

## Fair Work Amendment (Protecting Penalty and Overtime Rates) Bill 2025 (Bill)

Prepared by Tony Brindley, retired accountant (CPA) and business advisor. My comments on the proposed Bill are made in reference specifically to the Social, Community, Home Care and Disability Services Industry Award 2010 (**SCHADS**) award, the impacts of the Bill on a single award and its impact on NDIS small business.

### Financial Impact Statement

1. The statement in Explanatory Memorandum (**EM**) that the Bill has no direct financial impact is false. It has significant impact on multiple sectors and businesses of all sizes, significantly small business.
2. In regard to the SCHADS award there is a mismatch of what a Service provider (**SP**) is required to pay a part-time or casual employee for minimum hours and the amount that can be charged to the NDIS participant's plan.
3. Per the SCHADS award *Cl 10.5 Part-time and casual employees will be paid for the following minimum number of hours, at the appropriate rate, for each shift or period of work in a broken shift.*
  - a. *Cl 10.5(a) SCHADS award the minimum charge for social and community services employees (except when undertaking disability services work) – 3 hours.*
  - b. *All other employees – 2 hours.* This being a Disability Support Worker.
4. Under the NDIS Pricing Arrangements page 9 *The NDIA expects that providers pay their disability support workers in accordance with relevant awards and agreements.*
  - In 2022 the Fair Work Commission (**FWC**) changed the SCHADS award to include the minimum 2-hour shift for part-time and casual employees. The NDIS has stated quite clearly in a news release 20 September 2022:
    - *A provider cannot charge a participant for more time than the actual amount of support delivered.*
  - *The NDIA has heard from NDIS participants that following the 1 July 2022 changes to the SCHADS Award some providers are:*
    - *Imposing a minimum 2-hour engagement period for providing support to a participant.*
    - *Advising participants they will be charged for two hours of support, regardless of the amount of time workers actually delivered support to the participant.*
  - *This advice to NDIS participants is incorrect.*
  - *Changes to the SCHADS Award impacts providers' relationship with their workers/employees, not participants.*
5. A mismatch between the minimum hours to pay under the SCHADS award of 2 hours and the NDIS requirement to only charge actual hours worked creates a financial disadvantage to the employer as demonstrated in following example using 2025-26 NDIS Pricing Arrangements.
  - a. Casual employee Level 2, paypoint 1, hourly rate \$43.23 at ordinary hours.
  - b. Minimum payable = 2hrs x \$43.23 = \$86.46 + super (12% \$10.37) + NSW workers compensation (est 3% \$2.90) actual wage cost before overheads = \$99.73. If another shift is scheduled later on the same day the 2 shifts are referred to as a

- Broken Shift and a further allowance of \$20.82 is payable for a combined cost before overhead costs of \$120.55.
- c. Amount chargeable to NDIS participant for 1 hour of support is \$70.23 under NDIS item # 04\_104\_0125\_6\_1.
  - d. The loss of and impact to the NDIS employer on providing 1 hour of support for a NDIS participant who chooses when and how long to request support under the NDIS policy of choice and control becomes \$70.23 revenue less \$99.73 outgoings = (\$29.50) loss or (\$50.23) loss with a Broken Shift allowance.
  - e. Employers try not to roster shifts less than 2 hours as they lose money.
6. The NDIS support business is being discriminated by the Fair Work Act via the SCHADS award and the NDIS. **This adds new meaning to the term “wage theft”.**
  7. This proposed Bill will mandate that the penalties which includes a minimum 2 hour employee payment when the NDIS participant may end up with less than 2 hours of support plus a Broken Shift allowance for work not performed will become difficult to change under the proposed Bill leaving the employer at a financial disadvantage.
  8. The proposed Bill *new subsection 135A(3) to clarify that the operation of the principle at new subsection 135A(1) would not require the Fair Work Commission to undertake a review of all modern awards.* As cl10.5(b) minimum 2-hours payment for a DSW is in the SCHADS award, then in accordance with the EM NOTES ON CLAUSES, Schedule 1 Amendments para 5:
    - a. *New section 135A would set a clear principle requiring that, in exercising its powers under Part 2-3 to make, vary or revoke modern awards, the Commission must ensure that:*
      - i. *the rate of a penalty rate or an overtime rate employees are entitled to receive is not reduced, and*
      - ii. *modern awards do not include terms that substitute employees’ entitlements to receive penalty rates or overtime rates where those terms would have the effect of reducing the additional remuneration referred to in paragraph 134(1)(da) that any employee would otherwise receive.*
    - b. Then the 2-hour minimum employee payment penalty could not be changed enforcing financial discrimination against the NDIS service provider employer.
  9. Cl 25.6(f) Broken Shifts – span of hours requires double time to be paid where a Broken Shift spans more than 12 hours. By way of example a shift starts and finishes 6am to 8am for a minimum shift of 2 hours. No further work is required until 6pm to 8pm by a NDIS participant. The Span of Hours is from commencement at 6am to 6pm. Any work after 6pm exceeds the broken shift span of hours and the DSW receives 2 hours payment even though they have had a break of 10 hours. They also receive a Broken Shift allowance of \$20.82 plus double time on the last 2 hours of work. The casual employee is not prevented from working with another employer in any industry or themselves during their 10 hour break, however it is the original employer who bears the burden of the penalties. This further drains funds from the participants NDIS plan increasing NDIS costs.

