

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

JOINT UNION SUBMISSION IN REPLY

1. This submission in reply is made by the Australian Services Union ('ASU'), Health Services Union ('HSU') and the United Workers Union ('UWU') (collectively 'the Unions').
2. It is made in accordance with the Directions issued by the by the Commission on Friday, 3 September 2021¹ in Four Yearly Review of the *Social, Community, Home Care and Disability Services Industry Award 2010* ('Award').
3. On Wednesday, 15 September 2021, the employer parties in the four yearly review of the Award ('the Employers') and the Unions filed a respective joint submission responding to the questions in the Statement dated On Monday, 6 September 2021.²
4. In general, the parties³ agree that the Award should permit an shift worker⁴ to work a broken shift. The Employers also concede that an employee should be paid both the broken shift allowance and a shift penalty. The outstanding points of contention are the value of the broken shift allowances, and, how broken shift allowances will be paid.

QUESTION 1 – OPPOSITION TO THE COMMISSION'S PROVISIONAL VIEW

5. Both the Employers and the Unions made submissions supporting the Commission's provisional view. The provisional view should be adopted.
6. Despite supporting the provisional view the Employers filed copious submissions advancing their particular interpretation of the Award.
7. The Unions reserve their rights to file submissions in reply if the Commission decides that it does need to express an opinion on the proper construction of the Award.

QUESTION 2 – SHOULD THE SCHDS AWARD PERMIT AN AFTERNOON OR NIGHT SHIFT TO BE BROKEN IN ACCORDANCE WITH CLAUSE 25.6?

8. The Employers, the UWU and HSU answered this question in the positive. The ASU answered the question in the negative.
9. In support of their answer to Question 2, the Employers propose a finding about how work was performed before the commencement of the Award. They submit that *'the performance of work on broken shifts by shift workers was potentially a feature of the relevant sectors*

¹ *Four yearly review of modern awards* [2021] FWCFB 5493, [23].

² *Four yearly review of modern awards* [2021] FWCFB 5545, [2].

³ Noting that the ASU's answer to Question 2 is made in the alternative.

⁴ As in our Submission of 15 September, when we refer to an 'employee' or a 'shift worker', we refer to home care employees (covered by Schedule D of the Award) and Social and/or Community Services employees when undertaking disability services work (covered by Schedule B of the Award), unless otherwise stated.

covered by the Award for many years.⁵ The Unions do not agree with this submission, notwithstanding their answers to Question 2.

10. The basis for the Employer's submission is an assertion that pre-modern industrial instruments that covered the industry before the commencement of the Award permitted the performance of broken shifts (at [37(a)]). This is based on an erroneous analysis of the pre-modern industrial instruments, which assumes that if the Award '*did not specifically regulate the performance of broken shifts*' then that award permitted the working of broken shifts.⁶
11. Firstly, the pre-modern instruments were made by a number of industrial tribunals exercising different legislative powers, in different industrial circumstances, at different points in history. The Commission would exercise caution in expressing an opinion about the construction of a pre-modern industrial instrument, especially where it has no material before it to determine the legislative and industrial context in which the industrial instrument was made. The Commission would not express a blanket opinion about the construction of nearly a dozen industrial instruments.
12. The Employers offer the Commission nothing that would assist it to form an opinion about the proper construction of the pre-modern instruments. Their submission fails.
13. Secondly, the industrial history of shift work itself suggests that it generally refers to employees who work their hours continuously.
14. In the Shift Work Case 39 C.A.R. 239, (Case number 115 of 1969), the Commonwealth Conciliation and Arbitration Commission was asked to reconsider the quantum of shift premiums applicable to shift work in the Federal metal trades award. Looking at the history and purpose of shift work, the Commission found that shift work was originally intended to apply in circumstances where an industrial process required work to be performed continuously through the night and on weekends. It was later expanded to cover circumstances where it was simply desirable to increase productivity by working at unsocial hours.
15. The Commission stated:

It would seem that shift work was originally permitted for continuous processes and a rate fixed as an appropriate compensation for the disabilities encountered in the knowledge that the very nature of the industry required work to be performed at those times. The higher rate which was later awarded for employees on non-continuous shift work appears to have been justified on the basis that such work was not essential to the process involved but was performed to obtain additional production and because of economic factors applying to the employer concerned. It is apparent that the premiums were not established as deterrents to employers against the working of shifts but as compensation to the employees concerned. [page 243].

⁵ Employers Submission, [37(a)].

