Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Further Submission

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

(AM2018/26)

17 September 2021

AM2018/26 SOCIAL, COMMUNITY, HOME CARE AND DISABILITY SERVICES INDUSTRY AWARD 2010

1. INTRODUCTION

1. This submission is filed on behalf of:

   (a) The Australian Industry Group (**Ai Group**);

   (b) The Australian Federation of Employers and Industries (**AFEI**);

   (c) National Disability Services;

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

   (e) Business NSW;

   (f) Aged and Community Services; and

   (g) Leading Age Services Australia.

   (collectively, **Employer Parties**)

2. The submission is filed in accordance with the directions[1] issued by the Fair Work Commission (**Commission**) on 3 September 2021, which were subsequently amended on 15 September 2021. It responds to the following questions posed by the Commission:

   (a) Do the parties oppose the Commission's provisional view that it will not express an opinion about the interaction between clauses 25.6 and 29.4 of the *Social, Community, Home Care and Disability Services Industry Award 2010* (**Award**) and whether the Award currently permits an afternoon or night shift (as defined by clause 29.2) to be broken in accordance with clause 25.6? (**The First Question**)

[1] *4 yearly review of modern awards—Social, Community, Home Care and Disability Services Industry Award 2010* [2021] FWCFB 5493 at [23].

(b) Should the Award permit an afternoon or night shift to be broken in accordance with clause 25.6? (Noting that it is common ground that clause 25.6 only applies to social and community services employees when undertaking disability services work and home care employees) (**The Second Question**)

(c) If the Commission decides that the answer to the Second Question is yes; what terms and conditions should apply to shiftworkers when working broken shifts? (**The Third Question**)

(d) Should the Award be varied to provide a clear statement that employees must not be required to travel between work locations during their meal breaks and that overtime should be payable until an employee is allowed a meal break free from travel (as proposed by the Australian Services Union (**ASU**). If so, what form should that variation take? (**The Fourth Question**)

3. The Employer Parties' position in respect of the aforementioned questions can be summarised as follows:

The First Question	The Employer Parties support the Commission's provisional view.
The Second Question	The Award should permit an afternoon or night shift to be broken in accordance with clause 25.6 of the Award.
The Third Question	When a shiftworker performs work on a broken shift: • The Employer Parties accept that clause 25.6 of the Award, as proposed to be varied by the Commission in its draft determination of 25 August 2021, will regulate the performance of the broken shift. • The Employer Parties contend that the proposed broken shift allowances should be substantially reduced. • The Employer Parties contend that an employee should only be entitled to the shift loading during that portion of the broken shift that gives rise to the entitlement to the shift loading.
The Fourth Question	It is not necessary for the Award to be varied as proposed by the Fourth Question.

4. We deal with each of the questions in turn in the submissions that follow. In addition, we attach a draft determination at **Attachment A**, which gives effect to our submissions in this regard.[2]

[2] The draft determination is in the same terms as the draft determination Ai Group filed on 31 August 2021.

2. THE FIRST QUESTION

5. The Employer Parties support the Commission's provisional view that it will not express an opinion about:

   (a) The interaction between clauses 25.6 and 29.4 of the Award; and

   (b) Whether the Award currently permits an afternoon or night shift (as defined by clause 29.2 of the Award) to be broken in accordance with clause 25.6.

6. It is in our view unnecessary for the Commission to reach a concluded view about the proper meaning of the extant provisions in these proceedings, which form part of the 4 yearly review of modern awards and are ultimately directed towards ensuring that the Award achieves the modern awards objective.

7. If the Commission nonetheless decides that it should express an opinion about the meaning of the relevant terms; the Employer Parties submit that the Award does permit an afternoon or night shift to be broken in accordance with clause 25.6, having regard to the following:

   (a) The plain and ordinary meaning of the relevant words.

   (b) The history preceding the relevant extant Award clauses.

8. We nonetheless accept that the provisions are arguably unclear. They are certainly far from simple or easy to understand.

9. We address these matters in detail below, but in so doing, we do not seek to infer that the Full Bench is required to express a view about such matters. The Full Bench does not need to determine the proper interpretation of the extant provisions should it form the view that, regardless of the interpretive controversy, it is necessary for the Award to permit the working of broken shifts by shiftworkers.

The Plain and Ordinary Meaning of the Relevant Provisions of the Award

10. The Award defines a *'shiftworker'* as an employee who works shifts in accordance with clause 29.[3] In addition, clause 29.1 requires that an employer must advise an employee in writing if they wish to engage an employee in shiftwork, *'specifying the period over which the shift is ordinarily worked'*.

11. Clause 25.6 of the Award is in the following terms: (emphasis added)

> **25.6 Broken shifts**
>
> This clause only applies to social and community services employees when undertaking disability services work and home care employees.
>
> **(a)** A broken shift means a shift worked by an employee that includes one or more breaks (other than a meal break) and where the span of hours is not more than 12 hours.
>
> **(b)** Payment for a broken shift will be 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.
>
> **(c)** All work performed beyond the maximum span of 12 hours for a broken shift will be paid at double time.
>
> **(d)** An employee must receive a minimum break of 10 hours between broken shifts rostered on successive days.

12. On its face, clause 25.6 appears to apply to both day workers and shiftworkers. It is not expressly limited to one or the other. There is no indication in the text of clause 25.6(a) that the definition of a broken shift provided by clause 25.6(a) does not apply in the context of shiftwork. Indeed, the references to a *'shift'*, when considered in the context of references to *'shifts'* and *'shiftwork'* under other provisions of the Award suggests that the clause contemplates the inclusion of employees working a pattern of ordinary hours that extends beyond the pattern permissible for a day worker under clause 25.2.

13. Moreover, clause 25.6(b) arguably contemplates the performance of a broken shift by a shiftworker. It requires that an employee will be paid *'at ordinary pay'* and, in addition, will be paid *'penalty rates'* as well as *'shift allowances'*

[3] Clause 25.2(b) of the Award.

prescribed by clause 29. The provision then goes on to modify the way in which the shift allowances are to be applied to work performed on a broken shift. That is, it requires that the application of the shift allowance is to be determined by reference to the time at which the shift ends.

14. In our submission, the *'penalty rates'* referenced by clause 25.6(b) are premiums prescribed by the Award that are separate and distinct from the shift allowances prescribed by clause 29. So much is clear from the final phrase of the subclause, which deals specifically with *'shift allowances'* and thereby draws a distinction between shift allowances and penalty rates.

15. Read in this way, clause 25.6(b) signposts the various other Award entitlements that apply during the performance of a broken shift (i.e. shift allowances and other penalty rates, such as weekend and public holiday penalty rates). In addition, however, it alters the way in which shift allowances are to be calculated in respect of broken shifts.

16. To that extent, the provision does not require the payment of an additional amount, which is akin to a broken shift allowance that is calculated by reference to the shift allowances prescribed by clause 29.2. Rather, it identifies that shift allowances are payable as per clause 29, where an employee is performing shiftwork, and also requires that such provisions be applied in the manner contemplated by clause 25.6(b).

