



Australian Federation of
Employers & Industries

Fair Work Act 2009

Title of matter: Applications by the Australian Services Union, Health Services Union, United Workers Union and the National Disability Services (the Applicants) to vary the Social, Community, Home Care and Disability Services Industry Award 2010 (the Applications) re COVID-19 Care Allowance.

Section: s.157

Matter number: AM2020/18

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1. This submission outlines grounds on which the applications should be declined.

The applications do not attract the jurisdiction at s.139 (1)(g)(ii) of the Act

2. In support of the claim that the proposed allowance is directed at additional tasks arising from work with a client who is required to self-isolate, the applicants specifically identify the following as tasks which 'may' be required of a social and community services employee:
 - a. to help client understand and adjust to significant changes in routine, including the explaining the need for self-isolation, why they cannot leave the house, why they cannot see their friends, and why can no longer attend their regular activities;¹
 - b. to create new routines and programs;²
 - c. educating their client about self-isolation procedure and ensuring this is followed by their client;³
 - d. increased emotional support (to the client).⁴
3. These tasks are essentially concerned with the provision of information and assistance to the client. Taking into account the work regulated by this award, if any of these tasks reflects the experience of work performed with a self-isolating client, then that is not remarkable. In this regard, the responsibilities of Social and community services employee level 2 and Social and community services employee level 3 are expressed in broad terms and include particular responsibilities which resonate with the tasks identified by the applicants. In the case of Social and community services employee level 2, these are (with underlining for emphasis):
 - a. perform tasks of a sensitive nature including the provision of more than routine information, the receiving and accounting for moneys and assistance to clients;⁵
 - b. implementing client skills and activities programmes under limited supervision either individually or as part of a team as part of the delivery of disability services;⁶

¹ Applicants' Outline of Submissions 28 April 2020, p.4 [20].

² Applicants' Outline of Submissions 28 April 2020, p.4 [20].

³ Applicants' Outline of Submissions 28 April 2020, p.4 [21].

⁴ Applicants' Outline of Submissions 28 April 2020, p.4 [22].

⁵ Social, Community, Home Care and Disability Services Industry Award 2010 [MA000100] ('award'), Schedule B – Classification Definitions – Social and Community Services Employees – B.2 Social and community services employee level 2 – B.2.2 Responsibilities (h).

⁶ Award, Schedule B – Classification Definitions – Social and Community Services Employees – B.2 Social and community services employee level 2 – B.2.2 Responsibilities (k).

- c. supervising or providing a wide range of personal care services to residents under limited supervision either individually or as part of a team as part of the delivery of disability services;⁷
4. And in the case of Social and community services employee level 3, these are:
- a. assist in a range of functions and/or contribute to interpretation of matters for which there are no clearly established practices and procedures although such activity would not be the sole responsibility of such an employee within the workplace;⁸
 - b. in the delivery of disability services as described in subclauses B.1.2 or B.2.2, taking overall responsibility for the personal care of residents; training, co-ordinating and supervising other employees and scheduling work programmes; and assisting in liaison and co-ordination with other services and programmes.⁹
5. As these particular responsibilities are expressed within the overall responsibilities that may be expected of employees at these levels, it follows that the award already takes into account the responsibilities upon which the applicants rely in support of the claim. As the minimum weekly rates of pay align directly with classification levels in the classification structure,¹⁰ it follows that the responsibilities relied upon by the applicants are already taken into account in the rates of pay. Consequently, the applications do not attract the jurisdiction at s. 139(1)(g)(ii) of the Act, and should be declined.

The proposed allowance is not fair or relevant

6. From the text of the proposed variation, it is apparent that in order to qualify for payment of the allowance, it is unnecessary for the employee to actually exercise any particular additional responsibility or skill; there is no threshold to be met or satisfied; the only relevant expectation of the employee is that the employer requires the employee to work with a client.¹¹ The requirement to work with a client is hardly remarkable or unusual – it is not a qualifying circumstance for additional payment. In view of this, the proposed allowance is not fair, nor relevant. As the proposed allowance is unsuitable as condition for a modern award, the applications should be declined

⁷ Award, Schedule B – Classification Definitions – Social and Community Services Employees – B.2 Social and community services employee level 2 – B.2.2 Responsibilities (l).

⁸ Award, Schedule B – Classification Definitions – Social and Community Services Employees – B.3 Social and community services employee level 3 – B.3.2 Responsibilities (d).

⁹ Award, Schedule B – Classification Definitions – Social and Community Services Employees – B.3 Social and community services employee level 3 – B.3.2 Responsibilities (o).

¹⁰ Award, cl.15 - Minimum weekly wages for social and community services employees

¹¹ Draft Determination, X.3(b).

7. A further unsound feature of the proposed allowance is that it is paid on an hourly basis but there is no condition that requires the exercise any additional responsibility in each hour of work. This unsound feature is compounded by the unlikelihood that each hour of work will involve the tasks relied upon by the applicants.

Erroneous to commute worker safety to money payment

8. In support of the claim, the applicants rely upon health and safety measures, being:
 - a. The use of personal protective equipment ('PPE');¹²
 - b. Enhanced infection control measures;¹³
 - c. The requirements of physical distancing;¹⁴
 - d. Protocols and standards around infection control.¹⁵
9. It is uncontroversial that an employee might experience some or all of these measures in the course of work; indeed, to the extent that the client may present any risk, it should be assumed that that risk will be managed by the employer such that the risk is eliminated so far as reasonably practicable, or minimised as far as reasonably practicable.¹⁶ That is to say, the environment in which the employee is required to work with the client should be assumed to be an environment where the risks have been eliminated or minimised through safety compliant management.
10. Each of the safety measures relied upon by the applicants is, in effect, an outcome of appropriate safety management; but they are not measures which should be taken into account in determining wage outcomes under the Act. Where there is risk, it should be addressed through safety initiatives such as personal protective equipment and infection control – the applicants' reliance on those measures at least demonstrates that those measures are occurring in the industry. It is not appropriate – and would be contrary to long-standing industrial principle – to commute safety of workers to money payments. As Ferguson J said in *Gangers (State) Conciliation Committee* [1949] AR (NSW) 316:

*"I do not think it is desirable to provide extra payment for working in bad or dangerous ground. It is much more desirable to remove or minimise the danger. It is the duty of the employer to see that employees are not called upon to work under dangerous conditions or, if this is unavoidable, to take care that special precautions are observed"*¹⁷

¹² Applicants' Outline of Submissions 28 April 2020, p.4 [19]

¹³ Applicants' Outline of Submissions 28 April 2020, p.4 [19]

¹⁴ Applicants' Outline of Submissions 28 April 2020, p.4 [19]

¹⁵ Applicants' Outline of Submissions 28 April 2020, pp.3/4 [18]

¹⁶ As for example, *Work Health and Safety Act 2011*, s.17

¹⁷ Applied in *Ermani Constructions Pty Ltd v Australian Workers' Union, NSW Branch & Anor* (1988) 23 IR 346 at 352.