

Changes to the SCHCDS Award

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Workplace Relations and Employment
Team of the Year

2019 | 2018 | 2016



Today's session

-  Background
-  Key Changes to the Award
-  Organisational Planning
-  Next steps

Disclaimer: This material is intended to provide general information in summary form on legal topics, current at the time of first publication. The contents do not constitute legal advice and should not be relied upon as such. Formal legal advice should be sought in particular matters.

Background

4 Yearly Review of Modern Awards

- Three aspects of the Review:
 - » 'Claims' to vary the award
 - » 'Exposure Draft' process
 - » 'Plain Language' re-draft of select awards
- Long-running case: Involved 20+ proposals to vary the SCHCDS Award
- Series of Hearings and Decisions throughout 2018-2021
- Proceedings were split into two tranches:
 - » Tranche 1: Decision September 2019, commenced 1 July 2020
 - » Tranche 2: Decisions May and August 2021, to commence 1 July 2022
- ABLA represented ACSA and LASA in the proceedings

Background

Substantive claims that were pursued:

- Minimum engagements
- Broken shift restrictions
- Broken shift loading
- Travel time
- Overtime for part-timers
- Casual rates of pay
- Client cancellation
- Remote response work
- 24-hour care
- Sleepovers
- Changes to rosters
- First aid certificate renewal
- Community language skills allowance
- Damaged clothing

Background

Key issues / themes considered by FWC

- Employee / Union perspective:
 - » Increased fragmentation of working hours ('Casualisation' of work)
 - » Underemployment (desire for more hours)
 - » Unpaid working time (travelling, other work)
 - » Need to double the workforce (offering attractive terms / work value)
- Employer perspective:
 - » Consumer directed care ('choice and control')
 - » Funding reforms / limitations
 - » Fair and relevant minimum safety net

Background

Role of FWC in reviewing the Award

FWC must ensure that modern awards, together with the NES, provide a ***fair and relevant minimum safety net*** of terms and conditions, taking into account:

- relative living standards and the needs of the low paid; and
- the need to encourage collective bargaining; and
- the need to promote social inclusion through increased workforce participation; and
- the need to promote flexible modern work practices and the efficient and productive performance of work; and
- the need to provide additional remuneration for employees working overtime, unsocial, irregular or unpredictable hours, weekends, public holidays or shifts; and
- the principle of equal remuneration for work of equal or comparable value; and
- the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and
- the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and
- the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

This is the ***modern awards objective***.

Union claims rejected

- Paid travel time
- 15% broken shift loading
- Overtime for part-timer additional hours
- Removal of client cancellation clause
- Removal of 24 hour care clause
- First aid certificate renewal
- Community language allowance



Key Changes



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Changes to the Award

Minimum engagements	Remote work
Broken shifts	24 hour care
Overtime	Damaged clothing
Review of part-time hours	Sleepovers
Client cancellation	Roster changes

These changes will commence on the first full pay period on or after **1 July 2022**

Minimum engagements

- New minimum engagements / payments for part-time and casual employees
 - » 3 hour minimum for SACS stream (excl. disability)
 - » 2 hour minimum for Home Care and Disability streams
- The minimum periods apply to each portion of a broken shift
- No minimum engagement for full-time employees
- Transitional provision to facilitate changes to part-time agreed hours

Minimum engagements

Transitional provision for part-time employees

- Applies to existing part-timers who have an agreed pattern of work (10.3(c)) that was made before 1 February 2022 and which involves shifts of less than the new minimum engagement periods
- To facilitate the transition to the ‘new world’, employers must:
 - » Discuss the relevant minimum payment requirements with the employee;
 - » Genuinely try to reach agreement on a variation to the agreement; and
 - » Reasonably accommodate the employee’s circumstances.
- Where agreement cannot be reached, employers have a right to unilaterally vary the 10.3(c) agreement to make shifts consistent with new minimum engagements by providing 42 days’ notice to the employee in writing

