Australian Industry Group

Application for a Supported Bargaining Authorisation – Disability Services Industry

Submission

(B2023/1235)

15 March 2024

B2023/1235 APPLICATION FOR A SUPPORTED BARGAINING AUTHORISATION – DISABILITY SERVICES INDUSTRY

1. INTRODUCTION

1. This submission of the Australian Industry Group (**Ai Group**) relates to an application filed by the Health Services Union (Branch No. 2 Victoria) (**HACSU**) and the Australian Education Union – Victorian Branch (**AEU**) in the Fair Work Commission (**Commission**) for a supported bargaining authorisation (**SBA**). The submission is filed in accordance with amended directions issued by the Commission on 6 March 2024.

2. The application was originally filed on 9 November 2023 and was subsequently amended pursuant to an order of the Commission on 12 March 2024 [1] (**Application**).

3. Ai Group opposes the Application on the basis that it is not appropriate for the employers respondent to the Application to bargain together.

4. Ai Group urges the Commission to decline to make the SBA, for the reasons outlined in this submission.

[1] PR772281.

2. THE STATUTORY PROVISIONS

5. Section 243(1) requires the Commission to make a SBA if the criteria there stipulated are satisfied: (emphasis added)

> (1) The FWC must make a supported bargaining authorisation in relation to a proposed multi-enterprise agreement if:
>
> (a) an application for the authorisation has been made; and
>
> (b) the FWC is satisfied that it is appropriate for the employers and employees (which may be some or all of the employers or employees specified in the application) that will be covered by the agreement to bargain together, having regard to:
>
> (i) the prevailing pay and conditions within the relevant industry or sector (including whether low rates of pay prevail in the industry or sector); and
>
> (ii) whether the employers have clearly identifiable common interests; and
>
> (iii) whether the likely number of bargaining representatives for the agreement would be consistent with a manageable collective bargaining process; and
>
> (iv) any other matters the FWC considers appropriate; and
>
> (c) the FWC is satisfied that at least some of the employees who will be covered by the agreement are represented by an employee organisation.

6. Section 243(2) provides examples of *'common interests that employers may have'*:

> (2) For the purposes of subparagraph (1)(b)(ii), examples of common interests that employers may have include the following:
>
> (a) a geographical location;
>
> (b) the nature of the enterprises to which the agreement will relate, and the terms and conditions of employment in those enterprises;
>
> (c) being substantially funded, directly or indirectly, by the Commonwealth, a State or a Territory.

7. Where the Commission makes a SBA, s.243(3) specifies the matters the SBA is required to address:

> (3) The authorisation must specify:
>
> (a) the employers that will be covered by the agreement; and
>
> (b) the employees who will be covered by the agreement; and
>
> (c) any other matter prescribed by the procedural rules.

3. THE PROPER INTERPRETION OF SECTION 243

8. We here deal with the proper interpretation of various elements of s.243 of the Act.

9. The Commission has previously considered s.243 of the Act on only one occasion. In *Application by United Workers' Union, Australian Education Union and Independent Education Union of Australia* [2023] FWCFB 176 (***Long Day Care Decision***) the Commission determined to authorise supported bargaining for 64 consenting employer respondents and their employees engaged in work performed in a long day care setting covered by the *Children's Services Award 2010* and the *Educational Services (Teachers) Award 2020*.[2]

10. Accordingly, the Application appears to be only the second of its kind and the first to proceed without consent from the respondent employers.

Section 243(1)(a): Requirement for an Application

11. Section 243(1)(a) requires an application for a SBA to be made.

12. The Full Bench discussed this requirement in the *Long Day Care Decision*, as follows:

> The requirement for an application in paragraph (a) connotes an application that has validly been made in accordance with the requirements of s 242. This means that the application must have been made by a person with standing to do so under s 242(1), must specify the matters prescribed in s 242(2), and must not be made in relation to a proposed greenfields agreement in accordance with s 242(3).[3]

Section 243(1)(b): Application of a SBA & Coverage of a Proposed Agreement

13. Where an application for a SBA has been made, the employers and employees who would be covered by the proposed agreement must be clearly identified. This is evident from various aspects of the legislative provisions. For example:

[2] *Long Day Care Decision* at [1] – [2].

[3] *Long Day Care Decision* at [29].

(a) Section 243(1)(b) requires the Commission to determine whether it is appropriate for *'the employers and employees … that will be covered by the agreement'* to bargain together; and

(b) Section 243(3) requires that the employers and employees that will be covered by the proposed agreement must be specified in the SBA.

14. For the purposes of s.243(3):

(a) The relevant employers must be identified by name.[4]

(b) The relevant employees need not be identified by name; however, the class of employees must be described with sufficient specificity, such that they can be identified definitively and without doubt.

15. The scope of the parties who would be covered by a proposed SBA is a relevant consideration when determining whether the SBA should be made. It is conceivable that decisions about the scope or coverage of a proposed SBA will be made pragmatically by parties, with a view to limiting the impact of potentially divergent views amongst bargaining representatives being advanced during bargaining. Moreover, the scope of a proposed SBA could give rise to a raft of relevant discretionary considerations, depending on the circumstances of a particular matter. They could include:

(a) Any foreseeable potential impact of bargaining between the relevant parties on the economy, specific sectors and / or members of the community that rely upon services of the employers that will be covered by the proposed SBA; and

(b) The impact on other employers that might be said to have a common interest with those covered by the proposed SBA but who have been selectively excluded from the scope of any application. This should include a consideration of the possibility that such employers may subsequently be roped into the coverage of the SBA or any agreement ultimately made.

[4] Section 256A(3) of the Act.

Section 243(1)(b): Appropriateness of Making a SBA

16. Section 243(1)(b) of the Act requires the Commission to be satisfied it is '*appropriate*' for some or all of the respondent employers and their employees that will be covered by the proposed agreement to bargain together.

17. The assessment must be made having regard to the factors enumerated at ss.243(1)(b)(i) – (iv) of the Act. It should also involve a consideration of:

    (a) The objects of the Act;

    (b) The objects of Division 9 of Part 2-4 of the Act; and

    (c) The scheme of the Act as a whole, including the implications of making a SBA.

18. Critically, the objects of the Act continue to place an emphasis on enterprise-level collective bargaining; that is, bargaining in respect of terms and conditions that apply at a particular enterprise. Notably, in the *Long Day Care Decision*, the Commission accepted that enterprise-level bargaining is *'intended to be the primary and preferred mode of bargaining'*.[5]

Sections 243(1)(b): Having Regard to the Matters Listed

19. Section 243(1)(b) of the Act requires the commission to '*have regard to*' the matters listed in ss.243(1)(b)(i) – (iv). This is not, however, an exhaustive list of matters that may be relevant to the exercise of the Commission's discretion.

20. In the *Long Day Care Decision*, the Full Bench of the Commission determined:

> The consideration required under paragraph (b) of s243(1) requires a broad evaluative judgment to be made having regard to the matters specified in subparagraphs (i)-(iv). A requirement to have regard to a matter means that, insofar as it is relevant, it must be treated as a matter of significance in the decision-making process. However, no single matter in s 243(1)(b) is to be regarded as being determinative as to whether the requisite state of satisfaction is reached.[6]

[5] *Long Day Care Decision* at [41].

[6] *Long Day Care Decision* at [29].

21. Each of the factors identified in s.243(1)(b) must be *meaningfully* weighed. In some cases, the Commission may not be in a position to have regard to the matters identified at s.243(1)(b), because there is insufficient material before it about the relevant issue(s). For instance, in the absence of evidence about the *'prevailing pay and conditions within the relevant industry or sector'*, *'including whether low rates of pay prevail'*, the Commission may not be in a position to properly take into account the matters articulated at s.243(1)(b)(i).

