

IN THE FAIR WORK COMMISSION

MATTER NO.: AM2018/26

Four Yearly Review of Modern Awards – *Social, Community, Home Care and Disability Services Award 2010* – Substantive Claims

SUBMISSION OF THE AUSTRALIAN SERVICES UNION

1. This submission regards the Four Yearly Review of the *Social, Community, Home Care and Disability Services Industry Award 2010* ('**SCHDS Award**').
2. It is made in response to the provisional views expressed by the Fair Work Commission in its Decision¹ of 4 May 2021 ('**May Decision**') and addresses issues arising from the Draft Determination of the same date ('**Draft Determination**').

I – OPERATIVE DATE

3. In the May Decision, the Commission proposed an operative date of 1 October 2021 for all variations. This date should be maintained. The May Decision determined most matters of substance in the SCHDS Award. Employers have been on notice since then that they will need to implement these changes by 1 October 2021. They have had five months to implement the decision. There is no need for a further delay.

II – MATTERS FOR CONFERENCE

4. The ASU does not make submissions on the remote response/recall to work claims or the damaged clothing claims that have been referred to a separate conference.
5. Additionally, the ASU requests that the paid travel time claims be discussed at this conference as well. We address this issue in our submissions below.

III – WORKING ARRANGEMENTS

Minimum engagements

6. In the May Decision, the Commission proposed to introduce a minimum payment period for part-time employees by deleting clause 10.4(c) and inserting a new clause 10.5 to provide the following minimum payment periods for part-time and casual employees:
 - social and community service employees (except when undertaking disability work) – 3 hours' pay; and
 - all other employees – 2 hours' pay.
7. This is a determined view and should not be re-opened.

Travel time

8. In the May Decision, the Full Bench found, as a general proposition, that employees should be compensated for time spent travelling between engagements.
9. However, it also said that framing an award entitlement raised several issues, and noted that the minimum engagement, broken shifts and travel time claims were inter-related.

¹ *Four Yearly Review of Modern Awards* [2021] FWCFB 2383.

10. The purpose of the ASU's claim is to ensure that employees who are required to travel between work locations by their employer are paid for that work. The variations proposed by the Commission in its provisional view only address a separate problem: the extreme irregularity and variability in working time experienced by disability services and home care employees.
11. The new minimum engagements and restrictions on broken shifts will ensure that work is organised more fairly and efficiently. It is probable that the longer minimum engagements and restrictions on the number of breaks will reduce the amount of travel during unpaid time. But, it will not eliminate unpaid travel. For example, there is nothing to stop an employer breaking the shifts of a full-time employee when they travel between clients.
12. Further, the proposed allowances do not compensate for travel time. These amounts are intended to compensate employees for the disutility of longer working days and the additional travel time and cost associated with effectively presenting for work on two occasions (May Decision, at [550]).
13. We note the Full Bench's comment that the context in which the ASU's claims were made has changed. We propose that the travel time issue should be discussed further at a conference before the Fair Work Commission.

Broken Shifts

14. The ASU supports the Commission's provisional views regarding variations to the broken shifts clause, subject to the following comments.

Broken Shift Allowance

15. In the May Decision, the Commission identified that it is wrong in principle for an employee working a broken shift to receive no additional remuneration to compensate for the associated disutility (at [535]).
16. In considering an appropriate broken shift allowance, the Commission noted that '*broken shift allowances compensate employees for the disutility of working broken shifts*' (at [539]). Further, the Commission noted that '*additional remuneration for working a broken shift should not depend on the times at which the shift starts and finishes*' (at [540]).
17. The Commission expressed its 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 [553]). Additionally, for a 2 break shift, the Commission's provisional view is 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)*' (at [554]).

Quantum of the allowance

18. At paragraph [550], the Commission outlined the two disabilities that the broken shift allowance is designed to compensate for, namely:
 - 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 two occasions.
19. The allowance is one of the highest broken shift allowances in the modern award system. However, in context, the allowances are modest. Disability workers working broken shifts experience:
 - longer working days;

- multiple starting times;
- multiple starting locations;
- wasted time in breaks between engagements; and
- unpaid travel between working locations.

