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Sent: Wednesday, 20 March 2019 5:12 PM
To: AMOD
Cc: Kyle Scott
Subject: AM2018/13 – Aged Care Award 2010 – Substantive Issues [ABLAW-ImanageDocs.FID135697]

Dear Sir/Madam

AM2018/13 – Aged Care Award 2010 – Substantive Issues

We refer to the above proceedings and **attach** a submission on behalf of our clients, ABI and the NSW Business Chamber.

Should you have any questions in respect of these submissions, please do not hesitate to contact me.

Yours Sincerely

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Fair Work Commission: 4 yearly Review of modern awards

REPLY SUBMISSION

4 YEARLY REVIEW OF MODERN AWARDS: (AM2018/13)
AGED CARE AWARD 2010 - SUBSTANTIVE ISSUES

AUSTRALIAN BUSINESS INDUSTRIAL
- and -
THE NSW BUSINESS CHAMBER LTD

20 MARCH 2019

1. BACKGROUND

1.1 This reply submission is made on behalf of Australian Business Industrial (**ABI**) and the New South Wales Business Chamber Ltd (**NSWBC**) in accordance with the Amended Directions of the Fair Work Commission (**Commission**) issued on 24 January 2019.

1.2 This reply submission addresses the claims made by the Health Services Union (**HSU**) in their submissions dated 23 January 2019 (**HSU Submission**), and the United Voice in their submission dated 18 January 2019 (**UV Submission**) in respect of the *Aged Care Award 2010* (the **Award**). In this reply submission, the HSU and United Voice are referred to collectively as the 'Unions'.

1.3 The claims advanced by the Unions in this matter include:

(a) a claim to introduce a new 'Phone Allowance' into the Award;

(b) a claim to have the existing minimum engagement provisions in the Award apply to each portion of a broken shift;

(c) a claim for an increase to the monetary amounts payable to casual employees when performing work on weekends and public holidays; and

(d) a claim to vary the classification definitions in respect of the Aged Care Employee - Level 4 classification.

1.4 We deal with each of the above claims separately below. We also address briefly the legislative framework applicable to the 4 Yearly Review.

2. LEGISLATIVE FRAMEWORK OF THE FOUR YEARLY REVIEW

2.1 The legislative framework applicable to the 4 Yearly Review has been considered in detail in:

(a) *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 (the **Preliminary Issues Decision**); and

(b) *Four yearly review of modern awards - Penalty Rates* [2017] FWCFB 1001 (the **Penalty Rates Decision**).

2.2 The relevant principles are summarised as follows.

2.3 the Commission remains at all times obliged to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions, taking into account the modern awards objective.[1]

2.4 the Commission is to undertake the 4 Yearly Review on its own motion and may vary a modern award in whatever terms it considers appropriate, subject to its obligations relating to procedural fairness and the application of relevant statutory provisions.[2]

2.5 when considering any variation, the Commission should be focused upon ensuring that any new version of the safety net is consistent with the modern awards objective.

2.6 The purpose of section 134 of the Act is the created of a 'fair and relevant minimum safety net of terms and conditions' that is constituted by the NES and modern awards. It should be uncontroversial that what section 134 is setting is the terms and conditions of employment that no employee in a given circumstance should fall below; such is clear from the words "minimum safety net".

2.7 In arriving at this fair and relevant minimum safety net, the Commission is to "take into account" those matters set out in section 134(1)(a)-(h) inclusive. This said, the ultimate outcome is the creation of a "fair and relevant minimum safety net" having taken into account and weighed up the matters set out in section 134(1)(a)-(h).[3]

2.8 While section 134 is not the section in the Act that vests discretion, it is however a section that conditions the exercise of modern award powers which include for instance the discretion vested by section 139.

2.9 The discretion conferred on the Commission to make determinations varying modern awards is expressed in general terms. However, the need for a 'stable' modern award system suggests that parties seeking to vary a modern award must advance a merit argument in support of the proposed variation.[4]

2.10 There may be cases where the need for an award variation is self-evident. In such circumstances, proposed variations can be determined with little formality.[5]

[1] Preliminary Issues Decision at [23]
[2] Penalty Rates Decision at [110]
[3] Preliminary Issues Decision at [60]
[4] In our submission, a merit based argument would no doubt be more persuasive if it was aligned with the matters outlined in subsection 134(1) of the Act.
[5] Preliminary Issues Decision at [23] and [60]

2.11 Where significant award changes are proposed, they must be supported by submissions which address the legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation.[6]

2.12 The Commission should proceed on the basis that prima facie the modern award achieved the modern awards objective at the time it was made.

