

# Modern Awards Review 2023-24 – Work and Care

Submission of the Health Services Union

11 March 2024



## Introduction

1. This is a submission made in relation to stream 3 of the Modern Awards Review 2023-24 – work and care. The submission is made pursuant to the updated timetable set in Deputy President O’Neill’s Statement of 21 February 2024<sup>1</sup> and in response to the Discussion Paper published by the Commission on 29 January 2024 (**‘Discussion Paper’**).<sup>2</sup>
2. The Health Services Union (**HSU**) welcomes the opportunity to participate in this stream of the Modern Awards Review 2023-24 which is directed to considering the impact of workplace relations settings on work and care having regard to the findings and recommendations of the Final Report of the Senate Select Committee on Work and Care (**‘Senate Report’**).<sup>3</sup> The HSU participated in the Senate Select Committee’s Inquiry and supports the recommendations made in the Senate Report. Of their nature, many of the matters raised in the Discussion Paper and Senate Report are also directly relevant to the recent gender equality amendments to the *Fair Work Act 2009* (**‘the Act’**), in particular the amendment to s 3(a) making gender equality an object of the Act, and the new sub-s134(1)(ab) which requires the Commission to take into account the need to achieve gender equity in the workplace by ensuring equal remuneration for work of equal or comparable value, eliminating gender-based undervaluation of work, and providing workplace conditions that facilitate women’s full economic participation in ensuring that modern awards provide a fair and relevant safety net.
3. The HSU has had the opportunity to review the submission of the Australian Council of Trade Unions (**‘ACTU’**). The HSU endorses the ACTU’s submission and recommendations made therein. This submission will focus on particular issues raised in the discussion paper as they arise in the awards in which the HSU has a significant interest.
4. Of the 25 awards identified in the Discussion Paper, the HSU has a significant interest in the following three (together, **‘the Awards’**):
  - a) *Aged Care Award 2010*;
  - b) *Social, Community, Home Care and Disability Services Industry Award 2010* (**‘SCHADS Award’**);
  - c) *Health Professionals and Support Services Award 2020* (**‘HPSS Award’**).
5. The three awards in which the HSU has a significant interest set minimum wages and conditions of employment in feminised industries. They cover occupations which are some of the most feminised in the Australian economy including receptionists in general practice clinics, receptionists and general clerks in hospitals, medical technicians in pathology and diagnostic imaging services, dental assistants, psychologists, nursing support and personal care workers in residential aged care services, and aged and disabled carers.<sup>4</sup> The Awards remain highly relevant as employees in these

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<sup>1</sup> *Modern Awards Review 2023-24* [2024] FWC 476.

<sup>2</sup> Fair Work Commission, [Modern Awards Review 2023-24 Discussion Paper – Work and Care](#), 29 January 2024.

<sup>3</sup> Per the [President’s Statement](#), *Modern Awards Review 2023-24*, 15 September 2023.

<sup>4</sup> See, for example, the discussion in the [Stage 1 Research Report](#) produced by the UNSW Social Policy Research Centre prepared for the Fair Work Commission Cortis N, Naidoo T, Wong M and Bradbury B, *Gender-based Occupational Segregation: A National Data Profile – Final Report*, 6 November 2023 (published by the Commission on 15 November 2023).

sectors tend to be either award reliant or covered by enterprise agreements which closely resemble award wages and conditions.

6. The HSU’s members working in the health, care and support occupations covered by the Aged Care, SCHADS and HPSS Awards experience the double whammy of having to bear the cost of underfunded and undervalued formal care systems through low wages, insecure employment and low retirement incomes, while at the same time having to balance unpaid care responsibilities at home which continue to disproportionately fall to women.
7. Many of the issues raised in the Discussion Paper, including the predominance of part time employment arrangements characterised by low guaranteed hours and highly changeable rosters, inconsistent access to shift penalties and overtime as a result of span of hours provisions, overtime and time off in lieu of overtime arrangements, minimum engagements, access to additional annual leave, and low remuneration for on-call and recall to duty are consistently raised by HSU members as issues which have a negative impact on their ability to plan for and balance their unpaid caring responsibilities outside the workplace with their work commitments, plan financially and achieve financial security.
8. The HSU notes that while not the subject of a specific discussion question, the Discussion Paper notes the findings in the Senate Report that low wages and limited career progression opportunities – both typical in the care and support industries and parts of the health sector – are inextricably linked to and have a detrimental impact on time, and financial and personal resources for unpaid care commitments. Indeed, a key recommendation of the Senate Select Committee on Work and Care in its Interim Report was that an analysis of care work classifications and wage structures be undertaken to recognise the value of care work and to lift wages in the care sectors.<sup>5</sup> The HSU supports this recommendation. As the work value of residential and in-home aged care workers covered by the Aged Care and SCHADS Awards and changes to the relevant classification structures therein to better provide for meaningful career and wage progression are currently being actively considered by the Commission in the HSU’s aged care work value case, the HPSS and broader SCHADS Awards warrant similar consideration.
9. The HSU notes that both the SCHADS and HPSS Awards have been identified as awards covering priority occupations and industries which may be affected by undervaluation and work value issues<sup>6</sup>. It has been indicated that, in response<sup>6</sup> to the recent gender equality amendments to the Act, in particular the new sub-s 284(1)(aa), gender pay inequity and potential undervaluation of work and qualifications in those Awards may be investigated with a view to being resolved as part of the current or future Annual Wage Reviews.<sup>7</sup> The HSU presumes it is for that reason that pay and classification issues have not been specifically included as discussion questions in the Discussion Paper for this stream of the Award Review. The HSU will continue to closely follow the research phase of this part of the Annual Wage Review and will participate in that Review with respect to potential gendered undervaluation in these Awards.
10. This submission will therefore respond to the discussion questions raised in the Discussion Paper of particular significance to the HSU’s members covered by the Aged Care, SCHADS, and HPSS

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<sup>5</sup> Senate Select Committee on Work and Care, *Interim Report*, October 2022, Recommendation 2.