20. The proposed allowance for a '1 break' broken shift (\$17.50) is less than the national minimum hourly wage (\$20.33). The allowance for a '2 break' broken shift (\$25.75) is less than the minimum hourly wage rate for the entry level classification for a disability support worker (SACS Level 2.1, \$29.12).
21. The proposed allowances are clearly inadequate as compensation for the disutility associated with working broken shifts if they are also intended to compensate employees for unpaid work travel and (as will be discussed below) working unsocial hours.

Shift Penalties

22. Currently, clause 25.6(b) provides that the shift allowance specified in clause 29 are paid to an employee working a broken shift, and the shift allowance is determined by the '*finishing time of the broken shift*'. The focus of the current clause on the finishing time of a shift can result in an employee not receiving any shift loading despite working during an 'afternoon shift' or 'night shift' (for example, if an employee commences a broken shift at 5am and finishes at 3pm). This was the subject of a claim by the HSU in the Four Yearly Review.
23. The draft determination published on 4 May 2021 inserts a broken shift allowance at clause 20.10.
24. Clause 25.6 has been amended to include reference to the broken shift allowance. It appears that the variation to clause 25.6(d) has unintentionally removed an employee's entitlement to shift penalties for working during an 'afternoon shift' or a 'night shift' and penalty rates for working public holidays.
25. Currently, clause 25.6(b) states that an employee working a broken shift will be paid as follows:
- 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.*
26. The draft determination proposes to replace this language with the following (at clause 25.6(d)):
- Payment for a broken shift will be at ordinary pay with weekend and overtime penalty rates to be paid in accordance with clauses 26 and 28.*
27. This proposed wording does not make direct reference to an employee also being entitled to shift penalties under clause 29 – in particular, penalties for working during an 'afternoon shift' or a 'night shift' or to the public holiday penalty rates at clause 34.
28. It is not apparent that the intention of the Commission was to replace shift penalties for working an 'afternoon shift', 'night shift' or a 'public holiday shift'² with the broken shift allowance. As noted above, the broken shift allowance is intended to compensate an employee for the disutility of the length of the working day being extended and the disutility of additional travel time and cost. The broken shift allowance is clearly not intended to compensate an employee for the separately

² Note that a 'Public Holiday Shift' is defined under clause 29.2(c) to mean 'any time worked between midnight on the night prior to the public holiday and midnight of the public holiday'. 'Any part of that shift which is on the public holiday' will be paid at a rate of 150 per cent.

identified disutility of working late nights or early mornings (for example, the adverse health costs referred to in the *Penalty Rates Case* (see paragraph 341 and the comments from the Productivity Commission)).

29. The ASU submits that the draft determination should be amended as follows:

Payment for a broken shift will be at ordinary pay with shift, weekend, public holiday, and overtime, ~~penalty rates~~ to be paid in accordance with clauses 26, ~~and~~ 28, 29 and 34.

30. The quantum of the broken shift allowance is insufficient if the broken shift allowance is intended to replace shift penalties and public holiday rates.

31. It is very likely, depending on the length of the shift, that an employee working a broken shift would be paid less than an employee working an unbroken shift. In each case, the employee working a broken shift is worse-off compared to:

- an employee working an unbroken shift; and
- an employee working a broken shift incurring shift penalties under the current broken shift clause.

32. These shift lengths are a common feature of the disability sector. Employees working long broken shifts has been demonstrated in evidence filed by the ASU in this proceeding.

33. For example, Augustino Encabo gave evidence (at paragraph 25 of his statement dated 13 February 2019) that he is regularly required to work a broken shift that runs from 9.30am until 2.30pm, and then from 3pm until 5pm – a total of seven hours.

34. Similarly, Richard Rathbone stated (at paragraph 18 of his witness statement dated 18 February 2019) that he is rostered to work a broken shift that runs from 9.00am until 2.00pm, and then from 4.00pm until 6.30pm – totalling 9.5 hours.