⁶ Employers Submission, [29].

16. Shift penalties were not (unlike weekend and public holiday rates)⁷ intended to deter an employer from rostering shifts. Instead, they were intended to make shift work attractive by balancing the disutility with additional pay.

17. In the New South Wales jurisdiction, the NSW Industrial Relations Commission found in *Re Shift Workers Case*⁸ (at 648):

Overall, however, we are satisfied that shift work has disabilities which require special remuneration. This was not disputed. Probably where shift work is found attractive, in most cases it is because of the financial rewards. If it was not paid at a higher rate, there is little doubt that shift work would be acceptable only to a distinct minority.

18. The disutility of broken shift work is clear. If the Award does not provide compensation for working broken shifts, then the reasonable inference is that hours are worked continuously.

19. Further, industrial tribunals have also recognised that in many cases an employee simply cannot be made whole by offering them additional money for unsocial work. Hours of work must also be regulated if the Award is to provide a safety net.

20. In the *Working Hours Case*,⁹ the AIRC acknowledged that the safety net of awards contains detailed provisions regulating hours of workways in which award typically regulate and limit hours of work. A full bench of the AIRC said:

[222]...Typically, an award will contain provisions with respect to ordinary hours and overtime. Usually, ordinary hours will be quantified (for example, 38 per week) and be subject to a number of limitations as to the manner in which they are worked, for example, limits on the length of working days, the spread of hours within which daily hours are to be worked, meal and rest breaks and breaks between shifts.

21. Industrial tribunals have exercised caution about the impact on employees when dealing with broken shifts. where industrial tribunals have inserted provisions for split shifts they have generally done so explicitly and have also provided for additional compensation.

22. For example:

a. In *Re Darwin Bus Service - Split Shift Provisions ('Darwin Bus Case')*,¹⁰ the Australian Industrial Relations Commission ('AIRC') introduced split shifts partly on the basis that because of the application of the penalty rate provisions the earning capacity of individual employees would be improved by the introduction of split shifts.

b. In *Transport Workers (Australian Government Wages Staff) Award*¹¹ an AIRC Full Bench refused to introduce broken shift provisions into an award, partly because it would reduce overtime payments and employees' earnings. They distinguished the Darwin Bus Case because employees would see a reduction in employee earnings.

c. The Queensland Industrial Relations Commission acceded to the SDA's request to exclude retail stream employees from the operation of 'broken shift' provisions in the

⁷ See the discussion of the history of penalty rates at [143]-[145] of *Four Yearly Review of Modern Awards* [2017] FWCFB 1001.

⁸ [1972] AR 633

⁹ [2002] AIRC 857.

¹⁰ Print G5566.

¹¹ Print R7001.

proposed *Parents and Citizens Associations Award - State 2016* as the retail industry did not have prior exposure to broken shifts.¹²

- d. The question of whether the capacity for split shifts should be read into an ambiguous term of an award was considered was considered by a Full Bench of the NSW Industrial Relations Commission ('NSW IRC'). The Full Bench interpreted a broken shift to be two shifts, and thus prohibited by the award.¹³
23. In the Modern Award jurisdiction, only a minority of modern awards provide for broken shifts. Generally, where the Commission has made an award that permits broken shifts, it has done so through explicit provisions and has provided additional compensation.
 24. The meaning of the word 'shift' has to be read in the context of the particular award and its industrial history. Awards may also use the term inconsistently. But, in the absence of explicit provisions dealing with broken shifts (including additional compensation) it is more likely the word 'shift' refers to a continuous period of work than anything else.

QUESTION 3 – WHAT TERMS AND CONDITIONS SHOULD APPLY TO SHIFT WORKERS WHEN WORKING BROKEN SHIFTS?

25. The Unions press their Submissions and Draft Determination of 15 September 2021 in support of their claim. In those submissions, the Unions set out:
 - a. the merit argument for the payment of the broken shift allowance in addition to shift penalties at paragraphs [35] to [49]; and
 - b. the reasons why the Commission should not reduce the value of the broken shift allowance at paragraphs [50] to [54].
26. The Employers concede that shift workers who work broken shifts should be paid both the broken shift allowance and the shift penalties provided by clause 29.4.
27. However, they propose that the Commission should reduce the amounts payable to an employee for working a broken shift by reducing the value of the broken shift allowances and limiting the circumstances in which shift penalties should be paid.
28. The Employers submit that '*the shift allowances prescribed by the Award should be payable only for that portion of a broken shift that enlivens the entitlement to the shift allowance*'. They also submit the value of the broken shift allowance should be reduced. The Employers do not appear to agree what an appropriate value would be.
29. On 31 August 2021, AIG filed a Draft Determination setting out its proposed variations to the draft determination. The Employers have endorsed the AIG Draft Determination.
30. Relevantly, sub-clause 25.6(e) of the AIG Draft Determination provides for the payment of shift penalties as follows:

