**IN THE FAIR WORK COMMISSION**

**Matter No:** AM2023/28

**Applicant:** Australian Industry Group

## OUTLINE OF SUBMISSIONS OF THE APPLICANT

## A. OVERVIEW

1. On 2 November 2023, Australian Industry Group (**Ai Group**) made an application to vary the *Social, Community, Home Care and Disability Services Industry Award 2010* (**Award**) pursuant to s 160(1) or, alternatively, s 157(1)(a), of the FW Act.

2. The subject matter of the application relates to the terms of the Award relating to "sleepovers", which are primarily contained in sub-clause 25.7. A sleepover occurs "*where an employer requires an employee to sleep overnight at premises where the client for whom the employee is responsible is located*".[1]

3. Pursuant to the Commission's Directions, Ai Group has prepared a draft determination varying the Award, which is filed together with these submissions (**Draft Determination**). The substantive effect of the Draft Determination is to make clear that:

   (a) shifts immediately before and immediately after a sleepover may be rostered as separate shifts of ordinary hours (**Variation**); and

   (b) the period of a sleepover in such a case constitutes a break between shifts.[2]

4. The purpose of the Variation is to remove ambiguity and/or uncertainty (or otherwise comply with the modern awards objective) by making it clear that a sleepover constitutes a break for the purposes of the Award, such that periods of work rostered

[1] Sub-clause 25.7(a) of the Award.

[2] With some other minor amendments to clarify the operation of other provisions of the Award consequent upon those amendments.

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immediately on either side of a sleepover do not automatically form part of the one shift, but, rather, that they can be rostered as two separate shifts.

5. For the reasons set out below, the Commission should be satisfied that the Award is ambiguous and/or uncertain as to its treatment of two periods of work on either side of a sleepover, and that the Variation is appropriate to be made under s 160(1) in order to remove that ambiguity and uncertainty. The Commission should also be satisfied that it is appropriate to make an order under s 165(2) of the FW Act that that Variation take effect retrospectively, on and from the commencement of the Award. Alternatively, the Commission should be satisfied that it is necessary to make the Variation under s 157(1)(a) of the FW Act, in order to achieve the modern awards objective.

## B. BACKGROUND

6. Ai Group will lead evidence from the following witnesses in support of its application:

   (a) **Dean Keep**, the Managing Director of All Care Australia Pty Ltd, which provides child protection services in Queensland, including residential care services;[3]

   (b) **Tammy Lloyd**, the Group manager of Out of Home Care (North) for Anglicare Southern Queensland, a provider of children, youth and family services, including residential care services, in southern Queensland;[4]

   (c) **Shelley Wall**, the Chief Executive Officer and a Director of Infinity Community Solutions Ltd, which provides child protection services, including residential care services, in Queensland and South Australia. Ms Wall is also the Chair and a Director of the National Therapeutic Residential Care Alliance, which has members with operations in all States and Territories;[5]

   (d) **Tamara Gabell**, the Rostering Operations Manager at the Community Accommodation and Respite Agency Inc, a disability services provider operating in South Australia;[6]

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3 Statement of Dean Keep dated 11 June 2024 (**Keep Statement**).
4 Statement of Tammy Lloyd dated 11 June 2024 (**Lloyd Statement**).
5 Statement of Shelley Wall dated 11 June 2024 (**Wall Statement**).
6 Statement of Tamara Gabell dated 11 June 2024 (**Gabell Statement)**.

(e) **Brett Rankine**, the Executive Manager of People and Culture at Community Living Options Inc, a provider of community support services, including disability and child services support, in South Australia;[7] and

(f) **Michelle Black**, an expert child therapist with extensive experience and qualifications, as well as the Managing Director and Founder of Elegrow Pty Ltd, which provides counselling and support to young people. Ms Black also provides organisational development consulting services to a child residential care provider named Family Centre Ltd.[8]

7. From the evidence given by these witnesses, the Commission can be satisfied of at least the following matters:

(a) there has been a practice in the disability sector and the youth residential care sector, of workers being rostered to perform work immediately before and immediately after a sleepover, with the shifts on either side being treated as ordinary hours, and separately. An example of the practice is given at paragraph 46 of Mr Keep's statement as follows:

*"(a) The care worker worked ordinary hours from 2pm – 10pm (**Shift A**);*

*(b) The care worker then performed a sleepover during the period of 10pm – 6am; and*

*(c) The care worker then worked ordinary hours on a separate shift from 6am – 2pm (**Shift B**)."*

(b) there are substantial therapeutic, care, operational, logistical and worker benefits of applying that practice in those sectors;

(c) the Fair Work Ombudsman (**FWO**) has in more recent times, adopted the position that under clause 25.7 of the Award, such work performed on either side of a sleepover necessarily constitutes part of the same shift (*i.e.* not being broken by the sleepover), with various implications for the payment of overtime and shift allowances. The FWO has pursued (and continues to pursue) various

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7 Statement of Brett Rankine dated 11 June 2024 (**Rankine Statement**).
8 Statement of Michelle Black dated 11 June 2024 (**Black Statement**).

organisations in these sectors in respect of alleged underpayments arising from that position; and

(d) in light of the FWO's position, there are substantial challenges to continuing the practice, relating to the cost impost of overtime and/or shift allowance entitlements that are invoked (on the FWO's interpretation), the associated government-funding constraints and human resourcing issues, which have led to many providers ceasing to apply the practice (at least in the interim).

