

**4 Yearly Review – Social, Community, Home Care and Disability  
Services Industry Award 2010 – Tranche 2**

**Submissions pursuant to Fair Work Commission Decision [2021]  
FWCFB 2383**

**These submissions are divided into three ‘parts’ as follows:**

**PART 1: INTRODUCTION (Pages 2 – 4)**

**PART 2: OPERATIVE DATE (Pages 4 – 9)**

**PART 3: PROVISIONAL VIEWS AND DRAFT VARIATION  
DETERMINATION (Pages 10 – 16)**

## PART 1: INTRODUCTION

### Background

1. For the purposes of these submissions, the Social, Community, Home Care and Disability Services Industry Award 2010 shall be referred to as the 'Award'.
2. On 2 September 2019, the Fair Work Commission (the 'FWC') issued a decision that dealt with the 'Tranche 1' claims in respect of the Award ('tranche 1 proceedings').<sup>1</sup> The FWC decided to vary the rates of pay of casual employees who work overtime and on weekends and public holidays,<sup>2</sup> amongst other matters.
3. On 4 May 2021, the FWC issued a decision in respect of the remaining substantive claims in the Award and addressed aspects of claims from the Tranche 1 proceedings (the 'Tranche 2 decision').<sup>3</sup>
4. The FWC made the following determinations in the Tranche 2 decision (NOTE: these are not 'provisional views' of the FWC):

Introduction of minimum engagement for part-time employees and variation to minimum engagement for casual 'home care' employees <sup>4</sup>	<p>Minimum engagement for part-time employees:</p> <ul style="list-style-type: none"> <li>• 3 hours for SACS employees (except disability services work);</li> <li>• 2 hours for all other employees</li> </ul> <p>Minimum engagement for casual employees home care stream to be increased from 1 hour to 2 hours.</p>
Variation to clause 25.6 regarding broken shift <sup>5</sup>	Limit broken shifts to 1 unpaid break, with 2 break maximum with agreement of the employee and additional payment for working broken shifts.
Remote response <sup>6</sup>	Introduction of an award term dealing with remote response work.
Client cancellation <sup>7</sup>	<ul style="list-style-type: none"> <li>• extension of clause 25.5(f) to disability services;</li> <li>• cancellation notice period amended from "by 5:00pm the day prior" to "within 7 days of the scheduled service";</li> <li>• where a service is cancelled, the employer may direct employee to perform other work during those hours rostered or cancel the rostered shift;</li> <li>• Where the employer directs the employee to perform other work during those hours rostered the employee will be paid the greater of the amount payable had they performed the cancelled service or the amount payable in respect of work actually performed;</li> <li>• Where the employer cancels the rostered shift, the employer must pay the employee the amount they would have received had the shift not been cancelled or provide the employee with make up time (where cancellation occurs within 7 days of the scheduled service);</li> <li>• make-up time not permitted to be used, and payment must be made to the employee, where the employer is permitted to charge the client in respect of cancelled services;</li> <li>• Make up time must be rostered in accordance with clause 25.5(a);</li> <li>• Employer consultation applies re make up time;</li> <li>• Make up time can include work with other clients/in other areas of business; and</li> <li>• Make up time to be rostered within 6 weeks of cancelled service.</li> </ul>

<sup>1</sup> [2019] FWCFB 6067.

<sup>2</sup> This variation came into effect from 1 July 2020.

<sup>3</sup> [2021] FWCFB 2383.

<sup>4</sup> [2021] FWCFB 2383 at [233].

<sup>5</sup> [2021] FWCFB 2383 at [233].

<sup>6</sup> [2021] FWCFB 2383 at [722].

<sup>7</sup> [2021] FWCFB 2383 at [829-830].

Clothing and equipment allowance <sup>8</sup>	Award variation to provide for the reimbursement of reasonable costs associated with the cleaning or replacement of personal clothing which has been soiled or damaged in the course of employment
24 hour care <sup>9</sup>	24-hour care clause to be retained, but with amendments: <ul style="list-style-type: none"> <li>• requirement for employee to agree to work 24-hour care shift;</li> <li>• where employee is required to perform more than 8 hours work during a 24-hour care shift, overtime applies/TOIL per clause 28.2;</li> <li>• employee may refuse to work more than 8 hours if unreasonable;</li> <li>• an entitlement to an additional weeks annual leave as a shiftworker if employee works at least eight 24-hour care shifts in any 12 month period;</li> <li>• employee to be afforded an opportunity to sleep for a continuous period of 8 hours;</li> <li>• employee to be provided with clean linen, provision of appropriate facilities to include access to food preparation facilities and staff facilities if they exist); and</li> <li>• free board and lodging for sleepover.</li> </ul>
Sleepover <sup>10</sup>	Award entitlement to include clean linen and access to food preparation facilities (where these exist)

5. The Tranche 2 decision expressed a number of ‘provisional views’ as follows:

Broken shift allowance	an additional payment for working a broken shift to be an allowance calculated as a percentage of the standard weekly rate ranging from 1.7% SWR (\$17.10) for 1 break to 2.5% (\$25.15) for 2 breaks, proposed allowances to be payable per broken shift <sup>11</sup>
Overtime for day worker performing work outside the ordinary span of hours (including as part of a period of work in a broken shift) <sup>12</sup>	
Overtime for part-time workers	clarity that working additional hours is voluntary, and employees can request increases in agreed/guaranteed hours to reflect regular additional hours, request not to be unreasonably refused <sup>13</sup>
Variation to rosters	permitted anytime an employee agrees to a shift swap <sup>14</sup>
Remote Response	the minimum payment for remote response work performed between 6am – 10pm should be 30 mins and minimum payment for work between 10pm and 6am should be an hour. However, the FWC notes that there is an inter-relationship between the minimum payment period and rate of payment...where the appropriate rate of payment issue is subject to later conference <sup>15</sup>
Client cancellation	make up shifts can only be used with 12 hours notice. <sup>16</sup>

<sup>8</sup> [2021] FWCFB 2383 [882].

<sup>9</sup> [2021] FWCFB 2383 [1013].

<sup>10</sup> [2021] FWCFB 2383 [1114].

<sup>11</sup> [2021] FWCFB 2383 [552 – 554].

<sup>12</sup> [2021] FWCFB 2383 [555 – 556].

<sup>13</sup> [2021] FWCFB 2383 [987].

<sup>14</sup> [2021] FWCFB 2383 [643].

<sup>15</sup> [2021] FWCFB 2383 [733].

<sup>16</sup> [2021] FWCFB 2383 [830].

6. In addition to the above, the FWC:
  - a. in respect of the clothing and equipment claim, directed parties to confer about the form of a suitable variation;<sup>17</sup>
  - b. in respect of the remote response claim, directed the Australian Business Industrial and the New South Wales Business Chamber, Aged and Community Services Australia and Leading Age Services Australia (ABI) to provide further elaboration as to the meaning of ‘the appropriate rate’<sup>18</sup>; and
  - c. in respect of the travel time claim, accepted as a general proposition that employees should be compensated for time spent travelling between engagements but did not make any determination in respect of this claim.<sup>19</sup>
7. A conference was held before Justice Ross on 27 May 2021. In relation to the travel time claim, Justice Ross confirmed that this matter is ‘parked’ for the time being to allow a period of assessment on the impact of changes concerning variations to minimum engagement and broken shifts.<sup>20</sup>
8. The Tranche 2 decision attached a draft variation determination at Attachment P (‘draft variation determination’).
9. The Tranche 2 decision expressed a provisional view that the operative date for the proposed variations take effect from 1 October 2021 (‘Operative Date’).
10. The FWC invited interested parties to file submissions and evidence in respect of the draft variation determination, the provisional views and the Operative Date.<sup>21</sup>
11. These submissions are in response to [10] above. In addition, AFEI files and relies on the witness statement of Kylie Lambert, Director of Daugtherly Care Community Services Limited.

