Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Reply Submission

Social, Community, Home Care and Disability Services Industry Award 2010
(AM2018/26)

27 September 2021

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

1. INTRODUCTION

1. This reply submission is filed on behalf of:

   (a) The Australian Industry Group;

   (b) The Australian Federation of Employers and Industries;

   (c) National Disability Services;

   (d) Australian Business Industrial;

   (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 and amended on 22 September 2021. It responds to the joint submission filed by the Health Services Union, Australian Services Union (**ASU**) and United Workers' Union (collectively, **Unions**) on 15 September 2021, in relation 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

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

or night shift (as defined by clause 29.2) to be broken in accordance with clause 25.6? (**The First Question**)

(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 ASU). If so, what form should that variation take? (**The Fourth Question**)

2. THE FIRST QUESTION

3. The Employer Parties agree with the Unions that the Commission should confirm its provisional view.

3. THE SECOND QUESTION

4. The Employer Parties have submitted that the Award should clearly and expressly permit the performance of broken shifts in accordance with clause 25.6 by shiftworkers, for the reasons set out at paragraphs [36] – [67] of the Employer Parties' submission of 17 September 2021 (**Employer Parties' First Submission**). AFEI also filed separate submissions on 17 September 2021 addressing this question.

5. The HSU and UWU similarly submit that they *'answer the second question in the positive'*.[2] The Commission should accept this as meaning that they submit that

[2] Unions' submission at paragraph [19].

the Award *should* clearly and expressly permit the performance of broken shifts by shift workers.

6. In contrast to all other parties to the proceedings, the ASU answers this question in the negative.[3] They do not provide any explanation for adopting such a position or, more relevantly, any attempt to advance a merit-based argument as to why the Award should not permit an afternoon or night shift to be broken in accordance with clause 25.6. Whilst the ASU's submission reflects an unsurprising articulation of their previously stated position, it does not in itself reflect a compelling justification for the Commission varying the Award to give effect to it.

7. It is significant that no party has advanced a merit-based argument against permitting the working of broken shifts by shift workers. Put simply, there is no material before the Commission that could enable it to be satisfied that it is necessary for the Award to contain a term that, in effect, limits the working of broken shifts to day workers.

[3] Unions' submissions at paragraph [7].

Evidence of Working Patterns

8. At paragraphs [12] – [31] of the Unions' submissions, they advance various factual propositions relevant to broken shift arrangements.

9. In some instances, the assertions are portrayed as being supported by evidence advanced earlier in the proceedings dealing with different issues. In other instances, the submissions do not rise above bare assertions. For example, they do not reference any evidence in support of the assertions that they make about trends in hours of work at paragraphs [14] – [16] or the assertion that the disutility of working broken shifts is compounded, not diminished, when working an afternoon or night shift.[4]

10. In almost all instances, the evidence cited reflects working practices of individual employees rather than any evidence establishing sector-wide trends or practices.

11. The evidence referred to by the Unions does not establish a comprehensive picture of working arrangements in the sector. Nonetheless, without accepting the accuracy of the raft of observations made by the Unions, we note that the following factual propositions appear to be agreed by all parties and reflected in the evidence:

    (a) Employees in the disability and home care sectors work broken shifts at times that attract shift penalties under the Award.

    (b) Employers pay shift allowances (however described) to employees who work broken afternoon and night shifts.

    (c) Broken shifts are worked by employees in the disability and home care sectors at times that attract shift penalties under the Award for reasons that include the needs of clients.

12. The above uncontentious propositions support the submission that it is necessary for the Award to include terms that permit the working of broken shifts

[44] Unions' submission at paragraph [16].

by shiftworkers in order to ensure that it achieves the modern awards objective.[5] Such an outcome reflects current practices and an operational need for such arrangements.

13. At paragraphs [14] – [31] of their submission, the Unions describe purported trends and distinctions in working patterns between what they have described as different types of services within the overarching context of home care and disability services. They do not however identify what significance the Commission should attach to such matters.