<sup>6</sup> Above n 4.

<sup>7</sup> See *Annual Wage Review 2022-23 [2023] FWCFB 3500* at [11], [137]; [180]; [President’s Statement](#), *Gender pay equity research – Stage 1 report published*, 15 November 2023.

Awards and propose where the Awards could be improved to better allow employees to balance work and caring responsibilities.

11. While this submission has been prepared by HSU National, it is made on behalf of our branches and members Australia-wide.<sup>8</sup>

## Part-time arrangements

12. Rates of part-time employment in feminised occupations covered by the Awards are high compared to the general workforce. This ranges from, for example, 50 percent of hospital receptionists, 53 percent of psychologists and 57 percent of dental assistants to 60 percent of personal care workers in residential aged care facilities, 65 percent of aged and disabled carers and 71 percent of receptionists in general practice, compared to 33 percent across the workforce in general. (It is worth noting that casual employment is also relatively high among many of these occupations, including dental assistants, medical receptionists, personal care workers and aged and disabled carers, indicating that secure, permanent full-time employment in such occupations is the exception in these sectors.)<sup>9</sup>
13. For part-time employees, each of the Awards provide that, prior to the commencement of employment, employers and employees must agree in writing on a regular pattern of work including the number of ordinary hours to be worked each week, the days of the week the employee will work and the starting and finishing times each day.<sup>10</sup> Variations to these agreements must only occur by agreement, and in writing.<sup>11</sup>
14. These provisions are extremely important to HSU members covered by the Awards and employed on a part-time basis. Formal agreement around days and times of work is one of the few ways that part-time employees in these industries have some certainty around their hours. This is particularly significant in the health and care and support sectors, in which employees are uniquely susceptible to employer pressure to be constantly available and on hand given the precarity of their work and their commitment to their patients and clients.
15. The HSU is wary of proposals in other streams of the Award Review which would seek to undermine these important safeguards, including, for example, by effectively allowing variations to agreed hours to occur via an ongoing series of text messages.<sup>12</sup>
16. Rather than undermining what current protections there are, the HSU is of the view there are a number of ways in which part-time arrangements should be improved for workers covered by the Awards both to allow them to better accommodate caring responsibilities outside of work and to ensure the Awards continue to meet the modern awards objective having regard to the new sub-s 134(1)(ab).

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<sup>8</sup> HSU National is the trading name for the Health Services Union, a trade union registered under the *Fair Work (Registered Organisations) Act 2009*. The HSU has registered branches for New South Wales/Queensland/Australian Capital Territory; Victoria (4); Tasmania; South Australia/Northern Territory; and Western Australia.

<sup>9</sup> Above n 4.

<sup>10</sup> See cl 10.3(b) of the Aged Care Award; cl 10.3(c) of the SCHADS Award; and cl 10.2 of the HPSS Award.

<sup>11</sup> See cl 10.3(c) of the Aged Care Award; cl 10.3(e) of the SCHADS Award; and cl 10.3 of the HPSS Award.

<sup>12</sup> See for example, [Submission of Business NSW and Australian Business Industrial](#) in stream 4 of the 2023-24 Modern Award Review re making awards easier to you, at pages 22-23.

## Regular pattern of hours

17. A common issue experienced by HSU members covered by the HPSS Award and employed on a part-time basis is that, despite cl 10 of the HPSS Award not expressly providing for it (unlike, for example, cl 10.3(d) of the SCHADS Award), the ‘regular pattern of work’ required to be agreed upon pursuant to cl 10.2 of the Award often varies week-to-week over a two or four week rotating roster.
18. This practice undermines what the HSU considers to be the spirit of the provisions which are to provide employees certainty about their weekly roster. In the absence of an express provision allowing that the regular pattern of work does not need to be the same each week, the regular pattern of work should be consistent week-to-week. However, given this is not the way the Award is applied by many employers, the Award should be varied in the HSU’s view to expressly clarify that the regular pattern of work is to be the same each week unless the employee agrees in writing to an arrangement whereby the agreed pattern of work differs (for example over a two- or four-week roster).