## **PART 2: OPERATIVE DATE**

12. The FWC expressed the provisional view that variations to the Award commences on 1 October 2021.<sup>22</sup>
13. 1 October 2021 provides insufficient time for employers to implement the variations made and to give effect to the Tranche 2 decision.
14. The operative date should be no earlier than 1 July 2022 but ideally from twelve months when all matters in the Tranche 2 decision have been finalised (for example, the FWC makes the final determination on all matters relating to the Tranche 2 decision (including on remote response, clothing and equipment and broken shift allowance) on 1 September 2021, the operative date should be 1 September 2022), for the reasons that follow:

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<sup>17</sup> [2021] FWCFB 2383 [890].

<sup>18</sup> [2021] FWCFB 2383 [738].

<sup>19</sup> [2021] FWCFB 2383 [588].

<sup>20</sup> AM2018/26 Transcript of Proceedings, 27 May 2021; PN129 – PN130.

<sup>21</sup> [2021] FWCFB 2383 [1288 – 1289].

<sup>22</sup> [2021] FWCFB 2383 [1289].

15. ***The Tranche 2 Decision would result in significant unbudgeted costs for employers; current funding<sup>23</sup> provides insufficient cover for cost increases; employers will either be obliged to absorb the cost increases or pass cost increases onto participants; detrimental impact from both options.***
- a. *First*, the FWC acknowledged that variations to the minimum engagement and broken shift provisions are likely to result in an increase to costs for employers.<sup>24</sup> This is supported by evidence.<sup>25</sup>
  - b. *Second*, the FWC's determination concerning client cancellation and remote response work would also result in an increase to costs for employers.<sup>26</sup>
  - c. *Third*, the anticipated increase to costs could not have been budgeted for, for this financial year.<sup>27</sup>
  - d. *Fourth*, funding under the Government subsidised home care packages do not extend to a number of variations to the Award including broken shift allowance; minimum engagement; client cancellation payment; clothing and equipment; and remote response.<sup>28</sup> Further, Government funding in the home care sector this year only increased by a nominal amount.<sup>29</sup> To this end, AFEI attaches, at **Annexures A1 and A2**, information from the Australian Government on Aged Care subsidies and supplements on rates applicable from 1 July 2020 to 30 June 2021 and 1 July 2021 to 30 June 2022. The increases to the daily subsidy rates for this year are insufficient to even match the 2020-2021 national minimum wage increase of 2.5%.<sup>30</sup> These cost considerations are also compounded by the superannuation increases that took effect from 1 July 2021. AFEI attaches information from the Australian Tax Office on superannuation increases from 1 July 2021 at **Annexure B**.
  - e. *Fifth*, the FWC identified there was evidence to support a finding that although the Efficient Cost Model ('ECM') under the National Disability Insurance Agency ('NDIA') is used to estimate labour costs to service providers based on the Award as 'the foundation' of its assumptions and methodology, the ECM does not take into account a range of actual or contingent costs prescribed by the Award associated with delivering services including but not limited to the supply of uniforms or payment of a uniform allowance, all other allowances payable under the Award, including laundry allowance, meal allowances, first aid allowance, the motor vehicle kilometre reimbursement, telephone allowance, heat allowance, on-call allowance and the additional week of annual leave for shift workers.<sup>31</sup> AFEI understands that funding under the NDIA does not capture all variations in the Tranche 2 decision. To this end, AFEI attaches at **Annexure C** the National Disability Insurance Scheme Pricing Arrangements and Price Limits 2021 – 2022.
  - f. *Sixth*, not all employers in this sector receive Government funding for significant amount of their services.<sup>32</sup>

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<sup>23</sup> The FWC makes a number of observations and findings in relation to funding arrangements in this sector. [2021] FWCFB 2383 [212] – [219].

<sup>24</sup> [2021] FWCFB 2383 [386], [500].

<sup>25</sup> Witness Statement of Kylie Lambert dated 3 August 2021 ('Statement of Kylie Lambert') at para 35, para 42.

<sup>26</sup> Statement of Kylie Lambert at para 20 - 21.

<sup>27</sup> Statement of Kylie Lambert at para 52 - 53.

<sup>28</sup> Statement of Kylie Lambert at para 20.

<sup>29</sup> Statement of Kylie Lambert at para 54.

<sup>30</sup> [2021] FWCFB 3500.

<sup>31</sup> [2021] FWCFB 2383 [218].

<sup>32</sup> Statement of Kylie Lambert at para 16.

- g. *Seventh*, implementation of the Tranche 2 decision by October 2021 in the absence of sufficient funding would negatively impact employers on the basis that it is either the employer who would absorb the cost impact or the costs would be passed onto participants.<sup>33</sup>
- h. *Eighth*, employers who do not rely on Government funding and, as a consequence of the Tranche 2 decision, pass on the cost impact to participants through increases to fees for the provision of services, face the prospect of participants preferring alternative aged care providers (i.e. loss in business),<sup>34</sup> at a time when service providers are already facing significant challenges including being exposed to greater competition for business.<sup>35</sup>

16. ***Significant variations to employee rosters; recruitment and training of staff to fulfil service gaps created by changes to Award***

- a. The FWC's determination to introduce minimum engagement for part-time employees (and variation to minimum engagement provision for casual home-care employees); limit broken shifts to 1 break; introduce remote response; and vary payment provisions in client cancellation, would require service providers to make a number of changes to the way it currently operates including re-rostering employees in a significant and most cost-effective manner, to remain viable.<sup>36</sup>
- b. Home care providers operate on the model of Consumer Directed Care ('CDC'). CDC is a service delivery designed to give more choice and flexibility to consumers, by allowing individuals to have more control over the types of care and services they access and the delivery of those services including who delivers the services and when.<sup>37</sup>
- c. The current award provision permits a degree of flexibility in rostering to allow providers to work under the CDC model of client choice and flexibility.
- d. However, variations to the Award as a result of the Tranche 2 decision would significantly limit provider flexibility to rosters. Indeed, rostering practices would need to be revised significantly to not only give effect to the decision but to also ensure the continuing viability of businesses. For example, rostering practices would need to:
  - be planned in advance (instead of 4 x 1 hour shifts in a day or 3 x 1 hour shifts in a day, rosters would need to accommodate maximum of 2 shifts with 1 break);
  - cater for client cancellations and make up shifts;
  - cater for work that the employee would not normally be rostered to do, to fulfil the minimum engagement requirement; and
  - seek employee agreement to be rostered on broken shifts with two breaks.
- e. In relation to the above, the provider could be exposed to shifts where the employee who would usually work those shifts (as part of a multiple break broken shift) would no longer be able to work certain parts of the shift. For example, the employee currently provides services to Client A four times a day as follows: from 9:00am to 10:00am, from 11:30am to 12:00pm,<sup>38</sup> from 3:00pm to 4:00pm and from 6:00pm to 7:00pm. With the variations, the employee can only attend to Client A from 9:00am to 12:00pm (with one break) or from 9:00am to 4:00pm (with two breaks by agreement). The provider would be required

<sup>33</sup> Statement of Kylie Lambert at para 21.