2.13 Previous Full Bench decisions should generally be followed, in the absence of cogent reasons for not doing so.[7]

2.14 The Commission should also take into account previous decisions relevant to any contested issue, but there may be reasons for not doing so, including changes in legislative context, the extent of evidence and submissions and the absence of detailed reasons in a previous decision.[8]

2.15 If a variation is sought in relation to minimum wages, the Commission may vary modern award minimum wages only if it is satisfied that the variation is justified by work value reasons.[9]

3. CLAIM FOR A MOBILE PHONE ALLOWANCE

The Unions' claims

3.1 The Unions seek the introduction of a clause that would entitle employees who are required to use their mobile phone for certain prescribed reasons, to either:

(a) provision of a mobile phone and reimbursement of all subsequent costs of that phone; or

(b) reimbursement by their employer of the purchase costs and subsequent charges of the mobile phone.

3.2 In relation to the prescribed reasons, the above entitlement would be triggered where an employee is required to use a mobile phone in any of the following circumstances:

(a) for the purpose of being on call;

(b) for the performance of work duties;

(c) to access their work roster; or

[6] Ibid
[7] Ibid at [60]
[8] Penalty Rates Decision at [269]
[9] Ibid at [244]

(d) for other work purposes.

3.3 The Unions have not filed any evidence in support of their claims for a Mobile Phone allowance.

3.4 The grounds relied upon in support of the claim are broadly the following:

(a) A submission that "many" other modern awards contain allowances related to "tools of trade" (such as the *Hospitality Industry (General) Award 2010* which provides for reimbursement of the cost of "knives, choppers", etc.);[10]

(b) A submission that telephone allowance entitlements are contained in "a number" of comparable modern awards;[11]

(c) An assertion that employees perform a significant amount of work away from the "employer's principal place of business or office";[12]

(d) A reference to an apparently "established principle" of the modern awards system "generally" providing some form of compensation where an employer directs an employee to use a particular "tool of trade";[13]

(e) A general assertion that a mobile phone has the "status" of a tool of trade;[14]

(f) A submission that award-reliant workers should not be required to purchase and maintain a mobile phone at their own cost, where that mobile phone is used for work purposes;[15]

(g) A reference to the existence of a link between the greater use of technology and improved productivity and workforce participation;[16]

(h) A submission that where employers benefit from increased efficiencies and productivity derived from employees using mobile phones, the employer should bear the cost of use of those phones;[17] and

(i) A submission that because mobile phone use is now ubiquitous amongst the Australian workforce, the modern award system should include a provision for a mobile phone allowance.[18]

[10] United Voice submission at [14]
[11] Ibid at [10]
[12] Ibid at [25]
[13] Ibid at [18]
[14] Ibid at [28]
[15] Ibid at [24]-[26]
[16] Ibid at [22]
[17] Ibid at [29]

3.5 For the most part, these assertions are unsupported by evidence.

Failure to adduce evidence in support of the claim

3.6 As stated above, the Unions have not filed any evidence in support of their claims for a Mobile Phone allowance.

3.7 The documentary material relied upon or referred to in the Unions' written submissions is confined to:

(a) A Working Paper on 'Attraction, Retention and Utilisation of the Aged Care Workforce' prepared for the Aged Care Workforce Strategy Taskforce dated 19 April 2018 (**Workforce Working Paper**);

(b) The Productivity Commission Inquiry Report into 'Caring for Older Australians' dated 28 June 2011 (**PC Report**);

(c) Data regarding landline telephone and smart phone usage in Australia;[19] and

(d) A media article on the 'gig' economy.[20]

3.8 While the Workforce Working Paper and the PC Report are detailed publications, they are quite general in nature and neither of the publications (or any of the materials referred to in paragraph 3.7 above) contain any specific consideration of mobile phone usage of employees in the aged care industry.

