Australian Federation of Employers & Industries

BEFORE THE FAIR WORK COMMISSION

Fair Work Act 2009 (Cth)

Title of matter:	Application to vary the *Social, Community, Home Care and Disability Services Industry Award 2010*
Section:	s.157 *Fair Work Act 2009* (Cth)
Matter Number:	AM2020/18
Document:	Submissions pursuant to Amended Directions dated 6 May 2020
Date:	20 May 2020

Lodged by: Australian Federation of Employers and Industries

Address for Service: Australian Federation of Employers and Industries
PO Box A233, Sydney South NSW 1235

Telephone: (02) 9264 2000

Facsimile: (02) 9264 5699

Email: tony.doyle@afei.org.au

Background

1. On 28 April 2020, an application was filed by the Australian Services Union, Health Services Union, United Workers Union and National Disability Services ('NDS') (collectively, the Applicants) to vary the *Social, Community, Home Care and Disability Services Industry* Award 2010 ('the SCHADS Award').

2. The Application seeks to insert a new clause X.3 COVID-19 Care Allowance into Schedule X of the SCHADS Award. On 28 April 2020, the Applicants filed a draft determination ('the original draft determination').

3. On 1 May 2020, AFEI filed written submissions pursuant to the Fair Work Commission's directions dated 28 April 2020.

4. On 1 May 2020, the Applicants filed an amended draft determination as follows:

> 1. By inserting new clause X.3 in Schedule X as follows:
>
> **X.3 COVID-19 CARE ALLOWANCE**
>
> (a) This clause applies to social and community services employees undertaking disability services work.
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> (b) Clause X.3 reflects the additional responsibilities and disabilities associated with specific duties that may arise due to the COVID-19 pandemic and does not set any precedent in relation to award entitlements after its expiry date.
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> (c) This clause operates from 4 May 2020 until 28 September 2020. The period of operation can be extended on application.
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> (d) Where an employer requires an employee to work with a client who:
>
> (i) is required by government or medical authorities to self-isolate or self quarantine due to a reasonable suspicion, pending testing, that the client is likely to have COVID-19; or
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> (ii) is required on the advice of a medical practitioner to self-isolate or self quarantine due to a reasonable suspicion, pending testing, that the client is likely to have COVID-19; or
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> (iii) the employer reasonably suspects has COVID-19; or
>
> (iv) has COVID-19;
>
> the employee will be paid an hourly allowance of 0.5% percent of the Standard Rate.
>
> (e) In this clause, the following words:
>
> • self-isolate; and
>
> • self-quarantine
>
> has the meaning given to them by the government of the state or territory where the work described in clause X.3(d) is performed, and is distinct from general requirements for members of the community to stay at home during the COVID-19 pandemic.

5. On 4 May 2020, the application was heard before a Full Bench of the Fair Work Commission ('the Commission').

6. On 5 May 2020, the Commission issued:

   (a) a Statement which posed a number of questions and provisional views; and

   (b) Directions requiring interested parties to file further written submissions in response to the Statement by Friday, 8 May 2020 as well as listing this matter for hearing on Monday, 11 May 2020.

7. On 6 May 2020, the HSU, ASU and UWU sought an extension of time to file written materials and further evidence in this matter. The Commission granted the Unions' request for an extension and issued Amended Directions on the same day.

8. On 8 May 2020, NDS withdrew their support for the application and indicated that it would no longer pursue the application.

9. These submissions are in response to the questions posed by the Commission in the Statement and pursuant to the Amended Directions.

Question 1 – Not applicable to AFEI

Question 2 - Not applicable to AFEI

Question 3 – Parties are invited to comment on the Commission's provisional view

10. AFEI agree with the Commission's provisional view that Mr Moody's evidence is of little or no probative value to the Commission's consideration of the Application.

Question 4 – Parties are invited to adduce evidence in response to paragraph [46] of the Statement

11. AFEI has asked its membership this question and from the information received to-date, no members have had staff members provide care or support for a client/participant who has tested positive for COVID-19.

