17 The broken shifts provision was considered during the 2 yearly review. In that matter, the ASU sought to vary clause 25.6 to remove the availability of broken shifts in the disability services sector. In the alternative, the ASU sought the introduction of a broken shift allowance.

7.18 In that review process, Vice President Watson concluded that he was not satisfied that a case had been made out to modify the existing arrangements.

7.19 Ultimately, the unions (and particularly the ASU) are simply seeking to re-litigate a matter which had previously been advanced and rejected.

7.20 That said, we respond to the contentions advanced in support of the claims.

Other changes can remedy any concern that may exist with the broken shifts provision

7.21 Our clients accept that the current Award requires amendment to ensure that employees are not exposed to practices which do not provide them with a fair and relevant safety net of terms and conditions. However, our clients do not accept that there is any need to materially alter the broken shifts provision.

7.22 Rather, our clients consider that the issues identified by the unions can be properly addressed and rectified by:

(a) making some modest adjustments to the broken shifts provision (as detailed below);

(b) addressing the concerns around travel time; and

(c) by introducing appropriate minimum engagements for part-time employees in the form suggested in paragraphs 6.47 and 6.48 above.

7.23 This approach is at least in part acknowledged by United Voice, who contend in their written submissions that "the impact of broken shifts on employees is compounded by other 'issues' within the Award, including the lack of minimum engagements for part-time employees, and

the practice of some employers "requiring employees to travel to the next work location during unpaid break periods".[57]

7.24 We now turn to the specific claims advanced by the unions and our position with respect to same.

Response to the Union claims

Response to the HSU claims

7.25 Firstly, in respect of the HSU proposal to limit the application of the broken shifts clause to part-time and casual employees, the basis for that proposal is not clear. The HSU submissions do not appear to address this issue at all.

7.26 In respect of the proposal to impose a limit of one break per broken shift such that a broken shift cannot consist of more than two portions of work, our clients are opposed to this claim for a number of reasons. Firstly, such a variation would reduce operational flexibility and prevent employers from having employees work a broken pattern of work across the course of a day to meet customer needs. Secondly, the variation would likely have the effect of reducing the number of hours that employers can offer to employees, thereby reducing their hours of work and take home pay.

7.27 That said, to the extent that the Commission was minded to impose a restriction on the number of portions of a broken shift, our clients would not oppose a variation to the Award that would only permit a broken shift of more than two portions of work to be worked by agreement with an individual employee.

7.28 Our clients are not opposed to the proposal to introduce a requirement that broken shifts only be worked where there is mutual agreement between the employer and individual employee.

7.29 In relation to the proposal that a three hour minimum engagement be applied to each portion of a broken shift, our clients oppose that variation. The minimum engagement applicable to a broken shift should be considered in the context of the recent findings in the *Casual and Part Time Employment Decision* and the previous authorities considered in that decision. For example, the notion of a "daily" minimum engagement had effectively developed to ensure employees received a sufficient level of remuneration to justify their attendance at work. On that logic, if the Commission has determined an appropriate minimum daily engagement, it is unclear why that period would apply twice if a broken shift

[57] United Voice submission at [124]

is work. This is particularly so given that the broken shifts provision of the Award already provides for a shift loading.

7.30 In relation to the proposal that the shift allowances be determined by either the starting time or the finishing time of the broken shift, whichever is the greater, our clients do not oppose this variation.

Response to the United Voice claim

7.31 In respect of the proposal to impose a limit of one break per broken shift such that a broken shift cannot consist of more than two portions of work, we refer to paragraphs 7.26 and 7.27 above.

7.32 In relation to the proposal that the shift allowances be determined by either the starting time or the finishing time of the broken shift, whichever is the greater, our clients do not oppose this variation (as stated in paragraph 7.30 above).

Response to the ASU claim

7.33 Our clients are opposed to the introduction of a 15 percent loading to be paid when employees work a broken shift.

7.34 While our clients do not cavil with the contention that there is likely to be a degree of disutility associated with working a broken shift for some employees, it is not appropriate that a 15 percent loading be applied *in addition* to the existing penalty rates and shift allowances.

7.35 Further, it is not fair or reasonable that the 15 percent loading be payable in respect of the entire duration of the broken shift from commencement of the first portion of work to the cessation of the final portion of work (inclusive of breaks and unpaid non-working time). This is plainly unreasonable.

7.36 By way of illustration, a common working pattern is for employees to perform a 2-3 hour shift in the morning, and then have a large break from work until the afternoon or evening where a further period of work is performed. The gap between the two portions of the broken shift may in many cases be in the range of 6-8 hours, which provides an ample period of time for employees to engage in leisure activities, go home, rest, or in some cases perform work in secondary employment. It is not fair or reasonable for an employer to be required to pay a 15 percent loading in respect of a 12 hour span, in circumstances where up to 8 hours of that period the employee was not at work.

7.37 In respect of part-time employees, the alleged 'disutility' of working broken shifts needs to be assessed against the requirement at clause 10.3(c) that their pattern of work be agreed in writing on commencement of employment. In light of that existing protection, any disutility arising from a broken shift is largely mitigated by the employee having agreed on commencement of employment to the pattern of work and by having advanced notice of that fixed pattern of work.