3.9 Put simply, there is no evidence before the Commission that could be relied upon to support the claim. While there is evidence of widespread mobile phone and smart phone ownership throughout Australia, the Unions have failed to adduce any evidence of:

(a) the proportion of employees in the industry who are required to use mobile phones in the course of their employment;

(b) the extent to which employees covered by the Award are required to use their personal mobile phone for work purposes;

(c) the costs incurred by employees in using their mobile phones for work purposes;

(d) the proportion of work-related versus non-work-related usage by employees of mobile phones; or

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[18] Ibid at [10]
[19] Ibid at [11] and [20]
[20] Ibid at [21]

(e) the types of arrangements that businesses have in place regarding employees' use of mobile phones (e.g. whether businesses provide mobile phones, whether other forms of compensation are provided, etc.).

3.10 Nor is there any evidence before the Commission of:

(a) any Award-covered employer requiring prospective employees, as a condition of employment, to own a mobile phone; or

(b) any Award-covered employer directing or otherwise requiring existing employees to purchase a mobile phone.

3.11 Indeed, the evidence on smart phone and mobile phone ownership in Australia suggests that such scenarios would be very rare – for example:

(a) approximately 83 per cent, or 15.97 million Australian adults, already have a smart phone; and

(b) approximately 96 per cent, or 18.57 million Australian adults, own a mobile phone.[21]

3.12 When one takes into consideration the fact that elderly adults are less likely to have a mobile phone, the data suggests that it would be highly unusual for someone of working age to not own a smart phone, let alone a mobile phone.

3.13 It is difficult to understand how the Commission could be satisfied that the proposed new clause or term does not offend section 138 of the FW Act, in circumstances where there is no evidence supporting the factual premises underpinning the claim.

The drafting of the proposed provision

3.14 There are a range of issues with the drafting of the proposed claim.

3.15 Firstly, the clause requires an employer to either "provide" a mobile phone, or refund the "cost of purchase" of a mobile phone, where one is required to be used for specified purposes. However, there is no exemption in circumstances where an employee already owns a mobile phone. There is nothing to prevent an employee who already owns a mobile phone from purchasing a new one, simply in order to obtain the reimbursement for it.

3.16 Secondly, there is nothing to prevent an employee from seeking reimbursement of the purchase costs of a mobile phone that was purchased years before the employer required the employee to use it for work purposes, provided the employee can produce "receipted

[21] Australian Communications and Media Authority, Communications Report 2017-2018, p. 33. (30 November 2018)

accounts". This would result in the employer bearing the costs of a depreciated asset and subsidising the employee's personal use of the device.

3.17 Thirdly, there is no limitation on the costs which are required to be borne by the employer. There is no reference to refunding the "reasonable" purchase costs or "reasonable" subsequent charges. There is also no mechanism in the clause for the employer to have any control or oversight at all over the type of device or service arrangement that employees might purchase or enter into. It appears that the employee would be free to decide what device to purchase and what service arrangement they wish to obtain.

3.18 Although there is a total absence of evidence on this point, presumably the costs of mobile phones (both up-front costs and ongoing usage costs) vary wildly depending on:

(a) The type of device purchased;

(b) The type of usage 'plan' or fee arrangement that is in place;

(c) The amount of 'data' provided for use under the plan; and

(d) The extent of usage by the employee (in relation to calls, texts and 'data').

3.19 Fourthly, the clause fails to link the monetary entitlement to the type of device that an employer requires an employee to use. For example, an employer may only require an employee to have a basic mobile device that allows them to make and receive phone calls and text messages, yet unless the employer physically provides the device, the employer would be obliged to cover the purchase costs of whatever device the employee chooses to purchase (which may not be the basic device required by the employer). There is nothing to prevent an employee from purchasing a smart phone even though the employer only requires a more basic device.

3.20 Fifthly, and most importantly, the clause does not require an employer to reimburse an employee for only the work-related costs associated with the use of a mobile phone. It requires the employer to cover all costs, both up-front costs and "subsequent charges". This is plainly unreasonable.