12. AFEI refer to a letter from the Honourable Stuart Robert MP, Minister for the National Disability Insurance Scheme ('the Minister'). A copy of this letter is **attached** and marked as Annexure A within the Annexure Bundle. This letter states that, as at 1 May 2020, 10 NDIS participants and 12 NDIS workers have reported as testing positive to COVID-19. We understand that this letter was sent to the NDS on 7 May 2020 and had been forwarded, as requested by the Minister, to its members. We note this letter highlights obligations on NDIS providers to report changes or events specified in the NDIS (Provider Registration and Practice Standards) Rules 2018 and that

these report notifications help identify providers, participants and workers impacted by COVID-19.

13. Disability service providers are required to comply with the NDIS Code of Conduct and NDIS Practice Standards. These have included health and safety imperatives (in addition to State and Territory Work, Health and Safety laws) for disability services providers even prior to COVID-19. These include, for example:

13.1 The NDIS Code of Conduct dated March 2019 (a copy is **attached** and marked as Annexure B) require workers and providers to 'provide support and services in a safe and competent manner with care and skill' and 'promptly take steps to raise and act on concerns about matters that may impact the quality and safety of supports and services provided to people with a disability'. Compliance with work, health and safety legislation is required.[1]

13.2 The NDIS Practice Standards dated July 2018, a copy is **attached** and marked as Annexure C. (There has since been an updated Practice Standards dated January 2020, a copy is **attached** and marked as Annexure D). These standards set out the governance and operational management responsibilities for NDIS providers. The July 2018 Practice Standards oblige NDIS providers to ensure risk management procedures are in place, specifically implementation of procedures to identify, manage and limit any risk to work, health and safety.[2] Further, the Practice Standards oblige NDIS providers to ensure that there is a documented system that 'effectively manages identified risks".[3] These obligations remain unamended in the January 2020 Practice Standards

14. Advice to disability services providers to minimise the risk of COVID-19 to clients/participants and workers has involved re-enforcement of pre-existing infection control advice. For example:

14.1 NDIS Provider Alert dated 9 March 2020 (copy is **attached** and marked as Annexure E) reinforces existing NDIS provider obligations in response to the COVID-19 pandemic. That is, as an NDIS Provider:

(a) the obligations under NDIS Code of Conduct and Practice Standards continue to apply in order to provide safe, quality supports and services and the management of risks; and

(b) staff hygiene practices should 'continue' to apply

14.2 NDIS Provider Alert dated 24 March 2020 (copy **attached** and marked as Annexure F) reinforces the importance of 'continuing to practice good hand hygiene'.[4]

[1] NDIS Code of Conduct (page 17).

[2] NDIS Practice Standards July 2018 and January 2020 (page 8)

[3] NDIS Practice Standards July 2018 and January 2020 (page 8).

[4] https://www.ndiscommission.gov.au/sites/default/files/documents/2020-04/covid-19-information-support-workers-and-access-ppe.pdf

14.3 NDIS guidance to providers dated 26 March 2020 (copy **attached** and marked as Annexure G) recommends that support workers do not need to wear face masks unless there is a risk of contamination (i.e. suspected COVID-19 or confirmed COVID-19).

14.4 NDIS guidance to providers dated 7 April 2020 (copy **attached** and marked as Annexure H) advise that providers who "use PPE as a regular part of their support arrangements should continue to access PPE through their usual means" but does not include any requirement for new or novel PPE to be used in response to COVID-19.

15. Further, NDIS providers are guided by the Australian Guidelines for the Prevention and Control of Infection in Healthcare 2019[5] (published May 2019), 'the guidelines'. A copy of these guidelines are **attached** and marked as Annexure I. These guidelines provide a basis for healthcare workers to develop detailed protocols and processes for infection prevention and control. Specifically, the guidelines contemplated:

15.1 the risk of healthcare workers being exposed to infectious diseases including through direct contact with an infectious patient and that, as a result, the worker is obliged to follow established infection prevention and control policies as part of their contract or employment.[6]

15.2 Hand hygiene, the use of personal protective equipment, respiratory hygiene and cough etiquette, waste management are a 'standard precaution' against infectious agents. The guidelines recommend that standard precautions should be used in the handing of blood and all other body substances.[7]

15.3 Circumstances when personal protective equipment is to be worn by a healthcare worker.[8] Specifically, the recommendation is that PPE should be worn when:

(a) Health care workers are in close contact with the patient that may lead to contamination with infectious agent;

(b) There is a risk of contamination with blood, body substances, secretions or excretions;

(c) The guidelines on the wearing of PPE appear consistent with NDIS guidance. That is, PPE should not be worn unless there is a risk of contamination (either suspected COVID-19 or confirmed COVID-19). Example NDIS guidance on the wearing of PPE are **attached** and marked as Annexures J and F.