Minimum engagements

- Issues to consider re transitional provision:
 - » Transitional provision operates between 1 February - 1 October 2022
 - » The new 'agreed' pattern of work must not come into operation before 1 July 2022
 - » Can only use the transitional provision for part-timers with an agreed pattern of work made before 1 Feb 2022
 - » For new starters from 1 Feb 2022, no right to unilaterally change their 10.3(c) agreement on 1 July 2022

Minimum engagements: Transitional provision

An example:

- Ben is a PPT HC employee who regularly works 1 hour shifts/engagements for 3 days / week
- This agreed pattern of work was made prior to 1 February 2022
- As an employer, if you wish to increase length of those shifts to 2 hours (to meet new minimum payment provision), you must:
 - » have a discussion with Ben about the changes which will impact on his roster
 - » propose to increase the length of those shifts (which might require increase to their agreed weekly hours or change to other shifts etc.)
 - » consider Ben's views (e.g. carer's responsibilities) and seek to reach a suitable arrangement
 - » If no agreement can be reached, employer can unilaterally change agreed working pattern on at least 42 days' notice (to commence from 1 July 2022 or thereafter)

Overtime

- Award to be varied to make clear that OT is payable for day workers when working outside the span of hours (6am – 8pm Monday to Sunday)
- No other changes re overtime

Broken shifts

- Broken shifts can only involve one break (two portions of work)
- A 'two break' broken shift can be worked by individual agreement:
 - » Individual agreement must be reached on a 'per occasion' basis in advance of working
 - » Unless it is part of the agreed regular pattern of work of a PT employee (clause 10.3)
- Minimum engagement applies to each portion of work
- Break time falling within minimum engagement is time worked and doesn't count as a break
 - » e.g. 7-8am, 8.30-10.30am, 4-6pm
- Broken shift allowance:
 - » \$17.53 (1.7% standard rate) for 'one break'
 - » \$23.20 (2.25% standard rate) for 'two break'

Broken shifts & Shiftworkers

Complex interaction between day work and shiftwork

- Potential uncertainty re distinction between day workers and shiftworkers
 - » Clause 25.2(a): “The ordinary hours of work for a day worker will be worked between 6.00 am and 8.00 pm Monday to Sunday”.
 - » Clause 25.5(b): “A shiftworker is an employee who works shifts in accordance with clause 29—Shiftwork”.
- Who is a day worker? Who is a shiftworker?
- The label will be relevant for:
 - » Distinguishing between OT and shift loadings
 - » Determining payments for broken shifts going past 8pm

Broken shifts & Shiftworkers

- Tension between clauses 25.6(b) and 29.4
- Clause 29.4 suggested shiftworkers cannot work broken shifts
- That issue has now been resolved – variation to clause 29.4
- This means both day workers and shiftworkers can work broken shifts
- Different payment regime when working past 8pm:

Day workers	Shiftworkers
Ordinary rate	Ordinary rate
Broken shift allowance	Broken shift allowance
Time in excess of 12hr span = Double time	Time in excess of 12hr span = Double time
Time past 8pm = OT	Shift past 8pm = Afternoon shift loading (only applies to relevant portion of work)

Broken shift rules: some examples (home care)

9-11am and 5-8pm

- 2 hours @ ordinary rate (9-11am)
- 3 hours @ ordinary rate (5-8pm)
- \$17.53 BS allowance (1 break)

No other penalties (not past 8pm, span <12 hours)

Broken shift rules: some examples (home care)

7-10am, 3-10pm

- 3 hours @ ordinary rate (7-10am)
- 4 hours @ afternoon shift rate (3-7pm)
- 3 hours @ double time (7-10pm)
- BS allowance (1 break) of \$17.53

Various penalties (past 8pm, span >12 hours)

Broken shift rules: some examples (home care)

7-8am, 9.30-11am and 6-9pm

- 2 hours @ ordinary rate (7-9am)
- 2 hours @ ordinary rate (9.30-11.30am)
- 1 hour @ afternoon shift rate (6-7pm)
- 2 hours @ double time (7-9pm)
- BS allowance (2 break) of \$23.20

7 hours' pay for 5.5 hours' work

Various penalties (past 8pm, span >12 hours, 2 break BS)

Broken shift rules: some examples (home care)