## C. VARIATION TO REMOVE AMBIGUITY OR UNCERTAINTY (SECTION 160)

### *C1. Legal framework and principles*

8. Section 160 of the FW Act provides that the Commission *"may make a determination varying a modern award to remove an ambiguity or uncertainty …*".

9. Section 165(2) provides that a variation made under s 160 may be made retrospectively, if the Commission *"is satisfied that there are exceptional circumstances that justify*" it.

10. The principles applicable to s 160 of the FW Act have been summarised as follows:[9]

> *"[51] The principles applicable to the interpretation and application of s 160 are well established. It is first necessary to determine if the award provisions under consideration are ambiguous, uncertain or attended by error. To find ambiguity in respect of an award provision, there must usually be rival contentions as to the proper meaning of the provision which are reasonably arguable. The words 'ambiguous' and 'uncertain' are not synonyms, and uncertainty may be established even if the provision at issue has a clear meaning and is not ambiguous, since uncertainty may arise from the application of unambiguous terms to a given set of circumstances or if the provision is doubtful, vague or indistinct in its expression. Error will be demonstrated if some sort of*

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9 *Re Modern Award Superannuation Clause Review* [2023] FWCFB 264 at [51]-[52] (Hatcher J, Catanzariti VP and Clancy DP), cited recently in *Application by The Australian Retailers Association re General Retail Industry Award 2020* [2024] FWCFB 197 (***ARA***) at [8] (Hatcher J, Clancy DP and Matheson C). See also *Bianco Walling Pty Ltd v Construction, Forestry, Maritime, Mining and Energy Union and Others* [2020] FCAFC 50; (2020) 275 FCR 385 (***Bianco Walling***) (Flick, White and Perry JJ).

*mistake is shown, in that a provision of the award was made in a form which did not reflect the tribunal's intention. It is only if ambiguity, uncertainty or error is found that a variation to remedy this may be considered.*

*[52] The Commission has a discretion as to the terms of the variation to be made, subject to the variation determined having the purpose and effect of removing the identified ambiguity or uncertainty or correcting the identified error."*

(Footnotes omitted)

11. Relevantly, ambiguity means "*doubtfulness or uncertainty of meaning … [or] an equivocal or ambiguous word or expression …*", whereas uncertainty means "*not definitely or surely known; doubtful… not confident, assured or decided… fixed or determined… doubtful; vague; distinct …*".[10]

12. In considering a variation application, the Commission's task is not to interpret the industrial instrument, in the sense of determining as a matter of law the instrument's actual and true meaning. Rather, it is to determine whether it contains an ambiguity or uncertainty.[11] Consequently, the Commission is not necessarily constrained by the principles of construction that apply to the interpretation of the industrial instrument.[12]

### *C2. Relevant terms of the Award*

13. The Award provides the facility for employers to roster a "*sleepover*". Most of the key terms are contained in sub-clause 25.7.

14. Sub-clause 25.7(a) provides that: "*A sleepover means when an employer requires an employee to sleep overnight at premises where the client for whom the employee is responsible is located…*".

15. Sub-clause 25.7(b) provides that clause 25.5 (which provides for the rostering arrangements) applies to sleepovers.

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10 *Bianco Walling* at [74].
11 *Bianco Walling* at [67].
12 *Bianco Walling* at [68].

16. Sub-clause 25.7(d) provides that employees will be paid an allowance of 4.9% of the "*standard rate*" for each night on which they perform a sleepover.

17. Sub-clause 25.7(e) provides that, where an employee has to work during a sleepover, he or she will be paid at overtime rates for at least one hour.

18. Sub-clause 25.7(f) provides that an employer "*may roster an employee to perform work immediately before and/or after the sleepover period*", but at least one of the periods must be at least four hours of work (or the employee must be paid for at least four hours). The sub-clause also provides that the allowance in sub-clause 25.7(d) is in addition to such minimum payment.