15.4 The recommendation that every healthcare facility should have comprehensive written policies regarding disease specific work restriction.[9]

[5] NDIS Provider Alert dated 9 March 2020 (i.e. Annexure E) contain a hyperlink to 'The Australian Guidelines for the Prevention and Control of Infection in Healthcare'.

[6] Page 193 of the guidelines.

[7] Page 29 of the guidelines.

[8] Page 127 of the guidelines.

[9] Page 199 of the guidelines.

15.5 The guidelines include precautions for specific infections and conditions including the following viral infections:[10]

(a) Hepatitis (A, B, C, D, E and G)
(b) Human Immunodeficiency Virus (HIV)/AIDS
(c) Influenza
(d) Measles
(e) Middle East Respiratory Syndrome (Coronavirus MERS-CoV)
(f) Mumps
(g) Norovirus
(h) Severe Acute Respiratory Syndrome (SARS)

Question 5 – Not applicable to AFEI

Question 6 – Does any party take issue with ABI's submission?

16. The concessions made by ABI at paragraph 3.1 of their submissions dated 1 May 2020 are of a general and unspecific in nature. AFEI neither supports nor opposes these assertions.

Question 7 – Not applicable to AFEI

17. AFEI reiterates its earlier submissions in response to question 4. Any reframing of the Applicant's claim, as invited by the Commission, would not justify the additional payment sought.

Question 8 – Not applicable to AFEI

Question 9 – Not applicable to AFEI

Question 10 [58]-[59] 'Payment for Safety' - ABI is invited to identify any relevant authority in the Federal jurisdiction

18. Whilst AFEI notes that this question is directed to ABI, AFEI observes the following.

19. In its earlier submission in these proceedings, AFEI cited authority for the principle that is inappropriate (erroneous) to commute safety of workers to money payments.[11] Although the authorities cited are from the New South Wales jurisdiction,[12] the principle is also expressed in, and illustrated by, cases in the Federal jurisdiction.

[10] Page 259 – 280 of the guidelines.
[11] AFEI Submission filed 3 May 2020 at [8]-[10].
[12] Re Gangers (State) Conciliation Committee [1949] AR (NSW) 316; applied in Ermani Constructions Pty Ltd v. Australian Workers' Union, NSW Branch & Anor (1988) 23 IR 346 at 352.

20. AFEI can identify the following cases heard in the Federal jurisdiction where the health and safety of employees was considered of paramount importance and not a condition where payment should be made in lieu of a safe work environment.

21. In the ***Marine Cooks Case (1908),*** Higgins J. granted award wages for maritime cooks and galley staff,[13] but declined to take into account ship board sleeping and living conditions which were said to be unhealthy.[14] In this early expression of the principle, his Honour said:

> *"I decline, however, to make an award on the basis of conditions which are unnecessary unwholesome or degrading – in other words, to treat ship-owners as entitled to purchase the right of treating men as slaves or as pigs."* [15]

22. Acknowledging that grievances might arise from concerns about workplace health, his Honour nevertheless cautions against encroachment by the Court into the subject matter of those grievances:

> *"Such grievances, if they exist, would be best dealt with by regulations made by or under an Act; and if Parliament should see fit to regulate the accommodation and other conditions of the galley staff, the regulations will not affect the award which I am making."* [16] *(emphasis added)*

23. The caution expressed by Higgins J. has informed subsequent practice in the jurisdiction.

24. In ***Small Arms Factory Employees' Association v Minister for Defence of the Commonwealth (1915)***,[17] Powers J. similarly declined to grant wage increases claimed on the ground of the work being dangerous. His Honour's reasons suggest that this approach was, by the time of judgment, already an established Court practice:

> *"Following the practice of this Court, I have not allowed any increase in the wages of any of the employees because of the dangerous nature of the work".*[18]

25. In ***Federated Artificial Manure Trade and Chemical Workers Union of Australia v Cuming Smith and Company Proprietary Limited & Ors (1915)***,[19] Higgins J. expressed again the 'practice' of the Court to defer to the legislature with regard to workplace health and that such considerations are not relevant for the purposes of fixing wages:

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[13] Marine Cooks Bakers and Butchers Association of Australia v. Commonwealth Steam-ship Owners' Association (1908) 2 CAR 55 (8 November 1908); see [1]-[3] of the case extracts at Annexure L.