7.38 Lastly, there is no merit basis for casual employees to receive an additional loading for working broken shifts. Casual employees receive a casual loading which compensates for working irregular hours. Further, casual employees are under no obligation to accept shifts that they do not wish to take on.

8. HSU CLAIM RELATING TO OVERTIME FOR PART-TIME AND CASUAL EMPLOYEES (S50)

The HSU claim

8.1 The HSU seek the introduction of new overtime benefits for part-time and causal employees. Under the proposed variation:

(a) part-time employees would be entitled to overtime when working in excess of their rostered hours; and

(b) both part-time and casual employees will be entitled to overtime when working in excess of 8 hours per day.

8.2 Under the current Award, no overtime is payable where part-time employees agree to work additional hours (i.e. additional to their rostered hours), save for where they work in excess of 10 hours per day, 38 hours in any week or 76 hours in any fortnight.[58] In respect of casual employees, the current Award provides for overtime where they work in excess of 10 hours per day, 38 hours in any week or 76 hours in any fortnight.[59]

8.3 The grounds relied on by the HSU in support of the variation consist of the following:

(a) the absence of overtime rates for part-time employees working additional hours creates a "structural incentive" on the part of employers to underestimate the number of hours of work required of the employee[60] and utilise part-time workers like a pool of casual employees[61];

(b) work performed by carers in private homes and in the community providing personal or domestic assistance is both physically and mentally taxing;[62]

(c) the taxing nature of the work is compounded by the (often unpaid) travel involved;[63] and

(d) during long shifts, there may be little opportunity, or appropriate facility, for proper rest breaks.[64]

Response to the HSU claim

8.4 It is difficult to understand the rationale for this claim.

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[58] See clauses 28.1(b) (i), (ii) and (iii)
[59] See clauses 28.1(b) (i) and (ii)
[60] HSU submission at [46]
[61] Ibid
[62] Ibid at [47]
[63] Ibid
[64] Ibid

8.5 Many of the concerns raised by the Unions in these proceedings revolve around underemployment and their members having to work a particular pattern of work that is too short, or not efficiently allocated, or where their members are not able to secure as many hours of work as they would like. There is also evidence of employees being engaged in secondary employment in order to secure a sufficient amount of work. By way of example, the Unions assert that:

(a) there are high levels of underemployment within the sector, necessitating secondary employment;[65]

(b) since the commencement of the Award, there has been an increase in the proportion of care workers employed for fewer hours;[66] and

(c) there is a need for employees to work additional hours to maximise their incomes.[67]

8.6 The HSU claim runs counter to the above concerns.

8.7 The proposed variation will do nothing to address the above concerns, and will only have an adverse affect on both employees and employers.

8.8 The claim should be dismissed for the following reasons:

(a) the claim for overtime entitlements for hours worked in excess of 8 hours per day is inconsistent with the overall modern awards system and the position in other comparable modern awards;

(b) a case has not been made out on the evidence that would justify the introduction of overtime after 8 hours (rather than the existing position which is 10 hours);

(c) a very likely consequence of the variation would be a reduction in the working hours of part-time and casual employees, as employers will adopt rostering practices in order to avoid triggering overtime entitlements; and

(d) the mischief which the claim intends to seek to largely address can be more effectively dealt with in a more appropriate way by implementing certain safeguards to prevent employers from artificially underestimating the number of hours of work that can be given to part-time employees.

8.9 These matters are expanded on as follows.

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[65] See United Voice submission at [133]
[66] See HSU submission at [15]
[67] See ASU submission at [27]

Proposal to introduce overtime for work in excess of 8 hours in a day

8.10 The proposal to introduce overtime rates for work performed in excess of 8 hours in a day is inconsistent with the current modern awards system, and does not accord with the position in comparable modern awards. By way of example:

(a) the *Nurses Award 2010*, under which caring work of a similar nature is performed, provides for 10 hours to be worked before overtime rates are payable;[68]

(b) the *Health Professionals and Support Services Award 2010,* under which caring work of a similar nature is performed, provides for 10 hours to be worked before overtime rates are payable;[69]

(c) the *Supported Employment Services Award 2010,* under which employees responsible for the supervision of employees with a disability are employed, provides for 10 hours to be worked before overtime rates are payable;[70]

(d) the *Aged Care Award 2010*, under which caring work of a similar nature is performed, provides for 10 hours to be worked before overtime rates are payable;[71] and

(e) the *Local Government Industry Award 2010* provides for between 10 and 12 hours to be worked before overtime rates are payable.[72]

8.11 The current Award position cannot be said to be inconsistent or out of sync with other comparable awards such as those set out above. Further, while the work of many employees covered by the Award may well be physically or mentally challenging, it cannot fairly be said to be any more taxing than the work of nurses, health professionals, employees supervising supported employees, and the work of other employees doing comparable work.

8.12 Significantly, it should be noted that the *Local Government Industry Award 2010* covers employees of local government employers who perform community care work, which is essentially the same work as that regulated by the SCHCDS Award.

8.13 It is also notable that other inherently dangerous industries such as the road transport industry permit a greater number of hours to be worked before overtime rates are triggered.[73]

[68] Clause 21.2
[69] Clause 23.3
[70] Clause 21.5
[71] Clause 25.1
[72] Clause 21.5.