19. Sub-clause 25.4 deals with rest breaks between shifts. Pursuant to 25.4(a), an employee must have a break of not less than 10 hours between shifts or periods of work. However, 25.4(b) reduces the potential minimum break period in the case of sleepovers, as follows:

> "*(b) Notwithstanding the provisions of subclause (a), by agreement between the employee and the employer, the break between:*
>
> *(i) the end of a shift and the commencement of a shift contiguous with the start of a sleepover; or*
>
> *(ii) a shift commencing after the end of a shift contiguous with a sleepover*
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> *may not be less than eight hours.*"

20. Sub-clause 29.4 provides that "*Shifts are to be worked in one continuous block of hours that may include meal breaks and sleepovers, except where broken in accordance with clause 25.6*". Sub-clause 25.6 provides for the payment of broken shift allowances.

### *C3. Ambiguity and/or uncertainty*

21. It is plain that unlike predecessors to the Award,[13] a "sleepover" is not *work* as such within the meaning of the Award. It is not paid as *work* (sub-clause 25.7(d)) and a

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13 *Warramunda Village Inc v Pryde* [2002] FCA 250; (2002) 116 FCR 58 (Lee, Finkelstein and Gyles JJ).

period of actual *work* can be performed within a sleepover (sub-clause 25.7(e)). Nor is a sleepover explicitly identified as a period of non-work, or a break. It is more akin to some form of disability attracting an allowance (akin to an "on-call" allowance).

22. This immediately raises difficulties in applying the other provisions of the Award insofar as they provide for the rostering and payment of *work*, and the necessary minimum break periods between periods (or shifts) of *work*. Unfortunately, the Award is silent on such matters, including (relevantly) how the period of a sleepover is to be treated for the purposes of characterising work performed on shifts on either side of it, but contiguous with it. In particular, it is not clear whether work performed on a shift contiguous with the end of a sleepover starts afresh for the purposes of calculating ordinary hours and overtime, and also shift penalties.

23. These gaps (or silence) lead to competing constructions as to a range of issues thrown up by the above, whereby opposing interests seek to fill the gaps by reference to other provisions which touch upon (often tangentially) the issue, various of which are called in aid in support of one construction or the other, under the rubric of *context*.

Competing constructions

24. Ai Group contends that on a proper construction of sub-clause 25.7 of the Award, the sleepover constitutes (or may constitute) a break between shifts, such that periods of work on either side of a sleepover are treated separately for the purposes of the Award, including minimum shift lengths, rostering and calculating ordinary hours, overtime and shift penalties.

25. The following textual and contextual matters point to a construction that periods of work rostered on either side of a sleepover are capable of being treated as two separate shifts:

    (a) clause 25.7 operates on its face, as a stand-alone, specific and complete regulation of sleepover arrangements under the Award, to the exclusion of other, more general provisions;

(b) because a sleepover does not, of itself, constitute work, it should not therefore, conceptually, be treated as joining two actual periods of work (before and after it);

(c) sub-clause 25.7(f) provides for work being rostered on either side of a sleepover, with the logical starting point therefore, subject to contrary stipulation, being that those two periods of rostered work would be separate shifts, unless such work was expressly rostered or arranged as part of a single shift (see for example, clause 29.4);

(d) sub-clauses 25.7(d) and (e) provide for the payment of the sleepover allowance and for payment for actual work performed during a sleepover (at overtime rates), suggesting that the drafters of the Award turned their minds to the payment implications of a sleepover, and included only those terms (*i.e.* and not overtime or shift allowance implications); and

(e) sub-clause 25.4(b)(ii) contemplates the period of a sleepover constituting a break between shifts.

26. The Award makes no stipulation that the shifts on either side of a sleepover, and the sleepover itself, would necessarily and automatically be treated together as part of one shift, despite being broken by a lengthy period of non-work.[14] Had the drafters of the Award intended that application, given the potentially substantial entitlements to overtime and shift penalties that would flow from it, one would have expected them to have said so clearly. That is especially so where, given the context that non-compliance with the Award carries a risk of a civil penalty, it is to be expected that it should be reasonably capable of being understood by lay-people in the relevant industries by reference to the language used within it.[15] The absence of an express statement to the effect that the Award operates in that way, therefore supports Ai Group's construction.

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14 The terms "necessarily" and "automatically" are used advisedly, as there is nothing in the Award to prohibit an employer rostering two periods of work on either side of a sleepover as one continuous shift.

15 *King v Melbourne Vicentre Swimming Club Inc* [2021] FCAFC 123; (2021) 308 IR 171 at [43] (Collier, Katzmann and Jackson JJ).

Alternative construction

27. On the other hand, Ai Group is aware that some unions and the FWO contend that the Award does operate that way, such that hours worked on either side of a sleepover but contiguous with it, must constitute a single shift. Under that construction, where work was performed by an employee on either side of a sleepover, the period after the sleepover must be treated as running continuously with the period prior to the sleepover for the purposes of calculating overtime and shift penalties.