3.21 In practice, if the claim was to be successful, an employee could be required by their employer to use their mobile phone once per week to check their work roster, and the employer would automatically be obliged to cover both the purchase costs of the mobile device and the subsequent charges relating to the device. There would be nothing preventing the employee from taking out the most expensive mobile phone plan, using it virtually exclusively for personal use, and requiring the employer to foot the bill.

Implications of the Unions' claim

3.22 The Unions' claim would undoubtedly have a considerable adverse impact on employment costs for employers.[22] More importantly, it would impose an unreasonable cost on employers, given the issues identified above.

3.23 The extent of the cost imposition cannot be measured, given the lack of evidence before the Commission as to mobile phone usage by employees in the industry, and the costs associated with purchasing and maintaining a mobile phone. Nor can it be quantified or forecasted by employers, given that employers will not have any control over the types of phones and phone plans utilised by employees.

3.24 There has been no attempt by the Unions to limit the cost imposition on employers to only those expenses which are directly attributable to the work-related use. This does nothing to achieve a "fair and relevant" minimum safety net.

3.25 Of significant concern is the fact that the cost to be borne by employers under the proposal will be disproportionate to any benefits that an employer would derive, given that they will be subsidising an employee's (potentially significant) personal use. It is not difficult to imagine situations where an employee inadvertently incurs a huge mobile phone bill because they or a family member streams movies through a mobile device while travelling on a family holiday. On the drafting proposed by the Unions, the employer will be required to reimburse the employee for these costs.

3.26 It is difficult to understand how an employer can reasonably be expected to reimburse an employee for the up-front and ongoing costs of their mobile phone in circumstances where the employee already owned a mobile phone prior to commencing work with the employer, and primarily uses it for personal use.

No deficiency with current practice has been identified

3.27 The Unions' claim fails to recognise that where an employee incurs a work-related expense, the applicable income tax legislation entitles the employee to claim a tax deduction, which has the effect of reducing the individual's taxable income (and thereby reduces the amount of income tax required to be paid). This is a fundamental and well-established feature of the income tax system in Australia which has been in place in various forms since 1915.[23]

[22] *Fair Work Act 2009* (Cth), s. 134(1)(f)
[23] See *Income Tax Assessment Act 1915* (Cth)

3.28 One of the rationales for the current system of tax deductibility of work-related expenses is that it generates consumption benefits and stimulates the economy. Another important rationale is that certain cost items tend to have mixed uses or mixed functions (i.e. certain costs are partly work-related and partly non-work related). For example, employees incur a range of expenses which are partly work-related and partly for personal use. Common expenses include motor vehicle expenses, telephone expenses, home internet, laundry expenses, home office expenses, etc.

3.29 The Union has failed to identify the existence of this arrangement, which effectively compensates employees for expenses that are incurred in the course of generating their income. The Unions have also not raised issue with the adequacy of this system.

3.30 The vast majority of costs borne by employees through the purchase, use and maintenance of their mobile phone will almost certainly be related to their personal use of the device (rather than work-related use). While there is no evidence before the Commission on this point, we would expect that for most employees, their work-related usage would be only a small proportion of their overall usage, and as such the work-related costs would be a small proportion of the overall costs.

3.31 In light of the anticipated breakdown of the source of cost, in our submission the current tax deductibility system is the appropriate mechanism for this usage to be dealt with.

Conclusion

3.32 ABI and NSWBC are opposed to the Unions' claim for the introduction of a Mobile Phone allowance, for the reasons outlined above. A merit basis for the claim has not been made out. No mischief or problem has been properly identified which would warrant the intervention of the Commission. The claim will pass an unreasonable cost onto employers, which is in no way equivalent to the usage of mobile phones for work-purposes. The claim would effectively require employers to subsidy employees' personal usage of a personal device, for which employers have no way of controlling or maintaining. This is plainly unreasonable, and is inconsistent with the notion of creating a fair and relevant minimum safety net of terms and conditions. The proposed Award term will result in the Award not meeting the modern awards objective. The proposed term offends section 138 of the FW Act.

3.33 The Unions' claim must fail.

4. CLAIM RELATING TO BROKEN SHIFTS

The HSU claim

4.1 The HSU seek a variation to clause 22.8 of the Award to introduce a requirement that each portion of a broken shift be subject to the minimum payment provisions in clause 22.7 of the Award.