**Proposal 1:** *Insert a new cl 10.4 into the HPSS Award providing that the regular pattern of work shall provide the same guaranteed hours each week unless the employee agrees otherwise in writing.*

## Review of guaranteed part-time hours

19. A common problem faced by HSU members employed under the Awards as part-time employees is underemployment. Often, employees under all three Awards are engaged on (often very) low hour contracts, but regularly rostered to perform close to full-time hours. This practice was a key issue considered by the Senate Select Committee on Work and Care, which ultimately recommended that the use of low base hour contracts should be restricted.<sup>13</sup>
20. Ideally, employees should have as much certainty and predictability about their hours week-to-week as possible. Not having that certainty and predictability has negative impacts on employees’ ability to manage their caring responsibilities outside of work, and their financial security (impacting their ability to confidently manage a family budget, or secure a mortgage or rental property, for example).
21. The HSU is of the view that given their coverage of feminised industries and the high rates of part-time employment of employees covered by them, the Awards should include provisions requiring employers to carry out regular reviews of part-time employees’ hours with a view to increasing employees’ minimum guaranteed hours in circumstances where an employee has been regularly performing more than their guaranteed hours (up to and including conversion to full-time employment where employees have regularly worked 38 hours or an average of 38 hours over a 6 month period). There should be narrow, objective grounds on which an employer can refuse to offer increased hours. Employees should be able to dispute any refusal by the employer to increase their guaranteed hours including by way of referral to the Commission for resolution including, if necessary, by arbitration without requiring the consent of the employer.

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<sup>13</sup> Senate Select Committee on Work and Care, *Final Report*, March 2023, Recommendation 25.

22. While the SCHADS Award contains provision for part-time hours to be reviewed (at cl 10.3(g)), these provisions require employees to request an increase to their guaranteed hours, and allow employers to refuse the request on reasonable business grounds with no avenue for the employee to challenge that refusal. In the HSU's experience, despite the fact that employees being employed on low base hour contracts (sometimes multiple low hour contracts with the same employer) but regularly working much higher hours is a commonplace and notorious practice across the sectors covered by the SCHADS Award, the provision is rarely evoked or effectively used to increase employees' guaranteed hours. In the HSU's experience this is because employees, who are often financially dependent on their regular additional hours, are reluctant to 'rock the boat' by making a request, particularly when an employer can simply refuse, whether reasonably or unreasonably, and there is nothing a worker can do to challenge that decision.

23. The HSU proposes the following:

**Proposal 2:** *That a new cl 10.3(f) be inserted into the Aged Care Award and a new cl 10.4 be inserted into the HPSS Award, and that cl 10.3(g) of the SCHADS Award be varied, to give effect to the following:*

- *An employer must make an offer to a part-time employee to increase their guaranteed hours if the employee has regularly worked more than their guaranteed hours with the same employer for at least 6 months.*
- *The offer to increase the guaranteed hours must reflect the regular hours actually performed by the employee over the relevant period. Where an employee has regularly worked 38 hours or an average of 38 hours a week, the employee will be offered conversion to full-time employment;*
- *The offer must be in writing and include details of the hours worked by the employee over the relevant period relied on by the employer to determine the number of increased hours offered;*
- *An employer is not required to make an offer only if:*
  - o *There are reasonable business grounds not to make the offer;*
  - o *The reasonable business grounds are based on facts that are known, or reasonably foreseeable, at the time of deciding not to make the offer.*
- *Before making a decision not to make an offer to increase a part-time employee's guaranteed hours, an employer must:*
  - o *Discuss the review it has undertaken with the employee;*
  - o *Genuinely tried to reach agreement with the employee about increasing the employee's guaranteed hours;*
  - o *Have genuine regard to the consequences of the refusal for the employee.*
- *If an agreement cannot be reached and the employer proceeds to refuse to make an offer, the employer must communicate this to the employee in writing and include details of the reasons for not making an offer;*
- *If a dispute arises over an offer or a refusal or make an offer, dispute resolution procedures apply requiring, in the first instance, the parties to attempt to resolve the dispute at a workplace level, and failing that allowing either party to refer the dispute to the FWC to be dealt with by any means including arbitration.*

24. By putting the onus on employers to proactively review the hours regularly performed by part-time employees and offer increased guaranteed hours in circumstances where employees regularly perform more than their guaranteed hours for a period of at least 12 months and allowing an avenue for the review of employer decisions, the proposal would give effect to Recommendation 25 of the Senate Report as a way of restricting the use of low hours contracts.

### **Payment of overtime**

25. Another issue related to the use of low base hour contracts is the overtime arrangements that apply to part-time employees under the SCHADS Award.
26. While, in theory, part-time employees' days and hours of work each week will be agreed at the commencement of employment, the overtime provisions as they apply to part-time employees in the SCHADS Award also provide that those hours can be varied or added to without penalty in that employers are not required to pay overtime rates unless and until a worker exceeds 38 hours of work across the week (or 10 hours a shift).<sup>14</sup> This is in direct contrast to the industrial arrangements in many other Awards, including the Aged Care and HPSS Awards which require overtime rates to be paid for any time worked in excess of the agreed hours (including where varied in accordance with the relevant terms of the Awards).<sup>15</sup>
27. Underemployment in the industries and occupations covered by the SCHADS Award makes it more likely that part-time workers will agree to work additional hours over their agreed minimum hours when called on to do so. The capacity of employers to flex part time workers' hours up and down to their contracted hours at ordinary rates creates an effectively casualised or 'on-demand' workforce. Workers' rosters can be filled up entirely with 'additional hours' at no overtime pay, there is no regular agreed pattern of those additional hours, and in the result weekly hours and wages become variable.
28. The effect of this on workers is two-fold. First, restricted access to overtime payments compound upon already low rates of pay under the Award. As acknowledged in the Discussion Paper, low remuneration can have detrimental impacts on employees' time, and financial and personal resources for care. Second, it creates a high level of insecurity and uncertainty. The HSU's members routinely and consistently report feeling worried about their rosters – whether they'll get enough hours, how they'll juggle other responsibilities with hours that can vary week-to-week, and the fact that their shifts can change unexpectedly. They report feeling reluctant to utilise accrued entitlements or request flexibility to attend to personal or caring responsibilities for fear they will be 'punished' – for example, returning to work to find a regular shift has been removed from their roster without explanation and having to manage the financial implications of this.
29. Consistent with Recommendation 25 of the Senate Report, which called for the restriction of low base hour contracts which can be flexed up without incurring any pay penalty for additional hours worked beyond contract, the HSU proposes that the SCHADS Award be varied at cl 28.1 to ensure that work in excess of the agreed hours is paid at overtime rates. This should act as a disincentive to the practice of offering low base hour contracts where higher hours are routinely worked and should promote the provision of more accurate and stable guaranteed hours by employers who