<sup>34</sup> Statement of Kylie Lambert at para 23.

<sup>35</sup> [2021] FWCFB 2383 [218].

<sup>36</sup> [2021] FWCFB 2383 [372], [386], [500], Statement of Kylie Lambert at para 56.

<sup>37</sup> [2021] FWCFB 2383 [218].

<sup>38</sup> Statement of Kylie Lambert at para 40.

to roster another employee for the 6:00pm to 7:00pm shift. However, Client A would not be able to have choice and control in choosing the employee to provide services for the shift whereas clients currently enjoy choice and control in receiving services through CDC.

- f. Consequently, not only would the variations mean that consumers may not have the choice and control that they currently enjoy, but providers would be required to consider the issue of recruitment and training of staff to fulfil service demands and consequent gaps in services arising from the variations. Evidence demonstrates that providers are experiencing recruitment issues because of border closures in response to the COVID-19 pandemic.<sup>39</sup>

17. ***Implementation date of 1 October 2021 unworkable; employers currently facing multiple challenges***

18. The FWC made general findings on evidence that employers in this sector are facing numerous challenges (and continue to do so) due to 'structural change by reason of reforms that have been implemented across the country'.<sup>40</sup> Challenges include:<sup>41</sup>

- service providers have less certainty than before in relation to revenue;
- service providers experience greater volatility in demand for services, as consumers have a greater ability to terminate service arrangements;
- an increase to the number of service providers in the market;
- service providers are exposed to greater competition for business;
- service providers have reduced levels of control in relation to the delivery of services, as individual consumers have more control over the manner in which services are provided to them;
- greater fragmentation of working patterns, as the employer is now less able to organise the work in a manner that is most efficient to it; and
- greater choice and control for consumers has led to greater rostering challenges by reason of an increase in cancellations by clients; an increase in requests for changes to services by consumers; and an increase in requests for services to be delivered by particular support workers.

19. The FWC also acknowledged that "employers in the disability services sector have been under significant financial strain since the introduction of the NDIS".<sup>42</sup>

20. Furthermore, home care providers also face the prospect of increased competition with alternative aged care providers, such as online platforms and contractors.<sup>43</sup>

21. A major significant issue the home care sector currently faces is the implementation of the Improved Payment Arrangements reform ('IPA reform'). AFEI attaches at **Annexure D** information from the Government concerning changes to home care subsidies and supplements through the IPA reform.

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<sup>39</sup> Statement of Kylie Lambert at para 57.

<sup>40</sup> [2021] FWCFB 2383 [211].

<sup>41</sup> [2021] FWCFB 2383 [218].

<sup>42</sup> [2021] FWCFB 2383 [218].

<sup>43</sup> Statement of Kylie Lambert at para 23.

22. The IPA reform changes the way the Government pays home care packages program subsidies and supplements to providers. Instead of paying the full subsidy and supplements in advance each month, it is paid in arrears for services delivered.
23. The IPA reform is being implemented in 2 stages:
  - a. Phase 1 – 1 February 2021 (home care subsidies paid in arrears each month, paid in full regardless of services being delivered. Providers continue to hold unspent funds on behalf of clients); and
  - b. Phase 2 – 1 September 2021 (home care subsidies paid in arrears for actual services delivered. Government will hold unspent funds on behalf of client).
24. The IPA reform directly impacts on service providers cashflow as well as additional costs borne by providers to implement the changes through software modification, transaction process flows, staff training and education with care recipients as to the new treatment of funding and monthly statements. Providers are not aware of any specific funding to compensate for this cost. This represents a significant cost burden on providers.<sup>44</sup>
25. Meanwhile, service providers (both disability and home care) are also currently focussed on responding to the COVID-19 pandemic, Government public health orders, the health and safety of employees and clients, and vaccination of employees.<sup>45</sup>
26. A further consideration is the need for service providers to consult with participants on the forthcoming changes to their services including service fees and renegotiation of contracts. This creates an additional challenge due to the COVID-19 pandemic where participants are reducing face-to-face contact with providers where they can.<sup>46</sup>
27. AFEI notes that the FWC recognised that it may take time for a funding arrangement to adapt to an increase in employment costs occasioned by a variation to the award safety net... and that “such matters can be addressed by appropriate transitional arrangements.”<sup>47</sup>
28. Further also, a transitional arrangement would be appropriate to enable providers to implement practices to give full effect to the Tranche 2 decision by:<sup>48</sup>
  - a. reviewing and varying current rostering practices (including modifications to rostering systems and practices, testing out the changes and training of employees on the new rostering practices);<sup>49</sup>
  - b. recruiting and training new employees;<sup>50</sup>
  - c. implementation of a system to obtain employee agreement on broken shifts;<sup>51</sup>
  - d. consulting with employees concerning changes to working practices;<sup>52</sup> and
  - e. consulting with clients regarding changes to service provision and costs.<sup>53</sup>

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<sup>44</sup> [https://www.stewartbrown.com.au/images/documents/StewartBrown\\_-\\_ACFPS\\_Financial\\_Performance\\_Sector\\_Report\\_March\\_2021.pdf](https://www.stewartbrown.com.au/images/documents/StewartBrown_-_ACFPS_Financial_Performance_Sector_Report_March_2021.pdf) (pages 26-27); Statement of Kylie Lambert at para 25 – 29.

<sup>45</sup> Statement of Kylie Lambert at para 58.

<sup>46</sup> Statement of Kylie Lambert at para 60(g).

<sup>47</sup> [2021] FWCFB 2383 [226].

<sup>48</sup> Statement of Kylie Lambert at para 60.

<sup>49</sup> Statement of Kylie Lambert at para 60.

<sup>50</sup> Statement of Kylie Lambert at para 56, para 60.

<sup>51</sup> Statement of Kylie Lambert at para 56, para 60.

<sup>52</sup> Statement of Kylie Lambert at para 56, para 60.

<sup>53</sup> Statement of Kylie Lambert at para 56, para 60.



29. Further, NDIS price guides and pricing limits are usually published annually in July,<sup>54</sup> and increases to home care subsidies and supplements take effect from July each year.<sup>55</sup>
30. On the basis that certain significant matters are currently outstanding (for example, remote response, broken shift allowance and clothing and equipment allowance), and there is no certainty for employers of when these matters would be finalised, the more appropriate operative date would ideally be from twelve months from the finalisation of all matters in the Tranche 2 decision, and certainly no earlier than 1 July 2022.
31. Our proposal would also provide service providers with an opportunity to campaign for increases to funding.<sup>56</sup>
32. Implementation of significant increases to labour costs without appropriate time to adjust would cause significant unfairness to employers for the reasons stated.