4.2 The HSU express the view that the proposed amendment represents a "clarification" to the Award rather than a substantive change. However, they provide no further submissions in advance of that argument. Their position at to the proper interpretation of the existing Award is espoused in no more than a single sentence.

4.3 The HSU have not filed any evidence in support of this claim.

4.4 The grounds relied upon in support of the claim are confined to the following:

(a) An assertion, wholly unsupported by evidence, that employees who attend work to undertake a *portion* of a broken shift make the same sacrifices as employees who attend work for a non-broken shift;[24]

(b) A submission that the claim will result in an Award that is simpler and easier to understand, as it will apparently result in clause 22.8 being consistent with clause 22.7 of the Award;[25] and

(c) A submission that the claim would prevent "unscrupulous" employers from "exploiting" employees within the framework of the existing broken shifts Award provision.[26]

4.5 That is the extent of the HSU's written submissions in support of this claim.

4.6 We address each of the above arguments below.

Response to the HSU arguments

4.7 The first argument advanced by the HSU is prefaced on the assertion that an employee makes a proportionately greater sacrifice when working a broken shift as compared to an employee working a non-broken shift. Indeed, the HSU submission amounts to an assertion that:

[24] HSU Submission at [14]
[25] Ibid at [16]
[26] Ibid at [17]

(a) the quantum of "sacrifice" when working each *portion* of a broken shift is equal to the quantum of sacrifice when working a non-broking shift; and

(b) there is effectively a 'straight-line' relationship between the number of portions of work in a broken shift and the amount of "sacrifice" made by an employee.

4.8 In other words, where an employee undertakes a broken shift consisting of two portions of work, the HSU effectively contends that the employee makes twice the "sacrifice" as an employee who works a non-broken shift.

4.9 This assertion is made without any evidence having been adduced as to:

(a) firstly, whether there is any disutility associated with working broken shifts, and

(b) if so, the quantum of that disutility.

4.10 The HSU argument appears to be based on the assumption that employees working broken shifts face twice the "sacrifice" as employees working non-broken shifts. For example, it seems to be suggested that employees incur twice the travel time and costs when working broken shifts (i.e. they travel from home to work in order to commence a portion of work, then return home at the conclusion of that portion of work, and then repeat the process in order to undertake a second portion of work).

4.11 We do not accept that generalised assertion, and it is certainly unsupported by any probative evidence.

4.12 The reality is that there are likely to be efficiencies in an employee being able to work a broken shift and thereby obtaining a greater number of hours' work on a given day. In that sense, broken shifts mitigate the disutility of otherwise working short shifts by giving employees a greater number of hours' work on a given day.

4.13 In any event, the discussion on this point amounts to nothing more than speculation given the absence of any evidence of how broken shifts are utilised, and an assessment (with the benefit of evidence) of the impact on employees when working broken shifts.

4.14 As to the HSU's second argument, we do not consider that there is any merit to the suggestion that the HSU claim will make the Award simpler and easier to understand. If the Commission considers that clarification is required, it should insert wording into clause 22.8 to make it clear that the minimum payment provisions in clause 22.7 apply to broken shifts generally, and not to each portion of a broken shift. This would accord with the proper interpretation of the current Award.

4.15 In this respect, we note that this construction of the Award is reinforced by the decision of a six-member Full Bench of the Australian Industrial Relations Commission in *Aged Care Award 2010* [2010] FWAFB 2026. In that decision, the Full Bench considered a claim by the Liquor, Hospitality and Miscellaneous Union (the LHMU) to alter the minimum engagement provisions.

4.16 Specifically, the LHMU sought the inclusion of minimum engagement provisions from the pre-reform WA aged care award (the *Private Hospital and Residential Aged Care (Nursing Homes) Award 2002*) into the Award on a transitional basis. Notably, that pre-reform award provided a minimum engagement of three hours for all employees, and expressly included a minimum engagement of two hours for each part of a broken shift. This claim was rejected by the Full Bench.

4.17 The fact that the AIRC considered an d rejected a claim that specifically sought to include into the Award (albeit on a transitional basis) a minimum engagement for each portion of work in a broken shift reinforces the notion that the Award minimum engagements do not apply to each portion of a broken shift.