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<sup>14</sup> Cl 28.10(b).

<sup>15</sup> Cl 25.1(b)(iii) Aged Care Award, cl 25.1(b)(i) HPSS Award.

wish to avoid paying overtime rates. This would allow employees to have a greater ability to structure their lives through receiving reliable weekly wages and having more certainty of hours allowing them to meet other responsibilities such as caregiving.

**Proposal 3:** *That cl 28.1(b) of the SCHADS Award be varied to provide that all time worked in excess of a part-time employee's rostered hours on any one day (unless an agreement has been entered into under cl 10.3(e)), will be overtime and paid at the rates prescribed by cl 28.1(b).*

## Minimum payment periods

30. As noted in the Discussion Paper, the fundamental rationale for minimum engagement periods as explained by the Full Bench is to ensure employees receive enough work, and income, for each attendance at the workplace to justify the expense and inconvenience associated with that attendance by way of transport time and cost, work clothing expenses, childcare expenses and the like.<sup>16</sup> As further outlined by the Full Bench during the 4 Yearly Review, 'minimum engagement terms protect employees from exploitation by ensuring that they receive a minimum payment for each attendance at their workplace to justify the cost and inconvenience of each such attendance'.<sup>17</sup>
31. The HSU is of the view that the continued appropriateness of an absence of any minimum period of engagement for part-time workers under the HPSS Award is an issue that merits further consideration. However, the HSU is not in a position to propose a settled view on whether and how the Award should be varied to continue to meet the modern awards objective in this respect in the timeframe of this stream of the Award Review. The HSU intends to consult further with its membership on this issue and may take steps to address this matter at a later stage.
32. The HSU is also supportive of proposals in other streams of the Award Review which would remove the carve out in cl 10.5(a) of social and community services employees when undertaking disability services work from the 3-hour minimum engagement (meaning employees when undertaking that type of work only benefit from a minimum engagement of 2 hours).<sup>18</sup> The HSU would support the SCHADS Award being amended to remove that carve out so that all part-time and casual social and community services sector employees have the benefit of a 3-hour minimum engagement.

## Span of hours

33. Span of hour clauses have a role to play in the Awards in setting the structure of hours ordinarily to be worked by employees. In practice, employers usually expect employees to be available during the span of hours nominated by the Award. Outside those hours, overtime rates and shift allowances can apply, which compensate and reward the employee for working at unsociable times which often clash with caregiving responsibilities (particularly the care of children outside of normal school and childcare hours). Span of hour clauses can also determine, in part, when an

<sup>16</sup> *4 yearly review of modern awards – Casual employment and part-time employment* [2017] FWCFB 3541 at [399].

<sup>17</sup> *4 yearly review of modern awards – Social, Community, Home Care and Disability Services Industry Award* [2021] FWCFB 5244 at [54].

<sup>18</sup> See for example, [Submission of the Australian Workforce Compliance Council](#) in stream 4 of the 2023-24 Modern Award Review re making awards easier to you, at page 85.



employee is a shift worker and can therefore also impact on the quantum of annual leave an employee is entitled to. Accordingly, span of hour clauses can have a material impact on an employee's pay and entitlements, as well as their work-life balance.

34. There are different span of hour arrangements in each of the Aged Care, SCHADS, and HPSS Awards.
35. The Aged Care Award provides that ordinary hours for a day worker are worked between 6.00am to 6.00pm Monday to Friday.<sup>19</sup> The SCHADS Award is broader than the Aged Care Award, providing that ordinary hours for a day worker are worked between 6.00am and 8.00pm Monday to Sunday.<sup>20</sup> The Award also provides for maximum daily hours – being 8 hours, or, by agreement, up to 10 hours, per day<sup>21</sup> – and that the span of hours for a broken shift is up to 12 hours.<sup>22</sup>
36. Although the Awards both cover occupations which have been identified as highly feminised (being personal care workers in residential aged care covered by the Aged Care Award, and aged and disabled carers covered by the SCHADS Award), and both cover 24/7 operations, different span of hours provisions in the two Awards means that there is inconsistency in the way employees are compensated for working unsociable and non-family friendly hours. For example, whereas a part-time residential aged care worker covered by the Aged Care Award is entitled to an afternoon shift allowance for shifts which end after 6.00pm, the same only kicks in for a part-time in-home aged care worker covered by the SCHADS Award after 8.00pm. Workers under the Aged Care Award become eligible for an extra week of annual leave if they regularly work any weekend hours, whereas workers under the SCHADS Award must work more than 4 ordinary hours on 10 or more weekends in a year to attain the same.<sup>23</sup>
37. The situation is even more complex and inequitable in the HPSS Award. Despite this Award covering some of the most feminised occupations in Australia, it contains some of the broadest and least family friendly span of hours provisions which differ depending on which type of private medical practice and employee works in.
38. The Award provides a default span of hours of 6.00am to 6.00pm, Monday to Friday for day workers, unless they fall into one of the following three categories:
  - a) Private medical, dental, pathology, physiotherapy, chiropractic and osteopathic practices – where the span of hours is 7.30am to 9.00pm Monday to Friday, and 8.00am to 1.00pm on Saturday;
  - b) Private medical imaging practices which see patients on a 5.5 day a week basis – where the span of hours is 7.00am to 9.00pm Monday to Friday, and 8.00am to 1.00pm on Saturday;
  - c) Private medical imaging practices where the work location of the practice services patients on a 7 day a week basis – where the span of hours is 7.00am to 9.00pm Monday to Sunday.
39. As has been identified in the Stage 1 Research Report produced by the UNSW Social Policy Research Centre prepared for the Commission in the current Annual Wage Review,<sup>24</sup> for example,