22. If the Commission is not properly informed in relation to any of the mandatory considerations, it follows that, respectfully, it cannot reach the requisite degree of satisfaction required to invoke its power to make a SBA. That is, the Commission cannot be satisfied that it is appropriate to make a SBA if it is unable to have regard to any of the mandatory considerations. In such circumstances, its assessment as to whether it would be appropriate for the relevant employers and employees to bargain together would be fundamentally incomplete and therefore, it would not have jurisdiction to make a SBA.

23. Any limitation on the capacity of the Commission to robustly assess the matters that it is directed to take into account, either as a product of deficiencies in the material put before it or limitations on its capacity to ascertain relevant information on its accord, is a factor that will, at the very least, weigh against the granting of an application.

Section 243(1)(b)(i): The Prevailing Pay and Conditions

24. The first of four matters to which the Commission is required to have regard pursuant to s.243(1)(b)(i) is '*the prevailing pay and conditions within the relevant industry or sector (including whether low rates of pay prevail in the industry or sector)*'.

25. Relevantly, the Full Bench said the following regarding '*prevailing rates of pay and conditions within the relevant industry or sector*' in the *Long Day Care Decision*:

[30] *Second*, the consideration identified in s 243(1)(b)(i) requires us to have regard to the 'prevailing pay and conditions within the relevant industry or sector'. The reference to 'the relevant industry or sector' plainly indicates that the assessment required will extend beyond the pay and conditions of the employees to whom the authorisation sought will apply (unless the authorisation sought would encompass the entirety of the relevant industry or sector). That will mean that, in the normal course, an applicant for an authorisation might be expected to adduce evidence concerning prevailing pay and conditions within the relevant sector. 'Prevailing' is to be given its ordinary meaning; that is, 'predominant' or 'generally current'.

[31] The words in parentheses in s 243(1)(b)(i) require consideration to be given as to whether 'low rates of pay' prevail in the industry or sector. It is to be noted that the legislature has chosen to use the expression 'low rates of pay' rather than refer to the 'the low paid' — the expression used in the former low-paid bargaining scheme, and also currently used in ss 134(1)(a) and s 284(1)(c). This indicates that some distinction in meaning is intended. 'Low paid' connotes the earnings of employees generally, but 'low rates of pay' has a more confined meaning that refers only to the amount an employee is paid for each defined period of working time (for example, an hour, day or week) or, in the case of pieceworkers, for each completed task or unit of work. The use of this different expression indicates that the approach adopted in the *Practice Nurses decision* and *United Voice* whereby 'low paid' was given the same meaning in s 243 as it had been in Annual Wage Review decisions made by reference to ss 134(1)(a) and 284(1)(c), with the benchmark being two-thirds of median adult ordinary-time earnings, should no longer be followed.

[32] We consider that, *prima facie*, 'low rates of pay' will prevail in an industry or sector if employees are predominantly paid at or close to the award rates of pay for their classification, since this is the lowest rate legally available to pay. This is implicit from the objects of the supported bargaining scheme in s 241, including to assist and encourage employers and employees to bargain and make agreements to meet their needs and to address constraints on their ability to do so. The needs of employees who are paid at award rates include improving their terms and conditions of employment in circumstances where there have been constraints on their ability to bargain. It is also implicit that supported bargaining is a means to assist employers and employees who have been constrained from bargaining to access productivity benefits, consistent with the overarching objects in s 171. Further, this approach finds some support in paragraph [984] of the REM which, in relation to s 243(1)(b)(i), states:

> … the prevailing pay and conditions in the relevant industry – this is intended to include whether low rates of pay prevail in the industry, whether employees in the industry are paid at or close to relevant award rates, etc;…

[33] However, in a particular case, it may be that a prevailing rate of pay which is at or close to the relevant award rate cannot be characterised as a 'low rate of pay' because the award rate itself is relatively high. For the reasons set out later in this decision, it is not necessary for us to consider this possibility in this matter, and it is best left for fuller consideration in an appropriate case.[7]

[7] *Long Day Care Decision* at [30] – [33].

Section 243(1)(b)(ii): Clearly Identifiable Common Interests

26. The second of four matters to which the Commission is required to have regard pursuant to s.243(1)(b) is '*whether the employers have clearly identifiable common interests*'.[8]

27. Section 243(2) relevantly provides:

> *Common interests*
>
> (2) For the purposes of subparagraph (1)(b)(ii), examples of common interests that employers may have include the following:
>
> (a) a geographical location;
>
> (b) the nature of the enterprises to which the agreement will relate, and the terms and conditions of employment in those enterprises;
>
> (c) being substantially funded, directly or indirectly, by the Commonwealth, a State or a Territory.

28. In the *Long Day Care Decision*, the Full Bench compared the examples of '*clearly identifiable common interests*' in s.243(2) of the Act to the previous requirement in the low-paid bargaining stream for the Commission to take into account '*the degree of commonality in the nature of the enterprises to which the agreement relates, and the terms of employment in those enterprises*'.[9] The Full Bench concluded that the list of examples in s.243(2) of the Act '*indicates that a broader range of circumstances may be taken into account in accessing commonality of interests*'.[10]

29. The Full Bench went on to state:

> **[34]** Third, the expression 'common interests' used in s 243(1)(b)(ii) in connection with the employers the subject of an authorisation application is one of wide import, and on its ordinary meaning extends to any joint, shared, related or like characteristics, qualities, undertakings or concerns as between the relevant employers. The diversity of the non-exhaustive list of 'examples' of common interests in s 243(2) gives contextual support to the breadth of meaning which we assign to the expression. The common interests

[8] Section 243(1)(b)(ii) of the Act.

[9] This requirement was contained in section 243(2)(e) of the Act prior to the amendments made to s.243 by the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth).

[10] *Long Day Care Decision* at [27](3).

must be 'clearly identifiable', that is, plainly discernible or recognisable, but need not be self-evident.

30. The above statement was subsequently adopted by the same Full Bench when considering a very similar requirement in s.249(3)(a) of the Act, in the context of an application for a single interest employer authorisation.[11]

31. The Full Bench in the *Long Day Care Decision* also considered there to be force in the proposition that use of the plural expression *'common interests'* indicated a contrary intention to the expression being able to be read in the singular (and as a corollary, that it mandates a need for there be more than one common interest) but did not consider it necessary to determine the issue.[12]

32. In our submission, the existence of a common interest (or multiple common interests) cannot, of itself, satisfy the Commission that it is appropriate to make a SBA. For instance, it cannot be accepted that four businesses located in the same geographic location (e.g. on the same street, in the same suburb), each operating in different sectors, providing wholly different types of services, have a common interest that warrants the making of a SBA. The mere identification of a common interest (or interests) would not be enough to establish that a SBA must be made. Rather, when assessing the significance of a common interest and the extent to which it supports the making of a SBA, the Commission should also have regard to:

    (a) The nature of the interest;

    (b) The relevance that it has to the setting of employees' terms and conditions; and

    (c) The extent to which it relates to the employers' operational requirements and realities.

[11] *Independent Education Union of Australia v Catholic Education Western Australia Limited and others* [2023] FWCFB 177 at [14](2) and [31] – [32].

[12] *Long Day Care Decision* at [35].