8.14 No persuasive evidentiary case has been advanced which would support a conclusion that the current Award position is inadequate.

Proposal to introduce overtime for agreed additional hours by part-time employees

8.15 The proposal to introduce overtime entitlements for part-time employees working additional hours is a significant claim, and is a significant departure from the current Award position.

8.16 Since its introduction in 2010, the Award has allowed for part-time workers to work hours that are in excess of their rostered hours, by agreement. Where there is such an agreement, no overtime is payable in respect of those hours.

8.17 This has been a longstanding and well-established arrangement in the SCHCDS industry.

8.18 This well-entrenched industrial standard recognises the lack of certainty in demand for labour and the variability in working hours that naturally occurs when providing care services to individuals whose circumstances are subject to change.

8.19 It also provides a mechanism for employees to be given additional hours without the structural disincentive of triggering overtime payments. The simple reality is that employers would not readily offer employees additional hours if it would trigger an additional cost.

Implications of the proposed variations

8.20 Giving the funding constraints plaguing the industry, employers do currently and will continue to actively seek to avoid or minimise the number of overtime hours that are worked/paid.

8.21 As an example, the NDIS pricing system does not factor in overtime rates of pay, which means that if employers are required to pay overtime rates for particular hours of work, they cannot recover that cost from the participant or the NDIA. The effect of this would very likely be that the particular service is rendered unprofitable and cost accreting for the employer.

8.22 There is no reasonable basis for the imposition of overtime penalties for work in excess of 8 hours in a day, or where part-time employees agree to work additional hours, when one properly considers both:

(a) the obvious adverse implications for employers; and

(b) the very likely adverse implications for employees (as detailed below).

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[73] *Road Transport (Long Distance Operations) Award 2010*, clause 20.2(b)(ii).

8.23 The very likely implication of this claim for most Award-covered businesses in the SCHCDS industry would be that employers would take all available steps to ensure that part-time and casual employees never work more than 8 hours in a day. For those employees who are currently receiving shifts of more than 8 hours' duration, the employer will look at alternative options regarding the arrangement of work in order to avoid triggering overtime payments. This is borne out in the evidence of service providers filed in these proceedings.

8.24 Equally, employers would have no choice but to dramatically adjust their business models to avoid part-time employees triggering overtime payments for agreed additional hours.

8.25 In our submission, to the extent that the Commission considers that a variation is necessary in this regard, there are more effective ways to remedy the issues raised by the union which will not create chaos for a large part of the industry. This is addressed below.

Addressing the HSU's concerns around part-time employee hours

8.26 To the extent that the Commission forms the view that the Award contains any 'structural incentive' to set part-time employees' hours of work at artificially low levels, one approach to addressing that issue might be to introduce a mechanism for reviewing employees' hours upon request and adjusting their guaranteed hours to a more realistic reflection of their actual working patterns, subject to an ability for employers to refuse on reasonable business grounds.

8.27 This approach has been adopted in the context of enterprise bargaining in this sector. For example, we are aware of a number of enterprise agreements in the aged care and home care sector that contain a clause in the following form (or similar):[74]

Review of part time hours

(a) At the request of an employee, the hours worked by the employee will be reviewed annually. Where the employee is regularly working more than their guaranteed minimum number of hours then such hours shall be adjusted by the employer, and recorded in writing to reflect the hours regularly worked.

(i) The hours worked in the following circumstances will not be incorporated in the adjustment:

[74] For example; The Presbyterian Aged Care, NSWNMA and HSU NSW Enterprise Agreement 2017-2020; BaptistCare NSW & ACT Aged Care Enterprise Agreement 2017; McLean Care Ltd (NSW), NSWNMA and HSU NSW Enterprise Agreement 2017-2020; The Lutheran Aged Care Albury NSWNMA and HSU NSW Enterprise Agreement 2017-2020 and Diocese of Lismore Care Services, NSWNMA and HSU NSW Enterprise Agreement 2017-2020.

A. If the increase in hours is as a direct result of an employee being absent on leave, such as for example, annual leave, long service leave, parental leave, workers compensation; and

B. if the increase in hours is due to a temporary increase in hours, for example, due to the specific needs of a resident or client.

(ii) In addition to those matters covered in sub-clause x.x(a)(i) changes to hours for Home Care employees may be affected by:

A. continuity of funding;

B. client numbers; and

C. client preferences for services including their ability to choose particular care workers.

(iii) The employer will not unreasonably refuse to change the hours of a Home Care employee based on the circumstances in subclause x.x(a)(ii) unless there is an imminent change to any of those circumstances.

8.28 The above mechanism provides an opportunity for employees who regularly work in excess of their contracted hours to request that their hours be reviewed and increased on an annual basis, and employers cannot unreasonably refuse.

8.29 In our submission, such an approach would remedy the concerns raised by the HSU.

9. CLAIMS RELATING TO THE TELEPHONE ALLOWANCE (S21)

9.1 Two separate claims have been advanced by the unions in respect of clause 20.6 of the Award.

The HSU claim (S21)

9.2 The HSU seek a variation to the telephone allowance at clause 20.6 of the Award. The stated purpose of the variation is to effectively modernise the provision which is currently expressed to apply only to situations where an employee is required to install and/or maintain a landline telephone for the purpose of being on call.