28. As to overtime, the construction would have the effect that an employee's hours of work carry on after the sleepover, such that, where an employee works an eight hour shift before a sleepover, he or she would either automatically (or after working two hours if there was agreement to extending the length of ordinary hours on a shift to 10 hours)[16] be working overtime on the period of work after the sleepover. As to shift penalties, the construction would have the effect that, by virtue of the shift continuing, and ending after midnight, night shift penalties would apply to the whole period of work.[17]

29. Whilst this construction is doubtful and intuitively unsound, to the extent that it is arguable, there is an ambiguity and/or uncertainty in the sense contemplated by s 160 of the FW Act. The ambiguity/uncertainty arises because the Award, as currently drafted, fails to make plain the effect of a sleepover on the hours of work performed around it.

30. The effect of there being (beyond mere assertion) two reasonably arguable contentions as to the proper construction of clause 25.7 and several associated provisions, is that the meaning of the Award is ambiguous. The associated doubt and lack of clarity as to how the relevant terms are to be applied, also renders the clause uncertain.

31. A consideration of the history of the relevant terms in the Award and how they came to being, compounds the ambiguity and uncertainty.

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16 See Award, sub-clauses 25.1(a)(ii) and (b).

17 See Award, sub-clauses 29.2(b) and 29.3(b).

The making of the Award

32. The Award was first made by a Full Bench of the Australian Industrial Relations Commission (**AIRC**), pursuant to the award modernisation process set out in Part 10A of the *Workplace Relations Act 1996* (Cth). Pursuant to that process, and after a series of submissions and public consultations, on 25 September 2009, the AIRC issued a public exposure draft of the Award (**Exposure Draft**).[18]

33. The Exposure Draft provided for sleepovers. The following matters are relevant. Similarly to the current provisions of the Award, in the Exposure Draft:

    (a) a sleepover was defined as "*sleeping in at night in order to be on call for emergencies*";[19]

    (b) the span for a sleepover was to be at least eight hours, but not more than ten hours;[20]

    (c) employees who undertook a sleepover would be entitled to free board and lodging, with a separate room and bed and use of staff or client facilities, and "*in addition …, a sleepover allowance of 4.90% of the standard rate for each night on which they sleep over*";[21] and

    (d) employees would receive certain additional payments for time actually worked during a sleepover.[22]

34. However (and unlike the Award), specific provision was made for employees who, because of actual work performed during a sleepover, did not have a period of at least eight consecutive hours off duty between ordinary rostered hours, in a manner that made it clear that shifts before and after a sleepover could be separate shifts of ordinary hours.[23] That provision was as follows:

    "*(x) an employee (whether a full-time employee, part-time employee or casual employee) <u>who performs so much work during sleepover periods between</u>*

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18 The exposure draft was accompanied by a statement of the Full Bench: *Award Modernisation* [2009] AIRCFB 865.
19 Exposure Draft, clause 24.7(a).
20 Exposure Draft, clause 24.7(b)(i).
21 Exposure Draft, clauses 24.7(b)(iii) and (iv).
22 Exposure Draft, clause 24.7(b)(vii).
23 Exposure Draft, clause 24.7(b)(x).

> *the termination of their ordinary work on any day or shift and the commencement of their ordinary work on the next day or shift that they have not had at least eight consecutive hours off duty between these times will, subject to this clause, be released after completion of such work until they have had eight consecutive hours off duty without loss of pay for ordinary working time occurring during such absence. If, on the instruction of the employer, such an employee resumes or continues to work without having eight consecutive hours off duty, the employee will be paid at double the appropriate rate until they are released from duty for eight consecutive hours and be entitled to be absent until they have had 10 consecutive hours off duty without loss of pay for ordinary working time occurring during such absence*" (Emphasis added)

35. Further, the Exposure Draft also provided that:[24]

> "*a sleepover may be rostered to commence immediately at the conclusion of the employee's shift and continuous with that shift; and/or immediately prior to the employee's shift and continuous with that shift, and not otherwise;*"

36. As can be seen from the above summary, whilst the Exposure Draft contained many of the terms dealing with sleepovers that are now contained in the Award, it went further and necessitated that work before and after a sleepover be contiguous with it, and provided that such work was capable of being separate and distinct shifts of ordinary hours. Further, the Exposure Draft treated any work performed during the sleepover as, in effect, the interruption of a break, such that an employee would be compensated either by having paid time off, or by receiving double-time rates.

37. In October and November 2009, after the Exposure Draft had been published for consultation, there were further submissions and public consultations in respect of it. None of those submissions, and it is not apparent that any of the public consultations, addressed these particular provisions of the Exposure Draft, or proposed any relevant amendments to them.[25]

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24 Exposure Draft, clause 24.7(b)(viii).