14. Importantly, the Unions do not seek to argue that different arrangements should apply under the Award in the context of working broken shifts by shiftworkers depending upon the type of home care or disability service an employee is operating in. Nor has any variation to the Award giving effect to such an outcome been proposed by any party or contemplated in the context of proposals advanced in response to Question 3. Instead, the Unions' submissions appear to be advanced on the presumption that *'the matter to be determined by the Commission narrowly concerns the terms and conditions of employment for home care employees (covered by Schedule D of the Award) and Social and Community Services employees when undertaking disability services work'*.[6]

15. The extant broken shift provisions only apply to social and community services employees when undertaking disability services work and home care employees.[7] The Employer Parties submit that the resolution of the matter should result in a variation to the Award clarifying that this cohort of employees can undertake broken shifts under the Award when performing shift work as contemplated by clause 29. We are seeking the retention of flexibility that we contend is available now, rather than to extend any flexibility. The Employer Parties would however oppose any proposition that the application of the broken shift provisions should be narrowed.

[5] As contemplated by s.134(1) and s.138 of the Act.

[6] Unions' Submission at paragraph [4].

[7] Clause 25.6 of the Award.

16. Given that neither any party nor the Commission has proposed that the availability of broken shifts be limited to a group of employees different to that contemplated by clause 25.6, it is not necessary to determine the extent to which the various subtleties between working patterns within narrow sub-groups of services referred to in the Unions' submissions are established in the evidence.

The Evidence of Challenge Community Services

17. The only evidence that has been advanced specifically in relation to the current controversy is from Challenge Community Services (**CCS**). The organisation filed submissions[8] in the proceedings and a subsequent statement from Andrew Corbett, General Manager People & Safety at CCS, attesting that the submissions are *'true and correct'*.[9]

18. CCS is a registered NDIS provider. Their services include supported independent living and assistance with daily living. Its submission indicate that it has close to 600 employees working broken shifts.[10] In the period from 1 January 2021 to 1 August 2021, approximately 12% of rostered broken shifts finished after 8pm.[11] Shifts at CCS can end as late as 11.30pm.[12]

19. CCS's material supports the proposition that there is a need for broken shifts in the sectors in which it operates in order to accommodate client requirements.

20. The Employer Parties submit that a key reason that is necessary for the Award to permit the utilisation of broken shifts by shiftworkers is to enable the same employee to provide assistance to a client (such as an NDIS participant) who may not require assistance throughout the day. The importance of this to clients is succinctly reflected at paragraph [22] of CCS's submission, which addresses the prospect of replacing the use of broken shift arrangements with the

[8] Dated 30 August 2021.

[9] At paragraph [4].

[10] At paragraph [6].

[11] At paragraph [14].

[12] At paragraph [18].

implementation of arrangements involving rostering different employees to assist the same client at different times of the day:

> This roster arrangement would be undesirable for those participants who request, or require, assistance by the same employee as far as practicable. Our employees provide care services to participants with a range of disabilities (physical, intellectual, mental health or neurological). Participants with complex care needs often request services from the same person(s) (as far as practical) particularly for services of a sensitive and personal nature such as toileting, showering and being put to bed. Trust is important between employees and participants as well as an employee's thorough understanding of the participant's care needs.

21. It is axiomatic that, particularly in the context of clients with complex care needs as referred to by CCS, there are positive impacts on both the quality of care provided and the efficient performance of work that flows from the facilitation of rostering arrangements involving the working of broken shifts by the same employee who can assist a client throughout any given day. This benefits both clients and employers.[13]

22. CCS's material also highlights the risk that an inability to roster broken shifts under the Award would have adverse consequences for employees. It raises the possibility that it may result in the disruption of current arrangements that are desired by some employees and that it may result in some employers being only able to offer short shifts.[14]

23. The material advanced by the Employer Parties, CCS and the Unions provides a sufficient basis for the Full Bench to determine that it is necessary for the Award to include terms that permit the working of broken shifts in the context of both shiftwork and day work. No compelling case has been advanced against such a proposition.