17. This interpretation of the provisions is fortified by the use of the words *'in accordance with'*, in clause 25.6(b). That is, the clause requires the payment of shift allowances in accordance with clause 29, subject to the proviso that follows regarding the finishing time of the shift.

18. Relevantly, clause 29 prescribes shift allowances that are payable by reference to the time at which a shift, consisting of ordinary hours, starts and / or finishes. The determination of whether a period of work constitutes a *'shift'* for the purposes of clause 29 and if so, the allocation of the appropriate premium prescribed by clause 29.3, is determined by reference to when the relevant

period of work, made up of ordinary hours, commences and / or concludes. It does not require an assessment of time worked that constitutes overtime.

19. If time worked on a broken shift outside the spread of hours prescribed by the Award for day work (i.e. 6.00am to 8.00pm[4]) must be treated as overtime, because it cannot constitute part of an afternoon or night shift, that time would not form part of a *'shift'* for the purposes of clause 29 and therefore, a shift allowance *'in accordance with clause 29*' would not be payable.

20. Further, if clause 25.6(b) is read as requiring the payment of an additional amount to a full-time day worker who performs work on a broken shift that, for instance, finishes after 8.00pm, this would result in various unusual outcomes. For instance, such an employee would be entitled to:

    (a) An additional amount calculated by reference to the number of hours worked during the broken shift in accordance with clause 29.3; and

    (b) The employee would be entitled to overtime rates for time spent working after 8.00pm, in accordance with clause 28.1(a).

21. Meanwhile, an employee who finishes work on a broken shift at 8.00pm, will not be entitled to any additional amounts.

22. If clause 25.6(b) of the Award is intended to require the payment of an additional amount to an employee performing work on a broken shift for the disutility of working a broken shift, it is unclear why such an amount would be payable only to employees who work on a shift that finishes after 8pm. If, on the other hand, clause 25.6(b) is designed to compensate employees who work on a broken shift that finishes late in the day or early in the morning, when coupled with clause 28.1(a), the Award would appear to deliver two benefits that are directed towards substantially the same issue.[5] This would be an anomalous and unfair outcome.

[4] Clause 25.2(a) of the Award.

[5] For avoidance of doubt, we consider that although clause 28.1(a) does not expressly require the payment of overtime rates for time worked outside the span of hours prescribed by clause 25.2(a), such time will necessarily be *'in addition to [an employee's] rostered ordinary hours'* and accordingly,

23. Notwithstanding any of the above; the application of 25.6 of the Award to shiftworkers is brought into question by clause 29.4, which states as follows: (emphasis added)

> **29.4** Shifts are to be worked in one continuous block of hours that may include meal breaks and sleepover.

24. Read in isolation, it appears that clause 29.4 does not permit the performance of an afternoon or night shift, as defined by clause 29.2, in the form of a broken shift. Rather, it requires that ordinary hours of work that constitute such a shift must be worked continuously.

25. There is, as a consequence, an apparent tension between clause 25.6 and clause 29.4 of the Award, and as a consequence of clause 29.4, the application of clause 25.6 to shiftworkers is potentially unclear.

26. Nonetheless, in our submission, it is at least reasonably arguable that clause 25.6 qualifies the operation of clause 29.4. That is, it provides an exception to the general proposition that shifts are to be worked in a *'continuous block'* in relation to the categories of employees to whom clause 25.6 applies. Read in this way, clause 25.6 wholly regulates the manner in which an afternoon or night shift can be broken for such employees. Our submissions about the proper interpretation of clause 25.6(b) also support this view, as does the relevant history preceding the extant Award provisions. We turn to this issue below.

Historical Considerations

27. An analysis of the relevant historical considerations reveals that:

    (a) None of the pre-modern awards that expressly provided for broken shifts limited the performance of such shifts to day work or day workers.

it follows that overtime rates will be payable pursuant to clause 28.1(a), in the context of a full-time employee.

(b) The absence of an express exemption from the requirement at clause 29.4 for broken shifts of the nature contemplated by clause 25.6 of the Award appears to be the result of an error or anomaly that has emerged from the Part 10A Award Modernisation process.

(c) Although the interaction between clauses 25.6 and 29.4 was contemplated by various unions and employer associations during the Two Year Review, none proposed a specific variation to the Award to restrict the performance of broken shifts to day workers. The employer parties who made submissions argued that clause 25.6 provides an exception to clause 29.4. The Commission did not find otherwise.

28. We explain the bases for the above propositions in the submissions that follow.

The Pre-Modern Awards

29. At **Attachment B** to this submission, we set out our analysis of the awards that have been identified by the Commission as applying in the sectors covered by the Award prior to its operation.[6] The analysis reveals that the vast majority of instruments did not specifically regulate the performance of broken shifts. That is, whilst they did not require the continuous performance of ordinary hours, they did not prescribe specific terms and conditions associated with the performance of a broken shift.

30. A handful of awards did contain provisions that dealt specifically with work on a broken shift. None prohibited shiftworkers from performing such broken shifts; or put another way, none prohibited a shift from being broken in accordance with the broken shift provision.

31. This is relevant because:

(a) It demonstrates that the minimum safety net applying to the sectors covered by the Award has, for many years, typically permitted the performance of broken shifts by shiftworkers.

[6] Fair Work Commission, *Draft Award Audit* (as at 3 January 2012).

(b) It suggests that the performance of work on broken shifts by shiftworkers was potentially a feature of the sectors covered by the Award for many years.

(c) It reflects the position that existed prior to the Part 10A Award Modernisation process and the position that was likely intended to be retained when the Award was made, absent an express indication to the contrary from the Australian Industrial Relations Commission (**AIRC**) and / or any of the parties that were involved in that process.

The Part 10A Award Modernisation Process

32. At **Attachment C** to this submission, we have summarised the relevant developments during the Part 10 Award Modernisation Process. It appears that:

(a) The extant broken shift provision was adopted by the AIRC from a draft award filed by the ACE. That draft instrument made clear that broken shifts could be worked by shiftworkers and that the requirement that ordinary hours be worked continuously was subject to the performance of broken shifts in accordance with that clause.

(b) The shiftwork provisions were initially adopted by the AIRC from draft awards filed by AFEI and the ASU. Ultimately, the provisions were adopted from a draft instrument filed by ABI. Although ABI originally proposed that the provision now found at clause 29.4 of the Award should expressly exclude broken shifts, this appears to have been inadvertently and inexplicably omitted from a subsequent draft award filed by ABI.

(c) Accordingly, the source of the broken shift provisions and shiftwork provisions were different. Each of those provisions had originally been proposed in the context of different draft instruments, which purported to regulate shiftwork and broken shifts in different ways. The apparent tension between clauses 25.6 and 29.4 appears to have arisen from the various draft instruments having been combined.

(d) Respectfully, the interaction between the broken shift provision and the shiftwork provisions appears not to have been considered comprehensively by the parties and / or the AIRC during the process.

For instance, when the Award was made, the broken shift provision required that shift allowances were payable in accordance with the shiftwork clause by reference to the commencement time of the shift,[7] as had been proposed by the ACE in their draft award. That draft award defined afternoon and night shifts by reference to when the shifts commenced. However, the shift definitions ultimately adopted in the Award predominantly operated by reference to the time at which the shifts end.[8] This anomaly was subsequently remedied during the Two Year Review, as we explain below.