## **PART 3: PROVISIONAL VIEWS AND DRAFT VARIATION DETERMINATION**

### **Minimum engagement**

33. Current clause 10.4(c) of the Award relates to ‘casual employment’ and provides:

‘Casual employees will be paid the following minimum number of hours, at the appropriate rate, for each engagement:

  - (i) Social and community services employees except when undertaking disability services work – 3 hours;
  - (ii) Home care employees – 1 hour; or
  - (iii) All other employees – 2 hours’
34. The draft variation determination proposes to delete current clause 10.4(c) of the Award and replacing it with the following:

‘Minimum payments for part-time and casual employees

Part-time and casual employees will be paid for the following minimum number of hours, at the appropriate rate, for each shift or period of work in a broken shift:

  - i. social and community services employees (except when undertaking disability services work) – 3 hours;
  - ii. all other employees – 2 hours’
35. The draft variation determination varies the current award provision as follows:
  - a. introduces a minimum engagement period for part-time employees;
  - b. varies minimum engagement period for casual home care employees (from 1 hour to 2 hours).

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<sup>54</sup> <https://www.ndis.gov.au/providers/pricing-arrangements>

<sup>55</sup> [https://www.health.gov.au/sites/default/files/documents/2021/06/schedule-of-subsidies-and-supplements-for-aged-care-schedule-from-1-july-2021\\_1.pdf](https://www.health.gov.au/sites/default/files/documents/2021/06/schedule-of-subsidies-and-supplements-for-aged-care-schedule-from-1-july-2021_1.pdf)

<sup>56</sup> Statement of Kylie Lambert at para 60.

36. The FWC was not persuaded to provide a one hour minimum engagement for the purposes of staff meetings and training/professional development “at this time” in the absence of a cogent merit argument.<sup>57</sup> However, the FWC made it clear that this was not the end of the matter and provided interested parties an opportunity to present further arguments and evidence in support of the proposed change.<sup>58</sup>
37. AFEI notes that the one hour minimum engagement for staff meetings and training was opposed by the unions on the following basis:
- “...so far as ABI seeks to reserve a one hour minimum engagement for staff meetings and the like, ABI does not identify any other award with like provision. Given the rationale for minimum engagements is the avoidance of exploitation resulting from having the income generated by an attendance at work outweighed by the time and cost of attendance, there is no basis for exempting any particular work related activity from any minimum engagement provision.”<sup>59</sup>
38. In relation to training for employees:
- a. time in attendance at training can vary taking as little as seven minutes to at most, one hour in length;<sup>60</sup>
  - b. attendance at training can be completed online and in the employee’s own home or location of their choice and does not always require attendance at a location directed by the employer;<sup>61</sup>
  - c. to some extent, the training can be undertaken by employees at mutually convenient times to the employer and employee.<sup>62</sup>
39. The impact of the minimum engagement provision applying to training would be significant:
- a. *First*, the financial impact for employers in circumstances where training only takes 10 minutes to complete online in the employee’s own home but the employer would be required to pay for two hours; or
  - b. *Second*, to counter the significant financial impact, employers may be required to ‘bundle’ a series of training together until there is enough training to last two hours in length before requiring the employee to undertake the training (for example, if a training module takes 10 minutes in length, the employee may be required to undertake the training only when all 12 modules have been released). The consequential impact of this option would be on the employees and participants (including but not limited to their health and safety), particularly where the training is urgent in nature which is commonly the case given the nature of this sector.<sup>63</sup>
40. The cost impact would significantly outweigh the disutility of the training where training is undertaken online and in the employee’s own home and where there is no requirement for the employee to attend the workplace, which is the unions’ argument to justify the minimum engagement provision applying in such circumstances.

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<sup>57</sup> [2021] FWCFB 2383 [368] and [376].

<sup>58</sup> [2021] FWCFB 2383 [376].

<sup>59</sup> [2021] FWCFB 2383 [375].

<sup>60</sup> Statement of Kylie Lambert at para 32.

<sup>61</sup> Statement of Kylie Lambert at para 31.

<sup>62</sup> Statement of Kylie Lambert at para 34.

<sup>63</sup> Statement of Kylie Lambert at para 32 -33.

41. Due to the variable nature in the time involved to undertake training, the employee should be paid for the time it takes to complete the training. For example, payment at ordinary rate for 10 minutes of training. Accordingly, attendance at training should be exempt from the minimum engagement provisions.
42. Alternatively, employees favour the flexibility to undertake training at times convenient to them.<sup>64</sup> Accordingly, more flexibility should be provided to providers and employees in this respect. For example, with employee agreement, 3 x 20 minute training modules can be undertaken over a period of time, with all 3 training modules to be subject to the 1 hour minimum engagement.

### **Broken shift allowance**

#### *Determinations and Provisional View*

43. The FWC is not satisfied that clause 25.6 (broken shifts) in its current form provides a fair and relevant safety net, and that the “Award is less beneficial to employees than the broken shift provisions in a significant number of awards”.<sup>65</sup>
44. The FWC, in considering this claim determined that minimum engagement, broken shifts and travel time claims are inter-related.<sup>66</sup>
45. Consequently, the FWC determined that:<sup>67</sup>
  - a. a 2 hour minimum payment period will apply to each part of a broken shift;<sup>68</sup>
  - a. clause 25.6 will be varied to define a broken shift as a shift consisting of 2 separate periods of work with a single unpaid ‘break’;
  - b. a maximum of 2 unpaid ‘breaks’ would be permitted subject to employee agreement, on a per occasion basis;
  - c. an additional payment to apply for working broken shifts;
  - d. a 2 break shift would be subject to a higher payment than that payable for a 1 break shift;
  - e. clause 25.6 will also be varied to make clear that where a break in work for an employee (whether it be travel time or ‘dead’ time) falls within a minimum payment period, then it is to be counted as time worked and does not constitute a break in the employee’s shift.
46. In relation to the additional payment, the FWC further expressed the provisional view that the additional payment for working a broken shift should be an allowance calculated as a percentage of the standard weekly rate ranging from 1.7% Standard weekly rate (SWR) (\$17.10) for 1 break to 2.5% (\$25.15) for 2 breaks, payable per broken shift.<sup>69</sup>

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<sup>64</sup> Statement of Kylie Lambert at para 34.

<sup>65</sup> [2021] FWCFB 2383 [470].

<sup>66</sup> [2021] FWCFB 2383 [226].

<sup>67</sup> [2021] FWCFB 2383 [488 – 491].

<sup>68</sup> [2021] FWCFB 2383 [475].

<sup>69</sup> [2021] FWCFB 2383 [547], [552 – 554].

47. In reaching this provisional view, the FWC confirmed:
- a. “the entitlement to additional remuneration for working a broken shift should not depend on the times at which the shift starts and finishes”<sup>70</sup> and
  - b. “this new broken shift allowance will replace the current entitlement in clause 25.6(b)”.<sup>71</sup>
48. Consistent with its view above, the draft variation determination provides that the broken shift provision in the Award (clause 25.6) is to be replaced with a new provision that, amongst other things, removes the reference to clause 29-shiftwork.