[13] A consideration of 134(1)(g) would weigh if favour of permitting shift workers to undertake broken shifts.

[14] Submission of CCS at 20 to 23 and 25

4. THE THIRD QUESTION

24. In response to the Third Question, the Unions argue that shiftworkers who work broken shifts should be covered by clause 25.6 of the Award and should be paid the broken shift allowances in addition to the shift penalties prescribed by clause 29.

25. The Unions describe the broader terms and conditions that should apply to shiftworkers working broken shifts at paragraph [35]. They have also proposed a draft determination that is intended to give effect to these submissions.

26. As to the critical issue of payment, they propose that the Award should provide 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, 28, 29 and 34.

27. The Employer Parties oppose aspects of the Unions' proposal and the submissions in relation to this question. For the reasons articulated in the Employer Parties' First Submission, we submit that:

    (a) The quantum of the broken shift allowance should be substantially reduced.

    (b) The shift loading should be payable during only that portion of the broken shift that gives rise to the entitlement to the shift loading.

    (c) The shift loading should continue to be based upon the finishing time of the broken shift.

28. Inherent in the Employer Parties' position is an acceptance of the merit of a remuneration regime that provides separate entitlements for broken shifts and shift work. This is premised though on the contention that the broken shift allowance is lower than that proposed by the Full Bench and Unions, and that the shift allowances should operate differently in the context of broken shifts to the proposal advanced by the Unions.

29. The Employer Parties do not oppose the proposition that weekend, public holiday and overtime penalty rates would be applied in accordance with clauses 26, 28,

and 34. The payment of public holiday penalty rates in addition to the broken shift allowance was not contemplated by the Full Bench in its provisional view as to the quantum of a new broken shift allowance. The provision of such additional entitlements would accordingly warrant some reduction in the quantum of the broken shift allowance below that which was proposed by the Full Bench.

30. The key substantive contest between the parties appears to be as follows:

    (a) What should the quantum of the broken shift allowance be?

    (b) In what circumstances should the shift allowance should be payable (i.e. should it be based upon the finishing time as contemplated 25.6 or based upon either the starting or finishing time of the shift)?

    (c) Should the shift allowance apply to all parts of the broken shift or just the portion that gives rise to the entitlement?

31. The Employer Parties continue to rely on their previous submissions as to the approach that should be taken in relation to each of the matters.

The Contention that the Broken Shift Allowances are Insufficient Remuneration for Broken Afternoon and Night Shiftwork

32. At paragraphs [38] – [41] of their submissions, the Unions submit that, for various reasons, the Commission should increase the proposed quantum of the broken shift allowance if it is intended to replace the application of various shift penalties.

33. It is common ground between the parties that the Commission should provide separate entitlements in the form of a broken shift allowances and shift allowances. We do however differ in our views as to substance of such entitlements. The Employer Parties oppose the contention that the quantum of the broken shift allowances should be increased beyond the level proposed by the Commission if the Full Bench is not persuaded to adopt our proposal advanced in response to Question 3.

34. The Unions have argued that if the Full Bench adopts the currently proposed course of replacing applicable shift penalties with the proposed new broken shift

allowance, employees working broken night or afternoon shifts would, in some circumstances, be paid less than employees working a continuous night shifts. They have not, in the current phase of proceedings, led or referred to any evidence that would establish that such an outcome would materialise.

35. The Unions' submissions also appear to imply that the implementation of the Commission's provisional view would reduce the remuneration payable to shiftworkers.[15] Again, they have not however led evidence in support of this proposition. Regardless, the mere fact that an employee may receive reduced remuneration as a product of a proposed variation to an Award is not, in and of itself, a justification for not varying the Award. The Act does not require that awards can only ever be varied in a manner that increases employee entitlements.

36. The Unions raise an alternate argument that the quantum of the broken shift allowance should be raised if it is to entirely replace the application of shift allowances. The Employer Parties oppose this proposition. We have argued that, even adopting the Full Bench's proposed approach of replacing the obligation to pay shift allowances with a new broken shift allowance, the quantum of the proposed allowance is too high. We further submit that it would be entirely unfair to require employers paying a broken shift allowance to employees undertaking day work for the reasons relating to the circumstances of employees undertaking shiftwork.