9.30-11am and 6-9pm

- 2 hours @ ordinary rate (9.30-11.30am)
- BS allowance (1 break) of \$17.53
- *Then either:*

Day workers	Shiftworkers
2 hours @ ordinary rate (6-8pm)	3 hours @ afternoon shift rate (6-9pm)
1 hour @ OT (8-9pm)	

Payment obligation depends on whether employee is a day worker or shiftworker

Travel time

- FWC declined union claims for paid travel time, but found that:
 - » most workers are not paid for travelling to, from and between clients
 - » such time was often significant
 - » minimum engagement, broken shifts and travel time are “interrelated” issues
 - » the changes to minimum engagements and broken shifts will likely impact current rostering practices
- It is likely that the changes to minimum engagements and broken shifts will address the concerns around travel time
- FWC left open the prospect of reassessing the issue of travel time
- Further consideration of the various travel time claims will be deferred until the variations in respect of minimum payment and broken shifts have been in operation for 12 months

Review of part-time hours

New clause:

Review of guaranteed hours

(i) Where a part-time employee has regularly worked more than their guaranteed hours for at least 12 months, the employee may request in writing that the employer vary the agreement made under clause 10.3(c), or as subsequently varied under clause 10.3(e), to increase their guaranteed hours.

(ii) The employer must respond in writing to the employee's request within 21 days.

(iii) The employer may refuse the request only on reasonable business grounds.

(iv) Before refusing a request made under clause 10.3(g)(i), the employer must discuss the request with the employee and genuinely try to reach agreement on an increase to the employee's guaranteed hours that will give the employee more predictable hours of work and reasonably accommodate the employee's circumstances.

(v) If the employer and employee agree to vary the agreement made under clause 10.3(c), the employer's written response must record the agreed variation.

(vi) If the employer and employee do not reach agreement, the employer's written response must set out the grounds on which the employer has refused the employee's request.

(vii) Clause 10.3(g) is intended to operate in conjunction with clause 10.3(e) and does not prevent an employee and employer from agreeing to vary the agreement made under clause 10.3(c) in other circumstances.

(viii) An employee cannot make a request for a review of their guaranteed hours when:

(A) The employee has refused a previous offer to increase their guaranteed hours in the last 6 months; or

(B) The employer refused a request from the employee to increase their guaranteed hours based on reasonable business grounds in the last 6 months.

Client cancellation

Background

- Award provides ability to change roster on 7 days' notice
- Inside that 7 day window, more difficult to change employees' rosters:
 - » To enable the service of the organisation to be carried on where another employee is absent from duty on account of illness, or in an emergency
 - » Client cancellation events
- Existing client cancellation clause:
 - » Only applies to home care services
 - » Where employee is given notice of a change in roster by 5pm the day prior, shift can be cancelled without obligation to make payment
 - » Employers have the option to direct the employee to make-up time within a 1 month period (but no requirement to offer make-up time)

Client cancellation

New client cancellation provision

- New clause is less flexible:
 - » does not allow cancellation of shift without payment
 - » creates a new 'make up time' regime
- But will apply to disability services as well as home care
- Three options: Where a service is cancelled / rescheduled by a client, the employer may either:
 - » direct the employee to perform other work during those hours ('redeployment');
 - » cancel the shift or part of the shift and pay them; or
 - » cancel the shift or part of the shift and provide make-up time

Client cancellation

'Redeployment'

- 'Redeployment' might be impractical in many cases
- Where employee is redeployed, employee will be paid the greater of:
 - » amount payable had the employee performed the cancelled service; or
 - » the amount payable in respect of the work actually performed

Client cancellation

Make-up time

- Make-up time arrangement can only be used where employee was notified of the cancelled shift (or part thereof) at least 12 hours prior to commencement of the cancelled service
- If less than 12 hours' notice is provided, must redeploy or pay them
- Where the employer elects to provide make-up time:
 - » make-up time must be worked within 6 weeks of the cancelled service
 - » employer must consult regarding when the make-up time is to be worked
 - » employer must provide 7 days' notice of makeup-time (unless lesser period agreed)
 - » make-up time can include work with other clients / other areas of business provided the employee has the skill and competence to perform the work
 - » Where make-up time is worked, employee must be paid the amount payable for work actually performed or for the cancelled service (whichever is greater)