4.18 In response to the HSU's third argument, there is simply no evidence before the Commission as to any "unscrupulous" practices or "exploitation" to support those prejudicial allegations. The allegation is unfounded and should be rejected.

4.19 In reality, broken shifts are a necessary and very important feature of the industry, even more so given the recent changes to the client care models. In many cases, employees working broken shifts will receive a greater number of hours' work than they would otherwise receive if they did not work a broken shift. In other words, if working hours were not able to be performed non-consecutively under the Award, certain employees would almost certainly receive fewer hours of work, and therefore their take-home pay would be reduced, or they would be required to work additional days in order to maintain their take-home pay.

4.20 Broken shifts provide a mechanism for employers to provide a greater number of hours to employees on any given day, in circumstances where the employer is unable to provide a consecutive block of work. Employers cannot unilaterally impose a broken shift on an employee without their consent; broken shifts can not only be utilised where an employee agrees to work a broken shift.

4.21 Additionally, the current clause 22.8 provides a number of safeguards in relation to the use of broken shifts:

(a) Firstly, broken shifts can only be worked by casual and permanent part-time employees;

(b) Secondly, a broken shift can only be worked where the employee agrees to work the broken shift;

(c) Thirdly, the breaks within a broken shift cannot total more than four hours;

(d) Fourthly, the span of hours of a broken shift cannot exceed 12 hours;

(e) Fifthly, part-time employees have the certainty of their pattern of work having been agreed in advance (in writing), including the number of hours to be worked each week, the days of the week to be worked, and the starting and finishing times of each day;[27] and

(f) Sixthly, the existing minimum engagement provisions ensure that employees receive a minimum payment of two hours' pay when working a broken shift.

Implications of the claim

4.22 The HSU claim represents a substantive departure from the current Award position, and would materially alter the existing minimum payment obligations where employees undertake broken shifts.

4.23 The true implications of the claim, however, are difficult to assess given the evidentiary vacuum in which the claim has been advanced. The HSU claim should be dismissed.

5. CLAIM RELATING TO CASUAL LOADING

The HSU claim

5.1 The HSU seeks an increase to the rates of pay payable to casual employees when working on weekends and public holidays.

5.2 The rationale for the claim is an assertion that casual employees do not receive an amount in respect of casual loading when working on weekends and public holidays.

5.3 The HSU assert that there is "no basis for casual employees to have to forgo the casual loading for weekend and public holiday penalty rates". The logic behind that submission is that the casual loading and penalty rates serve different functions and so should therefore both be payable. The HSU rely on passages from the Penalty Rates Decision in support of this claim.

[27] See clause 10.3(b) of the Award

Threshold issue – work value considerations

5.4 The claim has been drafted in a curious manner. On one view, the claim involves a proposed increase to the weekend and public holiday penalty rates for casuals, rather than a claim for the payment of a casual loading *in addition to* the existing weekend and public holiday penalties.

5.5 This is because the proposed variation has been drafted in such a way so as to increase the applicable weekend or public holiday penalty rates, while expressly stating that the penalty rates are *in substitution* of the casual loading. In other words, they have not proposed to require that both the casual loading and the applicable penalties be paid, but rather have increased the penalty rates and made those penalties apply in substitution of the casual loading.

5.6 This is despite the fact that the claim is quite clearly directed towards ensuring that casual employees receive the casual loading in addition to the applicable penalty rates when performing work on weekends or public holidays.

5.7 There is a threshold question as to whether s156(3) applies to the claim.

5.8 Section 135 of the FW Act relevantly provides that:

> *(1) Modern award minimum wages cannot be varied under this Part except as follows:*
>
> *(a) modern award minimum wages can be varied if the FWC is satisfied that the variation is justified by work value reasons (see subsections 156(3) and 157(2));*

5.9 Section 156(3) provides:

> *In a 4 yearly review of modern awards, the FWC may make a determination varying modern award minimum wages* ***only if the FWC is satisfied that the variation of modern award minimum wages is justified by work value reasons****.* [emphasis added]

5.10 Section 284(3) provides the definition for 'modern award minimum wages', which is expressed as follows:

> *(3) Modern award minimum wages are the rates of minimum wages in modern awards, including:*

(a) *wage rates for junior employees, employees to whom training arrangements apply and employees with a disability; and*

(b) ***casual loadings****; and*

(c) *piece rates.* [emphasis added]

5.11 Given that the intent of the HSU claim is to ensure that a casual loading is paid on weekends and public holidays, it is arguable that the claim represents a proposal to vary "modern award minimum wages". If that is the case, the claim can only succeed if it is justified by work value reasons.