25 Save for the AFEI, which, in a submission dated 5 November 2009, proposed an amendment that it be made clear that the two periods of work on either side of a sleepover, would constitute separate shifts for the purposes of shift penalties.

38. However, on 4 December 2009, the first version of the Award was published by the AIRC. The relevant terms in the Award were substantially different to those contained in the Exposure Draft. The Decision of the Full Bench of the AIRC which accompanied the Award and published on the same day, contained no explanation as to why these changes had been made to the Exposure Draft.[26] The changes eliminating the clarity and giving rise to the present ambiguity and uncertainty, were made *sub silentio*, at no party's urging and without any statement of reasons.

39. Further, the Award was ambiguous[27] as to whether work could be performed on either side of a sleepover, or only on one side, providing (at clause 25.7(f)) that "*Such work will be performed immediately before or immediately after the sleepover period*".

Modern Awards Review

40. During the 2012 Modern Awards review process, various competing applications were filed to vary the Award, relating to whether work could be performed both before and after a sleepover, what the minimum break period should be where a sleepover was involved and whether work before and after a sleepover should be regarded as one shift. After a series of conciliation conferences presided over by Senior Deputy President Kaufman, on 21 November 2012, his Honour made a consent variation to the Award,[28] unaccompanied by any reasons, which:

(a) changed the wording of sub-clause 25.7(f), such that it relevantly read:

> *"An employer may roster an employee to perform work immediately before and/or immediately after the sleepover period, but must roster the employee or pay the employee for at least four hours' work for at least one of these periods of work.*" (Emphasis added); and

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26 See *Social, Community, Home Care and Disability Services Industry Award 2010* [2009] AIRCFB 945. At paragraph [80], the Full Bench said "*We have decided to make a modern award based on the terms of the exposure draft but with a number of alterations some of which we deal with below.*" At paragraph [82], the Full Bench said "*We mention some of the significant changes from the terms of the exposure draft.*"

27 It is noted that Cribb C rejected a submission that the Award was ambiguous in this respect, reasoning that it provided for one or the other, but not both: *Re Australian Federation of Employers and Industries* [2010] FWA 5123 at [44]-[47].

28 PR531544.

(b) inserted what is now found in sub-clause 25.4(b), extracted at paragraph 19 above, regarding the ability for a break period between shifts to be reduced from ten hours to eight hours by mutual agreement.

41. As can be seen, the effect of this former variation was to expressly specify that work could be rostered on either side of a sleepover, whereas the effect of the latter was to reduce the minimum break period where sleepovers were involved (but not (expressly) for shifts immediately before and immediately after a sleepover). Accordingly and as such, the silence (and lack of clarity) in relation to the actual treatment of the sleepover, and its impact on work performed immediately before and after it, remained.

Conclusion on ambiguity / uncertainty

42. In light of the above, the terms (including the absence thereof) and history of the Award give rise to a range of constructional choices as to the correct treatment of sleepovers. That is: does a sleepover constitute a break between two shifts, or does it instead automatically join two periods of work that constitute part of the same shift, or can it be either depending on how they are rostered?

43. The meaning of the Award is therefore ambiguous in that regard, and its application to the entitlements payable in the relevant sleepover scenario identified above is uncertain.

***C4. The variation should be made and it should be retrospective***

44. Having established that the Award is ambiguous and uncertain as to the intended treatment of sleepovers, the question becomes whether the Commission should exercise its discretion under s 160 of the FW Act to vary the Award to remove the ambiguity and uncertainty, and whether it should do so retrospectively.

Variation

45. In determining whether to exercise its discretion, the Commission is not constrained by the normal outcome of a process of construction: namely, to restore the objectively determined legal meaning of the term. Rather, the Commission may have regard to

a broader range of considerations, such as the equity, good conscience and merits of the matter.[29]

46. For the following reasons, the Commission should exercise its discretion to vary the Award in the terms of Ai Group's Draft Determination, which would have the effect of making express and clear the proper construction of the Award as to sleepovers: namely, that sleepovers may constitute a break between two shifts of work, such that separate shifts of ordinary hours of work may be worked immediately before, and immediately after, a sleepover.

47. *First*, the construction contended for by Ai Group is the correct or preferable construction, for the reasons set out above.

48. *Second*, the ambiguity and uncertainty as to whether sleepover arrangements require an employer to treat contiguous periods of work before and after a sleepover as one continuous shift (attracting overtime and shift penalties when they ought not to arise), or as requiring the performance and payment of large stretches of overtime, will likely lead employers to cease implementing these arrangements. There is evidence that this has already begun to occur at numerous organisations. Given the evidence of the therapeutic and operational benefits to the rostering of an employee to work shifts before and after a sleepover, and also the benefits provided to employees of, in effect, maximising non-work time by working a compressed roster, that is not a desirable outcome.