[14] Marine Cooks Bakers and Butchers Association of Australia v. Commonwealth Steam-ship Owners' Association (1908) 2 CAR 55 at 59; see [2] of Annexure L.

[15] Marine Cooks Bakers and Butchers Association of Australia v. Commonwealth Steam-ship Owners' Association (1908) 2 CAR 55 at 60; see [3] of Annexure L.

[16] Marine Cooks Bakers and Butchers Association of Australia v. Commonwealth Steam-ship Owners' Association (1908) 2 CAR 55 at 60; see [3] of Annexure L.

[17] Small Arms Factory Employees' Association v. Minister for Defence of the Commonwealth (1915) 9 CAR 163 (24 June 1915).

[18] Small Arms Factory Employees' Association v. Minister for Defence of the Commonwealth (1915) 9 CAR 163 at 172; see [5] of Annexure L.

[19] Federated Artificial Manure Trade and Chemical Workers' Union of Australia v. Cuming Smith and Company Pty Ltd & Ors (1915) 9 CAR 181 (30 July 1915)

"This Court can only deal with matters in dispute; and unless the matter come before the Court as a matter directly in dispute, it is for the Legislature, if it think right – not for the Court – to impose regulations on the employers as to atmospheric and other conditions of the work, just as it imposes regulations for ventilation or sanitary arrangements, or for the safety of mines or machinery. Nor is it for this Court to recognise an addition to wages as purchasing for employers a right to injure the health of their employees".[20]

And

"I should like it to be clearly understood (except on the lines which I have mentioned) it is not the practice of this Court to take into account in fixing a minimum wage, certain of the considerations which, as I understand from the judgment of 9th September 1913, been taken into account in the Victorian Court of Industrial Appeals—"The wholesomeness or the unwholesomeness of the employment, whether it is dangerous or safe, heavy or light, pleasant or unpleasant".[21]

26. In ***Federated Mining Employees' Association of Australia v. Oswald's Gold Mines No Liability, South German Reef Gold Mining Company No Liability and Great Cobar Limited (1916),*** [22] Powers J., dealt with a claim for extra wages which relied, in part, upon a ground that the conditions of work were injurious to health.[23]

27. In declining the wage claim on this ground, his Honour refers to *"the practice of this Court from its inception"* [24] and describes the Court's practice of deferring to the legislature on matters of workplace health:

"The reasons why danger to health is not considered in fixing wages were first laid down, so far as I know, by the President in 1908 in the Marine Cooks case. In that case he held that unhealthy conditions under which individual employees suffer, if the conditions are not necessarily incidental to their employment, are to be ignored in framing a scale of wages, and <u>may be left to parliamentary regulation (by the State)</u>." [25] *(emphasis added)*

28. In ***Arms Explosives and Munition Workers Federation of Australia v. Imperial Chemical Industries of Australian and New Zealand (1943)***,[26] Conciliation Commissioner G.A. Mooney declined a claim for danger money for munitions workers working within the black powder section of an explosives factory. This passage illustrates the application of the principle:

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[20] Federated Artificial Manure Trade and Chemical Workers' Union of Australia v. Cuming Smith and Company Pty Ltd & Ors (1915) 9 CAR 181 at 188; see [7] of Annexure L.

[21] Federated Artificial Manure Trade and Chemical Workers' Union of Australia v. Cuming Smith and Company Pty Ltd & Ors (1915) 9 CAR 181 at 188; see [7] of Annexure L.

[22] Federated Mining Employees' Association of Australia v. Oswald's Gold Mines No Liability South German Reef Gold Mining Company No Liability and Great Cobar Limited (1916) 10 CAR 272 (30 June 1916).