#### *Quantum of broken shift allowance*

49. AFEI notes that the:
- a. broken shift allowance is set “towards the upper end of the range of other modern awards”,<sup>72</sup>
  - b. quantum of the broken shift allowance in other awards range from 0.28% SWR to 2.29%SWR;<sup>73</sup> and
  - c. broken shift allowance is intended to compensate for 2 disutilities:<sup>74</sup>
    - i. the length of the working day being extended because hours are not worked continuously; and
    - ii. an additional travel time and cost associated with effectively presenting for work on 2 occasions.
50. AFEI does not agree that the quantum of the broken shift allowance should be set towards the upper end of the range of other modern awards.
51. *First*, the comparison of broken shift allowances across other modern awards is not a sound basis for concluding that the allowance is appropriate for this Award. Modern Awards are industry specific, and the SCHADS Award is intended to specifically address the needs of the disability services and home care industries.<sup>75</sup>
52. *Second*, the rationale for minimum engagement terms in modern awards was 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...and the like’.<sup>76</sup> Accordingly, the introduction of the two hour minimum engagement per engagement/shift goes some way towards the disutilities noted by the FWC, in undertaking broken shifts.
53. *Third*, AFEI understands that the provisional allowances of 1.7% and 2.5% of the standard weekly rate is based on a number of factors (including that home care and certain disability employees have no ‘base location’, the length of the working day is extended because hours are not worked continuously and the additional travel time and cost associated with presenting

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<sup>70</sup> [2021] FWCFB 2383 [540].

<sup>71</sup> [2021] FWCFB 2383 [554].

<sup>72</sup> [2021] FWCFB 2383 [551 – 552].

<sup>73</sup> [2021] FWCFB 2383 [408].

<sup>74</sup> [2021] FWCFB 2383 [550].

<sup>75</sup> [2021] FWCFB 2383 [445].

<sup>76</sup> [2021] FWCFB 2383 [245].

for work on 2 occasions).<sup>77</sup> However, it is not clear why the proposed allowances are higher, or as described by the FWC, towards the 'upper end' of the range of other modern awards. In the light of the determinations at 45 above, the effects of which would lessen the impact on the length of an employee's working day and travel time (i.e. the disutilities identified by the FWC for working broken shifts), allowances towards the 'upper end' of the scale is not justified and should be reduced. The provisional allowances should be:

- a. 1.3% of the SWR for a broken shift with 1 break; and
- b. 2.0% of the SWR for a broken shift with 2 breaks.

### **Client cancellation (make up time can only be used with 12 hours notice)**

54. The FWC expressed the provisional view that make up shifts can only be used when the employee is provided with 12 hours' notice prior to the scheduled commencement of the shift.<sup>78</sup>
55. Consequently, this means that make up shifts cannot be used where less than 12 hours' notice is provided to the employee. In such circumstance, and as provided in the draft variation determination, an employer must "pay the employee the amount they would have received had the shift not been cancelled".<sup>79</sup>
56. The variation differs to the current award provision as follows:
  - a. currently, no payment is required to be made to the employee where notice of client cancellation is given to the employee by 5:00pm the day prior (i.e. this can be less than 12 hours notice);<sup>80</sup> and
  - b. there is no restriction on 'make up time' being linked to notice; and
  - c. extension of cancellation provision to disability services.
57. The variations<sup>81</sup> would impose significant limitations on service providers (financial, bureaucratic and administrative) where:
  - a. the FWC has already acknowledged that service providers in this sector now have less certainty in relation to revenue; are experiencing greater volatility in demand for services; and are experiencing an increase in cancellations by clients; an increase in requests for changes to services by consumers;<sup>82</sup> and
  - b. the likelihood of client cancellation in home care and disability services with less than 12 hours' notice is a strong possibility by reason of the nature of this industry (ill health or injury, medical appointments, hospitalisation, transfer to permanent residential care etc),<sup>83</sup> and particularly in circumstances where there is no funding to cover this additional financial cost.<sup>84</sup>

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<sup>77</sup> [2021] FWCFB 2383 [549 – 550].

<sup>78</sup> [2021] FWCFB 2383 [830]; clause 25.5(f)(v) draft variation determination.

<sup>79</sup> Clause 25.5(iv)(A) draft variation determination.

<sup>80</sup> Clause 25.5(f) SCHADS Award.

<sup>81</sup> Including the variations for clause 25.5(f) in general as set out in the draft variation determination.

<sup>82</sup> [2021] FWCFB 2383 [218].

<sup>83</sup> [2021] FWCFB 2383 [784].

<sup>84</sup> Statement of Kylie Lambert at para 20.

58. Furthermore, for providers who currently roster or who plan to roster employees in advance, a practice that would become more of a necessity now in the light of the variations concerning minimum engagement and broken shifts, the make up shift limitation of 6 weeks would present an overly complex administrative onus/burden on employers.
59. The variation as proposed is inconsistent with section 134(d), 134(f), 134(g) of the *Fair Work Act 2009* (Cth) and is not necessary to achieve the modern awards objective.<sup>85</sup>

### Remote response

60. The FWC determined that it is necessary to introduce an award term dealing with remote response work.<sup>86</sup>
61. Remote response addresses the circumstance where an employee, who is not 'at work' or otherwise rostered to work or performing work at a particular time, is contacted and required to undertake certain functions remotely without physically attending the employer's premises (such as providing information to the employer over the telephone).<sup>87</sup>
62. The FWC expressed the provisional view that the minimum payment for remote response work performed between 6:00am to 10:00pm should be 30 minutes and minimum payment for work between 10:00pm and 6:00am should be one hour.
63. AFEI observes:
  - a. there is currently no determined definition of 'remote response work',<sup>88</sup>
  - b. the rate of payment is an undetermined issue;<sup>89</sup> and
  - c. the FWC has noted that there is an inter-relationship between the minimum payment period and rate of payment... the appropriate rate of payment issue is subject to later conference.<sup>90</sup>
64. The FWC made the following general observations about such a term:<sup>91</sup>
  - a. a shorter minimum payment should apply in circumstances where the employee is being paid an 'on call' allowance;
  - b. there is merit in ensuring that each discrete activity (such as a phone call) does not automatically trigger a separate minimum payment;

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<sup>85</sup> Sections 134(d), 134(f), 134(g) Fair Work Act 2009 (Cth) provides "the FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant safety net of terms and conditions, taking into account: **(d)** the need to promote flexible modern work practices and the efficient and productive performance of work; **(f)** the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden"; **(g)** the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards"

<sup>86</sup> [2021] FWCFB 2383 [722].

<sup>87</sup> [2021] FWCFB 2383 [647].

<sup>88</sup> [2021] FWCFB 2383 [722].

<sup>89</sup> [2021] FWCFB 2383 [738].

<sup>90</sup> [2021] FWCFB 2383 [733].

<sup>91</sup> [2021] FWCFB 2383 [722].

- c. ABI's proposed definition of 'remote response work' or 'remote response duties' as follows:

'In this award, remote response duties means the performance of the following activities:

- (a) Responding to phone calls, messages or emails;
- (b) Providing advice ("phone fixes");
- (c) Arranging call out/rosters of other employees; and
- (d) Remotely monitoring and/or addressing issues by remote telephone and/or computer access"; and

- d. The clause should include a mechanism for ensuring that the time spent by an employee working remotely is recorded and communicated to their employer.

65. In view of the FWC's Statement and directions dated 3 August 2021 for remote response and damaged clothing to be discussed through further conference, AFEI reserves its submissions pending the proposed conference.