49. *Third*, making the Variation will give clarity and certainty to employers that, if they choose to continue to implement arrangements of the aforementioned nature, they can do so without incurring disproportionate shift penalty liabilities or relying upon the routine performance of significant periods of overtime. Conversely, the Variation will also give clarity and certainty to employees and other stakeholders as to the obligations and entitlements that arise from working such arrangements, as is the goal of any Award.

50. *Fourth*, the Variation is consistent with the modern awards objective, for the reasons given in Part D below.

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[29] *Bianco Walling* at [68]; *Re Toll Transport Pty Ltd* [2022] FWC 3346 at [14].

Retrospectivity

51. If the Commission determines that it is appropriate to vary the Award in the terms of the Draft Determination, it should order, pursuant to s 165(2) of the FW Act, that the variation take effect from the commencement of the Award. In order to do so, the Commission must be satisfied that exceptional circumstances exist. For the following reasons, exceptional circumstances are made out here.

52. *First*, it is relevant that if the Commission is with Ai Group to this point, the Award is ambiguous and uncertain in a critical respect, and in a manner that is likely to mislead, and which has misled, persons as to the proper construction of the Award and the correct treatment of sleepovers. The Commission can infer that, given the evidence of industry practice as to the rostering of sleepovers, a large quantum of past entitlements rides on that misconception.

53. *Second* and relatedly, it is clear from the evidence that a substantial amount of disputation on the competing constructions of the Award is occurring, and is foreshadowed. The FWO has issued compliance notices to at least three operators (All Care, Parkerville and Jats Joint) in the care industry for alleged underpayments relating to the failure to pay overtime and shift penalties under the Award associated with working before and after sleepovers. The Commission can infer that the potential compliance issues flowing from the ambiguity and uncertainty to the entire industry are widespread, with significant monetary consequences. Applying the variation with retrospective effect will cure the disputation and avoid those unintended monetary consequences.[30]

54. *Third*, Ai Group's witness evidence suggests that there is a practice in the care industry of rostering work on either side of a sleepover and treating the two periods of work as separate shifts. A retrospective variation would be in the interests of justice, in that it would validate that treatment and relieve the employers of the prospect of facing prosecution for payment of civil penalties.

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30 See *4 Yearly Review of Modern Awards* [2017] FWCFB 6037; (2017) 270 IR 253 at [170] (Catanzariti VP, Sams DP and Saunders C).

55. *Fourth*, there is no risk in the circumstances of this case that a retrospective variation will make unlawful that which, at the time, may have been lawful, nor any realistic or material risk (given the amounts involved for each individual, the passage of time and the law of restitution) that employees may be liable to repay monies to which they were not (now) entitled.[31]

## D. VARIATION TO ACHIEVE MODERN AWARDS OBJECTIVE (SECTION 157)

56. In the alternative to the s 160 application, Ai Group applies for the Commission to make the Variation pursuant to s 157, on the basis that doing so is necessary to achieve the modern awards objective.

57. The effect of the Variation would be to specify that a sleepover under clause 25.7 of the Award would constitute a break between separate shifts of ordinary hours for the purposes of sub-clause 25.4(b), with the effect that the commencement of a shift contiguous with the end of a sleepover may start afresh as a new period of ordinary hours.

### *D1. Legal framework and principles*

58. Section 157(1)(a) of the FW Act relevantly provides that the Commission *"may … make a determination varying a modern award if [it is] satisfied that making the determination … is necessary to achieve the modern awards objective"*. There is no provision for such variations to be made retrospectively.

59. The modern awards objective is specified in s 134(1) of the FW Act to be that "*modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions*". The provision then sets out a list of relevant considerations for the Commission to consider in determining whether the modern awards objective has been met.

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31 If this remains a concern for the Commission, it can be addressed by a clause like that adopted by Lawler VP in the *Telecommunications Services Award 2010* (see clause 14.4(b)).

60. As Tracey J held in *Shop, Distributive and Allied Employees Association v National Retail Association (No.2)*:[32]

> "*The statutory foundation for the exercise of FWA's power to vary modern awards is to be found in s 157(1) of the Act. The power is discretionary in nature. Its exercise is conditioned upon FWA being satisfied that the variation is "necessary" in order "to achieve the modern awards objective". That objective is very broadly expressed: FWA must "provide a fair and relevant minimum safety net of terms and conditions" which govern employment in various industries. In determining appropriate terms and conditions regard must be had to matters such as the promotion of social inclusion through increased workforce participation and the need to promote flexible working practices.*"

61. As to the requirement for "fairness" in the minimum safety net, the Commission must consider the perspectives of both employers and employees, in the context of broader economic and industrial considerations that may be at play.[33] As to "relevance", the safety net must suit contemporary standards, in the sense of according with modern community standards and expectations.[34] To that can be added that the safety net should be "relevant" in the sense of being targeted to suit the particular practices, objectives and challenges of the industries that a modern award seeks to regulate.