Separate Payments for Separate Purposes

37. At paragraphs [43] to [45], the Unions argue that the Full Bench should approach the relevant interaction between broken shift and shift allowances in a manner that is analogous to the approach adopted by Commission in the Penalty Rates Case *'regarding separate and distinct forms of compensation for different disabilities'* and to the approach adopted by the Full Bench in its decision to vary

[15] Unions' submission at [40].

the Award so that the casual loading was paid in addition to weekend, public holiday and overtime rates.

38. It may be accepted that shift allowances and broken shift allowances *generally* compensate employees for differing matters (at least to some extent). Nonetheless, in considering whether to vary the Award to include both forms of allowances, the combined impact of both types of allowances must be considered in the context of taking into account the various matters contemplated by s.134(1). In particular, the cumulative impact upon employers of any proposed terms that would require the payment of both a broken shift allowance and other shift allowances must be weighed.

39. We further contend that there is some overlap between the matters for which such payments arguably compensate employees. Relevantly, if it intended that the proposed broken shift allowances compensate employees for working extended hours, the fact that the working of such extended hours will in some instances be the reason that employees work at times that attract shift penalties must also be considered.

40. It is overly simplistic to approach a consideration of how broken shift allowances and other shift allowances should operate within the context of an award independent of how the provisions will operate in conjunction with each other and other terms of the instrument. We agree with the Full Bench's observation that, in effect, the setting of the quantum of a broken shift allowance calls for the exercise of a broad judgment and is not a matter which lends itself to precise quantification.[16] We contend that the application of shift allowances is a matter that is relevant to this judgment and that it should not simply be assumed that employees should receive both amounts.

41. The Unions relevantly contend that employees working broken shifts should also receive shift allowances based on the application of clause 29 because the shift rates are set at an appropriate level, have been properly set and compensate

[16] [2021] FWCFB 2382 at 549

employees for working at particular times of the day which experience a particular disutility:

> 45. …An employee who works a 'shift' as defined in the award, suffers from a particular disutility associated with working shift work. The Commission should take the view that the penalty rates provided for in clause 29 of the award have been set at a level appropriate to compensate for the disutility associated with working shift work under the Award. No party genuinely contests that the shift rates are properly set.
>
> 46. The broken shift allowance is not intended to compensate employees for the disutility of working at particular times of the day or days of the week which attract a particular disutility. The shift penalties do that.

42. The submissions cannot be accepted as justifying the simplistic extension of the extant shift allowances regime to the context of broken shifts given that:

    (a) Clause 29.4 contemplates that employees work shiftwork hours continuously (although we note that it is the Employer Parties' view that the Award should not be interpreted as providing for such an outcome when the provisions of clause 25.6 are considered. We have addressed this tension in our previous submissions, but simply here make the point that it is not apparent that working of broken shifts has been properly considered in the framing of clause 29);

    (b) Clause 25.6 contemplates that shift allowances are only payable based upon the finishing time of the relevant shift; and

    (c) The Award as currently framed does not contemplate that employees receive a separate broken shift allowance in addition to the shift allowances prescribed by clause 29.

43. We further note that the history underpinning the development of the shift allowance regime has not been comprehensively established (beyond the previous treatment of this issue by the Employer Parties).[17] That is, no party has traced the history of the provisions to the point where the factors leading to the setting of the specific quantum of the allowance and the manner in which they apply, or the extent to which it was critically examined in the context of arbitral

[17] Employer Parties submission of 17 September 2021 at 27 to 35.

proceedings, has been comprehensively revealed. Accordingly, the manner in which shift allowances are applied should not be treated as though they are *'set in stone'* or not potentially warranting of amendment in the context of the changed circumstances of new broken shift allowances being included in the Award.