33. Similarly, that a group of employers are *'substantially funded … by the Commonwealth'*[13] may not of itself be enough to satisfy the Commission of the appropriateness of making a SBA. There are various types of funding afforded by the Commonwealth to different industries and, in some cases, within industries. Different funding models can operate in different ways and have differing implications for employers and employees. For instance, whilst the provision of home care to an aged person and a person with a disability are both funded by the Commonwealth, they are subsidised through fundamentally different programs that allocate funding to employers on different bases and in different ways. The specific implications of relying on such funding in respect of disability workers are different from the implications in respect of the provision of aged care in private residences.

34. Further, a group of employers receiving funding from the same source may not have a common interest that supports the making of a SBA because, for instance, some rely solely on that funding whilst others have access to other income streams. Alternatively, various organisations funded by one source may provide different types of services.

35. Similarly, the fact that a group of employers are required to comply with the same set of regulatory requirements may not justify the making of a SBA. Whether or not this is so will necessarily depend on the specific facts of the matter.

36. The Commission should adopt a careful and nuanced approach to evaluating any purported common interests.

37. Additionally, only the *'clearly identifiable common interests'* common to *all* of the employers proposed to be included in the SBA will be relevant. The provision requires a consideration of whether the *'employers'* – that is, the employers proposed to be covered by the SBA – have *'clearly identifiable common interests'*. Common interests that relate to only some but not all of the relevant employers would not be relevant for the purposes of s.243(1)(b)(ii).

[13] Section 243(2)(c) of the Act.

38. Finally and for completeness, consistent with the Supplementary Explanatory Memorandum to the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022* (**Bill**), when considering the *'nature of the enterprises'*, as contemplated by s.243(2)(b), factors such as the *'relative size and scope of the enterprises would be relevant'*.[14]

Section 243(1)(b)(iii): The Number of Bargaining Representatives

39. The third matters to which the Commission is required to have regard pursuant to s.243(1)(b) is *'whether the likely number of bargaining representatives for the agreement would be consistent with a manageable collective bargaining process'*.[15]

40. In circumstances where an authorisation is sought in relation to a narrow cohort of parties and there is a small number of representatives, this matter is not likely to weigh against the granting of a SBA. If a SBA could cover a wider range of parties with a greater number of representatives, the significance of this issue will be much greater.

41. The Full Bench considered this requirement in the *Long Day Care Decision* and stated: (emphasis added)

> **[36]** Fourth, s 243(1)(b)(iii) is concerned with whether the likely number of bargaining representatives is consistent with a 'manageable' — that is, workable or tractable — collective bargaining process. This requires an assessment to be made which is to some extent speculative or predictive, since the choice of bargaining representative by the relevant employers and employees may not be known at the time an application for an authorisation is considered, and weight has to be given to the scope of their capacity to choose, and change, their bargaining representatives under s 176 of the FW Act. However, the consideration required is what is 'likely' — that is, probable to happen — not what may possibly happen. Any past history of bargaining, representation at the hearing of the authorisation application, and any sameness or diversity of views amongst employees and employers concerning the prospect of multi-employer bargaining may all inform the assessment to be made. However, we do not consider that the prospect of an agreement being reached if an authorisation is made to be a significantly relevant consideration since s 243(1)(b)(iii) is concerned with the collective bargaining *process*, not the *outcome*.

[14] Supplementary Explanatory Memorandum at [161].

[15] Section 243(1)(b)(iii) of the Act.

Section 243(1)(b)(iv): Any Other Matters

42. The final of the four matters to which the Commission is required to have regard pursuant to s.243(1)(b) is *'any other matters the [Commission] considers appropriate'*.[16] It casts a wide net.

43. In the *Long Day Care Decision*, the Full Bench stated as follows:

> **[37]** Fifth, s 243(1)(b)(iv) gives the Commission a broad discretionary scope as to the relevance and weight of other matters to be taken into account. The applicable objects of the FW Act in ss 3, 171 and 241 will guide the Commission in identifying those matters which may appropriately be taken into account, as will the circumstances of the particular case.

44. To some extent, the matters that the Commission must take into account pursuant to s.243(2)(b)(iv) will differ between applications for SBAs, depending on the matters in issue in each set of proceedings, the circumstances of the relevant employers and employees, the context in which the application has been brought, the characteristics of the industry or sector in which the employers and employees are engaged, etc.

45. Nonetheless, we apprehend that it will typically, if not always, be appropriate for the Commission to take the following matters into account.

46. *First,* the views of the employers who would be covered by the proposed agreement. This is a matter that should be given significant weight.

47. We note that the Revised Explanatory Memorandum for the Bill relevantly says as follows in this regard: (emphasis added)

> 983. … In determining whether it is appropriate for the employers and employees to bargain together, it will be relevant for the Fair Work Commission to consider whether any employee organisation or employer supports this course of action. …
>
> 984. When considering whether it is appropriate for the employer and employees to bargain together, the FWC would have regard to:
>
> …

[16] Section 243(1)(b)(iv) of the Act.

• any other matters the FWC considers appropriate – this may include considering the views of the bargaining representatives.[17]

48. It was a matter taken into account by the Full Bench in the *Long Day Care Decision* and in respect of which the Full Bench stated as follows:

> **[54]** We consider it appropriate to have regard to four additional matters. The first is that all the affected employers support the application and none of the employees that would be affected has advised us that they oppose the making of the authorisation sought. This is of significance having regard to the prohibition upon employers engaging in bargaining for any type of agreement other than a supported bargaining agreement once an authorisation is in operation (s 172(7)(b)), and weighs in favour of making the authorisation.

49. To legal position described in the passage above has changed somewhat, by virtue of the *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* (Cth) (**Closing Loopholes No. 2 Act**), which was enacted subsequent to the *Long Day Care Decision*.

50. The Closing Loopholes No. 2 Act amended the Act so as to now permit an employer to bargain to replace a supported bargaining agreement (once made) with a single-enterprise agreement. This pathway is available only where each employee organisation to whom the supported bargaining agreement applies agrees to this course in writing, if the agreement is within its nominal term.[18] Additionally, any such single-enterprise agreement must leave employees better off overall compared to the supported bargaining agreement (as compared to the underpinning reference award(s), which is the usual comparator for the better off overall test).[19]

51. In any event, it remains the case under s.172(7)(b) of the Act (being the provision to which the Full Bench referred in its statement above) that an employer must not bargain for any other type of agreement than a supported bargaining agreement, once named in an authorisation.

[17] Revised Explanatory Memorandum at [983] – [984].

[18] Section 180B of the Act.

[19] Section 193(1) of the Act.

52. Accordingly, the Full Bench's comments at [54] of the *Long Day Care Decision* remain apposite in light of s.172(7)(b) of the Act and further, given the significant difficulties the new provisions will potentially pose for employers who wish to extract themselves from a supported bargaining agreement by making a single-enterprise agreement.

53. *Second,* any history of bargaining between the relevant employers and employees.

54. *Third,* any intention or efforts to make a single-enterprise agreement amongst the relevant employers and employees.

55. Where any of the employers and employees have previously engaged in enterprise bargaining and the relevant agreement has passed its nominal expiry date, the Commission should be reluctant to name them in a SBA, particularly where they do not wish to be covered by the proposed agreement and / or if they intend to engage in bargaining for a new single-enterprise agreement. Consistent with the scheme of the Act and the limited purpose for which the supported bargaining scheme has been created, such employers and employees should not lightly be required to be party to a multi-enterprise agreement. This is particularly relevant because once an employer is named in a SBA that is in operation, it can only make a supported bargaining agreement with the relevant group of employees.[20] The employer is prohibited from initiating bargaining or agreeing to bargain with those employees or their representatives for a single-enterprise agreement.[21] Further, for the reasons explained above, the Act does not provide for a workable pathway back to single-enterprise agreements once an employer is covered by a SBA or a supported bargaining agreement.