**Jats Joint Pty Ltd v Fair Work Ombudsman [2025] FCA 743**, date of judgement 8 July 2025.

10. The Hon Amanda Rishworth MP failed to reference this Federal Court Judgement in the EM to the proposed Bill.

11. The Judgement concerns the so-called penalties associated with Sleepovers” within the SCHADS award are indeed not penalties and no penalty rates are payable. The Fair Work Ombudsman (**FWO**) had argued they did apply and published Factsheets to support this position over preceding years. This position was recently rejected by the Federal Court.
12. The proposed Bill requires the FWC must ensure 135A(1)(a) *the rate of a penalty rate or an overtime rate that employees are entitled to receive is not reduced.*
13. Proposed 135A(3) has now been included to clarify that the principle [under subsection 135A(1)] *would not operate to require the Commission to:*
  - a. *Undertake a review of all modern awards*
  - b. *Initiate a review of any award terms outside the scope of an application before the Commission, or*
  - c. *Exercise its powers under part 2-3 of the Fair Work Act to make, vary or revoke modern awards.*
14. The SCHADS award is perhaps the most complex Modern award. The FWO and Unions have incorrectly interpreted the award requiring employers to pay penalty rates and overtime associated with Sleepovers in the SCHADS award to employees. The proposed Bill does nothing to assist in the repayment of false penalty rates and overtime payments made to employees. The proposed Bill does not address “entitled to receive”.
15. **The proposed Bill should include a subsection Employers can recover award overpayment for penalties and overtime payments from employees when incorrect advice is provided by the FWO or another agency or Department. Someone must be accountable for the incorrect advice provided on Australian workplace laws.**

#### **Breach of Human Rights and Discrimination of People with Disabilities.**

16. The proposed Bill subsection 135A ensures the FWC when exercising its powers to make, vary or revoke modern awards, must ensure the specified penalty rate or overtime rate in modern awards that employees are entitled to receive are not reduced.
17. The proposed Bill or EM does not question if the penalty rate or overtime rates comply with the objectives of the Discrimination Act 1992 or the NDIS.
18. The objects of the Discrimination Act can be summarised as:
  - a. *To eliminate, as far as possible, discrimination against persons on the ground of disability in the areas of:*
    - i. *(ii) ... services*
    - ii. *(iii) Existing laws*
    - iii. *(c) to promote recognition and acceptance within the community of the principle that persons with disabilities have the same fundamental rights as the rest of the community.*
19. Under the SCHADS award governed by the Fair Work Act to which this Bill applies, a person with a disability funded by the NDIS must go to sleep at 10pm and wake up at 6am. Working times around this “sleepover period” are inflexible.
20. The NDIS Pricing Arrangements page 19 says a sleepover is a continuous period of eight **hours or more**. [emphasis on more]
21. The NDIS also says the NDIS participant has choice and control over the type of service to be provided, time of day/night and the duration of that service.
22. The SCHADS award mandating that a NDIS participant will have a sleepover 10pm to 6am while the rest of Australia can go to bed and wake up whenever it suits them is a breach of the objective *persons with disabilities have the same fundamental rights as the rest of the community.*

23. To make matters worse, the SCHADS award cl 25.7(f) imposes a minimum 4-hour shift that has to be worked either before or after the mandatory sleepover period. These 4 hours have to be paid whether those hours were worked or not. This is a penalty.
24. Due to NDIS participant medications, their particular diagnosis, their sleeping habits are not the same between NDIS participants and the general population with many going to bed earlier than 10pm and sleeping longer. The effect of this is the award requires a DSW to be paid for hours that are not worked. This reduces productivity and wastes NDIS funding, both of which are major concerns of the current Government that can easily be corrected by changing the SCHADS award rather than this Bill preventing the FWC from reducing penalty and overtime rates when the FWC exercises its powers to make, vary or revoke modern awards.
25. In addition, the employee receives a sleepover allowance of \$60.02 to be on the premises. Perchance the NDIS participant requires some assistance even if only for 10 minutes, the employee receives the required overtime rate for the duration of the work with a minimum payment of 1 hour paid.
26. The proposed Bill will enshrine this discrimination into the Fair Work Act and should be objected to. The SCHADS award is just one award with unfair penalty and overtime rates that will become protected if accepted by the Parliament. The proposed Bill affects all Modern awards, not one and all Modern awards need to be correct before making a blanket change to enshrine false penalty and overtime rates into law.