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<sup>19</sup> CI 22.2.

<sup>20</sup> CI 25.2(a).

<sup>21</sup> CIs 25.1(a)(i), (b).

<sup>22</sup> CI 25.6(f).

<sup>23</sup> CIs 28.2 Aged Care Award, 31.2 SCHADS Award.

<sup>24</sup> Above n 4.

dental assistants, practice managers and dental hygienists, technicians and therapists are highly feminised occupations covered by the HPSS Award characterised by high rates of part-time employment. Similarly, receptionists in general practice clinics and medical technicians in pathology and diagnostic imaging services are highly feminised occupations, characterised by high levels of part-time employment, and in which employees have higher than average child and other caring responsibilities.

40. HSU members regularly report frustration with being required by their employers to be available at all times during the relevant span of hours – including evenings and weekends – and discuss the detrimental impact of having to give up time on the weekends – for example Saturday morning sports – with their families. The amount members are compensated for being available these unsociable and non-family friendly hours is impacted by the wide and varied span of hours provisions. For example, workers are required to be available to work long weekday and weekend hours, but only become entitled to shift penalties where they regularly work ordinary hours outside the relevant span of hours. Similarly, those who work Saturdays (or in the case of workers in 7-day private medical imaging practice, Saturdays or Sundays), are entitled to the lower weekend penalty rates rather than the higher overtime rates as a result of the span of hours provisions. As the broad term ‘private medical practices’ is not defined in the Award, employers can (and do) claim their operations are ‘private medical practices’ to avoid paying shift penalties during extended operating hours.
41. The span of hours provisions in the HPSS Award may be directly contrasted with other Awards covering the health sector and apply to 24/7 work environments, including the Medical Practitioners Award 2020 (which provides a span of hours of 6.00am to 6.00pm Monday to Friday for medical practitioners) and the Nurses Award 2020 (which provides a span of hours of 6.00am to 6.00pm Monday to Friday).
42. The HSU is of the view that the continued appropriateness of the broad and varied span of hours provisions in the SCHADS and HPSS Awards having regard to the Senate Report and the new sub-134(1)(ab) is an issue that merits further consideration. The HSU intends to consult further with its membership on this issue and may take steps to address this matter at a later stage.
43. A related issue in the HPSS Award is the lack of rest break provisions which result in undesirable rostering practices. For example, a common scenario faced by HSU members is being underemployed on a low base hour contract with the promise of being able to pick up additional hours. Members are then rostered on, for example, a 4-hour shift then offered another shift sometimes on the same day, sometimes with less than 30 minutes between the two engagements, with the employer insisting this does not amount to a broken shift. For example, a member may be rostered to work 8.00am-12pm, and then offered an additional shift commencing at 1.00pm- 4.00pm either at the same location or a different location. Members are then required to either travel to the new work location or remain at the current location waiting to recommence work, on their own unpaid time. This allows employers to pay (mostly female) employees for only 7 hours for what is effectively an 8-hour shift. For employees, this results in extended periods away from the home and less pay overall which is antithetical to balancing work and care responsibilities.

44. The HSU is of the view these types of rostering practices should be addressed by varying the HPSS Award to make clear that broken shifts are expressly prohibited, and to introduce some minimum rest break periods between rostered shifts.

### Notice of rosters

45. The HSU agrees with the findings of the Senate Report and the discussion in the Discussion Paper that variable hours, unexpected schedule changes, disruptive rostering and a lack of genuine consultation with staff negatively impact employees' caring responsibilities. The HSU supports Recommendation 5 of the Senate Select Committee on Work and Care in its interim report, namely that rostering rights for employees (and in particular working carers, high numbers of whom are covered by the Aged Care, SCHADS and HPSS Awards) including by ensuring employers implement rostering practices that are predictable, stable and focused on fixed shift scheduling and requiring employers to genuinely consider employee views about the impact of proposed roster changes.

