

SUBMISSION IN REPLY – FOUR YEARLY REVIEW – SUBSTANTIVE ISSUES

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

## Overview

These submissions are made by Business SA's as Submission in Reply to the substantive claims lodged by the Health Services Union (HSU) and United Voices (UV) to vary the Social, Community, Home Care and Disability Services Award 2010 (the Award). The matter dealt within this submission is based on the Statement issued by the Fair Work Commission on 3 April 2019 and the subsequent Mention of the same date. Business SA has not addressed all of the issues set out in the Statement of 3 April, however, this should not be taken as Business SA's agreement to the remaining Union claims set out in their applications.

## S51 Variation to overtime clause for casuals

1. United Voice (UV)<sup>1</sup> and the Health Services Union (HSU)<sup>2</sup> lodged substantive applications to vary Clause 28 – Overtime, to allow casual employees to be paid the casual loading when working overtime.

2. Clause 28.1(b)(iv) of the Award currently states:

*(iv) Overtime rates payable under this clause will be in substitution for and not cumulative upon:*

*(A) the shift premiums prescribed in clause 29—Shiftwork; and*

*(B) the casual loading prescribed in clause 10.4(b),*

*and are not applicable to ordinary hours worked on a Saturday or a Sunday.*

3. Casual employees in the Award are paid the following overtime penalties:

### **Clause 28.1(b)**

*(i) All time worked by part-time or casual employees in excess of 38 hours per week or 76 hours per fortnight will be paid for at the rate of time and a half for the first two hours and double time thereafter, except that on Sundays such overtime will be paid for at the rate of double time and on public holidays at the rate of double time and a half.*

*(ii) All time worked by part-time or casual employees which exceeds 10 hours per day, will be paid at the rate of time and a half for the first two hours and double time*

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<sup>1</sup> Submission of United Voice – Four Yearly Review, 5 February 2019, para 154

<sup>2</sup> Submission of Health Services Union – Four Yearly Review – Substantive Issues, 15 February 2019, para 48



*thereafter, except on Sundays when overtime will be paid for at the rate of double time, and on public holidays at the rate of double time and a half.*

4. The Union proposals are to remove subclause 28.1(b)(iv)(B).
5. UV have relied on the FWC's recent decisions in the Modern Award review of 23 February 2017, 4 yearly review of modern awards – Penalty Rates [2017] FWCFB 1001 ('the Penalty Rates Decision'), in which the Commission made reference to the views of the Productivity Commission concerning the interaction of penalty rates and the casual loading.
6. UV argues that at paragraph 337 of the Penalty Rates Decision, the Commission indicated a preference for the default approach as: ... the casual loading is paid to compensate casual employees for the nature of their employment and the fact that they do not receive the range of entitlements provided to full-time and part-time employees, such as annual leave, personal/carer's leave, notice of termination and redundancy benefits.<sup>3</sup>
7. Business SA argues Penalty Rates decision is not evidence that the SCHCADS Award should be varied for the following reasons:
8. The penalty rates decision was applicable specifically to the hospitality and retail sectors and the terms contained within those Awards.
9. Clause 10.4(b) of the SCHCADS Award provides that: '*A casual employee will be paid per hour calculated at the rate of 1/38<sup>th</sup> of the weekly rate appropriate to the employee's classification. In addition, a loading of 25% of that rate will be paid, instead of the **paid leave entitlements accrued by full-time employees.***' (emphasis added)
10. The terms of clause 10.4(b) expressly states that the casual loading is paid in substitution for the leave entitlement otherwise available to permanent employees and does not compensate for any other aspect of the work, including the inconvenient or unsociable time at which the work is performed. This interpretation of the casual loading clause is consistent with the HSU interpretation at paragraph 52 of their submission.<sup>4</sup>
11. Based on the wording of clause 10.4(b) of the Award, UV's view that the casual loading is paid to compensate casual employees for the nature of their employment is clearly not relevant to the specific terms of this award.
12. In regard to compensation for leave entitlements, full-time and part-time employees do not receive accruals of annual leave, personal/carer's leave or other benefits on overtime penalties. If casual employees receive an additional 25% casual loading on overtime, this would result casuals receiving compensation for an entitlement that full-time and part-time employees do not.
13. UV further argues "The Commission further observed that the default approach is consistent with consideration 134(1) (g) of the modern award objective which requires that modern awards are 'simple, easy to understand, stable and [provide a] sustainable system for Australia that avoids unnecessary overlap of modern awards'." and that consistency in the treatment of terms and conditions across all modern awards as prima facie an element of the modern award objective.<sup>5</sup>

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<sup>3</sup> Submission of United Voice – Four Yearly Review, 5 February 2019, para 159

<sup>4</sup> Submission of Health Services Union – Four Yearly Review – Substantive Issues, 15 February 2019, para 52

<sup>5</sup> Submission of United Voice – Four Yearly Review, 5 February 2019, para 160



14. UV has not provided evidence that changing the SCHCADS award will provide greater consistency between the Modern Awards. It is Business SA's view that the needs of the industry must be paramount when considering an application for variation. Awards are designed to be industry-based to meet the needs of specific industries. This has resulted in need for 122 industry based modern awards, rather than a single set of terms and conditions. The *Fair Work Act 2009* requires, the Fair Work Commission to take into consideration the needs of the industry as each modern Award must be reviewed in its own right.<sup>6</sup>
15. The SCHCADS industry has low margins, cost pressures and in the digital age, risks an influx of gig-economy style work practises and this must be taken into consideration. A significant number of employers who engage employees under the Award are non-for-profits or charities and want to ensure the continued viability and robustness of the industry.

## Conclusion

16. Funding arrangements for the NDIS are complex and there is no guarantee from the Federal Government that the National Disability Insurance Scheme (NDIS) will make adjustments to cover all of the additional costs specific to the increases if the Award is varied. This will result in businesses absorbing the cost of the increases. The flow-on effect of such increases will be the reduction of services to clients, reduction in staffing numbers, organisations looking towards alternative businesses models to overcome the increased costs and the closure of businesses.
17. Consideration of applications to vary the Award should only occur in the context of industry specific criteria and the unusual difficulties faced by the industry.
18. Business SA asks the Fair Work Commission to be cautious in implementing increases and variations that will have counter intuitive results to the industry and its stakeholders.

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File on behalf of: South Australian Chamber of Commerce and Industry (T/as Business SA)  
Address: 136 Greenhill Road, Unley, SOUTH AUSTRALIA, 5061  
Telephone: (08) 8300 0000  
Email: [esthav@business-sa.com](mailto:esthav@business-sa.com).

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<sup>6</sup> *Fair Work Act 2009* (Cth) s156(5)