[20] Section 172(7)(a) of the Act.

[21] Section 172(2)(b) of the Act.

56. Depending on the circumstances of a given matter, it may also be appropriate to take into account the following:

(a) Where there is a third party *'who exercises such a degree of control over the terms and conditions of the employees who will be covered by the agreement'* that their participation in bargaining is *'necessary for the agreement to be made'*,[22] or there is some other third party who directly or indirectly funds the employers who would be covered by the agreement; the willingness, capacity and ability of that other party to provide the requisite support, assistance, funding etc, that would enable an improvement in the terms and conditions afforded by the employers to the employees.

(b) Any potential implications for the customers, clients or other users of the employers' products or services.

(c) Any potential implications for other employers and employees who work in the same supply chain as those that are the subject of the application.

(d) Whether the making of a multi-enterprise agreement may unfavourably distort the labour market, by delivering significantly enhanced conditions to certain cohorts of workers *vis-à-vis* others who, for example, work alongside the relevant employees and undertake work that is substantially similar in nature.

(e) The size of each of the respondent employers.[23]

[22] Section 246(3) of the Act.

[23] *Long Day Care Decision* at [57].

4. RESPONSE TO THE APPLICATION

57. We now turn to particularise Ai Group's principal bases for opposing the Application, and in doing so, respond to the:

    (a) Outline of submissions filed by the Australian Council of Trade Unions (**ACTU**) on 2 February 2024 (**ACTU Submission**);

    (b) Outline of submissions filed by HACSU on 2 February 2024 (**HACSU Submission**);

    (c) Witness statement of Angela Carter dated 2 February 2024 (**Carter Statement**);

    (d) Outline of submissions filed by the AEU on 2 February 2024 (**AEU Submission**); and

    (e) Witness statement of Elaine Gillespie dated 2 February 2024 (**Gillespie Statement**).

Section 243(1)(b)(ii): Common Interests

58. The material filed by the applicants does not disclose clearly identifiable common interests that would render it appropriate for the respondents to be required to bargain together.

59. Further, contrary to the unions' assertions, there are key differences with respect to the terms and conditions of employment applying at the respondents' enterprises. There is also an absence of evidence as to commonality in the nature of the respondents' enterprises. These matters undermine the unions' contention that it is appropriate that the relevant employers bargain together.

60. Each of these contentions are outlined in more detail, below.

The Common Interests Identified by the Applicants

61. The AEU asserts that the respondent employers have common interests insofar as:

    (a) They (and their employees) are based in Victoria;[24]

    (b) The disability support work provided by the respondent employers and their employees is funded by the National Disability Insurance Scheme (**NDIS**);[25]

    (c) As NDIS service providers, they are regulated by the NDIS Quality and Safeguards Commission;[26] and

    (d) Where the respondent employer is or was covered by a zombie agreement, the employees performing day-service work have the same terms and conditions of employment.[27]

62. HACSU argues that there is an overriding common interest in this case – being that all of the respondent employers operate disability services businesses and employ staff to perform disability support work in those services[28] - which purportedly gives rise to a number of concomitant common interests. The asserted common interests are said to be:

    (a) Common rates of pay aligned to the *Social, Community, Home Care and Disability Services Industry Award 2010* (**SCHCDS Award**);[29]

    (b) '*(T)he same or substantially the same*' terms and conditions based on zombie agreements, a number of which are said to exceed SCHCDS Award terms and conditions;[30] and

[24] AEU Submission at [39](a).
[25] AEU Submission at [39](b).
[26] AEU Submission at [39](c).
[27] AEU Submission at [39](d).
[28] HACSU Submission at [47].
[29] HACSU Submission at [47](a).
[30] HACSU Submission at [47](b) and (c).

(c) Being registered NDIS providers covered by a common regulatory framework[31] and subject to common funding arrangements (namely, the NDIS).[32]

63. HACSU identifies various other common interests as including:

(a) The respondent employers' capacity to bargain being impacted by NDIS funding;[33]

(b) The provision of disability services in Victoria;[34]

(c) The respondents predominantly employ women;[35]

(d) A need to develop the skills, knowledge and abilities of the respondents' employees to improve their performance, productivity and capabilities;[36]

(e) The need to attract and retain a skilled and quality workforce to ensure their businesses remain viable;[37] and

(f) Being subject to the authority and regulatory powers of the Victorian Disability Workers Commission.[38]

64. In a similar vein, the ACTU points to a common interest arising from each of the respondent employers operating disability services businesses within the same industry, giving rise to concomitant interests in the form of the same award coverage, a common regulatory framework and common funding

[31] HACSU Submission at [47](d).
[32] HACSU Submission at [47](e).
[33] HACSU Submission at [49](i).
[34] HACSU Submission at [49](ii).
[35] HACSU Submission at [49](iii).
[36] HACSU Submission at [49](iv).
[37] HACSU Submission at [49](v).
[38] HACSU Submission at [49](vi).

arrangements.[39] The ACTU submits that the strength of these common interests weigh in favour of granting the Application.[40]

65. We respond to the applicants' assertions regarding commonality in employees' conditions of employment (as referred to at [61(d) and [62(a) and 62(b) above) at [69] – [75] of this submission. Briefly stated, they are either overstated or unsupported by evidence and as such, cannot be said to form the basis of a common interest between all fourteen respondents.

66. Nor do the balance of the common interests identified by the unions justify a finding of appropriateness in relation to the making of a SBA. As we set out earlier in this submission, the mere identification of common interests should not of themselves be accepted as sufficient to justify a conclusion that it is appropriate for employers with those common interests to be required to bargain together. Rather, consideration should be given to the *nature* of those interests, the relevance they have to the setting of employees' terms and conditions of employment, and the extent to which they relate to the employers' operational requirements and realities, in order to assess the extent to which they are relevant to the question of *appropriateness*.

67. More specifically; it is self-evident that a large number of employers may be said to have the following common interests:

    (a) They provide disability services;

    (b) The services they provide are funded by the NDIS; and

    (c) They are subject to a common regulatory framework.

68. It cannot be accepted that it would be appropriate for all employers with the above interests to bargain together. The same could be said of employers who have the above common interests and operate in the same geographic area.

[39] ACTU Submission at [50] – [51].

[40] ACTU Submission at [52].

Countless employers would potentially have those characteristics. It does not follow that it would be appropriate for them all to bargain together.

The Terms and Conditions of Employment

69. The AEU and HACSU argue that a common interest arises from the terms and conditions of employment in the enterprises of the respondent employers, because:

    (a) A number of the employer respondents currently have, or have previously had, a zombie agreement that applies to their workforce,[41] and

    (b) Those zombie agreements have *'the same or substantially the same'* terms and conditions as one another, including a number of entitlements that are above the level provided for in the SCHCDS, Award but with rates of pay aligned to the SCHADS Award.[42]

70. The unions' submissions in this respect are either unsupported by evidence or overstate the degree of commonality between the respondent employers and as such, fail to identify a level of commonality in the applicable terms and conditions of employment that might justify the appropriateness of making a SBA.

71. A number of observations may be made regarding the extent to which the zombie agreements evidence *'common'* terms and conditions of employment within the enterprises of the respondent employers.

72. *First*, the AEU has provided a bundle comprising of 14 zombie agreements, made to cover the 14 respondent employers[43]; however, it appears that three of those agreements no longer apply to the employer it is expressed to cover.

[41] HACSU Submission at [47](a) and (b); AEU Submission at [39](d).

[42] HACSU Submission at [47](a) – (c); AEU Submission at [39](d).