35. Tracy Kinchin, a full-time employee, stated (at paragraph 17 of her witness statement dated 24 June 2019) that while she is only paid for 8 hours per day, she is required to work these hours over a span of 9 to 10 hours each day.

36. Robert Steiner³ worked 11 hours on Friday, 1 March 2019 between 6.00am and 9.00pm with one 4-hour break. If Mr Steiner was paid the current wage rates for a SACS employee level 2.1 he would earn \$385.84 (10 hours' x \$32.76 + 1 hour x \$58.24). If the broken shift allowance excluded the afternoon shift allowance, Mr Steiner would only earn 367.19 (10 hours' x \$29.12 + 1 hour x \$58.24 + \$17.75).

37. The evidence filed by the ASU regarding working hours in the industry is supported by the State of the Disability Sector 2020 report published by the National Disability Service. The report notes a '*distinct shift towards permanent employment throughout the sector in the latter half of 2019, continuing the trend noted in the previous six-month period*' (page 49). As of June 2020, 62% of employees in the disability sector are employed on a permanent basis – a 7% increase from the figure 12 months earlier. In addition, 21% of employees who are employed as permanent employees are engaged to work full-time hours.

38. If the broken shift allowance is intended to replace shift penalties, the ASU submits that the quantum of the broken shift allowance is insufficient. As demonstrated below, any Social and community services employee at Level 2.1 or above working a broken shift of at least 6 hours will be worse off if

³ Steiner Statement, ASU7, [15].

the shift qualified as either an 'afternoon shift' or a 'night shift' (with the exception of a Level 2.1 or 3.1 employee working a 6-hour, 'two break' afternoon broken shift).

Level 2.1 (6 hour shift)	
Ordinary rate	\$29.12
Afternoon rate (12.5% loading)	\$32.76
Night rate (15% loading)	\$33.49
Broken shift allowance (one break)	\$17.50
Broken shift allowance (two breaks)	\$25.75
<i>Current arrangement</i>	
6 hour afternoon shift: 6 × \$32.76	\$196.56
6 hour night shift: 6 × \$33.49	\$200.93
<i>Proposed arrangement</i>	
6 hours' ordinary pay plus 'one break' broken shift allowance: 6 × \$29.12 + \$17.50	\$192.22
Difference compared to current arrangement (afternoon shift)	\$4.34
Difference compared to current arrangement (night shift)	\$8.71
6 hours' ordinary pay plus 'two break' broken shift allowance: 6 × \$29.12 + \$25.75	\$200.47
Difference compared to current arrangement (afternoon shift)	\$3.91 (better off)
Difference compared to current arrangement (night shift)	\$0.46

Level 2.1 (8 hour shift)	
Ordinary rate	\$29.12
Afternoon rate (12.5% loading)	\$32.76
Night rate (15% loading)	\$33.49
Broken shift allowance (one break)	\$17.50
Broken shift allowance (two breaks)	\$25.75
<i>Current arrangement</i>	
8 hour afternoon shift: 8 × \$32.76	\$262.08
8 hour night shift: 8 × \$33.49	\$267.90
<i>Proposed arrangement</i>	
8 hours' ordinary pay plus 'one break' broken shift allowance: 8 × \$29.12 + \$17.50	\$250.46
Difference compared to current arrangement (afternoon shift)	\$11.62
Difference compared to current arrangement (night shift)	\$17.44
8 hours' ordinary pay plus 'two break' broken shift allowance: 8 × \$29.12 + \$25.75	\$258.71
Difference compared to current arrangement (afternoon shift)	\$3.37
Difference compared to current arrangement (night shift)	\$9.19

Level 3.1 (6 hour shift)	
Ordinary rate	\$32.54
Afternoon rate (12.5% loading)	\$36.61
Night rate (15% loading)	\$37.42
Broken shift allowance (one break)	\$17.50
Broken shift allowance (two breaks)	\$25.75
<i>Current arrangement</i>	
6 hour afternoon shift: 6 × \$36.61	\$219.66