(e) The potential tension between clauses 25.6 and 29.4 is, similarly, the product of an oversight or inadvertence flowing from the process. This is unsurprising, given the nature of the proceedings, the large number of issues that required consideration and the limited timeframes within which the proceedings were required to be completed.

(f) None of the parties' submissions nor the AIRC appeared to have intended to preclude shiftworkers from working broken shifts. None of the parties who made submissions expressly called for such an outcome.

The Two Year Review

33. During the Two Year Review, various applications were made to vary the Award. Relevantly, some parties sought variations to the broken shift provisions. In summary:

(a) The ASU made an application to vary the Award (**Attachment K**). The application stated as follows:

[7] Clause 25.6(b) of the Award, when made.

[8] Clause 29.2 of the Award, when made.

34. The modern SACS award has provisions for Broken Shifts as per clause 25.6 but should not apply when the shift work clause applies at Clause 29 particularly where shifts are to be worked in “one continuous block” as per clause 29.4.

Despite this, the draft determination attached to the application did not propose a variation to the Award to give effect to the above. Rather, it proposed a variation that would have confined the application of the broken shift provision to home care employees, such that it would no longer apply to social and community services employees when undertaking disability services work.

(b) The ACE made an application to vary the broken shift provision (**Attachment L**). At that time, clause 25.6(b) required the payment of shift allowances in accordance with clause 29, by reference to the commencement time of the shift. The ACE sought the following variation to clause 25.6(b):

> Payment for a broken shift will be at ordinary pay with penalty rates and shift allowances in accordance with clause 29 - Shiftwork, ~~with shift allowances being determined by the commencing time of the broken shift~~.

It articulated the basis for the variation sought as follows:

> Variation 3 seeks to resolve the error in clause 25.6(b) which refers to shift "commencing times" in accordance with clause 29 of the Award. Clause 29 provides for shift allowances by reference to their "finishing times". The reference to 'times' is unnecessary. Only a reference to clause 29 is required.

(c) The aforementioned applications, as well as various others, were the subject of discussions between the parties, including before the Commission. As a product of those discussions, the parties agreed that clause 25.6(b) would be amended such that it referred to the finishing time of the shift.[9] The reason or basis upon which the change was agreed does not appear to be documented in any of the publicly available material on the Commission’s website.

[9] PR531544.

(d) The ASU continued to pursue the following changes to the broken shift provisions, which were contested by other parties:

(i) A variation that would have confined the application of the broken shift provision to home care employees, such that it would no longer apply to social and community services employees when undertaking disability services work.

(ii) In the alternate, the introduction of a broken shift allowance.

Although the union's submissions (**Attachment M**) again referenced the tension between clauses 25.6 and 29.4[10], the union did not in fact seek a variation to the Award in this regard.

(e) Submissions in response to the ASU's contention about the interaction between clauses 25.6 and 29.4 of the Award was addressed by ABI, Jobs Australia, AFEI and the ACE in their submissions in reply. They contended that the provisions were not inconsistent and that clause 25.6 provided an exception to clause 29.4.[11]

(f) In its decision, the Commission rejected the ASU's claims.[12] It did not deal with the apparent disagreement between the parties regarding the intersection between clauses 25.6 and 29.4.

34. It is apparent from the aforementioned developments that clause 25.6 and more specifically, clause 25.6(b), was the subject of specific discussion between, and consideration by, the parties that were involved in the Two Year Review. Whilst the ASU pointed out that there was an apparent tension between clauses 25.6 and 29, it did not in fact seek a variation to the Award to address this and by extension, it did not seek to confine the scope of clause 25.6 to day workers. This is particularly significant given the consistent submissions made by the employer

[10] Paragraph 36 of the ASU submission.

[11] Jobs Australia submission dated 16 November 2012 at [20]; ABI submission dated 16 November 2012 at [4.17], ACE submission dated 19 November 2012 at [12] and AFEI submission dated 19 November 2012 at [21].

[12] *Re Australian Municipal, Administrative, Clerical and Services Union* 2013 [FWC] 4141 at [24] – [29].

parties about the manner in which the two provisions interact and the application made by ACE, which was plainly advanced on the basis that clause 25.6(b) should operate by reference to the start and / or finishing times for an afternoon or night shift.

35. It is not clear that the ASU squarely opposed the employer parties' submissions about the relationship between the two provisions during the proceedings. Rather, what appears to have emerged from the proceedings is a shared understanding amongst the employer parties who participated in the process that clause 25.6 provides an exception to clause 29.4 and the absence of any clear opposition to that view by the ASU or, at the very least, an absence of any attempt made to vary the Award in a manner contrary to the employer parties' assertions.

3. THE SECOND QUESTION

36. The Employer Parties submit that the Award should permit an afternoon or night shift to be broken in accordance with clause 25.6 of the Award. The variation we have proposed to clause 29.4 would give effect to this.

37. Our submission is advanced on the following bases:

    (a) The minimum safety net applying to the sectors covered by the Award prior to the Award commencing operation typically permitted the performance of broken shifts by shiftworkers. This suggests that the performance of work on broken shifts by shiftworkers was potentially a feature of the relevant sectors covered by the Award for many years. We refer to section 2 of our submissions in this regard.

    (b) The proposed approach would remedy an anomaly or error that appears to have emerged from the Part 10A Award Modernisation Process, to the extent that the Award does not permit the performance of broken shifts by shiftworkers or is unclear as to whether broken shifts can be performed by shiftworkers. We refer in this regard to section 2 of our submissions.

    (c) The proposed approach would be consistent with the need to be able to implement arrangements whereby employees perform ordinary hours of work after 8pm, which constitute part of a broken shift.

    (d) The proposed approach would give effect to an interpretation of the extant provisions that is arguably available. Taken together with paragraph (a) above, the proposed approach would potentially give effect to arrangements that have been permitted by the safety net for over a decade.

    (e) The proposed approach would be reflective of the manner in which work is being arranged in practice by at least some employers.

38. Moreover, the proposed approach would:

    (a) Ensure that the Award is fair to employers and employees.[13]

    (b) Promote flexible modern work practices and the efficient and productive performance of work.[14]

    (c) Be consistent with the interests of employers and would moderate the cumulative impact of the changes to be made to the Award as a consequence of these proceedings.[15]

    (d) Ensure that the Award is simple and easy to understand.[16]

    (e) Be consistent with the need to ensure a stable modern awards system.[17]

39. For the reasons explained in this submission, a provision that clearly permits the performance of broken shifts by shiftworkers is *necessary* in the sense contemplated by s.138 of the Act.

Existing Practices

40. Disability support work and home care work is regularly undertaken after 8pm, including as part of a broken shift.

41. This was established by the evidence before the Commission. For example:

    (a) The evidence of Jeffrey Wright, who was employed by HammondCare as People Services Operations Manager. At paragraph [18] of his statement, Mr Wright said:

    > As clients have choice and control over their visit times, visits typically follow peak patterns. 55 per cent of visits take place between 7.00am and 12.00pm and the other 45 per cent span a nine hour period to 9.00pm.[18]

[13] Section 134(1) of the Act.