46. In practice, rosters are changed daily in industries like aged care, disability services and pathology. Employees are contacted relentlessly outside of work hours to alert them to last minute changes to work hours or location, often even when they are on their way to work at a particular location. This particularly affects, for example, phlebotomists who work in any number of collection centres across metropolitan or rural areas, some of which are 50km or more apart. It is not an uncommon situation for such workers to be contacted late in the evenings and notified of a change in work location for the following morning. HSU members also frequently report bring on their way to a rostered site, only to be called by their manager to have their work location changed. This involves redirecting – often in peak hour traffic – with obvious implications for travel time and family life. In other sectors, like aged care, it is common for employers to use electronic apps for rostering. Often, shifts are changed through the app without any notification to employees. While employers consider they have met the notice requirements in the Aged Care or SCHADS Award, the reality is this practice requires employees to regularly log on and check the app to ensure they are aware of any changes (including late in the evening and early in the morning). This has obvious implications for employees' ability to fully engage in family time.

47. The HSU has already proposed, with respect to the SCHADS Award in particular, variations which should go some way to improving certainty of hours for part-time workers covered by that Award.

48. In addition, in the HSU's view, the provisions in the Awards providing that rosters may be changed at any time in the event of staff illness or emergency are too broad. Given they allow the unilateral variation of rosters without any consultation, they are relied upon by employers to change rosters in the sectors covered by the Awards constantly including outside of employees' nominated availability.<sup>25</sup>

49. The HSU is of the view that, taking into account the relevant Recommendation of the Senate Select Committee on Work and Care and the new sub-s 134(1)(ab) of the Act, there would be merit in reviewing the change in roster clauses in the Awards to introduce allowances for roster

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<sup>25</sup> Cls 22.6(c) Aged Care Award, 25.5(d)(ii)(B) SCHADS Award, 14.1(b) HPSS Award.

changes within certain periods of time,<sup>26</sup> and to expressly prohibit employees being rostered outside their agreed availability without consultation.

## Overtime, TOIL, and make-up time

50. The HSU has already proposed, with respect to the SCHADS Award in particular, variations to provisions concerning the payment of overtime to part-time employees.
51. In addition, the HSU is concerned that in each of the Aged Care, SCHADS, and HPSS Awards – contrary to the majority of the 25 modern awards considered by the Commission in the Discussion Paper – employees’ entitlement to time off in lieu of overtime (‘TOIL’) is equivalent not to the overtime payment that would have been paid (e.g. 60 minutes of overtime worked at 150 percent of the hourly rate equating to 90 minutes of time off), but is equivalent to actual time worked (e.g. 60 minutes of overtime worked at 150 percent of the hourly rate, but equating only to 60 minutes off).
52. There does not appear to be any justifiable reason why employees covered by the Aged Care, SCHADS and HPSS Awards should receive a lesser TOIL entitlement compared to the majority of other modern awards. Concerningly, the HSU is aware of employers, particularly covered by the HPSS Award, who actively exploit this inequity by imposing on workers a policy of taking TOIL instead of making overtime payments so as to avoid having to make overtime payments.
53. As noted in the Discussion Paper, the purpose of overtime provisions is to compensate employees who perform work outside their ordinary or rostered hours. For those with caregiving responsibilities (a higher-than-average number of whom are covered by the Aged Care, SCHADS and HPSS Awards), overtime can conflict with caregiving responsibilities, or alternatively can provide welcome additional income. The inequity found in the TOIL provisions in these Awards is particularly concerning when considered in the context of the high level of part-time employment and low wages characteristic of work covered by the Awards.
54. The HSU proposes that to ensure the Awards continue to meet the modern awards objective, having particular regard to the new sub-s 134(1)(ab), the Aged Care, SCHADS and HPSS Awards should be varied to ensure that employees’ entitlement to time off in lieu of overtime is equivalent to the overtime payment that would have been paid.

**Proposal 4:** *That cl 25.2(d) of the Aged Care Award, cl 28.2(c) of the SCHADS Award, and cl 25.5(d) of the HPSS Award be varied to provide that the period of time off that an employee is entitled to take is equivalent to the overtime payment that would have been made.*

55. In a similar vein, cl 25.5(f) of the SCHADS Award provides that in circumstances where a client cancels a scheduled home care or disability service within 7 days of the scheduled service, and where the employee rostered to perform the service is notified within 12 hours prior to the scheduled commencement of the cancelled services, the employer can elect to either pay the employee the amount they would have received had the service not been cancelled, or provide

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<sup>26</sup> There are a range of models used in enterprise agreements – see for example the Nurses and Midwives (Victorian Public Sector) (Single Interest Employers) Enterprise Agreement 2020-2024 at cl 45.7, the Medical Scientists, Pharmacists and Psychologists Victorian Public Sector (Single Interest Employers) Enterprise Agreement 2021-25 at cl 57.2, and the Allied Health Professionals (Victorian Public Sector) (Single Interest Employers) Enterprise Agreement 2021-2026 at cl 50.2(b).

the employee make-up time. An issue that is regularly raised by HSU members is the cancelling of services on weekends and public holidays. When cancellation occurs in these circumstances, employers tend to elect to provide make-up time rather than paying the employee the amount they would have received (which would include public holiday or weekend penalties or shift allowances) saving the employer money but meaning employee loses out on pay. This has obvious implications for the low-paid, highly part-time, feminised workforces covered by the SCHADS Award.

56. The HSU is of the view that consideration should be given to varying the clause to ensure employees do not lose out on penalties and allowances they would otherwise have been due by the employer simply choosing to provide make-up time instead of paying the employee the amount they would have received had the service not been cancelled.