Remote work

New payment regime for 'remote work'

- Award does not deal with situations where employee's personal time is interrupted and they are required to perform work remotely (without returning to the workplace)
- New payment regime for 'remote work'
- Avoids exposure to underpayment / recall to work overtime / min engagements
- Works in parallel with the on-call regime and on-call allowance
- Will encourage proper 'on call' arrangements and reduce employee interruption during their free time
- Also establishes a 1 hour minimum payment for staff meetings and training held remotely

Remote work

Definition of 'remote work'

- Applies to '**remote work**':

“the performance of work by an employee at the direction of, or with the authorisation of, their employer that is:

- » not part of their ordinary hours of work rostered in accordance with clause 25.5 (or, in the case of casual employees, not a designated shift); and
- » not additional hours worked by a part-time employee under clause 28.1(b)(iii) or 10.3(e) or overtime contiguous with a rostered shift; and
- » not required to be performed at a designated workplace”.

Remote work

Minimum payments

- Employees will be paid for time spent performing remote work, with the following minimum payments applying:

Employees 'on call'	Employees not 'on call'	Staff meetings / training (remote)
15 minutes (6am – 10pm)	1 hour	1 hour
30 minutes (10pm – 6am)		

- Time worked beyond the minimum payment period is rounded up to nearest 15 mins
- Where multiple instances of remote work are performed on any day, separate minimum payments will apply (except where performed within the one minimum payment period)

Remote work

Rates of pay

- Rate of pay will be ordinary / minimum rate except:
 - » work outside the span of 6am-8pm
 - » work in excess of 38 hours per week or 76 hours per fortnight
 - » work performed in excess of 10 hours per day
 - » work performed on a Saturday, Sunday, or public holiday
- Rates are in substitution for and not cumulative upon the rates prescribed in clauses 26, 28, 29, and 34

Remote work

Other requirements

- Employees must maintain and provide a time sheet or other record acceptable to the employer specifying the time worked and a description of the work
- Such records must be provided to the employer within a reasonable period of time after the remote work is performed
- Remote work will not count for the purpose of:
 - » Clause 25.3 - rostered days off;
 - » Clause 25.4 - rest breaks between rostered work;
 - » Clause 28.3 - rest period after overtime;
 - » Clause 28.5 - rest break during overtime

24-hour care

Existing clause retained with the following changes:

- Employees can only work 24-hour care shifts by agreement
- Entitlement to basic facilities
- Employees must have the ‘opportunity to sleep for a continuous period of 8 hours’
- Overtime payments for work in excess of 8 hours
- Entitlement to 5 weeks’ annual leave where employees perform more than 8 24-hour care shifts per year

Other changes: Damaged clothing

- Existing Award provides:
 - » Obligation on employer to provide adequate number of uniforms without charge (where uniforms are required)
 - » Uniforms can be laundered and maintained by the employer (without charge)
 - » Where employer does not launder uniforms, laundry allowance of \$1.49 per week or \$0.32 per shift (whichever is lesser)
 - » Where uniforms not provided, employer may pay a uniform allowance of \$6.24 per week or \$1.23 per shift (whichever is lesser)
 - » Where employee required to wear PPE, employer must provide equipment or reimburse cost

Other changes: Damaged clothing

New clause: allowance for damaged clothing

20.3 Laundering of clothing other than uniforms

(a) If during any day or shift, the clothing of an employee (other than a uniform) is soiled in the course of the performance of their duties, the employee will be paid a laundry allowance of 32 cents per shift provided that:

(i) As soon as reasonably practicable the employee provides notice of the soiling and, if requested, evidence that would satisfy a reasonable person of the soiling and/or how it occurred; and

(ii) At the time the clothing was soiled the employee had complied with any reasonable requirement of the employer in relation to the wearing of personal protective equipment either provided or paid for by the employer in accordance with 20.2(d).