9.3 The HSU propose to extend both the operation of the provision and the quantum of the entitlement.

9.4 In respect of the operation of the provision, the HSU propose that the entitlement apply:

(a) where an employee is required to use a mobile phone rather than a landline telephone; and

(b) where the employee is required to use the phone for "any work related purpose" rather than only where employees are required to be "on-call".

9.5 Further, the HSU seek to alter the substance of the entitlement. The HSU propose that where the clause is triggered, employees be entitled to either:

(a) the provision of a mobile phone that is fit for purpose *and* reimbursement of the cost of "any subsequent charges"; or

(b) be refunded for the "cost of purchase" and "subsequent usage charges" on production of receipts.

9.6 The grounds advanced by the HSU in support of the variation include:

(a) that the current telephone allowance clause is "outdated" because it refers to a landline telephone and does not deal with mobile phones;[75]

(b) that the vast bulk of employees now have mobile phones which are available to them during the course of their work;[76]

(c) that employers "frequently require or expect" care workers to be contactable by mobile phone when performing their duties;[77]

[75] HSU Submission at [59]
[76] Ibid

(d) that employees who are required to use their phones for work purposes should receive a telephone allowance "that reflects the cost of maintaining and using such mobile phone";[78] and

(e) that employees required to use a smart phone should be reimbursed for the cost of purchasing one "if such purchase is necessary".[79]

The United Voice claim (S21)

9.7 The United Voice advances a similar claim to the HSU claim.

9.8 The variation sought by the United Voice is expressed in different terms:

> *Where the employer requires an employee to install and/or maintain a telephone or mobile phone for the purpose of being on call, for the performance of work duties or to access work related information, the employer will refund the installation costs and the subsequent rental charges on production of receipted accounts.*

9.9 As can be seen from the above drafting, the United Voice claim differs from the HSU claim in the following respects:

(a) the allowance is payable on three specific occasions, being when an employee needs a phone for:

(i) the purpose of being on call;

(ii) the performance of work duties; or

(iii) the purpose of accessing work related information.

(b) the employer is required to refund the installation costs, but not to 'provide a mobile phone'.

9.10 The grounds advanced by the United Voice in support of their claim are summarised as follows:

(a) the Award contains no clear allowance or mechanism for an employee who is required to purchase and maintain a mobile phone for work purposes to receive any reimbursement of costs associated with the work related use of the phone;[80]

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[77] HSU Submission [60]
[78] HSU Submission [60]
[79] HSU Submission [60]
[80] United Voice Submission at [82]

(b) the Award contains classifications where work takes place outside a conventional workplace office and an assertion that employees therefore perform a significant amount of work away from the workplace;[81]

(c) a general assertion that a mobile phone has the "status" of a tool of trade and that where a mobile phone has become a tool of the trade and an employee is directed to use one for work, the employee should be reimbursed;[82]

(d) a reference to an apparently "established principle" of the modern awards system "generally" providing some form of compensation where an employer directs an employee to use a particular "tool of trade";[83]and

(e) that the telephone allowance in the Award is anachronistic, does not reflect the current ubiquity of mobile 'smart' phone use and their status as work tools.[84]

Failure to adduce relevant evidence in support of the claim

9.11 While there is evidence of widespread mobile phone and smart phone ownership throughout Australia and evidence from some employees within the industry, the Unions have failed to adduce any evidence of:

(a) the proportion of employees in the industry who are required to use mobile phones in the course of their employment; and

(b) the proportion of work-related versus non-work-related usage by employees of mobile phones.

9.12 Nor is there any evidence before the Commission of:

(a) any Award-covered employer requiring prospective employees, as a condition of employment, to own a mobile phone; or

(b) any Award-covered employer directing or otherwise requiring existing employees to purchase a mobile phone.

9.13 Indeed, the evidence on smart phone and mobile phone ownership in Australia recently relied upon in the review of the *Aged Care Award 2010* suggested that such scenarios would be very rare – for example:

(a) approximately 83 per cent, or 15.97 million Australian adults, already have a smart

[81] United Voice Submission at [83]
[82] United Voice Submission at [90]
[83] Ibid
[84] Ibid at [101]

(b) phone; and

(c) approximately 96 per cent, or 18.57 million Australian adults, own a mobile phone.[85]

9.14 When one takes into consideration the fact that elderly adults are less likely to have a mobile phone, the data suggests that it would be highly unusual for someone of working age to not own a smart phone, let alone a mobile phone.

9.15 In line with the above, the evidence from United Voice is that the employees already have their own mobile phone, and that upon commencement of employment, the employee is asked for their mobile number so that the employer can communicate with the employee with regard to rosters.[86]

9.16 Evidence from the HSU suggests that some employers provide mobile phones[87], and others have employees use their own mobile phone which they already own.[88]

Response to Unions' claims

9.17 There are a range of issues with the drafting of the proposed claims.

9.18 Firstly, the submissions appear to be advanced in respect of "care workers".[89] However, the application of both clauses is not confined in such a manner. Rather, it is expressed to apply to all employees covered by the Award. This would extend to managerial staff and other very senior employees who do not work as carers or support workers.