44. Further, to the extent that the shift penalties prescribed by clause 29 compensate employees for the disutility of working at particular times (as asserted by the Unions), it is clearly anomalous and unfair for such premiums to be payable in relation to periods of work that could never form part of a shift under the provisions of clause 29, but may only be worked as a shift (in the sense that this constitutes an arrangement of ordinary hours of work) by virtue of the provisions of clause 25.6. It is particularly unfair for an obligation to pay premiums that are referable to work hours worked in the late afternoon/evening or night to be extended to hours worked in the day when an employee is also being compensated for the various disabilities associated with the breaking of the shift. The two parts of the shift should be regarded as separate engagements for the purposes of determining the application of shift allowances.

The Quantum of the Broken Shift Allowance

45. The Unions observe that some employers have submitted that the combination of the shift penalties and broken shift allowances would be unfair and seek to respond by asserting that the working of an afternoon or night shift does not diminish the disutility of working a broken shift.[18]

46. Nonetheless, this aspect of the Unions' submissions does not squarely address the impact of their proposal on employers.

47. The impact upon employers of the imposition of additional new allowances must be taken into account pursuant to s.134(1)(f) and is a factor weighing against the granting of a proposal that would see the simplistic imposition of the broken shift allowances on top of the currently applicable remuneration for employees working broken shifts.

[18] Unions' submissions at paragraph [53].

48. It is not possible for the Commission to draw any broad finding as to the level of impact upon employers generally of the ASU's proposal based upon the material advanced. It is however axiomatic that it will have a greater impact than the proposal advanced by the Employer Parties. The evidence of CCS, accepting that it is the evidence of a single employer, suggests that the unfunded cost implications of varying the Award in the manner proposed by the Unions may be significant.[19]

49. This lack of certainty as to the impact of a proposed variation, should warrant the adoption of a cautious approach to the introduction of a new monetary obligation. The appropriateness of such a course is reinforced by a consideration of the notoriously challenging financial position of many employers in the sector, their inability to recover such costs under current funding arrangements, and the cumulative impact of the various additional cost implications that are likely to be imposed upon employers because of other changes to the Award flowing from the 4 Yearly Review.

50. At paragraph [54] of their submissions, the Unions submit that employers can limit their liability to pay both broken shift allowances and shift allowances. Their argument in this regard that liability will be *limited 'because day workers who work outside the span of hours will be paid overtime instead of shift penalties'* is nonsensical. Day workers are a cohort of employees to whom shift allowances simply do not apply. The other assertions at paragraph [54] are unsupported by evidence and should not be accepted.

51. The Employer Parties contend that the approach they have proposed reflects a fair balance between the interests of employees and employers.

The Calculation of the Shift Allowances

52. The Employer Parties propose that the application of shift allowances should continue to be based upon the finishing time of a shift (or part of a shift). In

[19] Statement of Andrew Corbet at paragraphs [8] and [13].

contrast, the Unions have proposed that applicable shift allowance should be based on the simple application of clause 29.

53. The evidence before the Commission does not enable it to take into account the impact of implementing such a significant change from the current arrangements. The evidence does not reveal the prevalence of shifts commencing before 6am or the reasons why they may be utilised. It is however axiomatic that extending the circumstances where the shift allowances are payable could only have an adverse impact upon employers.

54. Given the absence of relevant evidentiary material, the Full Bench should not vary the Award to alter the current position that the shift allowances are based upon the finishing time of the shift (or part or a shift, based upon the Employer Parties' proposal).

5. THE FOURTH QUESTION

55. The Fourth Question is directed at meal breaks. We understand this to be a reference to meal breaks as contemplated by clause 27.1 of the Award.

56. The Unions submit that the Award should 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. They support the draft determination filed by the ASU on 9 August 2021, which would provide for the inclusion of the following new term:

> **27.3 Travel during meal and tea breaks**
>
> If an employer requires an employee to travel during a meal break or a tea break that time spent travelling will count as work and will be paid as such for the purposes of this clause.