[14] Section 134(1)(d) of the Act.

[15] Section 134(1)(f) of the Act.

[16] Section 134(1)(g) of the Act.

[17] Section 134(1)(g) of the Act.

[18] Page 472 of the Court Book.

(b) The evidence of Wendy Mason, who was employed by BaptistCare as Operations Group Manager for Home Services. Ms Mason gave the following evidence:

> 34. The nature of the aged care industry is such that operations are required in many areas on a 24 hours per day, seven days per week basis. Since the introduction of the consumer directed care model in Home Care in 2015 clients are increasingly requesting services outside the ordinary hours of work. This includes evening services that extent to 10.00pm, sleepovers and service provision on Saturdays, Sundays and Public Holidays. Consequently, the Company is seeking to recruit care service employees that are willing and available to work evening and weekend work.
>
> …
>
> 58. For example, in rural areas it is not uncommon for a care worker who lives locally to finish work for the day at 5.00pm and be rostered to go out again at 8.00pm to provide medical assistance, meal preparation and/or support to assist the client to bed. …
>
> …
>
> 66. The Company engages employees to work broken shifts. Broken shifts are an essential rostering mechanism in order to be able to effectively meet client requirements in relation to, for example, specified or preferred times for particular services under Consumer Directed Care. Certain services are often inflexible in terms of service time including the administration of or assistance with prescribed medications; early morning preparations for assistance with meals, showering and dressing; and evening preparations for bed which could include a brief service up until 9.00pm or 10.00pm at night.[19]

(c) The evidence of Augustino Encabo, who was employed as a support worker by the Community Living Association. Attached to his statement was his roster for the period of 24 September 2018 – 16 December 2018. It appears that Mr Encabo was rostered to perform various broken shifts that ended after 8pm, including on 8 October 2018, 16 October 2018, 17 October 2018, 24 October 2018, 21 November 2018, 10 December 2018, 11 December 2018 and 12 December 2018.[20]

[19] Pages 481, 486 and 487 of the Court Book.

[20] Pages 1142 – 1165 of the Court Book.

(d) The evidence of William Elrick, who was an Area Organiser for the Health Services Union (**HSU**). Mr Elrick gave the following evidence:

> 20. Broken shifts are very common in this sector.
>
> …
>
> 23. In group homes workers often do a morning and afternoon shift, such as 7am – 10am and then 3pm – 10pm. …[21]

(e) The evidence of Scott Quinn, who was employed as a disability support worker by Community Based Support. Mr Quinn testified that '[a] typical day of shifts are 12pm – 1pm, 3pm – 5pm, 5.30pm – 6.30pm and 8pm – 9pm'.[22] Attached to Mr Quinn's statement were hand written notes identifying the times at which he worked on various days. They similarly identify the performance of broken shifts that finished after 8pm on various occasions.[23]

42. The proposition that disability support work and home care work is undertaken after 8pm as part of a broken shift is, as we understand it, not contested by most of the parties appearing in these proceedings.

43. For example, in recent proceedings before Deputy President Clancy, the HSU made the following observations:

> I think that Mr Robson's characterisation of 25.6 being applied as an exemption is for those who actually looked at 29.4, which not everybody would have. But I would also suggest that more importantly that because 25.6 applies, whether it is as his Honour characterised it in the hearing as the way that people were paid, or whether it was seen as we've always seen it, as an exemption that meant somebody could - say a shift worker could work broken shifts, it refers to the shift allowances, so the understanding from the people in the sector is that people are working a broken shift and they're receiving shift allowances because they're shift workers.[24]

[21] Page 2936 of the Court Book.

[22] Page 2990 of the Court Book.

[23] Page 2995 – 3050 of the Court Book.

[24] Transcript of proceedings on 19 August 2021 at PN458.

44. The ASU made similar observations in those proceedings: (emphasis added)

> MR ROBSON: Yes, Deputy President, if I might speak. We disagree with Mr Pegg's analysis of how the award currently works. We do agree that there is a significant amount of broken shifts that are worked within the daytime span of hours, but there are a significant amount of work that may be rostered in the evenings or the early mornings, and there's for instance across - and I'm speaking of the disability sector here, I don't represent people covered by the homecare stream, but there are different types of disability supports.
>
> There's one on one supports in the home and the community, and they I have been the focus of the evidence in these proceedings. I'm not sure if someone has come from SEL or short term temporary accommodation. In in-community support, yes we would agree that there is a bulk of work that's being performed within that span of hours.
>
> There are what could be called put to bed shifts that would end at 10 or 11 o'clock at night as the client is going to sleep, and they may form part of an employee's agreed pattern of work, considering that the majority of workers in the sector - the biggest group of workers in the disability sector would be - and it has always been our understanding in dealing with this award and dealing with employers that those workers are shift workers.
>
> The rules in clause 26 modify the application of the broken shift term and modify the application of the payment of shift penalties that are earned by shift workers when they work them. A day worker for the purposes of the award probably just wouldn't be working past 8 pm.
>
> …
>
> THE DEPUTY PRESIDENT: How are they regulated? If there's clause 29.4, you're talking about - how does that interrelate with clause 29.4?
>
> MR ROBSON: I think that has been interpreted up to this point as being an exception to 29.4. The hours of work for a shift worker are worked continuously, and then the broken shift term applies as an exception for home care and disability support workers.
>
> …
>
> MR ROBSON: No, your Honour. We're viewing this from how this clause has been applied for 10 years. We applied to have the broken shift term removed from the award in the transitional review and we were unsuccessful then. And simply it had been - the way this term has been applied for nearly a decade now has been that shift penalties are applied.
>
> People working shifts can work broken shifts, an example being supported independent living where - these are the group homes - where people will be working a rotating pattern of nights and days, and in many group homes there isn't a continuous shift during the day. You have someone who comes in in the morning after 6 am for a wake-up, and that would work in the afternoon, and that would hand over to a night shift worker who is either working and active night shift or a sleepover shift, depending on the needs of the client.

> And then in the next rotating pattern that worker may be working as a - who may be working a continuous active night, or the unbroken sleepover shift where the periods of work may then be working a broken shift in the morning and the afternoon. Wherever possible we negotiate with employers' arrangements that try and make sure that, you know, those broken shifts are actually turned into continuous shifts.
>
> But certainly there are well-established patterns in the industry of shift workers working broken shifts, maybe not necessarily when they are working at times that attract a nightshift penalty. We just say it doesn't fit our experience of dealing with employers and employees in this sector.
>
> And for example Mr Pegg said it might be hypothetical that someone would be working a broken shift at night, but people with a disability go to work and they work shift work. They may need someone to accompany them to that shift that starts early in the morning or late in the evening. That's certainly not hypothetical, that is work that's performed under this award.[25]

45. The ASU has since submitted that the evidence it filed on 26 August 2021 suggests that there is no significant need for shiftworkers to perform broken shifts in the context of disability services.[26] We oppose the ASU's submission and respond as follows.