[23] Federated Mining Employees' Association of Australia v. Oswald's Gold Mines No Liability South German Reef Gold Mining Company No Liability and Great Cobar Limited (1916) 10 CAR 272 at 279; see [10] of Annexure L.

[24] Federated Mining Employees' Association of Australia v. Oswald's Gold Mines No Liability South German Reef Gold Mining Company No Liability and Great Cobar Limited (1916) 10 CAR 272 at 280; see [11] of Annexure L.

[25] Federated Mining Employees' Association of Australia v. Oswald's Gold Mines No Liability South German Reef Gold Mining Company No Liability and Great Cobar Limited (1916) 10 CAR 272 at 280; see [11] of Annexure L.

[26] Arms Explosive and Munitions Workers Federation of Australia v. Imperial Chemicals Industries of Australia and New Zealand Ltd (1943) 49 CAR 47 (6 January 1943).

"The Court has repeatedly stated as a principle that it will not increase wage rates because of the dangerous nature of the work, holding that it is far better that regulations and safety devices be introduced which will diminish or prevent the risks involved. I am entirely in accord with this principle." [27]

29. The Commissioner applied the principle again in the following year to refuse a similar claim:

"As far as I can see, the only substantial question is again the question of danger, but I do not think anything has been shown to demonstrate that I should depart from the decision I made in January 1943. In the course of that decision, I stated –"This Court has repeatedly stated as a principle that it will not increase wages rates because of the dangerous nature of the work, holding that it is far better that regulations and safety devices be introduced which will diminish or prevent the risks involved." [28]

30. In ***Imperial Chemical Industries of Australia and New Zealand Ltd v. Amalgamated Engineering Union & Ors (1949)***,[29] Conciliation Commissioner D.V. Morrison determined a claim for variation (increase) to a disability allowance for maintenance workers engaged at premises manufacturing chlorine and hydrogen sulphide gases; the claimed variation was said to be justified by an increased risk of accident.[30]

31. In an illustration of the principle, the Commissioner's decision reveals a clear preference for danger to be addressed through appropriate remedial action (about which the Commissioner was satisfied) [31] - and not by payment:

"The remedy then is increased activity by the general safety committee or sectional safety committees, so that any accident or risk of accident may be fully discussed by these committees, not only to suggest a remedy to cure a fault, but to prevent the possible eventuation of a happening which may prove harmful to an employee's health.

On some jobs masks must be worn. When they should be first donned and when they should be taken off is of vital concern to the user, especially where poisonous gases are prevalent. Accidents have occurred at this establishment because men have taken off their marks too soon. I think therefore, that in such cases a responsible person should be present to guide and instruct men what to do in such circumstances and that every precautionary measure should be taken to avoid infection.

Although it has been said in effect that you cannot purchase the health of a man by prescribing extra rates – a principle with which I agree without any reservation – you can,

[27] Arms Explosive and Munitions Workers Federation of Australia v. Imperial Chemicals Industries of Australia and New Zealand Ltd (1943) 49 CAR 47 at 48; see [13] of Annexure L.

[28] Arms Explosive and Munitions Workers Federation of Australia v. Imperial Chemicals Industries of Australia and New Zealand Ltd (1944) 53 CAR 260 (4 September 1944) at 261; see [15] of Annexure L.

[29] Imperial Chemical Industries of Australia and New Zealand Ltd v. Amalgamated Engineering Union & Ors (1949) 64 CAR 36 (29 April 1949).

[30] Imperial Chemical Industries of Australia and New Zealand Ltd v. Amalgamated Engineering Union & Ors (1949) 64 CAR 36 at 36-37; see [16]-[17] of Annexure L.

[31] This passage is at p.38 of decision, copy at [18] of Annexure L: *"It is quite patent from the report that the disabilities have not increased; in fact, protective measures have been introduced to lessen them. The accident rate, too, has fallen considerably, which proves that the Company is doing everything humanly possible to eliminate industrial hazards and to safeguard the health of its employees. I think that is the real approach to this problem because you cannot purchase by money the right to injure health".*

in my opinion, impose a penalty on an employer so severe that, rather than take the risk of placing the health of his employees in jeopardy, he would be forced to introduce effective precautionary measures rather than pay the penalty." [32]