#### **Fair Work Act sub section 134 The modern awards objective**

27. The EM is misleading at para 10. The EM only refers to 134(1) (da) although the reference to (da) was not included. It was however, correctly referenced in the EM at NOTES ON CLAUSES para 6.
28. Subsection 134(1) actually states the Fair Work modern awards objective to take into account:
  - a. *(a) relative living standards and the **needs of the low paid; AND***
  - b. *(d) the need to promote flexible modern work practices and the efficient and productive performance of work; **AND***
  - c. *(da) the need to provide additional remuneration for employees working:*
    - i. *(i) overtime; OR*
    - ii. *(ii) unsocial, irregular or unpredictable hours; OR*
    - iii. *(iii) weekends or public holidays; OR*
    - iv. *(iv) shifts; **AND***
  - d. *(f) the **likely impact** of any exercise of modern award powers **on business, including on productivity, employment costs and the regulatory burden; AND***

...
29. The SCHADS award has 8 Employee classifications for NDIS Support Workers with increasing pay points within each classification. Subsection 134(1) requires the FWC to take into account **ALL** the subclauses starting with (a) the needs of the **low paid**, not just (da).
30. By way of example, a Casual Disability Support Worker employed under the SCHADS award Level 2, pay point 1, \$43.23/hr is a low paid employee under this award working 38 hours per week (between the hours of 6am to 8pm) Monday to Friday for say 48 weeks per annum with no overtime, weekend or public holiday work will earn \$78,851.52pa or \$1,516.37pw. This is hardly low paid. If 5 additional hours are worked on Sundays for 48 weeks at the overtime rate of \$77.81/hr then a further \$14,783.90 is

earnt for a total of \$93,635.42pa or \$1,800.68pw. The medium Australian weekly earnings for Australian workers are \$1,396pw (ABS Nov 2024).

31. No reference is made in the proposed Bill limiting it to the low paid employees. S134(1)(a).

### **Human Rights Compliance**

32. The EM mentions Human Rights under Article 6 but does not mention the right to work which the worker freely chooses or accepts. The worker is not enslaved to work.
33. The EM mentions the right under Article 15 to take part in cultural life which somehow has been translated to mean weekends and penalties and overtime rates are sacred and should be imposed when a worker gives up his weekend of cultural life for work.
34. Cultural life takes place everyday of the week, not just weekends. A worker has a right to partake if they chose. Under Article 6 they chose to work or not. If they chose to work on a weekend they freely do so and give up some weekend cultural life.
35. It has been portrayed that weekend workers give up the right to attend major weekend sporting events, music events, etc. The reality is if a stadium holds 100,000 people the event is not reserved for weekend workers. They must compete with more than 26 million others to attend this single event. Why should penalties be imposed on their work, which was their choice under Article 6 when they have little likelihood to obtain tickets to attend such an event regardless if it is held on a weekend or weekday.
36. I am old enough to remember when shops closed noon on Saturday and reopened on Mondays. Those days have long gone but the penalty and overtime rates that were then introduced for weekend trading linger.

### **Complexity**

37. I oppose the proposed Bill because the FWC should make, vary and review all Modern awards and in particular penalty and overtime rates. Simpler awards will streamline payroll processing by removing complexities and if the FWO can't interpret the Modern awards correctly as evidenced in the very recent Jats Joint Pty Ltd v FWO case what hope do Australian small businesses have who are the backbone of the Australian economy. It is time for a change to reduce the regulatory burden.

### **Cost Recovery**

38. Most awards operate in industries that set their prices. Under the SCHADS award a SP cannot charge more than the published annual NDIS Pricing Arrangements, yet the SCHADS award has employee charges that cannot be recovered and must be borne by the business. This is unfair and discrimination against businesses.

### **Reputational damage**

39. The complexities of the SCHADS award creates reputational damage and worker turnover as they believe they are entitled penalties and overtime that are incorrect, partly attributable to the FWO. This creates additional work for the business to resolve.

### **Sole Trader non employing businesses not affected by the Bill**

40. A sole trader who does not employ workers and completes all work themselves is not restricted by the same working conditions as imposed by the SCHADS award and does

not have to comply with the Fair Work Act because although they work, they are not considered employees.

41. This provides a competitive advantage over employing a NDIS service provider businesses.

### **Summary**

42. I do not agree with the proposed Bill.
43. It is time to make, vary and review all Modern awards as demonstrated by the inconsistencies within the SCHADS award being mismatched with the requirements of the NDIS. This is just one problematic Modern award.
44. Mandating NDIS participants sleep between 10pm and 6am is discriminatory, inflating requirements for additional shifts while artificially inflating NDIS expenditure and regulatory burden.
45. Disability support businesses should not have to fund award conditions that are not funded by the NDIS and cannot be charged by the NDIS business to NDIS participants. The business should not have to absorb the loss.
46. Changes advocated in this submission will improve business efficiency through payroll processing efficiency while lessening the regulatory burden. Complies with FWC objective s134(1)f).
47. Increase productivity by only paying workers for shift work actually completed for a NDIS participant, which in turn will reduce NDIS participant expenditure and reducing the growth in NDIS funding. Both increased productivity gains and reduced NDIS expenditure are Government priorities. Complies with FWC objective s134(1)f).
48. The proposed Bill has no provision to legislate cost recovery for incorrect advice from the FWO for award overpayments acted upon by business.
49. The Modern Awards were introduced in 2010 and are some 15 plus years old. The world economic conditions and business conditions in Australia have evolved since then and the Modern Awards are “modern” in name only. The FWC should retain its independence to make, vary or revoke modern awards.