6 hour night shift: $6 \times \$37.42$	\$224.54
<i>Proposed arrangement</i>	
6 hours' ordinary pay plus 'one break' broken shift allowance: $6 \times \$32.54 + \17.50	\$212.74
Difference compared to current arrangement (afternoon shift)	\$6.92
Difference compared to current arrangement (night shift)	\$11.78
6 hours' ordinary pay plus 'two break' broken shift allowance: $6 \times \$32.54 + \25.75	\$220.99
Difference compared to current arrangement (afternoon shift)	\$1.33 (better off)
Difference compared to current arrangement (night shift)	\$3.53

Level 3.1 (8 hour shift)	
Ordinary rate	\$32.54
Afternoon rate (12.5% loading)	\$36.61
Night rate (15% loading)	\$37.42
Broken shift allowance (one break)	\$17.50
Broken shift allowance (two breaks)	\$25.75
<i>Current arrangement</i>	
8 hour afternoon shift: $8 \times \$36.61$	\$292.88
8 hour night shift: $8 \times \$37.42$	\$299.36
<i>Proposed arrangement</i>	
8 hours' ordinary pay plus 'one break' broken shift allowance: $8 \times \$32.54 + \17.50	\$277.82
Difference compared to current arrangement (afternoon shift)	\$15.06
Difference compared to current arrangement (night shift)	\$21.54
8 hours' ordinary pay plus 'two break' broken shift allowance: $8 \times \$32.54 + \25.75	\$286.07
Difference compared to current arrangement (afternoon shift)	\$6.81
Difference compared to current arrangement (night shift)	\$13.29

Level 4.1 (6 hour shift)	
Ordinary rate	\$37.54
Afternoon rate (12.5% loading)	\$42.23
Night rate (15% loading)	\$43.17
Broken shift allowance (one break)	\$17.50
Broken shift allowance (two breaks)	\$25.75
<i>Current arrangement</i>	
6 hour afternoon shift: $6 \times \$42.23$	\$253.38
6 hour night shift: $6 \times \$43.17$	\$259.02
<i>Proposed arrangement</i>	
6 hours' ordinary pay plus 'one break' broken shift allowance: $6 \times \$37.54 + \17.50	\$242.74
Difference compared to current arrangement (afternoon shift)	\$10.64
Difference compared to current arrangement (night shift)	\$16.28
6 hours' ordinary pay plus 'two break' broken shift allowance: $6 \times \$37.54 + \25.75	\$250.99
Difference compared to current arrangement (afternoon shift)	\$2.39
Difference compared to current arrangement (night shift)	\$8.03

Level 4.1 (8 hour shift)	
Ordinary rate	\$37.54
Afternoon rate (12.5% loading)	\$42.23
Night rate (15% loading)	\$43.17
Broken shift allowance (one break)	\$17.50
Broken shift allowance (two breaks)	\$25.75
<i>Current arrangement</i>	
8 hour afternoon shift: 8 × \$42.23	\$337.84
8 hour night shift: 8 × \$43.17	\$345.36
<i>Proposed arrangement</i>	
8 hours' ordinary pay plus 'one break' broken shift allowance: 8 × \$37.54 + \$17.50	\$317.82
Difference compared to current arrangement (afternoon shift)	\$20.02
Difference compared to current arrangement (night shift)	\$27.54
8 hours' ordinary pay plus 'two break' broken shift allowance: 8 × \$37.54 + \$25.75	\$326.07
Difference compared to current arrangement (afternoon shift)	\$11.77
Difference compared to current arrangement (night shift)	\$19.29

Meal Breaks

39. It is likely, given current practices in the sector,⁴ that employers will require employees to travel during their work breaks.
40. If the Commission adopted the ASU's claim for paid travel time, then clause 27.1(b) would undoubtedly apply and employees would be paid at double time until a meal break is taken when they travel during their meal breaks.
41. In the absence of a provision for paid travel time, the SCHDS Award should provide a clear statement that employees must not be required to travel between work locations during their meal breaks. Overtime should be payable until an employee is allowed a meal break free from travel.