9.19 Secondly, the HSU clause requires an employer to either "provide" a mobile phone, or refund the "cost of purchase" of a mobile phone, where one is required to be used for specified purposes. However, there is no exemption in circumstances where an employee already owns a mobile phone. There is nothing to prevent an employee who already owns a mobile phone from purchasing a new one, simply in order to obtain the reimbursement for it.

9.20 Thirdly, there is nothing to prevent an employee from seeking reimbursement of the purchase costs of a mobile phone that was purchased years before the employer required the employee to use it for work purposes, provided the employee can produce "receipted

[85] Australian Communications and Media Authority, Communications Report 2017-2018, p. 33. (30 November 2018)
[86] Statement of Trish Stewart at [21], Statement of Deon Fleming at [28], Statement of Belinda Sinclair at [16], Statement of
[87] Statement of Thelma Thames at [22], Statement of Heather Waddell at [31], Statement of Pamela Wilcock at [19]
[88] Statement of Bernie Lobert at [18]
[89] See HSU submission at [60] and United Voice Submission at [83]

accounts". This would result in the employer bearing the costs of a depreciated asset and subsidising the employee's personal use of the device.

9.21 Fourth, in relation to both Union claims, there is no limitation on the costs which are required to be borne by the employer.

9.22 There is no reference to refunding the "reasonable" purchase costs or "reasonable" subsequent charges. There is also no mechanism in the clause for the employer to have any control or oversight at all over the type of device or service arrangement that employees might purchase or enter into. It appears that the employee would be free to decide what device to purchase and what service arrangement they wish to obtain.

9.23 The evidence tendered during the hearing in relation to the review of the *Aged Care Award 2010* demonstrated that the costs of mobile phones (both up-front costs and ongoing usage costs) vary wildly depending on:

(a) The type of device purchased;

(b) The type of usage 'plan' or fee arrangement that is in place;

(c) The amount of 'data' provided for use under the plan; and

(d) The extent of usage by the employee (in relation to calls, texts and 'data').

9.24 Fifth, both clauses fail to link the monetary entitlement to the type of device that an employer requires an employee to use. For example, an employer may only require an employee to have a basic mobile device that allows them to make and receive phone calls and text messages, yet unless the employer physically provides the device, the employer would be obliged to cover the purchase costs of whatever device the employee chooses to purchase (which may not be the basic device required by the employer). There is nothing to prevent an employee from purchasing a smart phone even though the employer only requires a more basic device.

9.25 Sixth, and most importantly, the clauses do not require an employer to reimburse or refund an employee for only the work-related costs associated with the use of a mobile phone. It requires the employer to cover all costs, both up-front costs and "subsequent charges". This is plainly unreasonable.

9.26 In practice, if the claim was to be successful, an employee could be required by their employer to use their mobile phone once per week to check their work roster, and the employer would automatically be obliged to cover both the purchase costs of the mobile device and the subsequent charges relating to the device. There would be nothing

preventing the employee from taking out the most expensive mobile phone plan, using it virtually exclusively for personal use, and requiring the employer to foot the bill.

9.27 In relation to the United Voice claim specifically, the drafting uses the same wording that was used for the home phone telephone allowance that exists within the Award already. This means that there is reference to 'installation costs' being refunded. A mobile phone does not need to be installed and there would be no costs associated with that. It is therefore not clear if this is intended to entitle employees to be refunded the cost of purchase (as is the case with the HSU claim), or if the reference to installation is irrelevant in respect of mobile phones.

Implications of the Unions' claim

9.28 The Unions' claim would undoubtedly have a considerable adverse impact on employment costs for employers.[90] More importantly, it would impose an unreasonable cost on employers, given the issues identified above.

9.29 There has been no attempt by the Unions to limit the cost imposition on employers to only those expenses which are directly attributable to the work-related use. This does nothing to achieve a "fair and relevant" minimum safety net.

9.30 Of significant concern is the fact that the cost to be borne by employers under the proposal will be disproportionate to any benefits that an employer would derive, given that they will be subsidising an employee's (potentially significant) personal use. It is not difficult to imagine situations where an employee inadvertently incurs a huge mobile phone bill because they or a family member streams movies through a mobile device while travelling on a family holiday. On the drafting proposed by the Unions, the employer will be required to reimburse the employee for these costs.

9.31 It is difficult to understand how an employer can reasonably be expected to reimburse an employee for the up-front and ongoing costs of their mobile phone in circumstances where the employee already owned a mobile phone prior to commencing work with the employer, and primarily uses it for personal use.

9.32 The Unions' claim also fails to recognise that where an employee incurs a work-related expense, the applicable income tax legislation entitles the employee to claim a tax deduction, which has the effect of reducing the individual's taxable income (and thereby

[90] *Fair Work Act 2009* (Cth), s. 134(1)(f)

reduces the amount of income tax required to be paid). This is a fundamental and well-established feature of the income tax system in Australia.