32. In ***PGA Welding Service Engineers Pty Ltd v Boilermakers Society of Australia (1954),***[33] Chief Conciliation Commissioner G.A. Mooney declined a claim for danger money for certain oil refinery workers. The following passage reveals the Chief Commissioner's diligent adherence to the relevant principle:

> *"The case of the men seemed to rest mainly upon the ground that an accident, such as a fire or explosion, could happen, and of course it is unfortunately true that an accident could happen at these works as it could happen in almost any place. In a similar case in 1943 at the works of the Imperial Chemical Industries of Australia and New Zealand Ltd, where a claim was made for danger money for persons employed handling black powder, in the course of my decision I said:-*
> *"This Court has repeatedly stated as a principle that it will not increase wages rates because of the dangerous nature of the work, holding <u>that it is far better that regulations and safety devices</u> be introduced which will diminish or prevent the risks involved"* [34] *(emphasis added)*

33. In ***Appeal Against Orders Varying Awards (1967)***,[35] the appeal bench reiterated the practice of the Commission in this unambiguous and firm statement:

> *"It has been the invariable practice of this Commission – and of the Court before it – to refuse to commute to a money allowance any risk of danger which it is possible to compel an employer to eliminate".* [36]

34. In ***Australian Federation of Air Pilots v Australian National Airlines Commission (1968),***[37] Professor J.E. Isaac's discussion of the role of the tribunal regarding safety issues is faithful to the caution expressed by Higgins J. in 1908:

> *"The interlocking of safety and industrial issues invariably poses a difficult task for an industrial tribunal; in this case, an industrial demand for an improvement in earning power is met by a rejection of the demand based on safety grounds. However, in this industry, the Department of Civil Aviation is entrusted with the task of prescribing safety requirements. This being so, I believe that so long as this Tribunal keeps its awards within the safety rulings of DCA, it should, as far as possible, ignore safety arguments for or against any industrial claim. It should confine its deliberations to industrial arguments relating to differences on the terms of employment of flight crew officers. If the parties believe that the safety constraints should be narrowed or widened in order to change the scope of the Tribunal's awards the way is surely open*

[32] Imperial Chemical Industries of Australia and New Zealand Ltd v. Amalgamated Engineering Union & Ors (1949) 64 CAR 36 at 38; see [18] of Annexure L.

[33] PGA Welding Service Engineers Pty Ltd v. Boilermakers Society of Australia & Anor (1954) 78 CAR 711 (30 March 1954).

[34] PGA Welding Service Engineers Pty Ltd v. Boilermakers Society of Australia & Anor (1954) 78 CAR 711 at 711; see [20] of Annexure L.

[35] Appeals Against Varying Awards (1967) 121 CAR 449 (6 December 1967) (per Wright & Nimmo JJ, Senr Commr Taylor)

[36] Appeals Against Varying Awards (1967) 121 CAR 449 at 451; see [23] of Annexure G.

[37] Australian Federation of Air Pilots v. Australian National Airlines Commission & Qantas Airlines Limited (1968) 126 CAR 1071 (13 December 1968).

to them to take the matter up with the body which has the competence and the authority to deal with safety matters. To take any other approach would expose the Tribunal to the criticism of usurping the role properly entrusted to DCA." [38]

35. ***Re Vickers Cockatoo Dockyard Pty Limited v FEDFA (1981)***,[39] illustrates the application of the principle in terms which are succinct but faithful to the caution expressed by Higgins J. in 1908:

> *" I am of the opinion that if the work in question is dangerous then it should be a matter of removing the danger rather than of fixing of a penalty amount."*[40]

36. Thus, the enduring principle in the Federal jurisdiction is that it is erroneous to commute worker safety to money payment. The Applications are contrary to that principle and should be declined on that basis.

37. In the Annexure Bundle, AFEI have included copies of extracts from case law referred to in response to this question. The index to the case extracts in response to this question is **attached** and marked as Annexure K. Copies of extracts from the case law referred to in response to this question is **attached** and marked as Annexure L.

38. It also is to be noted that from around the time of the most recent cases referred to above, Occupational Health and Safety legislation was enacted in all Australian states and territories, such as the Occupational Health and Safety Act 1983 (NSW), in Victoria, the Occupational Health and Safety Act 1985, in South Australia, the Occupational Health, Safety and Welfare Act 1986, and in Western Australia, the Occupational Health, Safety and Welfare Act (No 43 of 1987).