### **On-call and recall to duty**

57. On-call and recall to duty are significant issues for employees covered by the HPSS and SCHADS Awards, as are the use of sleepover shifts in the SCHADS Award. All are forms of work that require employees to hold themselves ready and available to work, at the direction of the employer. They impact what an employee may do and where they may go in time that is meant to be their own. In the case of sleepovers, employees are required to be present at the workplace at the employer's direction, and responsible for residents or clients who may require support overnight. The compensation provided for employees on-call, when recalled to work, and when rostered on sleepovers under the HPSS and SCHADS Awards is, unsurprisingly, very low, particularly when compared to similar clauses in more masculinised modern awards. This reflects a broader historical undervaluation of work deemed as 'women's work' and should be given significant consideration by the Commission in this stream of the Award Review.
58. The HSU agrees with the findings in the Senate Report that, for caregivers, the expectation to remain on-call and available for extended periods of time (including on sleepover shifts) in order to secure sufficient paid work can have a profound impact on the ability to manage work and care effectively and to be able to disconnect from the workplace. Under the HPSS Award, this is an issue that impacts, in particular, medical scientists, senior dieticians (particularly over weekends), senior pharmacists (particularly during nights and weekends), medical physicists, clinical perfusionists, and psychologists. Under the SCHADS Award, this particularly impacts disability support workers and in-home aged care workers.
59. However, despite being subject to a significant amount of control and direction from their employer over where they can go and what they can do, employees are not appropriately compensated. For example, employees on-call under the HPSS Award receive only \$23.42 for every 24-hour period they are on call Monday to Friday, or \$46.72 for every 24-period they are only call on a weekend or public holiday.<sup>27</sup> Further, there is no restriction in the Award on how often employees can be rostered on-call.
60. The amounts payable to employees under the SCHADS Award are even less. Employees required to be on-call under that Award receive only \$22.81 for every 24-hour period Monday to Friday,

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<sup>27</sup> Cl 23(d).

and \$45.17 for every 24-hour period on the weekend.<sup>28</sup> For employees required to be physically present at the workplace and responsible for a client who requires care on an 8 hour sleepover shift, the compensation they receive for that period is \$55.90.<sup>29</sup>

61. The on-call and recall to duty provisions of the HPSS and SCHADS Awards, and the sleepover provisions in the SCHADS Award should be re-examined having regard to the findings of the Senate Report and the new sub-s 134(1)(ab) to ensure the compensation payable to employees for being required to be on-call and available to work properly value that work having particular regard to the highly feminised nature of the occupations covered by the Award and the higher than average caring responsibilities of employees covered by the Award. The Awards should also be reviewed to ensure employees have minimum periods free from being on-call, to increase the minimum payment for workers required to be on-call and when recalled to work overtime, and to provide for recall not requiring a physical return to the workplace (as it is common for health professionals to give advice via the phone when on-call, which should be treated, in the HSU's view, as recall). The telephone allowance at cl 23.3(f) should also be contemporised to reflect modern communication methods (mobile phones, email, and so on).

### Travel time

62. The HSU absolutely concurs with the findings in the Senate Report that low remuneration across some sectors, such as the aged and disability sectors, is often compounded by the fact that many workers are not paid for time spent travelling (as well as time spent completing administration and undertaking training, amongst other things).
63. The issue of unpaid travel time is consistently raised as an issue by HSU members, in particular home care and disability support workers under the SCHADS Award and phlebotomists and others under the HPSS Award. As noted in the Discussion Paper, approximately 15 per cent of the total hours worked by community sector workers is unpaid. Despite being required to drive to and from clients and locations in the course of their work, the fact of this time being unpaid results in financial stress for workers. As noted in the Discussion Paper, this can make it difficult for workers to afford necessary care services and requires workers to work longer hours in order to earn sufficient income, which further impacts the work-care dynamic.
64. The issue also arises commonly for phlebotomists working at collection centres covered by the HPSS Award. Each employer commonly has a large number of collection centres. Employees are not contracted to a particular location or collection centre. In some companies, phlebotomists might be allocated to a specific area within a 10-20km radius, in others they may be rostered anywhere in the metropolitan area (or further afield, including mine sites). One member recently advised the HSU she was on her way to her originally rostered at a work location in Jandakot around 4km from her home. On the way, she received a call advising that she was needed in Joondalup almost 50km away. She had to re-route and drive (in her own vehicle and in her own unpaid time) to a collection centre 46km away from her original rostered place of work. This is a not uncommon experience for HSU members.

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<sup>28</sup> Cl 20.11.

<sup>29</sup> Cl 25.7.

65. The issue of paid travel time was considered in the 4 Yearly Review with respect to the SCHADS Award, during which the Full Bench declined to include provision for paid travel time at that stage, preferring to make changes to the minimum engagement and broken shifts provisions of the Award and allowing a period of time after those changes had taken effect in which to assess whether issues around travel time persisted.
66. Given that almost two years have passed since the minimum engagement and broken shift changes to the SCHADS Award came into effect, and particularly now having regard to the findings of the Senate Report and the new sub-s 134(1)(ab), the HSU is of the view that the issue of unpaid travel time in both the SCHADS and HPSS Awards warrants reconsideration in order to ensure the Awards continue to meet the modern awards objective. The HSU intends to consult further with its membership on this issue and may take steps to address this matter at a later stage.