9.33 One of the rationales for the current system of tax deductibility of work-related expenses is that it generates consumption benefits and stimulates the economy. Another important rationale is that certain cost items tend to have mixed uses or mixed functions (i.e. certain costs are partly work-related and partly non-work related). For example, employees incur a range of expenses which are partly work-related and partly for personal use. Common expenses include motor vehicle expenses, telephone expenses, home internet, laundry expenses, home office expenses, etc.

9.34 The vast majority of costs borne by employees through the purchase, use and maintenance of their mobile phone will almost certainly be related to their personal use of the device (rather than work-related use). We would expect that for most employees, their work-related usage would be only a small proportion of their overall usage, and as such the work-related costs would be a small proportion of the overall costs.

9.35 In light of the anticipated breakdown of the source of cost, in our submission the current tax deductibility system is the appropriate mechanism for this usage to be dealt with.

Conclusion

9.36 Our clients are opposed to the Unions' claims for the reasons outlined above. A merit basis for the claim has not been made out. No mischief or problem has been properly identified which would warrant the intervention of the Commission. The claim will pass an unreasonable cost onto employers, which is in no way equivalent to the usage of mobile phones for work-purposes. The claim would effectively require employers to subsidy employees' personal usage of a personal device, for which employers have no way of controlling or maintaining. This is plainly unreasonable, and is inconsistent with the notion of creating a fair and relevant minimum safety net of terms and conditions. The proposed Award term will result in the Award not meeting the modern awards objective. The proposed term offends section 138 of the FW Act.

9.37 The Unions' claims should be dismissed.

10. CLAIMS RELATING TO CLOTHING AND UNIFORMS (S20, S2A, S20A)

The HSU claim (S20A)

10.1 The HSU seek the introduction of a new clause in the Award (to be numbered clause 20.3) to provide for a "damaged clothing allowance".

10.2 Under the proposed clause, employers would be required to compensate employees, to the amount of the "reasonable replacement value", for any damage to, or soiling of, any clothing or other personal effects (excluding hosiery) which are damaged in the course of the employee's employment.

10.3 The grounds relied upon by the HSU in support of this variation consist of the following:

(a) an assertion that many employees, particularly support workers in home care and disability services, wear their own clothes to work and are not provided with a uniform;[91]

(b) a submission that employees' clothes are at risk of being soiled or damaged in the course of their duties;[92] and

(c) an assertion that employees' clothes "will frequently become damaged, soiled or worn" given the nature of the work they do.[93]

Response to the HSU claim

10.4 The Award already contains an allowance at clause 20.2 for uniforms and their laundering. That provision is expressed as follows:

(a) Employees required by the employer to wear uniforms will be supplied with an adequate number of uniforms appropriate to the occupation free of cost to employees. Such items are to remain the property of the employer and be laundered and maintained by the employer free of cost to the employee.

(b) Instead of the provision of such uniforms, the employer may, by agreement with the employee, pay such employee a uniform allowance at the rate of $1.23 per shift or part thereof on duty or $6.24 per week, whichever is the lesser amount. Where such employee's uniforms are not laundered by or at the expense of the employer, the employee will be paid a laundry allowance of $0.32 per shift or part thereof on duty or $1.49 per week, whichever is the lesser amount.

[91] HSU submission at [61]
[92] Ibid
[93] Ibid at [62]

10.5 If an employer does not provide the employee with a uniform (as is the case with the two witnesses that provide evidence in support of the HSU claim), the employee is entitled to receive a uniform allowance. This uniform allowance can be used to purchase clothes to wear to work, and, if those clothes become damaged in the course of their employment, to replace them. The alternative is that the employer provides a uniform, and if it is damaged, the employer replaces the uniform.

10.6 The primary concern with this variation is that the Award already provides an allowance for employees who are not issued with a uniform.

10.7 There are also both drafting and practical issues with the clause., given the lack of precision around how the replacement value of clothing is to be calculated and the phrase "suffers any damage".

10.8 For example, it is not clear how an employer should determine what the "reasonable replacement value" is, and whether the employer would be required to replace a second-hand piece of clothing with a new piece of clothing.

The United Voice claim (S2A, S20)

10.9 United Voice seek the introduction of a new clause 20.2(b) in the Award to insert additional wording in relation to the requirement that an "adequate number of uniforms" be provided to an employee.

10.10 Under the proposed clause, employers would be required to provide employees with enough uniforms to allow employees to go the full week without needing to launder their work uniforms more than once per week.

10.11 Our clients do not accept the contention advanced by United Voice that "the decision as to what constitutes an 'adequate' amount of uniforms is often made solely by the employer".[94] The Award terms are clear, and the obligation requires an objective assessment as to the adequacy of the number of uniforms to be provided, having regard to the particular circumstances.

10.12 If there is any dispute about the number of uniforms provided by a particular employer, the matter can be resolved through the application of the dispute resolution procedure provided for in the Award including, if necessary, the involvement of the Commission.

10.13 We do not consider that a sufficient case has been made out for this variation.

[94] United Voice submission at [50]

11. CLAIM RELATING TO RECALL TO WORK (S22)

The HSU claim

11.1 The HSU seek a variation to clause 28.4 to introduce a regime for compensation where employees are required to perform work remotely outside of working hours, without having to physically be recalled to work.

11.2 Under the HSU proposal, the employee would be entitled to a minimum of one hour's pay at overtime rates "for each time recalled".