(e) An employee must paid be the shift allowances in accordance with clause 29 in relation to work performed on a broken shift, provided that:

¹² *Re: In the matter of the making of Modern Awards - Parents and Citizens Associations Award - State 2016* [2016] QIRC 94 (31 August 2016).

¹³ See *State Transit Authority of New South Wales v Australian Rail Tram and Bus Industry Union New South Wales Branch Bus and Tram Division* [2014] NSWIRComm 41 (29 August 2014).

(i) The night shift allowance is not payable for work performed on a night shift that commences before 6.00 am.

(ii) The shift allowances are only payable in respect of periods of work in a broken shift that satisfy the definitions of afternoon shift, night shift and public holiday shift (as defined by clause 29.2 and in accordance with clause 25.6(e)(i)).

Example: If an employee performs work on a broken shift at 11.00 am – 1.00 pm and 7.00pm – 10.00pm, the afternoon shift allowance will be payable on the second period of work only.

31. AIG's drafting is ambiguous, but the apparent intention is that each distinct period of work on a broken shift would be treated as a distinct shift for the purposes of clause 29.4. The Employers submit there is 'no justification' for an employee to be paid a shift penalty for a separate period of work in a broken shift, if that period of work would not attract a shift penalty as a standalone shift.
32. This submission must fail for the following reasons.
33. Firstly, the Employers do not propose to vary:
 - a. the way in which Saturday, Sunday and Public Holiday penalty rates are paid to employee working broken shifts; and
 - b. the way that shift penalties are paid to shift workers who work their hours of work continuously.
34. The Employers do not make any attempt to justify their inconsistent approach to additional remuneration for shift work, weekend and public holiday work.
35. This exposes the narrowness of the Employers' objection to the Union proposal. The only genuine argument advanced by the Employers is a generalised complaint that the combined cost of the broken shift allowance and the clause 29 shift penalties would be excessive, and therefore unfair to employers.
36. No evidence has been adduced that demonstrates the impact of the combined entitlements on employers, and no evidence has been put before the Commission at any stage during these proceedings to support this contention. The Commission should not be persuaded that the combination of the broken shift allowance and the shift penalties is excessive.
37. Secondly, the Employers do not address the fact that if their proposal were adopted different rules regarding the payment of shift penalties would apply to an employee depending on whether or not they were working a broken or unbroken shift. The way an employee is paid could change day-by-day under the Employers' proposal. This would make the Award significantly more complex and impose a severe administrative burden on an employer. In the absence of a positive merit argument in favour of such an arrangement, this militates against the Employers' proposal.
38. Thirdly, the broken shift allowance and the shift penalties serve distinct purposes: the first to compensate for the disutility associated with shift work, and the second to compensate for

the completely separate disabilities associated with working a broken shift identified by the Commission in the May Decision¹⁴. One cannot simply be replaced by the other.

39. The Employers have not explained how an unpaid break between periods of work on shift means that some of that work does cause disutility when the entire shift would result in disutility if those same hours were worked without the unpaid break. Shift penalties paid to compensate employees for the disutility associated with afternoon and night shifts. That disutility remains even when the shift is broken. An employee working a broken shift only adds disability to that disutility.
40. Finally, the Employers cite a recent regarding the *Manufacturing and Associated Industries and Occupations Award 2020* ('**Manufacturing Award**') to suggest their proposal is consistent with Commission precedent. We make three points:
 - a. the Manufacturing Award provides that all employees must work their hours continuously; and
 - b. shift penalties under the Manufacturing Award are paid for the entire shift; and
 - c. an employee covered by the Manufacturing Award who worked a broken shift would be paid at overtime rates for the second period of work; and
 - d. In the Decision cited the Commission determined that a shift penalty should be paid in addition to the separate and distinct casual loading.

QUESTION 4 – SHOULD THE SCHADS 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?

41. The Employers have not made submissions in response to this question. The Unions reserve the right to make submissions in reply to the Employers material.

Australian Services Union

Health Services Union

United Workers Union

21 September 2021

¹⁴ [550] [2021] FWCFB 2383