62. In order for a variation to be made, the Commission must be satisfied that the variation is *necessary*, as opposed to merely desirable. Whether a proposed variation is necessary is a matter for the opinion of the Commission.[35]

63. The list of considerations posed in s 134(1) do not, of themselves, set any standards or pose any questions against which the modern awards objective is to be evaluated. They are mainly broad social objectives, and many of them may not be relevant to a particular matter under consideration.[36] The question that ultimately remains is

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32 [2012] FCA 480; (2012) 205 FCR 227 (***SDA v NRA***) at [35].

33 *Shop, Distributive and Allied Employees Association v $2 and Under* (2003) 135 IR 1 at [11] (Giudice J, Watson SDP and Raffaelli C), cited and applied in *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001; (2017) 265 IR 1 at [118]-[119] (***Penalty Rates Decision***).

34 *Penalty Rates Decision* at [122].

35 *SDA v NRA* at [30].

36 *National Retail Association v Fair Work Commission* [2014] FCAFC 118; (2014) 225 FCR 114 at [109] (Collier, Bromberg and Katzmann JJ).

whether a fair and relevant minimum safety net of terms and conditions has been provided.

### *D2. The Variation is necessary to achieve the modern awards objective*

64. For the following reasons, Ai Group contends that the Variation is necessary to be made in order to achieve the modern awards objective.

65. *First,* the Variation reflects an interpretation of the extant Award provisions that is reasonably arguable, is preferable and has been adopted and applied by employers in the care industry.

66. *Second,* the Variation would enable employers to provide care to their clients in a way that best meets their needs, and in a way that appropriately compensates employees, without disproportionately inflating employment costs beyond fixed funding. Specifically, it would facilitate continuity of care, with regular and predictable rostering arrangements. The evidence establishes that continuity of care has an important therapeutic objective in maintaining stability, consistency and predictability for the vulnerable who find themselves in those facilities.

67. *Third,* the Variation would also improve efficiency and productivity in the performance of work in the care industry[37] where sleepover arrangements are permitted and called for, by reducing the instances in which it is necessary to hand over care from one employee to another.

68. *Fourth,* to the extent that the Variation would allow for ordinary hours to be worked on either side of a sleepover, that is reflective of a flexible modern work practice.[38] While this involves employees working more ordinary hours than under usual arrangements within a 24 hour period, it correspondingly compresses the time the employee spends at work in the course of a given week, so as to maximise the periods that the employee is able to spend away from work, and is therefore desirable to employees.[39] This is, of course, a common practice in many industries. Therefore, the rationale for an entitlement to be paid disproportionate overtime and shift penalties in such a case, is not present.

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37 Section 134(1)(d) and section 134(1)(f) of the FW Act

38 Section 134(1)(d) of the FW Act.

39 E.g. Rankine Statement, [25] and [39]; Gabell Statement, [28]; Lloyd Statement, [31].

69. *Fifth*, the evidence demonstrates that an impact of the rostering practices that have been ushered in to reflect the FWO's interpretation of the Award has a host of undesirable work-related impacts. For instance, the need to ensure that employees receive the required break between shifts and have the required minimum number of days off leads to organisations requiring more workers, but being able to offer them fewer hours, which, in the context of a tight labour market, has led to failed attempts at recruitment and a reliance on labour hire.[40] Further, there is an increased regulatory burden on organisations in having to roster twice the amount of employees. This is an already a complex requirement given the need to match clients with an appropriate carer, which may be influenced by a range of factors.[41]

70. *Sixth,* reliance on the performance of overtime during a period of work after a sleepover is undesirable for at least the following reasons:

    (a) it is undesirable for employers to be required to rely upon the routine performance of overtime to conduct their ordinary operations. Inherent in such arrangements is a degree of uncertainty for both employers and their clients, which is not optimal, having regard to the nature of the relevant services provided by employers;[42]

    (b) employees are not guaranteed, and indeed many employers may wish to structure their working arrangements so as to avoid, overtime. Such arrangements therefore disadvantage those who wish to perform the relevant work;

    (c) employees are not entitled to the superannuation guarantee, or to take or accrue paid leave pursuant to the NES, in respect of overtime; and

    (d) the cost implications of being required to pay overtime rates.[43] This is particularly pertinent to this matter, because the relevant services provided by employers are funded by various Governments. Typically, employers rely wholly, or in large part, on this funding, to cover the costs associated with providing the relevant services. In many cases, the funding does not