11.3 The HSU have not advanced any submission as to why the minimum payment of one hour's pay should be adopted, other than to point out that the "work should be compensated appropriately".[95]

11.4 There is no specific submission which addresses why a minimum payment of one hour is appropriate, or why such a payment provides employees with 'fair and relevant' compensation for the disutility associated with working at the particular time(s) to which the penalty attaches.[96]

11.5 Our clients are opposed to the HSU claim.

Our clients' competing proposal

11.6 Our clients have a competing claim in respect to this issue.

11.7 Our clients' claim involves a proposed new clause 20.10, as well as consequential amendments to clauses 20.9 and 28.4. Under the proposed new clause 20.10, employees would be entitled to payment for performing remote response duties, with the quantum of such payment and the relevant minimum payment dependent on when the remote response duties are performed.

11.8 Specifically, it is proposed that employees be paid:

(a) at the applicable rate of pay for work performed between 6.00am and 10.00pm, with a minimum payment of 15 minutes; and

(b) at the applicable rate of pay for work performed between 10.00pm and 6.00am, with a minimum payment of one hour.

[95] HSU Submission of 15 February 2019, at [71].
[96] See Penalty Rates Decision at [202].

11.9 While there is a large degree of overlap between the competing proposals, the key difference between the proposals relates to the scheme of remuneration to be applied when employees perform remote response work.

11.10 We refer to our submissions dated 2 July 2019 as to the reasons why our clients' proposal is to be favoured and should be adopted.

12. CLAIM RELATING TO CLIENT CANCELLATION PROVISION (S29)

The HSU claim

12.1 The HSU seek a variation to the client cancellation provision at clause 25.5(f) to increase the amount of notice required to be given by employers to employees in the home care stream of a cancellation of, or change to, a rostered home care service in order to avoid the obligation to pay the employee for the cancelled shift.

12.2 Under the HSU proposal, where an employer fails to provide the employee with 48 hours' notice of a cancelled shift, the employer would be required to pay the employee for their minimum specified hours on that day.

Our clients' position on the HSU claim

12.3 Our clients are opposed to the HSU's claim. The reality is that most cancellations or changes to rostered home care services by customers are made in the 24 hours prior to the commencement of the scheduled service. The evidence before the Commission will overwhelmingly support this.

12.4 That being the case, the HSU variation would effectively nullify the utility of this clause for employers, which is more important than ever in the context of the consumer-directed-care reforms that have recently been implemented.

Our clients' competing proposal

12.5 Our clients recognise that the current client cancellation clause requires review and amendment to ensure:

(a) it provides a fair and balanced framework for dealing with client cancellation events;

(b) its scope is extended to disability services work; and

(c) it operates harmoniously with other Award provisions concerning roster changes.[97]

12.6 Our clients are pursuing a separate variation to this clause, which is set out in a Draft Determination filed on 2 April 2019, and supported by submissions filed on 2 July 2019.

12.7 It is critical that the current client cancellation clause be extended to the disability services sector, and that it operates harmoniously with the NDIS rules and pricing arrangements dealing with client cancellations. We refer to paragraphs 5.1 to 5.20 of our submissions filed on 2 July 2019.

[97] The clause as currently drafted is arguably inconsistent with clause 10.3(c) in respect of part-time employees.

13. CLAIM RELATING TO THE SLEEPOVER CLAUSE (S38)

The HSU claim

13.1 The HSU seek to vary clause 25.7(c) of the Award which relates to sleepovers. In essence, the HSU propose to vary the items required to be provided to employees when performing a sleepover.

13.2 The current Award clause provides:

> (c) The span for a sleepover will be a continuous period of eight hours. Employees will be provided with a separate room with a bed, use of appropriate facilities (including staff facilities where these exist) and free board and lodging for each night when the employee sleeps over.

13.3 Under the variation proposed by the HSU, employers would be required to provide the following:

> (a) "a separate and securely lockable room with a peephole or similar in the door, a bed and a telephone connection in the room";
>
> (b) "suitable sleeping requirements such as a lamp and clean linen";
>
> (c) use of appropriate facilities (including staff facilities where these exist); and
>
> (d) free board and lodging for each night when the employee sleeps over.

13.4 Items (a) and (b) above represent variations to the current Award provision.

13.5 In support of this claim, the HSU have filed written submissions totalling two paragraphs, one of which does not deal with the specific variation that has been sought.[98] The submissions advanced in support of the variation are limited to:

> (a) a submission that the Award should be varied "to ensure appropriate facilities are provided" to employees when undertaking a sleepover; and
>
> (b) an opinion that sleepover shifts are "compensated modestly".[99]

Response to the HSU claim

13.6 As to the first ground relied on in support of the variation, the HSU have failed to articulate why it is that they consider the current clause to be deficient. Put simply, the basis for the variation is unclear. The application is not accompanied by sufficient evidence going

[98] HSU submission at [74]
[99] Ibid at [73]

towards demonstrating that there is any problem with the current clause, or that the variation proposed will rectify any such problems.

13.7 As to the second ground, the HSU's opinion as to the adequacy of the sleepover allowance does not appear to have any relevance to the variation sought. The variation proposed does not have any relevance to payment.