[43] 'AEU Zombie Bundle' filed by the AEU on 2 February 2024. See also Gillespie Statement at [32]. Whilst the Gillespie Statement appears to indicate there are 15 zombie agreements, this does not appear to be consistent with Table 1 set out under paragraph [32] of the Gillespie Statement, nor the contents of the AEU Zombie Bundle.

73. The AEU's assertion that '*[w]here a Relevant Employer <u>is, or was</u>, covered by an AEU Zombie Agreement, the employees performing day-service work <u>have the same</u> terms and conditions of employment'*[44] (emphasis added) is utterly inaccurate. Even where the terms and conditions in particular zombie agreements were identical, in circumstances where a zombie agreement still applies to one employer but has ceased to apply to another, it is incorrect to say that the employees of those employers '*have*' (present tense) the same terms and conditions in so far as one employer '*was*' (past tense) covered by a zombie agreement and the other '*is*' (present tense) still covered. In our submission, commonality in terms and conditions of employment should be assessed as those terms and conditions apply at the time the Application is being considered. In any event, as we explain below, the terms of all 14 zombie agreements are not the same.

74. *Second,* both the AEU and HACSU have identified points of commonality amongst the zombie agreements.[45] Ai Group makes the following observations in response:

    (a) Across the overall group of respondent employers, there appear to be three separate subsets of employers who have *'the same'* terms and conditions of employment. These include:

        (i) Employers to whom the SCHADS Award appears to apply (**SCHADS Award Employers**).

            There are three SCHADS Award Employers. They are:

            (A) Amicus Community Services Limited;

            (B) Dame Pattie Menzies Centre Inc; and

            (C) Mambourin Enterprises Ltd.

[44] AEU Submission at [39](d)

[45] AEU Submission at [39](d); Gillespie Statement at [39]; HACSU Submission at [47](b).

Each of the SCHCDS Award Employers previously had a zombie agreement that applied to their workforce, which is included in the '*AEU Zombie Bundle'* filed by the AEU on 2 February 2024.[46]

However, there is no evidence of any application having been made to extend the period of operation of these zombie agreements,[47] and the Gillespie Statement identifies the zombie agreements of the three SCHCDS Award Employers as having expired (which we understand to be intended to be a reference to the agreement having ceased to operate rather than nominally expired).[48]

None of the SCHCDS Award Employers appear on the Commission's database of enterprise agreements pending approval or made.[49]

As the applicants assert that the proposed SBA relates to employees of the respondent employers who perform work covered by the SCHCDS Award,[50] it follows that in the absence of any registered agreement operating so as to displace its application, the SCHADS Award appears to apply to these employers' workforces to whom the proposed authorisation relates.

[46] Being the *Amicus Group Disability Services Victoria (Part 1) Collective Agreement 2008*, *Dame Pattie Menzies Centre Disability Services Victoria (Part 1) Collective Agreement 2008*, and *Mambourin Enterprise Inc Disability Services Victoria (Part 1) Collective Agreement 2008*.

[47] The names of the three SCHADS Award Employers do not appear on the Commission's '*List of pre-2010 agreements – extended or pending extension application*' (available at https://www.fwc.gov.au/documents/agreements/resources/list-of-pre-2010-agreements-extended-or-pending-extension-application.xlsx) nor the Commission's list of zombie agreements extended past 7 December 2023 (available at https://www.fwc.gov.au/agreements-awards/enterprise-agreements/sunsetting-pre-2010-agreements/zombie-agreements-extended).

[48] Gillespie Statement at [32]. See Items 1, 8 and 12 of Table 1. Summary of zombie agreements. We assume the reference to the zombie agreements expiring is not a reference to 'nominal expiry date' given the statement at [33] of the Gillespie Statement that the nominal expiry date for each AEU zombie agreement was 30 June 2009; and further, given the operation of Item 20A(1) of Schedule 3 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth).

[49] Based on searches undertaken using the employer named identified in Table 1 at [33] of the Gillespie Statement, in the Commission's 'Agreements in Progress' and 'Document Search' databases.

[50] AEU Submission at [3].

(ii) Employers to whom a zombie agreement negotiated in or around 2005 applies (**2005 Agreements**), the terms of which appear to be the same as one another (but not the same as the SCHCDS Award or the 2008 Agreements) (**2005 Agreement Employers**).

There are three 2005 Agreement Employers. They are:

(A) Milparinka Adult Training Unit Inc;[51]

(B) Mirridong Services Inc;[52] and

(C) Windarring Limited.[53]

(ii) Employers to whom a zombie agreement negotiated in or around 2008 applies (the **2008 Agreements**), the terms of which appear to be the same as one another (but not the same as the SCHADS Award or the 2005 Agreements) (**2008 Agreement Employers**).

There are seven 2008 Agreement Employers. They are:

(A) Asteria Services Inc[54]

(B) Aurora Support Services Inc;[55]

(C) Community Accessibility Inc;[56]

[51] The relevant zombie agreements is the *Milparinka Inc Disability Services Victoria (Part 1) Enterprise Agreement 2005*.

[52] The relevant zombie agreement is the *Mirridong Services Inc Disability Services Victoria (Part 1) Enterprise Agreement 2005.*

[53] The relevant zombie agreement is *Windarring ATSS Disability Services Victoria (Part 1) Enterprise Agreement 2005.*

[54] The relevant zombie agreement is the *Asteria Services Inc Disability Services Victoria (Part 1) Collective Agreement 2008.*

[55] The relevant zombie agreement is the *Whittlesea District ATSS Disability Services Vic Collective Agreement.*

[56] The relevant zombie agreement is the *Murray Valley Centre Disability Services Victoria (Part 1) Collective Agreement 2008.*

(D) George Gray Centre Inc;[57]

(E) Life Skills Victoria Inc;[58]

(F) McCallum Disability Services Inc;[59] and

(G) Noweyung Ltd.[60]

(iii) There is also one further employer – Distinctive Options – with an agreement in terms that are not the same as the 2005 Agreements or 2008 Agreements.[61]

(b) On our review, some of the terms and conditions asserted as being common to all of the zombie agreements only appear to be common across the 2008 Agreements and 2005 Agreements. This includes, for example, the entitlements to:

(i) Five hours' weekly non-contact time for full-time employees and pro-rata for part-time and casual employees[62]. The *Distinctive Options Day Services Collective Agreement 2006 – 2009* (**Distinctive Options Agreement**) does not contain a term dealing with non-contact time; and

(i) Four professional development and program development days for instructors to plan programs and their professional development[63]. The Distinctive Options Agreement provides Disability Day Services Practitioners with an entitlement to a minimum of three program

[57] The relevant zombie agreement is the *George Gray Centre Disability Services Victoria (Part 1) Collective Agreement 2008.*

[58] The relevant zombie agreement is the *Moe Life Skills Community Centre Disability Services (Part 1) Collective Agreement.*

[59] The relevant zombie agreement is the *McCallum Disability Services Disability Services Victoria (Part 1) Collective Agreement 2008.*

[60] The relevant zombie agreement is the *Noweyung Ltd Disability Services Victoria (Part 1) Collective Agreement 2008.*

[61] The relevant agreement is the *Distinctive Options Day Services Collective Agreement 2006 – 2009.*

[62] Gillespie Statement at [39](a).

[63] Gillespie Statement at [39](b).

development days per annum with such days being used for program development purposes.[64]

75. *Third*, in response to the assertion that the terms of the zombie agreements in relation to the shift allowance, first aid allowance and sleepover allowance are more generous than the SCHADS Award[65] we have not identified the existence of above-award entitlements to this effect in the relevant instruments.