Question 11 – Not applicable to AFEI

Question 12 – Not applicable to AFEI

Question 13 – Not applicable to AFEI

Question 14 – ABI is invited to identify any relevant authority in the Federal jurisdiction - Not applicable to AFEI

39. AFEI notes this question is directed at ABI. However, AFEI states as follows.

40. First, the jurisdiction of the Commission to make, vary or revoke modern awards is set out in Part 2-3 of the Fair Work Act 2009 (Cth) ('the Act').

41. Division 2 provides for the modern awards objective. This requires the Commission to ensure that modern awards, together with the National Employment Standards, provide a fair and

[38] Australian Federation of Air Pilots v. Australian National Airlines Commission & Qantas Airlines Limited (1968) 126 CAR 1071 at 1073; see [25] of Annexure L.

[39] Re Vickers Cockatoo Dockyard Pty Limited & FEDFA (1981) 250 CAR 338 (22 January 1981).

[40] Re Vickers Cockatoo Dockyard Pty Limited & FEDFA (1981) 250 CAR 338 at 338 (Commissioner Bennett); see [26] of Annexure L.

relevant minimum safety net of terms and conditions, taking into account certain social and economic factors. AFEI responds to the s. 134 factors in questions 20 and 21 below.

42. Division 3 deals with the terms of modern wards, and s. 136(1) of the Act provides that 'a modern award must only include terms that are permitted or required by Subdivision B (which deals with terms that may be included in modern awards). Subdivision B does not include attraction and retention rates.

43. Further, in accordance with s. 157(2), variations to modern award minimum wages must be justified by work value reasons. As attraction and retention factors are not concerned with the value of the work being performed, they are not matters which may be considered in the setting of minimum wages, or, in the present matter, are not matters which can be compensated by way of an allowance, according to S139(1)(g).

Question 15 – Not applicable to AFEI

Question 16 – How many clients of the employers you represent have been required to self-isolate or self-quarantine for the reasons specified in proposed clause X.3(d)?

44. AFEI is in the process of asking this question of its members. The feedback received from members thus far, is that none have had clients test positive to COVID-19.

45. As at 31 March 2020, there are 364,879 people with disability receiving support as participants in the NDIS scheme. This data is obtained from the NDIS Council of Australian Government's (COAG) Disability Reform Council Quarterly Report dated 31 March 2020. [41]A copy of this report is **attached** and marked as Annexure M. According to the Minister's letter (Annexure A), as at 1 May 2020, 10 NDIS participants and 12 NDIS workers have reported as testing positive to COVID-19 and that "very few notifications relating to COVID-19 infections have been received".

46. The feedback from members on rates of self-isolation is also consistent with indications from the Minister of low incidence of confirmed cases nationally for NDIS participants and workers (Annexure A). That is, members are reporting a low incidence of self-isolation/quarantine of clients. There are, however, reports of clients choosing to self-isolate on voluntary basis to minimise the risk of being infected in the community.

Question 17 – Evidence on the funding announcements in this sector

47. AFEI notes the letter from the Minister (Annexure A) provides information concerning funding announced by the Australian Government.

Question 18 – Not applicable to AFEI

[41] NDIS COAG Disability Reform Council Quarterly Report, page 9.

Question 19 – Does any party take issue with the summary of the statutory framework?

48. AFEI does not take issue with the summary of the statutory framework set out at paragraphs 78–84 of the Statement. However, for the reasons already set out in AFEI's submissions dated 3 May 2020, the application does not attract the jurisdiction at s. 139(1)(g)(ii) of the *Fair Work Act 2009* (Cth).[42]

Question 20 – Does any party oppose the Commission's provisional views in respect of the s 134 considerations?

S. 134(1)(a): relative living standards and the needs of the low paid

49. AFEI does not agree with the Commission's provisional view at paragraph 91 of the Statement, that '*some of the employees who are the subject of this claim are 'low paid'*.