57. It is notable that the Unions have collectively mounted just four short paragraphs is support of their contention that the Award should be varied in relation to this matter. They have not filed any evidence that is specifically responsive to the Fourth Question. It would be fair to say that they have not advanced a serious or in any way compelling case for their proposed change to the Award.

58. The Employers maintain their view that it is not necessary to vary the Award to as proposed by the Fourth Question. We similarly oppose the ASU's proposed variation.

59. The regulation of work undertaken during meal breaks is currently adequately addressed by clause 27.1 of the Award:

> **27.1 Meal breaks**
>
> **(a)** Each employee who works in excess of five hours will be entitled to an unpaid meal break of not less than 30 minutes and not more than 60 minutes duration, to be taken at a mutually agreed time after commencing work.
>
> **(b)** Where an employee is required to work during a meal break and continuously thereafter, they will be paid overtime for all time worked until the meal break is taken.

60. The provision entitles an employee to a break and also deals with the prospect that an employee may be required to work during that break. If an employee is required to undertake work during their break in the nature of travelling between work locations, they would be entitled to be paid at overtime rates for such work. Importantly, they are to be paid overtime rates until a meal break is taken. This would logically provide a meaningful incentive for an employer to avoid requiring an employee to undertake work in a manner that prevents them from taking a meal break.

61. In our view, there is no lack of clarity in the current provisions.

62. The Unions' submissions are somewhat unclear as to whether they are directed solely at the issue of work that occurs during meal breaks, or instead directed also at other breaks that may occur during the course of the work day. At paragraph [56], they make reference to travel during both *'work breaks' and 'meal breaks'*. The also reference evidence which appears to relate primarily to matters associated with the working of broken shifts. We deal later with the approach that should be taken in these proceedings to any contention that the Award should be varied to require payment for travel during breaks that occur as part of a broken shift (as opposed to meal breaks).

66. At paragraph [57], the Unions submit, more specifically, that it is unclear how the Award treats travel at the direction of the employer during a meal break. As already indicated, the Employer Parties do not accept that there is any problematic lack of clarity in the current Award provisions. The submissions of the Union do not clearly identify or explain any deficiency in the text of clause 27.1 that would give rise to an uncertainty in relation to its treatment of travel.

67. The Unions have not filed any evidence in response to the Fourth Question. Nor have they pointed to any evidence advanced earlier in the proceedings of disputation or confusion in relating to the application of this provision in support of their contention that the provision should be varied.

68. To the extent that they point to some evidence led earlier in the proceedings we say that this should not be sufficient to persuade the Full Bench that a variation

to the Award in relation to meal breaks is necessary. We make the following observations.

69. *Firstly*, the evidence was led prior to the ASU's current proposal pertaining to travel during meal and tea breaks and in the context of a different claim. Consequently, it was not the subject of cross examination for the purposes of testing its probative value in the context of the Full Bench's consideration of the current proposal.

70. *Secondly*, when the substance of the evidence referred to is considered, its utility is further undermined. The evidence referred to was primarily directed at the issue of travel undertaken in the course of broken shifts rather than in the context of during meal break.

71. The statements of Mr Encabo and Mr Rathbone do not establish that they travel during meal breaks. Indeed, the evidence of Mr Encarbo is that he is not rostered for meal breaks because he is required to have meals with his clients under clause 27.1(c) of the Award.[20]

72. The referenced evidence of Ms Kinchin in relation to travel during meal breaks is somewhat unclear, however it appears to relate to the practices of her former employer (Leap Frog Ability). [21] The evidence does not establish that she was required to travel during meal breaks by her employer at the time that she gave evidence (LiveBetter). Further, while the statement could be construed as suggesting that Ms Kinchin was not paid for travel during her meal breaks by Leap Frog Ability, this is not entirely clear.

73. *Thirdly*, the evidence of the experiences of such a small number of employee witnesses cannot be extrapolated to establish the current practices relating to travel during meal breaks in the sector or the assertion that it is likely that employers will require employees to travel during meal breaks (if that is what is being asserted in the first sentence of paragraph [56] of the Unions' submission).