## Annual leave

### Baseline additional week of annual leave

67. The HSU is of the view employees covered by the HPSS Award should be entitled to a standard five weeks' annual leave regardless of their shiftworker status. This is an entitlement that is already extended to nurses under the Nurses Award 2020 (at cl 22.2(c)). The additional week of leave is justified as a matter of fairness, and on the basis that it is necessary to counteract the high levels of burnout in the health sector and to provide fatigue management particularly given the high level of on-call, recall and overtime worked by health workers, unsociable working hours, and roster rotations that require constant body clock adjustments which takes a toll both physically and psychologically on workers (not to mention requiring them to constantly juggle their outside of work life and caring responsibilities). The extension of 5 weeks' annual leave across the health industry is becoming standard practice in enterprise agreements,<sup>30</sup> and the HSU is of the view the HPSS Award should keep pace with industry standards to remain a relevant and fair safety net.

**Proposal 5:** *Insert a new cl 27.2A of the Award to provide that employees who are not shiftworkers for the purpose of cl 27.2 are entitled to 5 weeks of paid annual leave for each year of service with their employer, and an employee who is a shiftworker for the purposes of cl 27.2 is entitled to 6 weeks of paid annual leave for each year of service with their employer.*

### Additional week of annual leave for shiftworkers

68. At present, employees' entitlement to an extra week of annual leave by virtue of being a shiftworker for the purposes of the NES varies significantly Award to Award.
69. Under the Aged Care Award, workers become entitled to an additional week's leave if they are either regularly rostered to work their ordinary hours outside the span of hours (which is 6.00am

<sup>30</sup> See, for example, Ramsay Health Care Victoria Health Professionals Enterprise Agreement 2023 at cl 6.1.4; Psychologists, Dieticians, Audiologists and Pharmacists (Victorian Stand-Alone Community Health Services) Enterprise Agreement 2023-2026 at cl 50.1; Medical Scientists, Pharmacists and Psychologists Victorian Public Sector (Single Interest Employers) Enterprise Agreement 2021-2025 at cl 61.2; Merri Health – Audiologists, Dieticians, Pharmacists, Psychologists and Dentists Enterprise Agreement 2023-2027 at cl 48.1; and, Melbourne IVF Medical Scientist and Support Services Enterprise Agreement 2022 at cl 17(a).

to 6.00pm Monday to Friday) or if they work more than four ordinary hours on 10 or more weekends (meaning work in ordinary time on a Saturday and/or a Sunday in any one calendar week).<sup>31</sup>

70. Under the SCHADS Award, workers become entitled to an additional week’s leave if they either work more than four ordinary hours on 10 or more weekends during the year or work at least 8 24-hour care shifts in a year.<sup>32</sup>
71. However, under the HPSS Award, workers only become entitled to an additional week’s leave if they are regularly rostered to work Sundays and public holidays.<sup>33</sup> This narrow conception of what a shiftworker is for the purposes of the NES entitlement to an additional week’s annual leave make it almost impossible for workers covered by the HPSS Award to access that entitlement, notwithstanding the fact that they are very regularly required to work nights and Saturdays.
72. Given that the addition of an extra week of annual leave for shiftworkers is specifically for the purpose of compensating employees for the disruption to personal and family life which is occasioned by working unsociable and un-family friendly hours, access to the additional week should not be predicated upon narrow conceptions of what a shiftworker is. That the definition of shiftworker for the purposes of the NES under the HPSS Award should be broadened to include at least regular work on Saturdays, and ideally also evening work, is even more necessary given what is known about the highly feminised nature of occupations covered by the Award and the high levels of child and other unpaid caring responsibilities employees covered by that Award tend to have.
73. The HSU proposes that consideration should be given to varying the definition of shiftworker for the purposes of the NES in both the SCHADS Award to include work regularly performed in the evenings, and in the HPSS Award to include regular work on Saturdays and evenings.

## Other variations to modern awards

### Weekend and public holiday penalties for casual workers

74. The calculation of weekend penalty rates for casual workers under the Aged Care and HPSS Awards differs from the SCHADS Award. The SCHADS Award provides, at cl 26.3, that casual employees will be paid the casual loading *in addition to* Saturday and Sunday and public holiday rates.
75. However, the Aged Care and HPSS Awards expressly provide that Saturday and Sunday and public holiday penalties for casuals *will not be* cumulative upon the casual loading.<sup>34</sup> There does not seem to be any justifiable reason for the different approach taken under the Awards. Given the highly feminised nature of the sectors and occupations covered by the Awards, and the low rates of pay already characteristic of many parts of the health and care sectors, this manner of calculating penalty rates leads to lower overall remuneration for casual workers covered by the

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<sup>31</sup> Cl 28.2.

<sup>32</sup> Cl 31.2.

<sup>33</sup> Cl 27.2.

<sup>34</sup> Cls 23.3 and 29.2(c)(ii) Aged Care Award and cl 26.1(b) HPSS Award.



Aged Care and HPSS Awards which impacts on their ability to provide caregiving outside of work for reasons already discussed in this paper.

76. The Aged Care and HPSS Awards should be varied to provide that casual entitlements to weekend and public holiday rates are to be calculated consistently with the approach taken in the SCHADS Award.

77. The HSU proposes the following variations:

**Proposal 6:** *That cls 23.3 and 29.2(c)(ii) of the Aged Care Award, and cl 26.1(b) of the HPSS Award be varied to provide that casual employees will be paid the relevant casual loading in addition to the relevant weekend and public holiday rates.*

**Authorised by Tim Jacobson, Acting National Secretary**

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