46. *First,* we note that the submission advanced by the ASU is confined to disability services. The ASU does not seek to make the same or a similar submission about the provision of home care. The broken shift clause, however, applies to both types of work, as does clause 29, which concerns shiftwork.

47. We also note that the Employer Parties representing the home care sector contend that there is a need for shiftworkers to work broken shifts and that such work is, in fact, performed in the sector.

48. In the absence of any contest as to the aforementioned factual proposition in relation to the home care sector, the Commission should in our submission accept it, even if it is of the view that the evidence before it does not establish it.[27]

[25] Transcript of proceedings on 19 August 2021 at PN442 – PN456.

[26] ASU submission dated 26 August 2021 at [28].

[27] *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Melbourne and Metropolitan Tramways Board* (1965) 113 CLR 228 at 243.

49. *Second,* in any event, the ASU's submissions[28] describe specific forms of disability support provided to clients which, in some circumstances, necessarily occurs after 8pm. It is axiomatic that at least some disability support work and home care work is performed after 8pm, for example, for the purposes of assisting a client to get ready for bed. The Employer Parties submit that this work takes place routinely and regularly in respect of such clients; that is, it is typically not ad hoc or irregular work.

50. *Third,* the ASU goes on to submit that all broken shifts performed by disability support workers in residential settings are undertaken by day workers. In support of this proposition, it relies on:

    (a) The evidence of Feargus Manning. Mr Manning is an employee of The Disability Trust.

        Self-evidently, the evidence of one employee in relation to one employer cannot be relied upon to substantiate the proposition that throughout the sector, broken shifts are not performed by shiftworkers in residential settings.

    (b) The evidence of William Elrick at paragraph [23], which is extracted below:

        > In group homes workers will often do a morning shift and an afternoon shift, such as 7am – 10am and then 3pm – 10pm. In home support workers generally have a more fragmented working pattern and may be required to do several shifts in a day. For example, rosters of 7am – 9am, 11am – 1pm, and then 5pm – 7pm are common. These shifts are normally for the purposes of providing meal assistance and personal care to clients.[29]

        In our submission, Mr Elrick's evidence in fact demonstrates that employees *do* perform broken shifts that involve work after 8pm in residential settings, such as group homes. As we understand the first sentence of the extracted paragraph above, Mr Elrick's evidence was that certain employees often perform separate portions of work in the morning

[28] ASU submission dated 26 August 2021 at [39].

[29] Page 2936 of the Court Book.

(e.g. 7am – 10am) and later in the day (e.g. 7pm – 10pm); thereby constituting a broken shift that includes work after 10pm.

51. The Commission should not find that shiftworkers performing disability services do not perform broken shifts in residential settings or that in such environments, work is consistently arranged in the manner described by the ASU in its submissions. In making this submission, we note that it is inconsistent with our understanding of the manner in which work is arranged by at least some employers in group home settings.

Section 138 and the Modern Awards Objective

52. If the application of the broken shift provision is limited to day workers or, put another way, if the Award does not permit the performance of such work by shiftworkers, any time worked before 6am or after 8pm on a broken shift must necessarily be treated as overtime, in accordance with clauses 25.2(a) and 28.1(a) of the Award. In addition to the distinction in the rate of pay that would apply to the work performed by employees on such shifts; various other consequences would flow from this.

53. *First,* an employee would not:

    (a) Accrue leave in respect of time spent working beyond the span of hours.

    (b) Be entitled to payment of the superannuation guarantee in respect of time spent working beyond the span of hours.

    (c) Be entitled to take paid leave in respect of hours that they would have worked beyond the span of hours.

54. Each of these consequences would be unfair to employees[30], particularly where such work is undertaken regularly. It may also impact the relative living standards and needs of the low paid.[31]

[30] Section 134(1) of the Act.

[31] Section 134(1)(a) of the Act.

55. *Second,* an employee can potentially refuse to work overtime beyond the span of hours. The Award does not contain a provision requiring that employees perform reasonable overtime. Accordingly, an inability to structure work so that it is undertaken during a broken shift, within ordinary hours, would create significant uncertainty for an employer when preparing rosters and endeavouring to align their clients' wishes as to when and how they wish to be serviced with their employees' hours of work.

56. The uncontested evidence led by Ai Group demonstrates that the task of *'matching' clients'* with employees is a complex one.[32] The complexities experienced by employers will necessarily be compounded where an employer does not have a right to direct an employee to perform the relevant work.

57. Accordingly, confining the performance of broken shifts to day workers would:

    (a) Be inconsistent with the need to promote flexible modern work practices and the efficient and productive performance of work.[33]

    (b) Have an adverse impact on employers.[34]

58. *Third,* existing arrangements would potentially be disturbed; noting that, in our submission:

    (a) It is at least reasonably arguable that such arrangements are currently permitted by the Award.

    (b) Work is in fact being arranged in that way.

[32] Witness statement of Richard Cabrita at [65]- [78] and witness statement of Aleysia Leonard at [36] – [44].

[33] Section 134(1)(d) of the Act.

[34] Section 134(1)(f) of the Act.

59. Employers would face the regulatory burden associated with rearranging this work, for which they would need to engage with and consult employees and / or clients. Such a process is potentially time consuming and resource intensive, requiring discussions with individual clients and employees, on a one-on-one basis.

60. *Fourth,* employers may suffer a loss of productivity[35] and, simultaneously, the continuity of care available to clients may be compromised. For example, it may no longer be plausible for an employer to roster the same employee to provide support to an employee on more than one occasion through the course of the day – once during the morning and again at night, to assist them to get ready for bed. Such patterns of work are common in the context of disability and home care.

61. *Fifth,* the delivery of services to clients may be adversely impacted, due to the lack of certainty flowing from a requirement to treat such time as overtime and the issue described immediately above. Depending on an employer's capacity to rearrange work, clients may ultimately face some disruption to the delivery of services to them, including an inability to continue to access services as and when they wish to receive them.

62. The ASU's simplistic submissions that work outside the span of hours should be rearranged such that the hours are worked continuously ignores the practical difficulties facing employers in relation to the scheduling of work. Indeed, the Commission has found that:

    (a) Employers are less able to organise work in a way that is most efficient for them due to reforms that have affected the sector in recent years.[36]

    (b) Greater choice and control for customers has led to greater rostering challenges.[37]

[35] Section 134(1)(f) of the Act0.

[36] Decision at [218](10)(f).

[37] Decision at [218](10)(g).

63. In addition, we refer again to the uncontested evidence filed by Ai Group that deals with similar issues.[38] The evidence does *not* establish that the instances in which work cannot be reorganised in continuous shifts are *'marginal'*, as submitted by the ASU.[39]

64. The ASU similarly over-simplifies and overstates the accessibility of individual flexibility arrangements and enterprise agreements as potential solutions for employers who require shiftworkers to perform broken shifts. Clearly, in either instance, employees would need to be *'better off overall'* and in the context of enterprise agreements, it would be necessary for all other relevant statutory criteria to be satisfied in order for the agreement to be approved by the Commission. Many small and medium enterprises, particularly not-for-profits, do not have the resources or the expertise required to implement either strategy as a means of circumventing inflexibilities imposed by the Award. It is unfair and inappropriate that absent the capacity to institute such measures, which impose a significant regulatory burden, employers will be saddled with Award restrictions that do not permit such arrangements.