76. *Lastly,* we include as **Attachment A** to this submission, analysis of the terms and conditions contained in the 2008 Agreements, 2005 Agreements, SCHCDS Award and Distinctive Options in relation to the following matters:

    (a) Ordinary hours of work (including span of ordinary hours, hours averaging periods, maximum shift length, maximum ordinary hours per week and arrangements for weekend work);

    (b) Minimum engagement periods;

    (c) Personal leave;

    (d) Annual leave;

    (e) Shift allowances;

    (f) First aid allowance;

    (g) Sleepover allowance;

    (h) Make-up pay, and

    (i) Redundancy pay.

77. As is evident from that analysis, there are differences across the four categories of instruments (and by extension, the four categories of respondent employers) such that there is no single, common standard.

[64] Clause 19.1 of the Distinctive Options Agreement.

[65] HACSU Submission at [8] and [47](c); Carter Statement at [24].

The Nature of the Respondents' Enterprises

78. The unions' case regarding the nature of the respondent employers' enterprises dose not rise beyond bare assertions that each of them:

    (a) Operate disability services businesses (to which common funding and regulatory arrangements apply), in which disability support workers are employed to provide those services;[66] and

    (b) Employ predominantly women.[67]

79. Neither HACSU nor the AEU have provided any evidence in relation to the nature of the respondent employers' operations. It is not addressed at all in the Carter Statement, whilst the Gillespie Statement simply states it is understood the relevant employers will provide evidence in the proceedings as to the nature of their enterprises.[68]

80. The nature of the enterprises of the respondent employers' is clearly a matter that is potentially relevant to the employment arrangements within those enterprises. Operational differences are likely to give rise to a need for different types of employment arrangements – for example, with respect to the way in which labour is utilised or required to be deployed.

81. On the basis of the material before it, the Commission cannot conclude that the respondent employers' operations are sufficiently similar so as to be satisfied that it is appropriate that they bargain together.

Section 243(1)(b)(iii): The Likely Number of Bargaining Representatives

82. The AEU notes that some (not all) of the employer respondents have legal representation in relation to these proceedings, [69] whilst others have not

[66] HACSU Submission at [47]; AEU Submission at [39](b) and (c).

[67] HACSU Submission at [49](iii). The AEU Submission at [42](b) and ACTU Submission at [63](c) make more generalised submissions concerning the highly feminised nature of the sector without specific reference to the workforce composition of the respondent employers.

[68] Gillespie Statement at [40].

[69] AEU Submission at [41]; Gillespie Statement at [16].

appointed a bargaining representative.[70] The fact that some of the respondent employers are represented in relation to proceedings relating to the SBA does not of itself establish that those employers will be represented during any bargaining process. Rather, on its face, it appears likely that the respondent employers will participate separately in the bargaining process; some with and others without representation. This may be contrasted to the circumstances of the matter considered in the *Long Day Care Decision*, in which a large number of respondents had appointed a small number of bargaining representatives and there was only one large employer who represented itself.[71]

83. In the *Long Day Care Decision*, the Full Bench noted that (amongst other things) *'any sameness or diversity of views amongst employees and employers concerning the prospect of multi-employer bargaining may (all) inform the assessment to be made*' for the purpose of s.243(1)(b)(iii).[72] Accordingly, in considering whether for the purpose of s.243(1)(b)(iii) the collective bargaining process will be '*manageable*', it is relevant to consider the likely complexion of the negotiation, where a majority (if not all) employers are opposed to bargaining together. This is a factor which weighs against the likely manageability of bargaining.

84. Finally, HACSU speculates that bargaining may proceed in an efficient manner if it were to follow a similar course with respect to the manner in which it has negotiated multi-enterprise agreements in the past. It does not, however, particularise any reasons why it may reasonably be anticipated to proceed in a similar fashion.[73]

Section 243(1)(b)(iv): Other Matters

85. For the purposes of s.243(1)(b)(iv), Ai Group submits that the attitude of the respondents towards the Application tells strongly against its making. To our

[70] Gillespie Statement at [16].

[71] *Long Day Care Decision* at [2].

[72] *Long Day Care Decision* at [36].

[73] HACSU Submission at [53] – [55].

knowledge, many if not most of the respondent employers do not support the Application.

86. In contrast to the circumstances in the *Long Day Care Decision*, there is no evidence in this matter that the respondent employers support the making of the SBA.[74]

87. Instead, the evidence and submissions put by the AEU and HACSU is to the effect that the response to correspondence sent by HACSU to thirteen of the respondent employers during the period July - August 2023 which (amongst other things) enquired '*whether there might be any interest in making a joint supported bargaining application*' was not positive:

> The Respondents either did not respond, advised they were not interested in bargaining or did not provide a firm commitment to want to explore bargaining further.[75]

88. The ACTU acknowledges that the presence of consent between the parties to a proposed SBA will weigh in favour of making it, but argues that the absence of consent amongst respondent employers should not weigh *against* a SBA.[76]

89. The tenor of the ACTU's submission is that the absence of consent should be treated as a neutral consideration. We disagree. In the *Long Day Care Decision*, the Full Bench noted that all of the specified employers supported the making of the authorisation sought by the applicants[77] and concluded that the absence of opposition to the SBA by any of the affected employers or employees was '*of significance*'.

90. In this matter, the corollary must be true. The absence of support is of significance.

[74] *Long Day Care Decision* at [2].

[75] HACSU Submission at [10]; Carter Statement at [24] – [25] and Annexure AC3.

[76] ACTU Submission at [76].

[77] *Long Day Care Decision* at [2].

ATTACHMENT A

Analysis of terms and conditions in industrial instruments applying to Respondent Employers

Respondent Employer Groups	**2008 Agreement**	**2005 Agreement**	***Social, Community, Home Care and Disability Services Industry Award 2010* (SCHADS Award) Employers**	**Distinctive Options Day Services Collective Agreement 2006 – 2009 (Distinctive Options Agreement)**
Respondent Employers in each Group	Asteria Services Inc. Aurora Support Services Inc Community Accessibility Inc George Gray Centre Inc Life Skills Victoria Inc McCallum Disability Services Inc Noweyung Ltd	Milparinka Adult Training Unit Inc Mirridong Services Inc Windarring Limited	Amicus Community Services Limited Dame Pattie Menzies Centre Inc Mambourin Enterprises Ltd	Distinctive Options
Entitlement **Ordinary hours of work (employees employed on or after the date of lodgement of the Agreement, or by agreement)**	**Ordinary hours and averaging period:** Ordinary hours are an average of 38 per week, averaged either fortnightly or 4-weekly. **Span of ordinary hours:** Ordinary hours are to be worked 7am - 10pm, Monday to Sunday, unless otherwise agreed between the employee and employer. **Maximum shift length:** The span of ordinary hours must not exceed 12 in any one day. **Maximum ordinary hours per week:**	**Ordinary hours and averaging period:** Ordinary hours are 152 per 4 week period. **Span of ordinary hours:** Ordinary hours are to be worked between 7:30am - 7:30pm, Monday to Friday, as either: • 20 days of not more than 7.6 consecutive hours each; or • a maximum of 9 consecutive hours in any 1 day with a maximum average of 38 hours per week over a 4 week period by providing RDOs; or • by mutual agreement, any other arrangement provided the length of any ordinary day shall not exceed 12	**Ordinary hours and averaging period:** Ordinary hours are 38 per week or an average of 38 per week worked either: • in a week of five days in shifts not exceeding eight hours each; • in a fortnight of 76 hours in 10 shifts not exceeding eight hours each; or • in a four week period of 152 hours to be worked as 19 shifts of eight hours each, subject to practicality. **Span of ordinary hours:**	**Ordinary hours and averaging period:** Ordinary hours are 152 per 4 week period. **Span of ordinary hours:** Ordinary hours are to be worked between 7am - 10pm, Monday to Friday, worked as either: • 20 days of not more than 7.6 consecutive hours each; or • a maximum of 9 consecutive hours in any 1 day with a maximum average of 38 hours per week over a 4 week period by providing RDOs; or • by mutual agreement, any other arrangement provided the length of any ordinary