[20] Encarbo statement at paragraph [22].

[21] Kinchin statement at paragraph [12].

74. *Fourthly*, to the extent that the Unions rely on the evidence to establish that travel is undertaken during a broken shift, as opposed to meal breaks, it is simply not relevant to the Fourth Question raised by the Full Bench and does not support the granting of the ASU's proposed variation which is directed at work undertaken during meal breaks and tea breaks.

75. For all of the above reasons, there is not sufficient cogent submissions or probative evidence before the Full Bench to warrant varying the current meal break provisions. A case for such change has simply not been made out.

Travel During Broken Shifts

76. For completeness, we note that we are concerned that the Unions' submission seeks, to some extent, to reagitate the issue of payment for travel undertaken during breaks that occur in the course of a broken shift. That is, travel that is undertaken by an employee between separate engagements on a broken shift.

77. This is a matter that should not be further considered at this time, given the position reached by the Full Bench in relation to travel time in its 25 August Decision[22]:

> **[228]** In the *May 2021 Decision* we accepted, as a general proposition, that employees should be compensated for the time spent travelling between engagements, but noted that framing an award entitlement to address this issue raised several issues, including the circumstances in which any payment is to be made and the calculation of that payment. We concluded that this issue required further consideration and said that a conference would be convened to discuss the next steps.
>
> **[229]** At the conference held on 27 May 2021, the President noted that since the various claims with respect to travel time were made the circumstances have changed in that we have decided to vary the minimum payments term and the broken shifts term. The President observed that:
>
> > 'once the changes are made around minimum engagement and broken shifts and they've operated for a period, that parties have liberty to have the matter called back on and can pursue a particular outcome in relation to travel time.'
>
> We endorse these remarks. It seems to us that it is likely that employers will seek to change rosters and patterns of work in response to our decisions in respect of minimum payment periods and broken shifts. These changes may well reduce the incidence of unpaid travel time.

[22] [2021] FWCFB 5244.

[230] We have decided to defer further consideration of the various travel time claims until the variations in respect of minimum payment periods and broken shifts have been in operation for 12 months.

78. We further note the interconnectedness of issues related to the payment for travel time, minimum engagements and broken shifts. If the Full Bench were minded to regulate payment for travel undertaken in the context of breaks occurring in the course of broken shifts a reconsideration of the minimum payment provisions would be warranted. This would also be relevant to the consideration of the approach that should be taken to the regulation of payment for broken shifts.

79. Regardless, the Fourth Question is directed at what occurs during meal breaks, not at travel during broken shifts. Similarly, the ASU's proposal is directed at travel during meal breaks. The issue of whether travel should be paid during breaks occurring between active portions of a broken shift simply does not arise for consideration in the context of the current proceedings.

Considerations relating to 'Tea Breaks'

80. The ASU's proposal extends to dealing with travel during tea breaks. As in the context of meal breaks, it requires that time an employer requires an employee to spend traveling during a meal break will be time worked for the purposes of clause 27 and paid at overtime rates.

81. Clause 27.2 of the Award relevantly provides as follows

> **27.2 Tea breaks**
>
> **(a)** Every employee will be entitled to a paid 10 minute tea break in each four hours worked at a time to be agreed between the employer and employee.
>
> **(b)** Tea breaks will count as time worked.

82. Clause 27.2 does not permit an employee to be required to work during a tea break. It affords an entitlement to a *break* and, unlike clause 27.1, does not countenance any work occurring during such a period. Consequently, an employee cannot be required to travel during a tea break.

83. Clause 27.2 already provides that tea breaks will count as time worked.

84. Given the requirements of clause 27.1, there is no apparent need for a variation to deal with travel during tea breaks as proposed by the ASU.

85. The Unions have not advanced any submissions addressing the issue of treatment of meal breaks. Nor have they referred to any evidence that employees are being required to travel during tea breaks.

86. The Full Bench should not be satisfied that there is any justification for amending the Award to prescribe a payment for work during tea breaks.