65. *Sixth,* in addition:

    (a) There is no evidence or other material to suggest that limiting the scope of the broken shift clause to day workers would improve the relative living standards and needs of the low paid.[40]

    (b) It is unlikely that this matter alone will encourage collective bargaining.[41]

    (c) We consider it unlikely that such an approach would promote social inclusion through increased workforce participation.[42]

[38] Witness statement of Richard Cabrita at [65] – [78] and witness statement of Aleysia Leonard at [36] – [44].

[39] ASU submission dated 26 August 2021 at [28].

[40] Section 134(1)(a) of the Act.

[41] Section 134(1)(b) of the Act.

[42] Section 134(1)(c) of the Act.

(d) The need to promote additional remuneration for employees working shifts, or *'unsocial, irregular or unpredictable hours'* is a neutral consideration.[43] Shiftworkers are entitled to shift allowances that afford them additional remuneration for working shifts. In addition, the Commission has provisionally determined that a new broken shift allowance will be introduced in the Award, which would compensate employees for any irregularity or unpredictability experienced by employees for performing work on a broken shift. The Employer Parties do not oppose this aspect of the Commission's decision; our submissions relate only to the quantum of the allowance that should be payable if it is to apply in addition to shift allowances.

(e) The principle of equal remuneration for work of equal or comparable value is a neutral consideration.[44]

(f) The need to ensure that the Award is simple and easy to understand does not require that the Award prohibit shiftworkers from performing broken shifts. This aspect of s.134(1) will be satisfied so long as it is clear whether the broken shift provision applies to shiftworkers. [45]

66. Moreover, expressly enabling the performance of broken shifts by shiftworkers in the manner proposed by the Employer Parties would address the matters identified above and would:

(a) Ensure that the Award is fair to employers and employees.[46]

(b) Promote flexible modern work practices and the efficient and productive performance of work.[47]

[43] Section 134(1)(da) of the Act.

[44] Section 134(1)(e) of the Act.

[45] Section 134(1)(g) of the Act.

[46] Section 134(1) of the Act.

[47] Section 134(1)(d) of the Act.

(c) Be consistent with the interests of employers and would moderate the cumulative impact of the changes to be made to the Award as a consequence of these proceedings.[48]

(d) Ensure that the Award is simple and easy to understand.[49]

(e) Be consistent with the need to ensure a stable modern awards system.[50]

67. For all of the reasons described above, the proposed clause 29.4 advanced by the Employer Parties is *necessary* to ensure that the Award achieves the modern awards objective.

[48] Section 134(1)(f) of the Act.

[49] Section 134(1)(g) of the Act.

[50] Section 134(1)(g) of the Act.

4. THE THIRD QUESTION

68. If the Commission decides that the answer to the Second Question is *'yes'*, the terms and conditions set out in the draft determination attached to this submission should apply to shiftworkers whilst working on a broken shift. The draft determination is advanced on the basis that:

    (a) The Employer Parties accept that clause 25.6 of the Award, as proposed to be varied by the Commission in its draft determination of 25 August 2021, will regulate the performance of broken shifts.

    (b) The Employer Parties contend that the quantum of the proposed broken shift allowances should be substantially reduced.

    (c) The Employer Parties contend that an employee should only be entitled to the shift loading during that portion of the broken shift that gives rise to the entitlement to the shift loading.

69. We set out the bases for our position below.

The Quantum of the Proposed Broken Shift Allowance

70. Paragraphs [514] – [556] of the Decision dealt with the various claims advanced by the ASU, United Workers' Union (**UWU**) and HSU about the amounts payable to employees for the performance of work on a broken shift. Relevantly, the HSU and UWU sought a variation to clause 25.6(b) so that the applicable shift allowance would be determined by the start or finishing time of the shift, whichever is higher.[51]

[51] Decision at [530].

71. If a shiftworker can perform broken shifts under the Award, as it is currently drafted, the effect of clause 25.6(b) is to identify that an employee must be paid shift allowances in accordance with clause 29, subject to one modification. That is, an employee is entitled to:

    (a) The afternoon shift allowance, where a broken shift finishes after 8.00pm and at or before midnight; and

    (b) The night shift allowance, if the broken shift finishes after midnight and at or before 6.00am. The night shift allowance is *not*, however, payable if a broken shift commences before 6.00am.

72. As we understand it, the unions' claim was directed towards:

    (a) Maintaining the entitlement to the afternoon and night shift allowances in the circumstances described above.

    (b) Introducing an entitlement to the night shift allowance in respect of broken shifts that start before 6.00am; noting that an employee who works a shift that is not a broken shift, which starts before 6.00am, would be entitled to a night shift allowance.[52]

    (c) Requiring the payment of the higher of the afternoon and night shift allowances if an employee was eligible for both.

73. The Commission said as follows about this aspect of the unions' claims: (emphasis added)

> **[532]** Clause 25.6(b) provides that the payment of a shift allowance specified in clause 29 is determined by the '*finishing time* of the broken shift'. Fixing the quantum of the broken shift allowance to the finishing time of the shift (as is currently the case – clause 25.6(b)) gives rise to some curious results.
>
> **[533]** As the UWU points out, under the current term an employee who commenced a broken shift at 5am and finished at 3pm would not receive any shift loading. No other party challenged the accuracy of the example provided.

[52] HSU submission dated 3 August 2021 at [14].

[534] Ai Group submit that there is 'nothing anomalous about such an outcome', because:

> 'There is no 'early morning' shift allowance payable under the Award and a shift that ends at 3pm would never attract an additional loading as it would not constitute either an afternoon or night shift under the Award.'

[535] We disagree. A broken shift allowance is intended to compensate employees for the disutility of working a broken shift. The way the current term operates means that some employees who work broken shifts will receive *no* additional remuneration to compensate for the associated disutility. Such an outcome is anomalous; and wrong in principle.

…

[538] It seems to us that there is a more significant, conceptual issue with the proposal (and with the current SCHADS Award term).

[539] As mentioned earlier, broken shift allowances compensate employees for the disutility of working broken shifts. Both the current SCHADS Award term and the Unions' proposed variation operate such that the additional payment for a broken shift and the quantum of that payment depend on the start/finish time of that shift. The HSU points to the anomalous outcomes which flow from the current term – some employees receive no additional compensation for working a broken shift. It seems to us that the same circumstance may arise under the variation proposed by the Unions. For example, under the Unions' proposal an employee who commences a broken shift *after* 6am and finishes *before* 8pm receives no additional payment for working a broken shift.

[540] The entitlement to additional remuneration for working a broken shift should not depend on the times at which the shift starts and finishes. It is perhaps for this reason that most awards which contain a broken shift allowance express that allowance as a percentage of the standard rate (see [406] – [408] above). Indeed, the only 2 modern awards which use the shift finishing time to determine the additional remuneration are the SCHADS Award and the Aged Care Award.