50. ***First***, the unions submit that social and community services employees Level 2 and 3 is the appropriate classification point for the care allowance.[43] All employees within these classifications are currently subject to an Equal Remuneration Order (the ERO) affecting the minimum rate that can be paid.[44] A copy of the ERO is **attached** and marked as Annexure N. In accordance with clause 5.3 – 5.5 of the ERO, the Fair Work Ombudsman pay guide for the SCHADS Award[45] sets out the minimum weekly pay rate for a social and community services employee at Level 2, pay point 1 is $1,038.84 ($27.34 per hour).[46] **Attached** and marked as Annexure O are the relevant sections of the pay guide. In some states, such as NSW, the minimum weekly pay rate is higher again due to the application of the relevant transitional instrument. Level 2 and Level 3 SACS ERO rates will increase again effective 1 December 2020 due to the final instalment of the ERO.

51. Using the two-thirds of median full-time wages as the benchmark, that is $920.00 as identified by the ABS Characteristics of Employment survey for August 2019[47] or $973.33 as identified by the data from the survey of Employee Earnings and Hours for May 2018[48], social and community services employees Level 2 and 3 are not 'low paid'.

52. ***Second***, the unions submission that the "commencement rates for a social and community services employee level 2 (level 2.1) is $22.69 per hour"[49] is inaccurate and misleading as it ignores the ERO and section 306 of the Act, which states:

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[42] AFEI submissions dated 3 May 2020, paragraphs 2 – 5.
[43] Applicants' outline of submissions dated 28 April 2020 at paragraphs [7 - 8].
[44] S306
[45] Social, Community, Home Care and Disability Services Industry Award 2010 Pay Guide, published by the Fair Work Ombudsman on 28 November 2019 with rates in the guide applying from 1 December 2019.
[46] This pay guide publishes rates applicable under the ERO where there was no pre-modern award, or the pre-modern award rates were lower than the modern award rates.
[47] Paragraph 87 of Statement.
[48] Paragraph 87 of Statement.
[49] Applicants' outline of submissions dated 28 April 2020 at paragraph [28] and repeated at paragraph 89 of the Statement.

'A term of a modern award, an enterprise agreement or a FWC order has no effect in relation to an employee to the extent that it is less beneficial to the employee than a term of an equal remuneration order that applies to the employee.'

53. In the light of the above, AFEI submits that this consideration is neutral.

S. 134(1)(b): the need to encourage collective bargaining

54. AFEI agree with the Commission's provisional view that the proposed insertion of Clause X.3 would not 'encourage collective bargaining',[50] and thus weighs against the Application.

S. 134(1)(h): the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy

55. AFEI agree with the Commission's provisional views at paragraph [104] that this consideration is neutral.

Question 21 – All parties are invited to make further submissions directed at the s 134 considerations

In addition to the above:

S. 134(1)(c): the need to promote social inclusion through increased workforce participation

56. AFEI oppose the Applicants' submission that there is a compensable disability of having to apply enhanced hygiene protocols and use PPE to do their work.[51]. The Applicant's assertion is without merit and probative evidence in support.[52] AFEI refers to its response to Question 4 and Question 10 above.

57. The Applicant's further submit that the proposed care allowance is directed to the disincentives that have arisen concerning this group of workers' participation in work and the "working in disability services during the pandemic will be less attractive, given the increased responsibilities and disabilities associated with clients who have or might have COVID-10" in comparison to workers receiving social welfare payments.[53] This submission is misconceived to the extent it infers that an allowance can be included in an award for the purpose of ensuring/addressing labour supply to a particular industry or occupation. AFEI refers to its response to Question 14.

58. It follows that 134(1)(c) is a neutral consideration.

[50] Paragraph 93 of Statement.
[51] Paragraph 94 of Statement.
[52] [2014] FWCFB 1788 at [23].
[53] Paragraph 94 of Statement.

S.134(1)(d) – (f): the need to promote flexible modern work practices and the efficient and productive performance of work and the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and regulatory burden

59. This consideration weighs against the proposed variation including for the reasons set out in our response to Question 10.

S. 134(1)(e): the principle of equal remuneration for work of equal or comparable value

60. AFEI agree with the Commission's provisional view that s. 134(1)(e) is not a relevant consideration in respect of the Application.

Australian Federation Employers & Industries

Annexure

The Annexure Bundle as referred to in the submissions can be accessed via this link.