13.8 Turning to the specific terms of the variation sought, the proposed variation relates to the specific items that are required to be provided by an employer during a sleepover. The current Award clause refers to providing employees with "use of appropriate facilities". We consider that formulation to be sensible, as it is sufficiently flexible to apply to a broad range of circumstances. Ultimately, what is "appropriate" will vary depending on the circumstances of a particular situation, having regard to a range of factors.

13.9 Given that the Award is an industry-wide minimum safety net instrument covering employers operating in a diverse range of sectors and catering to a broad customer base, we do not consider that it is appropriate to prescribe in any greater detail the specific items that must be provided to every Award-covered employee across Australia performing sleepover shifts.

13.10 For example, it cannot be said that it is necessary or appropriate to require employers in all circumstances to ensure employees are provided with a room that is "securely lockable", and that the door has a "peephole or similar". Nor can it be said that it is necessary or appropriate to require employers in all circumstances to ensure every room used by employees for sleepovers has "a telephone connection in the room". While these types of facilities may well be "appropriate" in some circumstances, it is not the case that such requirements are necessary or appropriate in all situations.

13.11 There is insufficient evidence before the Commission of instances where employers have not provided suitable facilities for employees performing sleepover shifts, and so insufficient evidence of the current clause not operating unsatisfactorily.

13.12 It cannot be said that the variation is self-evident. Therefore, in the absence of any probative evidence substantiating the issues that the HSU seek to address, the claim should be dismissed.

14. CLAIM RELATING TO ROSTERS (S3)

The United Voice claim

14.1 The United Voice seek a variation to clause 25.5(d)(i) to provide that full-time and part-time employees will be entitled to the payment of overtime for roster changes where seven days' notice is not provided.

Our response

14.2 Roster changes are a significant issue in many parts of the SCHCDS industry, and the rostering arrangements in the Award require consideration.

14.3 This proposed variation is reflective of the issues currently facing the SCHCDS industry. United Voice note at [71] of their submissions that:

> This needs to be considered in the context of a sector in which there are constant and unpredictable shift changes. Our witnesses all indicate that there are frequent changes to their rosters and a significant variability in hours from week to week.

14.4 The challenges facing employers in this industry with respect of rostering appear to be well accepted from both employer and union parties. The reality is that employers do not change rosters for fun. Where employers seek to change an employee's roster, it is for a legitimate operational reason and generally in order to meet the needs of the vulnerable customers which the organisation is providing care services to.

14.5 Employer parties have been vocal about the challenges around rostering since the commencement of the four yearly review. This has particularly been an issue in the disability services sector as a result of the introduction of the NDIS. Two of our clients, ABI and NSWBC, sought a variation to clause 10.3(c) of the Award as part of the Casual and Part-Time Employment common issues matter in order to specifically address this challenge. The variation sought in that proceeding was to remove some of the restrictions on the rostering of part-time employees to meet the needs of industry, and to ensure that the part-time employment category continue to be fit-for-purpose so as to prevent the casualisation of the workforce.

14.6 The union parties opposed the variation sought by ABI and NSWBC in that matter, and advanced evidence from witnesses who were support workers who almost exclusively worked in group homes in a bid to demonstrate that the hours of part-time employees were reasonably predictable and not subject to change.

14.7 In the current proceeding, we now have union parties advancing evidence from part-time employees working outside of a group home setting, for whom employers struggle to provide reasonably predictable hours of work.

14.8 Ultimately, if the Award is varied to make it even more difficult for employers to utilise part-time employees in the current dynamic operating environment (for example, by imposing overtime payment obligations where a part-time employee's roster is changed), employers will transition towards a workforce composition with a greater proportion of casual employees.

14.9 Contrary to the assertion of the United Voice, the Award currently does not provide "a significant level of flexibility in rostering".

14.10 Although the 'change in roster' provision at clause 25.5(d)(i) purports, at first glance, to provide the employer with the ability to change the roster of an employee on 7 days' notice, the reality is that this right is limited in two ways:

(a) Firstly, the employer must consult with the employee (and his/her representative, if any) regarding the proposed roster change in accordance with clause 8A, which involves:

(i) providing information about the proposed change;

(ii) inviting the employee (and their representative) to give their views about the impact of the proposed change on them; and

(iii) considering the views expressed by the employee and their representative (if any),

prior to implementing the roster change under clause 25.5(d)(i); and

(b) Secondly, where the employer wishes to change the roster of a part-time employee, clause 10.3(c) operates so as to prevent the employer from utilising the right conferred on it under clause 25.5(d)(i) unless the employee agrees in writing to the change.

14.11 The first limitation outlined in paragraph 14.10(a) above is not cavilled with.

14.12 However, the second limitation materially diminishes the right under clause 25.5(d) to change a part-time employee's roster.

14.13 In our clients' submission, the rostering provisions in the Award (particularly for part-time employees) require consideration to ensure they provide an appropriate balance between

the interests of employees in having have sufficient certainty around working patterns, and the interests of employers in being able to continue to utilise part-time employment as a viable form of employment under the current operating environment.

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- **THE NSW BUSINESS CHAMBER LTD**
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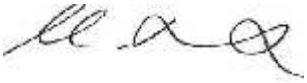

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