Background to clause 23.2 of the Award and previous Full Bench decision

5.12 The HSU conveniently ignore the relevant historical background to clause 23.2 of the Award.

5.13 Notably, this issue (and this exact claim) was previously the subject of an application to vary the Award by the Liquor, Hospitality and Miscellaneous Union (now United Voice), which was considered by a six-member Full Bench of the AIRC in 2010.

5.14 It is necessary to outline some of the relevant background to this claim as follows.

5.15 During the award modernisation process that led to the making of the Award, the HSU and the Aged Care Industry Employer Associations (**ACE**) both filed party draft awards which influenced the current formulation of the Award term.

5.16 The HSU filed a draft Award (the **HSU Draft**) on 31 October 2008. Clause 21.8(c) of the HSU Draft provided that employees working a Saturday would be paid at time and one-half, and employees working a Sunday would be paid at time and three-quarters. It then clarified at clause 21.8(d):

> *The foregoing paragraph shall apply to casual employees who work less than 38 hours per week, but such casual employees shall not be entitled to be paid in addition any casual loading in respect of their employment between midnight on Friday and midnight on Sunday.*

5.17 Similarly, the Aged Care Industry Employer Associations filed a Draft Award (the **ACE Draft**) on the same date. The ACE Draft proposed an identical clause to that proposed by the HSU in the HSU Draft.

5.18 The identical position advanced by both the HSU and ACE reflected a reasonable position having regard to the positions in the various pre-reform industrial instruments. For example, the main Federal Award, the *Private Hospital and Residential Aged Care (Nursing Homes)*

Award 2002 (**Federal Award**) provided penalty rates for employees working on weekends, but did not expressly provide for causal employees to receive the casual loading in addition to the weekend penalties.[28] This was also the position in various other pre-reform awards.[29]

5.19 Relevantly, the *Community and Aged Care Services (ACT) Award 2002* (the **ACT Award**) contained a slightly different arrangement. Clause 15.3 of the ACT Award provided that:

> *An employee so engaged shall be paid for all time worked at an hourly rate calculated on the basis of 1/38th of the appropriate rate of pay for the classification in which engaged, plus 20 per cent. For weekend and public holiday work, casual employees shall, in lieu of other penalty rates and the 20 per cent casual loading, receive the penalty rates prescribed for weekend and public holiday work.* [emphasis added]

5.20 When the Exposure Draft of the Award was released on 23 January 2009, it contained a clause which differed from that which had been proposed by both the HSU and ACE. Clause 23.2 of the Exposure Draft provided:

> *Casual employees, who work less than 38 hours per week, will not be entitled to payment in addition to any casual loading in respect of their employment between midnight on Friday and midnight on Sunday.*

5.21 The Award was then made on 3 April 2009 with clause 23.2 being in identical terms to the Exposure Draft.

5.22 Subsequently, on 28 October 2009, the LHMU made an application to vary clause 23.2 of the Award to entitle casual employees to *both* the casual loading and the applicable weekend or public holiday penalties when working at those times. In the alternative, the LHMU sought a variation to provide that casual employees who work less than 38 hours per week would be entitled to weekend penalty rates rather than the casual loading.[30]

5.23 Employer parties involved in the proceeding opposed the primary variation sought, however did not oppose the alternate claim, submitting that:

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[28] See clause 18.3

[29] See *Health and Community Services Industry Sector - Minimum Wage Order - Victoria 1997*; *Residential Aged Care (Hostels) Award 2002*; *Nursing Assistant's Award 2002*

[30] See *Aged Care Award 2010* [2010] FWAFB 2026

> *"The variation proposed by the LHMU in Appendix A2 [the alternative claim] would correct the unintended consequence that occurred during the drafting and subsequent finalisation of the AC Award."*[31]

5.24 By that, we understand that the employer parties were expressing the view that the final version Award had (apparently inadvertently) moved away from the wording that had been proposed in both the HSU Draft and the ACE Draft.