## 24-Hour Care

66. The FWC confirmed its provisional view that the 24-hour care provision (clause 25.8) should be retained, but that the existing clause requires amendment.<sup>92</sup>

67. The draft variation determination specifies variations to the 24-hour care clause as follows:

- a. requirement for employee to agree to work 24-hour care shift;
- b. where employee is required to perform more than 8 hours work during a 24-hour care shift, overtime applies/TOIL per clause 28.2;
- c. employee may refuse to work more than 8 hours if unreasonable;
- d. an entitlement to an additional weeks' annual leave as a shiftworker if employee works at least eight 24-hour care shifts in any 12 month period;
- e. employee to be afforded an opportunity to sleep for a continuous period of 8 hours;
- f. employee to be provided with clean linen, provision of appropriate facilities to include access to food preparation facilities and staff facilities if they exist); and
- g. free board and lodging for sleepover.

68. In relation to the new requirement for the employee to be afforded the opportunity to sleep for a "**continuous** period of 8 hours", it is AFEI's understanding that the FWC appreciates that during a 24-hour care shift, an employee's sleep could be interrupted.<sup>93</sup> However, clause 25.8(c) of the draft variation determination does not reflect this understanding and further, the clause as currently drafted, fails to take into account the realities of an employee performing a 24-hour care shift which include that:

- a. the purpose of 24-hour care is so that a carer is with a client for a 24-hour period providing one-on-one personalised care;<sup>94</sup>

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<sup>92</sup> [2021] FWCFB 2383 [1013].

<sup>93</sup> [2021] FWCFB 2383 [1061] states "In relation to the proposed payment regime for where sleep is interrupted, ABI's proposed clause 25.8(e) has the effect of treating such work as overtime. In our view no further change is necessary".

<sup>94</sup> Statement of Kylie Lambert at para 7.

- b. employees will have an opportunity to sleep during the shift, often for more than 8 hours,<sup>95</sup> and
  - c. 24 hour clients are often frail and suffer from medical diagnoses such as dementia and as such, they will need to get out of bed during the night to use the toilet.<sup>96</sup>
69. As a practical alternative, we suggest either removal of the word “continuous” in clause 25.8(c) of the draft variation determination or vary the provision to make clear that where an employee undertakes work in the night, that such work would count towards the 8 hours of care work.

### **Clothing and Equipment Allowance**

70. In view of the FWC’s Statement and directions dated 3 August 2021 for remote response and damaged clothing to be discussed through further conference, AFEI reserves its submissions pending the proposed conference.

### **Travel Time**

71. In relation to travel time, Justice Ross reiterated at a conference held on 27 May 2021,<sup>97</sup> that the claims concerning minimum engagement, broken shifts and travel time are interrelated and all impact on one another and that the changes made in relation to minimum engagement and broken shifts may impact on parties’ perspective around travel time. On this basis, Justice Ross confirmed that travel time is ‘parked for the moment’ to allow time to observe the impact on the changes made to minimum engagement and broken shifts once they have operated for a period.
72. In the light of the above, AFEI reserves its right to make further submissions in relation to travel time.

3 August 2021

**Australian Federation of Employers and Industries**

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<sup>95</sup> Statement of Kylie Lambert at para 50.

<sup>96</sup> Statement of Kylie Lambert at para 50.

<sup>97</sup> Transcript of Proceedings (AM2018/26) Thursday 27 May 2021 at PN129-PN130.



## FAIR WORK COMMISSION

4 Yearly Review of Modern Awards – Social, Community, Home Care and Disability Services Industry Award 2010 ('SCHADS Award') – Substantive Claims

Matter: AM2018/26

### STATEMENT OF KYLIE LAMBERT

I, Kylie Lambert, of Daughterly Care Community Services Limited located at [REDACTED], say as follows:

#### MY BACKGROUND

1. I am the Director and Co-Founder of Daughterly Care Community Services Limited ('Daughterly Care'). I have been in this role since 2016. Prior to that time, I have over twenty years' experience in home care services as the CEO of Daughter Care Pty Limited. This company no longer employs any persons engaged under the SCHADS Award.
2. My day-to-day duties and responsibilities in my role at Daughterly Care include the following:
  - a. providing strategic, financial and operational leadership;
  - b. providing internal advice regarding financial matters associated with services, including funding arrangements and contractual arrangements with clients;
  - c. maintaining current knowledge of funding arrangements relevant to operations, including by reviewing updates provided by the relevant Government Departments; and
  - d. recommending pricing & wages changes to the Board of Daughterly Care.
3. I have a Bachelor Degree from Sydney University in Economics. I also have a Graduate Diploma in Applied Finance and Investment from FINSIA, The Financial Services Institute of Australasia.

#### INFORMATION ABOUT DAUGHTERLY CARE

4. Daughterly Care is a Not-for-Profit organisation and a registered charity with the Australian Charities and Not-for-Profit Commission.
5. Daughterly Care provides in home aged care support and care to elders in New South Wales.
6. 43% of care is provided through services of 2 hours or more during the day which include inactive and active overnight care services (i.e., the care worker is in the client's house overnight for a shift. For an inactive overnight shift, the care worker can sleep but responds to any client needs arising overnight. For an active overnight, the care worker does not sleep).
7. The remaining 57% is the provision of 24-hour care. This is when a care worker is with a client for a 24-hour period providing one-on-one personalised care.
8. For the last financial year (1 July 2019 – 30 June 2020), Daughterly Care operated on 2.3% profit, with 90.7% of expenses going towards labour costs.
9. Daughterly Care currently employs 206 home care workers. Home care workers are employed mostly on a casual basis.

10. Daughterly Care currently pay care workers at an above award rate. Our care workers are classified as social and community services level 2 pay point 2 (the pay for this level is \$927.70 per week) and Daughterly Care pay these workers at Level 3, pay point 2 (\$1009.70 per week). This is the rate used to calculate the base rate for casual workers, which carries an additional 25% loading. We pay an above award rate of pay to attract good quality care workers to work with us.

#### **THE FAIR WORK COMMISSION'S DECISION**

11. I understand that the Fair Work Commission (the 'Commission') has recently issued a decision in relation to the 4-yearly review of the Social, Community, Home Care and Disability Services Industry Award (the 'decision').
12. I understand that the decision proposes a number of changes to the Award including:
  - a. variation to broken shift provisions to limit broken shifts to one break or two breaks maximum, with employee agreement on a per shift basis ("broken shift provision");
  - b. variation to the minimum engagement provisions for casual home care employees from 1 hour to 2 hours ("minimum engagement");
  - c. variations to the 24-hour care provision including affording an opportunity for an employee to sleep for a continuous period of 8 hours;
  - d. variations to client cancellation provision including, where make-up time cannot be provided, an employer must pay the employee the amount they would have received had the shift not been cancelled ("client cancellation payment");
  - e. reimbursement of reasonable costs associated with the cleaning or replacement of personal clothing which has been soiled/damaged in the course of employment ("damaged clothing allowance"); and
  - f. introduction of an award term dealing with remote response work.
13. I also understand that the Commission has expressed a number of provisional views that include:
  - a. additional remuneration should be paid in the form of an allowance for working a broken shift under clause 25.6; that the allowance should be 1.7% of the standard weekly rate ('SWR') for 1 break; and an allowance of 2.5% for 2 breaks, by agreement ("broken shift allowance");
  - b. commencement date for the variations to take effect from 1 October 2021.