	Ordinary hours must not exceed 48 hours in any 1 week. **Weekend work:** Where an employee works on a weekend, they receive 2 consecutive days off and the ordinary time worked on a weekend will be paid at time and one quarter.	consecutive hours and provided no more than 48 hours may be worked in any 1 week. OR Where it is proposed work be carried out on a weekend, 7:30am - 7:30pm on five out of seven days, by agreement, provided an employee receives 2 consecutive days off. **Weekend work:** Where an employee works on a weekend, they receive 2 consecutive days off and the ordinary time worked on a weekend will be paid at time and one quarter.	Day worker - 6am - 8pm, Monday to Sunday	day shall not exceed 12 consecutive hours and provided no more than 48 hours may be worked in any 1 week. OR Where it is proposed work be carried out on a weekend, 7am - 10pm on five out of seven days, by agreement, provided an employee receives 2 consecutive days off. **Weekend work:** Where an employee works on a weekend, they receive 2 consecutive days off and the ordinary time worked on a weekend will be paid at time and one quarter.
Ordinary hours of work (employees employed prior to the date of lodgement of the Agreement)	**Ordinary hours and averaging period:** Ordinary hours are 152 per 4 week period. **Span of ordinary hours:** Ordinary hours are to be worked between 7:30am - 7:30pm, Monday to Friday, as either: • 20 days of not more than 7.6 consecutive hours each; or • a maximum of 9 consecutive hours in any 1 day with a	The hours of work do not differ for employees based on when they commenced employment.	The hours of work do not differ for employees based on when they commenced employment.	**Ordinary hours and averaging period:** Not specified. **Span of ordinary hours:** Ordinary hours are to be worked between 7:30am - 7:30pm, Monday to Friday, to be worked as either: • 20 days of not more than 7.6 consecutive hours each; or • a maximum of 9 consecutive hours in any 1 day with a

	maximum average of 38 hours per week over a 4 week period by providing RDOs; or • by mutual agreement, any other arrangement provided the length of any ordinary day shall not exceed 12 consecutive hours and provided no more than 48 hours may be worked in any 1 week. OR Where it is proposed work be carried out on a weekend, 7:30am - 7:30pm on five out of seven days, by agreement, provided an employee receives 2 consecutive days off. **Weekend work:** Where an employee works on a weekend, they receive 2 consecutive days off and the ordinary time worked on a weekend will be paid at time and one quarter.			maximum average of 38 hours per week over a 4 week period by providing RDOs; or • by mutual agreement, any other arrangement provided the length of any ordinary day shall not exceed 12 consecutive hours and provided no more than 48 hours may be worked in any 1 week. OR Where it is proposed work be carried out on a weekend, 7:30am - 7:30pm on five out of seven days, by agreement, provided an employee receives 2 consecutive days off. **Weekend work:** Where an employee works on a weekend, they receive 2 consecutive days off and the ordinary time worked on a weekend will be paid at time and one quarter.
Minimum engagement periods	The 2008 Agreements do not provide minimum engagement periods for shifts.	The 2005 Agreements do not provide minimum engagement periods for shifts. The 2005 Agreements incorporate the Disability Services Award (Victoria) 1999	The award provides the following minimum engagement periods: **Clause 10.5:** part-time and casual employees must be paid for the following minimum	The minimum period of engagement for casual employees is 2 hours.

		(the Award) as at the time of certification of each agreement, and as varied after that date to give effect to a test case standard. The 2005 Agreements were approved on 26 August 2005, 28 October 2005 and 28 March 2006. A version of the Award incorporating all amendments up to and including 20 January 2006 has been located and reviewed. This version of the Award does not provide any minimum engagement periods.	number of hours for each shift or period of work in a broken shift: (a) SACS employees (except when undertaking disability services work) - 3 hours; and (b) all other employees - 2 hours. **Clause 25.7(e):** if an employee on sleepover is required to perform work during the sleepover period, they must be paid for the time worked with a minimum payment of 1 hour. **Clause 25.7(f):** 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 4 hours' work for at least 1 of these periods of work. **Clause 25.10(c)** - Minimum payments for remote work: (A) where the employee is on call between 6am and 10pm—a minimum payment of 15 minutes' pay; (B) where the employee is on call between 10pm and 6am—a minimum payment of 30 minutes' pay;	

			(C) where the employee is not on call—a minimum payment of 1 hour's pay; (D) where the remote work involves participating in staff meetings or staff training remotely—a minimum payment of 1 hour's pay. (i) Any time worked continuously beyond the minimum payment period outlined above will be rounded up to the nearest 15 minutes and paid accordingly. (ii) Where multiple instances of remote work are performed on any day, separate minimum payments will be triggered for each instance of remote work performed, save that where multiple instances of remote work are performed within the applicable minimum payment period, only 1 minimum payment period is triggered. **Clause 28.4**: if recalled to work overtime, a minimum of 2 hours' work at the appropriate rate for each time recalled.	

Personal leave	Full-time employees are entitled to 15 days of personal in each year of service (pro-rata for part-time employees). Employees are entitled to use up to 10 days of "carer's leave" in each year of service. However, this "comes off" their personal leave entitlement. It is not stated that the carer's leave entitlement is pro-rata for part-time employees. However, because taking carer's leave reduces an employee's personal leave entitlement, an employee could not take carer's leave unless they have accrued sufficient personal leave (which accrues pro-rata for part-time employees)	Full-time employees are entitled to 15 days of personal in each year of service (pro-rata for part-time employees). Employees are entitled to use up to 5 days of "carer's leave" in each year of service. However, this is deducted from the employee's personal leave entitlement. The 2005 Agreements do not specify that the carer's leave entitlement is pro-rata for part-time employees.	The award provides personal/carer's leave in accordance with the National Employment Standards in the *Fair Work Act 2009* (Cth).	Full-time employees are entitled to 15 days of personal in each year of service (pro-rata for part-time employees). Employees are entitled to use up to 10 days of "carer's leave" in each year of service. However, this "comes off" their personal leave entitlement. It is not stated that the carer's leave entitlement is pro-rata for part-time employees.
Annual leave	Permanent full-time employees are entitled to 6 weeks annual leave per annum (pro-rata for permanent part-time employees). An employee who, during the year, is rostered to work ordinary hours on 30 or more weekends, is entitled to an additional week's annual leave (pro-rata for permanent part-time employees).	Permanent full-time employees are entitled to 6 weeks annual leave per annum (pro-rata for permanent part-time employees). An employee who undertakes work on 30 or more weekends in any 1 year, as part of their ordinary weekly hours of work, is entitled to an additional week's annual leave (pro-rata for permanent part-time employees).	The award provides annual leave in accordance with the National Employment Standards in the *Fair Work Act 2009* (Cth). In addition, the award provides that an employee who works either of the following during the yearly period in respect of which their annual leave accrues, is entitled to an additional week's annual leave on the same terms and conditions:	Permanent full-time employees are entitled to 6 weeks annual leave per annum (pro-rata for permanent part-time employees).