Overtime for dayworkers who work beyond the span of hours

42. We support the Commission's provisional view that if a day worker works outside the span of hours on a broken shift they should be paid overtime rates.

Shift swaps

43. The Full Bench expressed the view that there is merit in varying clause 25.5(d) to permit the variation of a roster by mutual agreement in circumstances where the variation is proposed by an employee to accommodate an agreed shift swap with another employee. The ASU supports the proposed variation.

Client Cancellation

44. In the May Decision, the Commission decided to significantly vary the 'client cancellation' term of the SCHDS Award and extended the application of the term to disability services. The ASU opposed extending the application of the term. However, given the Commission's clear decision, we support the draft determination.

⁴ Kinchin Statement, Ex. ASU7, [12]. Ms Kinchin is required to travel between work locations during her breaks. See also the attachments to the Encabo Statement and the Rathbone Statement, they are not rostered for meal breaks, their shifts are simply broken.

45. We note that clause 25.5(f)(v) in the Draft Determination provides:

The make-up time arrangement can only be used where the employee was notified of the cancelled shift at least 12 hours prior to the scheduled commencement of the shift. In these cases, clause 25.5(f)(iv)(A) applies.

46. The Commission asked the parties if an employer should be entitled to claim make up time from an employee if they are able to bill the client or funding body for those cancelled hours.

47. It is manifestly unfair to allow an employer to require additional work from an employee when they have billed their funding body for that employee's wages for the cancelled period. The client cancellation term already offers the employer an unusual ability to unilaterally vary an employee's hours of work, this should be enough. Employers should not be able to expect a windfall gain when a client cancels a shift.

48. Where an employer is able to claim payment for a cancelled service, the employer must pay the employee and must not direct the employee to make up the duties.

49. In the May Decision, the Commission identified that an employee may be entitled to different payments where they perform alternative duties during a cancelled shift. Most likely, this would occur if the employee would be entitled to additional allowances or if they were performing higher duties. The Commission has decided that an employee should be entitled to the greater of the amount payable for the cancelled service or the amount payable for the alternative duties. The draft determination provides at clause 25.5(f)(iii) that an employee who performs alternative duties under clause 25.5(f)(ii)(A) will be paid the amount payable had the employee performed the cancelled service or the amount payable in respect of the work actually performed, whichever is the greater.

50. Similarly, an employee may be entitled to different payments to what they would have earned working a cancelled shift where they perform make up time. This could be because they are working higher duties, performing duties that attract allowances, or because they are working at times that attract a penalty rate. The Commission should take the same position as it has for alternate duties during a cancelled shift. We propose the following addition to sub clause 25.5(f)(vi):

(E) an employee who works make up time will be paid the amount payable had the employee performed the cancelled service or the amount payable in respect of the work actually performed, whichever is the greater.

IV – OVERTIME FOR PART-TIME AND CASUAL EMPLOYEES

51. The ASU maintains its position that additional hours worked by a part-time employee beyond their contracted hours should be paid as overtime.

52. However, we note the Commission does not accept this proposition and expressed a provisional view that the Award be varied in two respects:

- to make it clear that working additional hours is voluntary; and
- to introduce a mechanism whereby a part-time employee who regularly works additional hours may request that their guaranteed hours be reviewed and increased, and their employer cannot unreasonably refuse such a request.

53. Respectfully, the ASU submit that the proposed changes to overtime arrangements for part-time employees are unlikely to have much practical utility to employees. There are unintended negative consequences for employers.