Other changes: Damaged clothing

New clause: reimbursement of damaged clothing

20.4 Repair and replacement of clothing other than uniforms

(a) If the clothing of an employee is soiled or damaged (excluding normal wear and tear) in the course of the performance of their duties, to the extent that its repair or replacement is necessary, the employer must reimburse the employee for the reasonable cost incurred in repairing or replacing the clothing with a substitute item, provided that:

(i) As soon as reasonably practicable the employee provides notice of the soiling or damage and, if requested, evidence that would satisfy a reasonable person of the soiling or damage, how it occurred, and the reasonable repair or replacement costs;

(ii) At the time the clothing was soiled or damaged the employee had complied with any reasonable requirement of the employer in relation to the wearing of personal protective equipment either provided or paid for by the employer in accordance with 20.2(d); and

(iii) The damage or soiling of an employee's clothes is not caused by the negligence of the employee.

(b) This clause will not apply where an employee is permitted or required to wear a uniform supplied by the employer or is otherwise entitled to any payment under clause 20.2.

Other changes: Sleepover clause

Clause 25.7(c)

- Minor tweak to the facilities to be provided to employees:

(c) *The span for a sleepover will be a continuous period of 8 hours. Employees will be provided with a separate room with a bed **and clean linen**, the use of appropriate facilities (including **access to food preparation facilities and** staff facilities where these exist) and free board and lodging for each night when the employee sleeps over.*

Other changes: Roster changes

Clause 25.5(d): Change in roster

- Minor tweak to permit a roster change on <7 days' notice for 'shift swaps' approved by the employer:
 - (i) *Seven days' notice will be given of a change in a roster.*
 - (ii) *However, a roster may be changed at any time:*
 - (A) *if the change is proposed by an employee to accommodate an agreed shift swap with another employee, subject to the agreement of the employer; or*
 - (B) *to enable the service of the organisation to be carried on where another employee is absent from duty on account of illness, or in an emergency.*
 - (iii) *This clause will not apply where the only change to the roster of a part-time employee is the mutually agreed addition of extra hours to be worked such that the part-time employee still has four rostered days off in that fortnight or eight rostered days off in a 28 day roster cycle, as the case may be.*



Organisational Planning



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What should employers be doing?

First, understand the potential impact

- Audit working patterns to assess impact of changes:
 - » How many shifts / portions of work are less than the minimum engagement period?
 - » How many broken shifts are worked?
 - » How many broken shifts involve 2+ breaks?
 - » How many shifts are worked past 8pm?
 - » How do you currently manage client cancellation events?
 - » How do you currently manage on-call / remote response work?

What should employers be doing?

Second, mitigate the impact of the changes

- Take steps to mitigate adverse impact of changes:
 - » Can client engagements be ‘bundled’ into a meaningful shift?
 - » Can the use of broken shifts be minimised?
 - » Can you negotiate changes with clients:
 - When service is delivered
 - Length of service
 - Cost of service
 - » Do you cease providing services that are not financially viable?

What should employers be doing?

Third, take other steps to ensure compliance

- Other compliance measures:
 - » Agreed patterns of work for part-timers (compliance with clause 10.3(c))
 - » Review of part-time hours (annual reviews and adjustments)
 - » Working Outside Hours policy? (remote work)
 - » Audit facilities at premises where sleepovers are worked
 - » Consider feasibility / adjustments to 24-hour care shifts
 - » Role and use of employment contracts

What should employers be doing?

Fourth, other practical / strategic considerations to consider

- For award-covered employers:
 - » Updating and upgrading rostering / payroll systems will be critical
 - » Consideration of service model / scale issues
 - » Customer discussions / negotiation of terms
 - » Employee engagement / communication
- For EA covered organisations, consider impact on your business and IR strategy



Next steps: Is the Review over now?



Plain Language project

- Plain language award pilot developed in 2015-6
- Five awards (and then a further 10) included in project – including SCHCDS Award
- Other awards to receive plain language ‘light touch’ redrafting
- ‘Standard clauses’ have been implemented across all awards
- “The plain language redrafting of the Award will commence after the substantive issues have been heard and determined” (Feb 2019 Statement).
- Will plain language re-draft happen?

Questions?



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