			• for more than 4 ordinary hours on 10 or more weekends; or • at least 8 24-hour care shifts in accordance with clause 25.8 of the award.	
Shift allowances	The 2008 Agreements do not contain shift allowances. While the enterprise agreements refer to shift allowances, they do not state the amount of any such shift allowance, or when it is payable. For completeness, the enterprise agreements expressly operate to the exclusion of all awards.	The 2005 Agreements do not provide any shift allowances. The 2005 Agreements incorporate the Disability Services Award (Victoria) 1999 (the Award) as at the time of certification of each agreement, and as varied after that date to give effect to a test case standard. The 2005 Agreements were approved on 26 August 2005, 28 October 2005 and 28 March 2006. A version of the Award incorporating all amendments up to and including 20 January 2006 has been located and reviewed. This version of the Award does not provide for any shift allowances.	Afternoon shift (any shift which finishes after 8pm and at or before 12 midnight Monday to Friday): 12.5% of the employee's ordinary rate of pay for the whole of such shift. Night shift (any shift which finishes after 12 midnight or commences before 6am Monday to Friday): - 15% of the employee's ordinary rate of pay for the whole of such shift. Public holiday shift (any time worked between midnight on the night prior to the public holiday and midnight of the public holiday): 150% of the employee's ordinary rate of pay for that part of such shift which is on the public holiday.	The Distinctive Options Agreement does not provide any shift allowances. While the Distinctive Options Agreement refers to shift allowances, it does not state the amount of any such shift allowance, or when it is payable. For completeness, while the Distinctive Options Agreement incorporates some provisions of an award by reference (although the award it refers to is not defined), it does not incorporate any provision that provides a shift allowance.

Is the shift penalty cumulative with other penalties (in particular, weekend penalties)?	The 2008 Agreements do not provide any shift allowances.	The 2005 Agreements do not provide any shift allowance.	The Saturday and Sunday penalties are in substitution for and not cumulative upon the afternoon shift, night shift, and public holiday shift, penalties.	The Distinctive Options Agreement does not provide any shift allowances.
First Aid allowance	The 2008 Agreements do not provide a first aid allowance. For completeness, the enterprise agreements expressly operate to the exclusion of all awards.	The 2005 Agreements do not provide a first aid allowance. The enterprise agreements incorporate the Disability Services Award (Victoria) 1999 (the Award) as at the time of certification of each agreement, and as varied after that date to give effect to a test case standard. The 2005 Agreements were approved on 26 August 2005, 28 October 2005 and 28 March 2006. A version of the Award incorporating all amendments up to and including 20 January 2006 has been located and reviewed. This version of the Award does not provide for first aid allowance.	For permanent full-time employees, the award provides a first aid allowance of 1.67% of the standard rate (as defined) per week ($19.04 per week) (pro-rate for permanent part-time and casual employees).	The Distinctive Options Agreement does not provide a first aid allowance. For completeness, while the Distinctive Options Agreement incorporates some provisions of an award by reference (although the award it refers to is not defined), it does not incorporate any provision that provides a first aid allowance.
Sleepover allowance	The 2008 Agreements provide for time-off-in-lieu for authorised overnight stays in independent living houses. The 2008 Agreements do not provide a sleepover allowance, and for completeness, are	The 2005 Agreements do not provide a sleepover allowance. The 2005 Agreements incorporate the Disability Services Award (Victoria) 1999 (the Award) as at the time of certification of each agreement, and as varied after that date to	The award provides a sleepover allowance to employees of 4.9% of the standard rate (as defined) for each night on which they sleep over (i.e. $55.89 per night).	The Distinctive Options Agreement does not provide a sleepover allowance. For completeness, while the Distinctive Options Agreement incorporates some provisions of an award by reference (although the award it refers to is not

	expressed as operating to the exclusion of all awards.	give effect to a test case standard. The 2005 Agreements were approved on 26 August 2005, 28 October 2005 and 28 March 2006. A version of the Award incorporating all amendments up to and including 20 January 2006 has been located and reviewed. This version of the Award does not provide for a sleepover allowance.		defined), it does not incorporate any provision that provides a sleepover allowance.
Make-up pay	The 2008 Agreements provide an entitlement to accident make-up pay where an employee becomes entitled to weekly compensation payments pursuant to the Accident Compensation Act 1985 (Vic).	The 2005 Agreements provide an entitlement to accident make-up pay where an employee becomes entitled to weekly compensation payments pursuant to the Accident Compensation Act 1985 (Vic).	The award does not provide make-up (accident) pay.	The Distinctive Options Agreement provides an entitlement to accident make-up pay where an employee becomes entitled to weekly compensation payments pursuant to the Accident Compensation Act 1985 (Vic). The maximum period of accident pay to be made for any one injury is 52 weeks. Accident pay does not apply for an injury during the first 5 normal working days of incapacity, or to any incapacity occurring during the first 2 weeks of employment (unless such incapacity continues beyond the first 2 weeks).

Amount of redundancy pay (other than for small business employers)	The 2008 Agreements provide an amount of redundancy pay that is consistent with the National Employment Standards in the *Fair Work Act 2009* (Cth).	The 2005 Agreements provide an amount of redundancy pay that is consistent with the National Employment Standards in the *Fair Work Act 2009* (Cth).	The award provides an amount of redundancy pay that is consistent with the National Employment Standards in the *Fair Work Act 2009* (Cth).	The Distinctive Options Agreement provides redundancy pay to an employee who is terminated by reason of redundancy, as follows, in respect of their continuous service: Less than 1 year - NIL 1 year and less than 2 years - 4 weeks' pay 2 years and less than 3 years - 6 weeks' pay 3 years and less than 4 years - 7 weeks' pay 4 years and less than 5 years - 8 weeks' pay 5 years and less than 6 years - 10 weeks' pay 6 years and less than 7 years - 11 weeks' pay 7 years and less than 8 years - 13 weeks' pay 8 years and more - 14 weeks' pay

Amount of redundancy pay (small business employer)	A small business employer is defined as an employer who employs fewer than 15 employees. The 2008 Agreements provide redundancy pay to an employee of a small business employer who is terminated by reason of redundancy, as follows, in respect of their continuous service: Less than 1 year - NIL 1 year and less than 2 years - 4 weeks 2 years and less than 3 years - 6 weeks 3 years and less than 4 years - 7 weeks 4 years and over - 8 weeks	A small business employer is defined as an employer who employs fewer than 15 employees. The 2005 Agreements provide redundancy pay to an employee of a small business employer who is terminated by reason of redundancy, as follows, in respect of their continuous service: Less than 1 year - NIL 1 year and less than 2 years - 4 weeks 2 years and less than 3 years - 6 weeks 3 years and less than 4 years - 7 weeks 4 years and over - 8 weeks	The award provides an amount of redundancy pay that is consistent with the National Employment Standards in the *Fair Work Act 2009* (Cth). The obligation to pay redundancy pay does not apply to small business employers (with certain exemptions).	A small business employer is defined as an employer who employs fewer than 15 employees. However, the Distinctive Options Agreement does not exclude an employee from eligibility to a redundancy payment where they are employed by a small business employer. The significance of the definition of "small employer" is not apparent. The Distinctive Options Agreement provides redundancy pay to an employee who is terminated by reason of redundancy, as follows, in respect of their continuous service: Less than 1 year - NIL 1 year and less than 2 years - 4 weeks' pay 2 years and less than 3 years - 6 weeks' pay 3 years and less than 4 years - 7 weeks' pay 4 years and less than 5 years - 8 weeks' pay

				5 years and less than 6 years - 10 weeks' pay 6 years and less than 7 years - 11 weeks' pay 7 years and less than 8 years - 13 weeks' pay 8 years and more - 14 weeks' pay