‘Voluntary’ Overtime

54. The Commission has decided that new words should be inserted into the Award to clarify that additional hours worked by part-time employees that do not attract an overtime payment should be voluntary. As noted by the Fair Work Commission, this is a right that already exists under the National Employment Standards.⁵
55. The evidence before the Commission demonstrates that employees covered by the SCHDS Award, by and large, agree to work additional hours.
56. This was also a finding of the Part-time Employment Full Bench in *4 yearly review of modern awards – Casual employment and Part-time employment*, who (at [637]) accepted evidence that showed:
- [E]mployees are generally willing to work such additional hours if it does not interfere with fixed private commitments; for example, in the case of a person with a disability attending a social event which ran over time, the employee involved readily agreed to stay on for the additional time until it ended.*⁶
57. The Part-time Employment Full Bench accepted that *‘participants value support workers who provide a high quality and amenable service, and they also value having continuity in the personnel who provide the service.’*
58. The current employment practices lead to volatile rostering. The Full Bench has accepted general findings that demonstrate great rostering challenges which have impacts on employees.
- ‘As greater choice and control for consumers has led to greater rostering challenges by reason of:*
- (i) an increase in cancellations by clients;*
- (ii) an increase in requests for changes to services by consumers; and*
- (iii) an increase in requests for services to be delivered by particular support workers*⁷
59. These challenges have had impacts on an employee’s ability to decline overtime, particularly once they have commenced their shift. A statement in the Award that working additional hours is voluntary offers very little to a disability support worker who cannot leave a client unattended or a family and domestic violence practitioner dealing with a survivor an emergency. Many employees would be happy for the opportunity to voluntarily earn additional income, but others would be concerned that refusing a request would jeopardise their employment.
60. Additionally, there may be circumstances where an employer may be required to direct an employee to remain at work beyond their rostered hours without their consent. An employer may be obliged to keep an employee on duty to ensure they comply with the laws, regulations and professional standards covering their sector. They may also be obliged to direct an employee to keep working to ensure the safety of the persons in their care.

⁵ May Decision,

⁶ *4 yearly review of modern awards – Casual employment and Part-time employment*, [640].

⁷ *May Decision*, [218].

61. The Commission should adopt the position taken by the Award Modernisation Full Bench in *Award Modernisation* [2009] AIRCFB 345 in relation to the *Aged Care Award 2010*, the *Nurses Award 2010* and the *Health Professionals and Support Services Award 2010*.⁸
62. The Award Modernisation Full Bench found that those awards should provide employees with the opportunity to give written consent to work additional hours at their ordinary rates of pay up to 10 hours per day or 38 hours per week. If they did not give that consent, they would be paid at overtime rates for the additional hours.
63. This would provide a fair and relevant safety net to part-time employees without any significant impact on flexibility for employers, given the noted willingness of SCHDS Industry workers to make agreements to work additional hours.

Review of Part-time Hours Clause

64. In the absence of an entitlement to overtime for part-time employees where they are required to work additional hours, the ASU supports the introduction of the 'review of part-time hours' term.
65. However, the ASU doubts it will do very much to ensure that an employee's contracted hours reflect their actual weekly working hours.
66. The ASU respectfully disagrees with the Commission that the prevalence of 'review of part-time hours' clauses in enterprise agreements implies utility and may inform the structure of an appropriate award term. As the Full Bench observed in the *Modern Awards Review 2012 – Penalty Rates* decision, care should be exercised when referring to terms of enterprise agreements in the context of modern award reviews. The number of Enterprise Agreements referred to by the Commission are products of negotiations, which may include trading conditions and productivity discussions.
67. Importantly, subclause 595(1) provides that the Commission may only deal with a dispute if it is expressly authorised to do so under the Act. The Award does not contain a compulsory arbitration clause which means that there is no mechanism for an employee to dispute a decision made by their employers not to revise their hours of work in the Commission. Instead, the employee would need to make a costly court application.
68. Without an appropriate mechanism to deal with disputes, the clause could not function as a safety net.
69. We propose that the clause should be reviewed after a year of operation.

V – SLEEPOVER CLAIMS

70. The Full Bench decided to vary clause 25.7(c) – Sleepovers to provide employees performing a sleepover shift with access to clean bed linen and access to food preparation facilities. The ASU supports the draft determination.

Australian Services Union

3 August 2021

⁸ [147]-[149].