#### **IMPACTS OF THE DECISION ON DAUGHTERLY CARE**

14. The decision will have a significant negative impact on our operations. These impacts are explained in more detail below.

#### **FUNDING ARRANGEMENTS (HOME CARE SERVICES)**

15. Daughterly Care provides privately funded care and Government subsidised home care packages ('HCP').
16. There are two parts to the business, the first part is the hourly and overnight care which represents 43% of the business, of which 45%, for the last financial year, was funded by HCP. The other part of the business is live in care and 24-hour care which is mostly funded privately.

17. The Federal Government has mandated that HCP have a consumer directed care approach. This means that clients have choice, flexibility and control over the types of services they receive; how the services are provided; who provides the services; and when the services are to be provided.
18. The level of funding is assessed through individual client care needs by the Aged Care Assessment Team, a Government body.
19. HCP funding is administered by Daughterly Care (as an approved provider) but notionally the funding belongs to the client to pay for the care services chosen by the client.
20. HCP funding will not cover the anticipated increases in costs arising from the decision in relation to:
  - a. broken shift allowance;
  - b. minimum engagement;
  - c. client cancellation payment;
  - d. damaged clothing allowance; and
  - e. remote response.
21. These anticipated costs would need to be borne by Daughterly Care or the client.
22. This is a significant concern given the profit margin referred to earlier.
23. Cost increases for our HCP and private paying clients also run the risk of those clients preferring alternative aged care providers including aged care providers who engage care workers on a contractor basis (such as provided through online platforms as opposed to employment of care workers) and who would therefore not be subject to the SCHADS Award and the associated costs.
24. If our clients were to move to a different provider because of increases to service fees, we would need to spend money on advertising and marketing to find new clients. We would prefer not to have to do this of course, we would rather prefer to retain our current clientele.
25. On 1 February 2021, the Federal Government implemented the Improved Payment Arrangements reform ('IPA Reform'). The IPA reform changes the way the Government pays home care package program subsidies and supplements to providers. Instead of paying the full subsidy and supplements in advance each month, it has been paid in arrears. This means that we now require additional working capital.
26. The most significant funding change to HCP starts in September 2021, where in home care providers will now be paid in arrears for services provided. This could mean waiting months to be paid for services delivered.
27. Other changes as a result of the IPA reform include that unspent funds will no longer sit at the approved provider level but be retained by the Federal Government. As a result, this would double the reconciliation workload. The additional workload that would need to be undertaken include the provision of statements to clients confirming their funding, the work undertaken by Daughterly care and the client's unspent funds. We would also have to

reconcile our accounts with the Government's accounts concerning client funding to ensure any incorrect information is to be corrected. To do this extra work will incur additional accounting and audit costs. I estimate additional reconciliation costs to be in the region of over \$50,000.00 excluding costs of an external auditor.

28. We would also be required to make programming changes to software to reconcile information from Medicare with unspent client funds. We have got our software to the base changes needed and it has cost us \$127,000 so far.
29. The Government did not provide any increase in funding to compensate for the increased need for working capital, the delay in payments for work done or implementation of new systems to address changes to unspent funds.

#### **MINIMUM ENGAGEMENT**

30. I have seen the draft variation determination that was issued alongside the decision. Generally I support the variation to clause 10.5 of the award concerning minimum payments for part-time and casual employees except that there needs to be some flexibility in relation to training, staff meetings and minimum engagement.
31. Our care workers undertake training. Training can be completed face-to-face or online. Online training can be completed in the care worker's own home.
32. The time engaged by care workers attending training is highly variable, particularly where the training is completed online. Taking the COVID-19 pandemic for example, the Government drip-fed training modules to be completed by our care workers. Some modules lasted for as little as 7 minutes whilst other modules lasted one hour. Because the training arose as a result of the pandemic and related to employee and client health and safety, it was important to have our care workers complete the training as soon as practicable, to optimise theirs and the client's protection.
33. With the Commission's decision to vary minimum engagement for casual employees in the home care stream to be increased from 1 hour to 2 hours, we would be required to 'bank up' two hours' worth of online training for our care workers. Where the training only takes ten minutes in length and can be done online, it would take a while before the training can be 'banked up'. Without stating the obvious, this is not an efficient way to train our care workers and could work against protecting the health and safety of our employees and clients.
34. It would also be easier for care workers to find ten minutes, twenty minutes or even one hour in their week (or day) to focus on one training topic than be overwhelmed by lots of topics for two hours. Care workers are working, raising children, caring for their parents and managing their home.
35. If we were to apply the two hour minimum to training that takes less than two hours in length to complete, this would:
  - a. Increase training costs substantially; and
  - b. potentially make the training less effective for care workers because:

- i. they would be required to undertake the training at times that may not be convenient to them but rather is undertaken at such time when there is sufficient training to last 2 hours in length;
- ii. care workers may find it more overwhelming to sit through continuous training lasting 2 hours as opposed to short, sharp topics lasting ten minutes to one hour.

36. Although not frequent, Daughterly Care do, on occasion, hold staff meetings, both face to face and online. Staff meetings are usually held to discuss employee performance or underperformance. Where meetings are held, we would pay for the care worker's time in attendance at the meeting. Such meetings do not last two hours in length, particularly where meetings are held online. Online meetings can be completed quicker than face to face meetings as there is less time wasted.

#### **BROKEN SHIFT ALLOWANCE**

37. The provisional view on broken shift allowance would have a direct cost impact on our organisation.

38. I have undertaken a review of broken shifts rostered over the financial year ending 30 June 2021 (1 July 2020 to 30 June 2021). In this period, we rostered 7,106 broken shifts out of 25,205 total rostered shifts, for casual employees

39. There were 6,067 or 86% of broken shifts with one break, 865 or 12% percent with two breaks, and 174 or 2.0% percent with three or more breaks.

40. Although we implement a two hour minimum engagement, I am aware of other providers implementing engagements for periods shorter than one hour in length.

41. With the Commission's provisional view to introduce broken shift allowances, I calculate potential cost impact of these variations to be in the region of \$121,571.92 for the year.

42. This represents an increase to our wage costs by 3.14%.

#### **REMOTE RESPONSE**

43. I understand that:

- a. the Commission has determined to introduce an award term dealing with remote response work; and
- b. there is currently no determined definition of remote response work although at paragraph 722 of the decision, the Commission noted ABI's proposed definition for 'remote response work' as follows:

*"In this award, remote response duties means the performance of the following activities:*

- (a) Responding to phone calls, messages or emails;*
- (b) Providing advice ("phone fixes");*
- (c) Arranging call out/rosters of other employees; and*

*(d) Remotely monitoring and/or addressing issues by remote telephone and/or computer access”*

- c. the Commission has expressed the provisional view that the minimum payment for remote response work performed between 6:00am and 10:00pm should be 30 minutes and the minimum payment between 10:00pm and 6:00am should be 1 hour
44. The way that Daughterly Care currently operate, we don't contact our care workers when they are on shift with a client so that our worker can focus on providing quality services. Our contact is made by telephone or email on an 'as needed' basis about medical issues or hospital appointments or shifts such as start and finish times.
  45. For example, we would contact our worker by phone about Mrs Smith's change in medical circumstance, and ask whether the worker would still be willing to work with Mrs Smith in the light of the medical changes given that the worker would not have dealt with such medical issues previously but has nevertheless been trained to address such issues.
  46. The contact above does not constitute 'work' because it does not require any particular functions to be undertaken by the worker.
  47. For this reason, the definition of remote response work should be clarified so that the following is excluded from application:
    - a. responding to a telephone call, message or email where:
      - i. this is essential to the health or safety of a client;
      - ii. the contact is a consequence of the worker not undertaking, or not properly undertaking, a task that they were required to perform whilst at work (e.g. calls to clarify whether a client has been given medication in circumstances where handover notes have not been properly completed by the employee);
      - iii. the contact is about the offer/acceptance/cancellation of a shift
    - b. undertaking administrative tasks associated with maintaining employment, for example, communicating with us to indicate whether they are willing to work hours outside of rostered hours or undertake a shift which is broken twice; responding to suggestions for make-up time for cancelled shifts; reviewing or enquiring about roster.