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40 E.g. Gabell Statement, [41]-[45].
41 E.g. Gabell Statement, [11]-[21]; Keep Statement, [42] and [45].
42 Section 134(1)(f) of the FW Act.
43 Section 134(1)(f) of the FW Act.

adequately cover those costs. Under NDIS funding arrangements, price caps are stipulated which, in effect, prohibit employers from charging more for the provision of service. The price cap is determined by reference to a range of factors, including the time of day that the work is performed. The arrangements do not contemplate work performed before or after a sleepover being treated as a night shift, and therefore, do not factor in payment of the night shift penalty.[44] Further, employers operating in the relevant sectors are generally not-for-profit organisations that are not in a position to absorb costs that materially exceed the funding they receive on an ongoing basis.

71. *Seventh,* the arguments above at paragraph 70(d) are also relevant to the payment of shift penalties for work on both sides of a sleepover.

72. *Eighth,* as a matter of industrial merit, shift penalties should not be payable in respect of work that is performed, discontinuously, at a time of the day that does not involve the disabilities that might be associated with the performance of the particular shiftwork for which they are paid. Therefore, a circumstance in which an employee performs an afternoon shift, followed by a sleepover, followed by a day shift, and stands to be compensated for that entire period as if it was a continuous night shift, lacks an industrial rationale. By way of analogy, the Commission has previously varied the Award with respect to broken shifts to ensure that shift penalties are only payable in respect of the part of a broken shift that satisfies the entitlement to the penalty.[45] It would be incongruous for shifts broken by a sleepover to operate differently.

73. *Ninth*, as a further matter of industrial merit, a sleepover should be treated as a break between shifts. A break from work is, in essence, a temporary stoppage of work. A sleepover amounts to a break from work, except where an employee is required to perform work as contemplated by clause 25.7(e). Indeed, not only is an employee permitted to sleep during a sleepover, the Award requires that employees are provided with facilities that are designed to enable this to occur, such as a separate room with a bed and clean linen.

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44 See Gabell Statement, [48]-[52] and TG-2. See also *Re Social, Community, Home Care and Disability Services Industry Award 2010* [2021] FWCFB 2383 at [218(11)-(24)].

45 See [2021] FWCFB 2383 at [468]-[556]; [2021] FWCFB 5493 at [11]-[19] and [2021] FWCFB 5641 at [210]-[314].

74. The mere fact that an employee is required to remain at a client's residence or care facility operated by the employer does not, of itself, render a sleepover incapable of constituting a break. It is not uncommon for other awards (those which provide for remote work are an obvious example) to include analogous arrangements, whereby the relevant period of time which is required to be spent at a particular location (or even a workplace), constitutes time off work.

75. Put another way, during a sleepover, an employee is, in essence, engaged in an arrangement akin to being on stand-by, or on-call — concepts that are commonly found in modern awards. Generally, where awards contemplate standing by or on call arrangements, they entitle an employee to a payment for the disutility of having to do so (as does this Award); but they do not treat the time spent standing by or being on call, as time worked or require that they form part of a shift. For example:

    (a) On call provisions in the *Nurses Award 2020* (clause 17.2(a)) and the *Health Professionals and Support Services Award 2020* (clause 23.2(d));

    (b) Standing by provisions in the *Manufacturing and Associated Industries and Occupations Award 2020* (**Manufacturing Award**) (clause 32.14);

    (c) Overtime crib breaks under the Manufacturing Award (clause 57.2). Similar arrangements apply under a large number of other awards; and

    (d) Living away from home due to distant work under *the Building and Construction General On-Site Award 2020* (clause 25), the *Joinery and Building Trades Award 2020* (clause 21.4(g)) and the *Plumbing and Fire Sprinklers Award 2020* (clause 21.10).

76. *Tenth,* the Variation would facilitate patterns of work that, by virtue of their regularity and predictability, would lend themselves to permanent employment (*vis-à-vis* casual employment).[46]

77. *Finally,* the Variation is simple and easy to understand.[47] The extant provisions of the Award are not. Rather, they are ambiguous, uncertain and have been the subject of significant disputation or disagreement as to their correct application.

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46 Section 134(1)(aa) of the FW Act.
47 Section 134(1)(g) of the FW Act.

### *D3. Conclusion under s 157(1)(a)*

78. For these reasons, if the Commission does not make the orders sought by Ai Group under s 160 of the FW Act, the Commission should be satisfied that the Variation is necessary in order to achieve the modern awards objective, and determine to vary the Award accordingly under s 157(1)(a) of the FW Act.

**Matthew Follett SC**

**Matt Garozzo**

Dated: 11 June 2024