[541] We acknowledge that the current method of calculating the broken shift allowance in the SCHADS Award is one of long standing. Consistent with the approach generally taken by the Award Modernisation Full Bench it may be accepted that the current shift allowance methodology reflected the terms in the preponderance of pre-reform instruments. But we are not confined by this history and nor are we required to make a decision in the terms applied for.

…

[543] It is convenient to deal now with 2 aspects of the modern awards objective.

…

[545] We are required to consider the need to provide additional remuneration for working shifts. While s.134(1)(da) of the Act is not a statutory directive that additional remuneration must be paid; it is a relevant consideration. Neither the current SCHADS Award term nor the Unions' proposal provide additional remuneration to all employees working broken shifts.

[546] Second, the reference in s.134(1)(g) of the Act to the 'need to ensure a simple, easy to understand, stable and sustainable modern award system' does not mean that we are constrained by the current terms of an award. …

…

[547] It is our *provisional* view that the additional remuneration for working a broken shift under clause 25.6 of the SCHADS Award should be an allowance calculated as a percentage of the standard weekly rate.

[548] The 'standard rate' in the SCHADS Award is defined in clause 3 as the minimum rate for a social and community services employee level 3 at pay point 3, currently $1006.10.

[549] As mentioned earlier, there is considerable variation in the proportion of the standard rate fixed as a broken shift allowance. Fixing the proportion calls for the exercise of broad judgment, it is not a matter which lends itself to precise quantification. In fixing the proportion for the SCHADS Award we have had regard to the current method – which may result in an employee receiving a loading of 15% of their ordinary rate – and to the fact that employees do not operate from a base location. As mentioned earlier, employees in home care and certain disability services have no '*base location*' where they start at and finish at each day. The work site for such employees is the home of the client, or locations where the client may need to be taken (such as medical centres, shopping centres, social events).

[550] This is relevant because broadly speaking a broken shift allowance compensates for 2 disutilities:

- the length of the working day being extended because hours are not worked continuously, and

- the additional travel time and cost associated with effectively presenting for work on 2 occasions.

[551] As to the second matter, a broken shift of 2 portions of work and a break will usually mean that the employee will travel between the end of the first portion of the shift and the start of the second. Depending on the duration of the break they may travel home or to the location of their next engagement.

[552] These considerations have led us to the *provisional* view that we should set the proportion of the standard rate in the SCHADS Award towards the upper end of the range of other modern awards (and noting that several of the awards discussed at [400] also include travel time allowances).

[553] It is our *provisional* view that an employee working a broken shift under clause 25.6 receive a broken shift allowance of 1.7% of the standard rate, per broken shift. At present this amounts to $17.10 per broken shift. This is the amount payable to any employee who works a 'one break' broken shift.

[554] As mentioned earlier, a 2 break shift would be subject to a higher payment. It is our *provisional* view that the broken shift allowance payable for a 2 break broken shift be set at 2.5% of the standard rate (or $25.15 per broken shift). This new broken shift allowance will replace the current entitlement in clause 25.6(b).

[555] In addition, there is currently a lack of clarity in the SCHADS Award as to when overtime is payable in respect of work performed by day workers outside the ordinary span of hours; however it would seem as a matter of logic that overtime is payable for such work.

[556] It is our *provisional* view that the SCHADS Award should be varied to make clear that where an employee who is a day worker (including part-time and casual employees) performs work outside of the ordinary span of hours (including as part of a period of work in a broken shift), the employee is entitled to overtime for such work.[53]

74. It is apparent from the Decision that the Commission:

(a) Conceived of the payment described by clause 25.6(b) as a *'broken shift allowance'* that purportedly compensates (and should compensate) employees for the disutility for working on a broken shift.

(b) Determined that clause 25.6(b) operates in anomalous ways because, for example:

(i) Some employees who perform broken shifts are not entitled to a payment pursuant to that provision; and

(ii) The quantum of the payment is determined by reference to when the shift ends.

(c) Determined that all employees should be entitled to a broken shift allowance, that compensates them for:

(i) The length of the working day being extended because hours are not worked continuously; and

(ii) The additional travel time and cost associated with effectively presenting for work on two occasions.

(d) For the purposes of determining the quantum of the proposed broken shift allowance, had regard to the proposition that some employees are currently entitled to 15% of their hourly rate (i.e. the night shift allowance) for work on a broken shift.

[53] Decision at [532] – [556].

75. The Commission's Decision would result in employees being entitled to the highest broken shift allowances afforded by the modern awards system, in circumstances where they have been struck on the basis that they replace any existing entitlement to a shift allowance (however described) by virtue of clause 25.6(b).

76. Clause 25.6(b) of the Award, in our view, provides for a payment to shiftworkers who perform work on broken shifts. It requires that shiftworkers are paid in accordance with clause 29, except that a shiftworker who starts work on a broken shift before 6.00am is not entitled to a night shift allowance. In our respectful submission, clause 25.6(b) does not, as such, deliver a separate entitlement that is specifically intended to compensate an employee for the disutility for working a broken shift and we did not understand the HSU and UWU's claims to have proceeded on that basis.

77. Indeed, it has been our understanding that it was for this reason that the ASU sought the introduction of a separate broken shift allowance, that would have been payable in all circumstances that a broken shift is worked. As the Commission observed at paragraph [417] of the Decision:

> **[417]** The variation sought [by the ASU] would provide that employees working a broken shift receive an *additional* 15% loading for the duration of the entire shift and any intervening breaks; that is, in addition to the shift allowances provided in clause.[54]

78. If the broken shift provision is to require the payment of shift allowances to employees performing shiftwork, the quantum of the broken shift allowance should be reconsidered and reduced. This is because:

    (a) The broken shift allowances will not *replace* an employee's entitlement to the payment of the shift allowances prescribed by clause 29, as was contemplated by the Commission in the Decision.

    (b) To the extent that the proposed broken shift allowances have been designed to compensate employees for *'the length of the working day being extended because hours are not worked continuously'*, this is not necessary

[54] Decision at [417].

or appropriate. The extant broken shift provision (and the broken shift provision proposed by the Commission) limit the performance of a broken shift to a maximum spread of 12 hours and require the payment of double time for time spent working beyond that spread. The material before the Commission does not establish that those elements of the clause are inadequate or that they do not ensure the provision of a fair and relevant minimum safety net.

(c) Employees would unfairly and inappropriately benefit from a windfall gain, whilst employers would face substantial additional employment costs.

79. We agree with the general proposition that any broken shift allowance should be calculated by reference to the standard rate and should not be determined by reference to the start or finish time of a shift. However, in our submission, the broken shift allowances should be substantially lower than those determined by the Commission.

80. We note that ABI[55] and AFEI[56] have previously argued that the broken shift allowances should be reduced, even if they are to apply in lieu of the shift allowances. We support those submissions and contend that the broken shift allowances should be even less if they are to apply in addition to the shift allowances.

81. The UWU contends that the awards considered in the Decision with respect to the broken shift allowance all require the payment of shift allowances in addition to the broken shift allowances.[57]

82. In response, we make the obvious observation that those awards provide for broken shift allowances that are lower in quantum than those proposed by the Commission. For instance, of the ten awards identified by the UWU, six provide for a broken shift allowance that amounts to less than 50% of the lower of the

[55] ABI submission dated 3 August 2021 at [13] – [28].