#### **24-HOUR CARE**

48. 24-hour care forms a significant part of our services, I refer to paragraph 7 above. 24-hour care is important to our business and for our clients. 24-hour care provides our elderly clients with the dignity to live comfortably, joyfully and safely in their own home, rather than a nursing home, with the support from our care workers. There are certain practicalities required for the provision of this type of work.
49. I understand that the Commission has confirmed its provisional view to retain the 24-hour care clause in the Award subject to variations to existing clauses 25.8 and 31.2.

50. I have concerns with the proposed clause, specifically the new requirement for the employee to be afforded the opportunity to sleep for a “**continuous** period of 8 hours”. The way that 24 hour care operates in reality is that:
- a. care workers will have an opportunity to sleep during the shift, often for more than 8 hours; however
  - b. our 24 hour clients are frail or have a form of dementia. Often they will get up to go to the toilet during the night. We assist them to safely go to the toilet and then the employee will go back to sleep. Our care worker might get 10 hours sleep but it is not always 8 *continuous* hours.
51. The clause should read “the carer to be afforded an opportunity to 8 hours’ sleep, to be continuous where practicable”.

### **OTHER IMPLICATIONS**

52. Daughtery Care sets budgets by May each year.
53. The above estimated increases to costs have not been budgeted for, for this year.
54. The impacts of the decision are further exacerbated by:
- a. HCP funding for July 2021 increased by only 1% (this is despite a minimum wage increase of 2.5% as well as recent superannuation increasing from 9.5% to 10% so in effect the cost of employing staff has increased by 3% before all these provisional changes); and
  - b. the Commission’s determination in the Tranche 1 proceedings to vary the payment of casual loading in addition to weekend penalties, public holiday penalties for ordinary hours worked and in addition to overtime penalties, which resulted in a an additional 25% pay for weekends, public holidays and overtime rates. These additional costs were so large that they were not fully passed on to our clients and so for some services, we operated at a loss.
55. Consequently, I anticipate that we would need to make changes to the way the organisation is currently run to counter the anticipated cost impact, which would include a review of and increase to client costs (both private and HCP clients) as well as considering our ability to continue to pay our care workers at an above award rate of pay.
56. Implementation of the decision would also require, at the very least:
- a. a significant alteration to rosters;
  - b. amendments to rostering and payroll systems;
  - c. employee agreement to be obtained from all care workers as you never know when a break will appear. A client cancelling a service can create a break;
  - d. recruitment of employees to fulfil gaps in roster as a result of changes to broken shifts and minimum engagement;
  - e. consultation and training of employees on the new systems and the decision;
  - f. consultation with clients on changes to their services.
57. In relation to 56(d), Daughtery Care has experienced significant difficulties with recruitment of employees for since January 2020 when the COVID-19 pandemic began due to the closure of Australian Borders. This is a further impact on our organisation.

### **OTHER CHALLENGES CURRENTLY FACED BY DAUGHTERLY CARE**

58. Daughterly Care is also currently facing numerous other challenges including, in response to the COVID-19 pandemic, we are required to take additional steps to ensure the health, safety and wellbeing of our employees and clients including but not limited to:
- a. ensuring our employees undertake on-going and refresher COVID-19 training;
  - b. alteration to rosters, sometimes on a daily basis, due to care workers being 'close' or 'casual' contacts of COVID positive persons;
  - c. alterations to rosters, sometimes on a daily basis, because of clients cancelling services or needing additional services because their family cannot visit as they usually do;
  - d. ensuring appropriate personal protective equipment is provided to all employees;
  - e. regularly communicating with our care workers about vaccination. Despite the Government mandating vaccination for aged care workers, this requirement excludes in-home care workers. Therefore, our workers are not mandated to be vaccinated against COVID-19. This creates issues for our organisation. For example, we spend a lot of time:
    - educating our workers of the risks of not being vaccinated versus perceived risk of blood clots from the Astra Zeneca vaccine;
    - responding to clients who only wish to receive services from vaccinated staff;
    - organising rosters to cater to client requests including recruitment of workers where required;
    - organising rosters to cater to clients who may have been potentially exposed to COVID-19 (we may have a worker who agrees to work with a client of this type but we would not permit the same worker to provide services to other clients (as the worker normally would) and thus our rosters would need to be amended accordingly);
    - booking in care workers for vaccinations;
    - provision of a weekly report to the Government regarding vaccination status of workers.

59. As stated earlier, an added difficulty for Daughterly Care is the difficulties it has experienced with recruitment due to the COVID-19 pandemic. Daughterly Care has found that recruitment has become expensive and difficult for a range of reasons (for example, older care workers withdrawing from the workforce to protect their own health and the health of their partner; care workers who are grandparents reducing hours or withdrawing from the workforce to provide child minding and home schooling assistance to their grandchildren etc.)

### **PROVISIONAL COMMENCEMENT DATE – 1 OCTOBER 2021**

60. I understand that the Commission has expressed the provisional view that variations to the Award would commence on 1 October 2021. I have concerns that this would provide Daughterly Care with insufficient time to:
- a. seek funding increases to account for the costs;
  - b. review, consider, vary and implement changes to rosters for over 206 employees. We would be required to make modifications to our rostering software, and test those changes and re-program and re-educate our rostering team.



- c. review, consider, vary and implement a system to obtain employee agreement to change the way that broken shifts are worked (i.e. from multiple breaks to maximum of two breaks);
- d. review, consider, vary and or implement a reorganisation to the workforce if appropriate;
- e. hire new employees (home care employees and additional rostering staff) - we currently employ 3 full-time rostering employees to roster 206 home care workers;
- f. meet with and consult with employees regarding proposed variations; and
- g. meet and consult with clients (and their adult children where required) regarding proposed variations to services. On this point, we are currently in a pandemic – clients do not want superfluous people entering their homes. Clients are not only reducing services to as few as they can live with to reduce risk but also reducing unnecessary persons from entering their homes. At the same time contracts need to be re-negotiated and this should be done face-to-face because changes to service agreements will require signing of paperwork. With the pandemic, this can't be done by 1 October 2021, it is not physically possible.

61. 1 July 2022 would be a more reasonable time frame to implement the proposed variations.

[REDACTED]

Signed by Kylie Lambert

3 August 2021