[56] AFEI submission dated 3 August 2021 at [53].

[57] UWU submission dated 3 August 2021 at [22].

two broken shift allowances proposed by the Commission, on a per day / shift basis.[58]

83. We also note that at least one of the awards[59] does not in fact contain shift loadings (however described).

84. In addition, at least four of the awards prescribe the entitlement to the relevant shift allowances in a way that is clearly distinguishable from the approach adopted by the Award. That is, they each require that the shift allowance (however described) is payable only for the portion of the broken shift that falls within a specific span of hours or that enlivens the entitlement to the shift allowance.[60]

85. For the reasons set out above, the Employer Parties submit that if the Award is to make clear that shiftworkers can work broken shifts and to provide for the payment of shift allowances for such work, the quantum of the proposed broken shift allowance should be substantially reduced.

The Payment of the Shift Allowances

86. The Employer Parties submit that the shift allowances prescribed by the Award should be payable only for that portion of a broken shift that enlivens the entitlement to the shift allowance.

87. That is, if an employee is required to work a broken shift that ends at 8.30pm, the afternoon shift allowance should be payable only for the final portion of the broken shift. Similarly, if an employee works on a broken shift at 11.00am – 1.00pm, 6.00pm – 8.30pm and 9.00pm – 11.00pm; the afternoon shift allowance would only be payable on the second and third portions of the broken shift.

[58] Decision at [400].

[59] *Fitness Industry Award 2020*.

[60] *Hospitality Industry (General) Award 2020* (clause 29.2); *Security Services Industry Award 2020* (clause 20.2); *Registered and Licensed Clubs Award 2020* (clause 24.4) and *Restaurant Industry Award 2010* (clause 24.2).

88. Shift loadings are, on their face, intended to compensate employees for the disutility of performing work late in the day or early in the morning. If work is performed during a separate portion of a broken shift, that does not of itself enliven an entitlement to the relevant shift allowance, an employee will not experience the relevant disutility in respect of such work. There is accordingly no justification for requiring the payment of shift allowances in such circumstances.

89. In a recent decision in which the Commission considered the proper interpretation of the shift provisions in the *Manufacturing and Associated Industries and Occupations Award 2020*, the Commission described the purpose of the night shift allowance prescribed by that award as follows: (emphasis added)

> **[49]** Clause 37.3(c) of the Award requires the payment of "30% extra for all time worked during ordinary working hours on such night shift". The ordinary meaning of "extra" is "beyond or more than what is usual, expected, or necessary; additional". Accordingly, the question is how does one calculate what is 30% more than what is usual, expected, or necessary. That begs the question of what is "usual, expected or necessary". In the context of a provision such as clause 37.3(c) of the Award which governs the payment of a "30% extra" night shift loading , the purpose of which is to compensate an employee for the inconvenience of working unsociable hours, what is "usual, expected or necessary" is the payment the employee would receive for working ordinary hours on day work when no such loading is payable. When a casual employee to whom the Agreement applies performs work during ordinary hours on day work, they are entitled to receive their "ordinary hourly rate of pay for the relevant classification plus a casual loading of 25%".[19] It follows, in my opinion, that for a casual employee to be "paid 30% extra for all time worked during ordinary working hours on such night shift" pursuant to clause 37.3(c) of the Award, they must receive 30% more than they would usually receive for working the same ordinary hours on day work. That is, the 30% shift loading must be applied to the base rate plus a casual loading of 25%, not just to the base rate. Otherwise, the employee would not be paid "30% extra for all time worked ... on night shift".[61]

90. In an earlier decision that dealt with the terms of the *Transport Workers Award 1998*, the Commission made similar observations:

> **[44]** Casual loadings are payable largely to compensate for the fact that casual employees do not receive the same benefits in terms of notice of termination, redundancy, annual leave, personal leave, jury service and public holidays as do full-time or part-time employees. This is made plain in the Award (see Clause 12.5.5). Separately shift loadings are payable to employees working shift work, whether they are casual, full time or part time, as compensation for the inherent disabilities of working

[61] *"Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU) v UGL Pty Ltd T/A UGL Limited* [2020] FWC 889 at [49].

unsociable hours. The reasons for the two loadings are separate and distinct and do not interact.[62]

91. The purpose or rationale for shift allowances has, historically, been understood in the same way. For example, in a decision of the Australian Conciliation and Arbitration Commission, it was observed that:

> Shift loadings are paid by way of compensation for the times an employee is required to work outside the usual hours fixed for day workers and allowances payable in respect to periods of duty in this area were reviewed in June 1974 with consequential changes being made.[63]

92. In our submission, it follows that there is no justification or rationale for requiring the payment of shift allowances during portions of broken shifts that do not constitute *'unsociable hours'* or, put another way, that are performed within the span of hours applying to day work. An employee does not, during the performance of such work, experience any of the disutility that may be experienced when working unsociable hours, such as time worked early in the morning or late at night.

Section 138 and the Modern Awards Objective

93. The approach proposed by the Employer Parties regarding the amounts that would be payable to employees for work performed on broken shifts should be adopted because it would:

    (a) Moderate the adverse consequences for employers that will flow from the Decision, in the form of increased inflexibility and additional employment costs, for which employers may not receive any additional funding.

    (b) Address the anomalous extant requirement to pay shift allowances for work that does not in fact result in the disutility for which those shift allowances are payable.

[62] *Transport Workers' Union of Australia v SCT Logistics* [2013] FWC 1186 at [44].

[63] *Municipal Officers' (Melbourne and Metropolitan Tramways Board) Award 1970* [1976] CthArbRp 1905.

(c) Ensure that the Award does not contain provisions that are not necessary to ensure that it achieves the modern awards objective.

94. In addition:

(a) There is no material before the Commission that might suggest that the proposed approach would materially affect, in an adverse way, the relative living standards and needs of the low paid.

(b) It is unlikely that this matter alone will encourage or discourage collecting bargaining.

(c) The need to promote social inclusion through increased workforce participation is a neutral consideration.

(d) The need to provide additional remuneration for employees:

(i) Working overtime, would be satisfied. Employees would continue to be entitled to payment at overtime rates, where relevant.

(ii) Working unsocial, irregular or unpredictable hours would be satisfied. The Award would continue to provide additional remuneration to employees where unsocial hours are worked.

(iii) Working weekends or public holidays would be satisfied. Employees would be entitled to weekend and public holiday penalty rates if a broken shift is performed in such circumstances.

(iv) Working shifts, would be satisfied. Employees would receive shift allowances where a broken shift meets an applicable shift definition.

(e) The principle of equal remuneration for work of equal or comparable value is a neutral consideration.

(f) The proposed approach would ensure that the Award is simple and easy to understand.

5. THE FOURTH QUESTION

95. The Employer Parties contends that it is not necessary for the Award to be varied as proposed by the Fourth Question. We may seek to address this matter further in our reply material if other parties adopt or confirm an alternate view.