5.25 Ultimately, the Full Bench granted the LHMU's claim in the alternative, and varied the Award such that clause 23.2 provides:

> *Casual employees will be paid in accordance with clause 23.1. The rates prescribed in clause 23.1 will be in substitution for and not cumulative upon the casual loading prescribed in clause 10.4(b).*

5.26 In reaching that conclusion, the Bench observed that:

> *Having regard to the regulation in this area, in particular the incidence of some form of penalty payment to casuals for weekend work, we think the LHMU has made out a strong case for change. Nevertheless the position under the relevant award-based transitional instruments is by no means uniform. In particular we note that in many of those instruments the casual loading is lower than the loading in the modern award.* ***In the circumstances we consider that it would be fair to adopt the LHMU's alternative position, and make provision for casual employees to receive the relevant weekend penalty rates in substitution for the casual loading***.[32] [emphasis added]

5.27 As the above demonstrates, a six-member Full Bench of the AIRC considered the appropriate entitlements for casual employees when working on weekends and public holidays in the context of the variation application that was made by the LHMU on 28 October 2009.

5.28 The Full Bench granted the union's claim in the alternative, and in so doing observed that it would result in a "fair" outcome for casual employees working on weekends and public holidays.

5.29 In the absence of a compelling case, the Commission should not depart from the previous Full Bench decision.

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[31] *Aged Care Award 2010* [2010] FWAFB 2026 at [57]
[32] Ibid at [59]

5.30 In our submission, no such compelling case has been put. Rather, the HSU have advanced submissions totalling eight paragraphs, and no evidence (let alone probative evidence), in support of their assertion that a change is warranted.

Conclusion

5.31 The HSU has not advanced any cogent reason for this Commission departing from the previous Full Bench decision in *Aged Care Award 2010* [2010] FWAFB 2026. Therefore, the HSU claim should be dismissed.

6. CLAIM RELATING TO CLASSIFICATION - PERSONAL CARE WORKER LEVEL 4

United Voice Claim

6.1 United Voice seek a variation to the personal care worker level 4 classification (at dot point B.4), to remove the requirement for employees to be required by their employers to hold a relevant certificate III qualification. United Voice instead propose an amendment that would result in employees being classified as level 4 if they '*hold a relevant certificate III qualification or possess equivalent knowledge and skills gained through on the job training*'.[33]

6.2 Importantly, the proposed variation alters the relevant threshold from circumstances where an employee "is required" to hold a relevant certificate III qualification, to circumstances where they simply hold a relevant qualification, irrespective of whether the work they perform requires that level of qualification.

6.3 If the claim was to be granted, it would result in employees being classified as Level 4 merely because they hold a relevant Certificate III qualification, in circumstances where the work they carry out does not require it. Additionally, it would result in employees being classified as Level 4 where they have a particular level of knowledge and skills, again in circumstances where such knowledge and skills are not required to perform the duties.

6.4 The grounds relied upon in support of the claim are broadly the following:

(a) An assertion, unsupported by evidence, that employees who possesses a certificate III qualification and utilise that qualification in their work as a personal care worker, are being graded well below a level 4;[34]

[33] United Voice Submission at [32]
[34] Ibid at [50]

(b) a submission to the effect that employers gain the benefit of the employee's qualification but no effective mechanism exists for the qualification to be recognised within the classification structure of the Award;[35]

(c) a submission that the current classification structure enables employers to 'arbitrarily devalue work of a skilled employees';[36] and

(d) a submission that the proposed amendment will assist in creating a skills-related career path and deal with skill shortages.[37]

6.5 For the most part, these assertions are unsupported by evidence.

Classifications should be linked to duties, not qualifications

6.6 It is an established feature of awards (and classifications within awards) that an employee should be classified based on the skill and experience of the employee, and the nature of the duties that the employee is required to perform.

6.7 While qualifications are of course relevant, implementing hard-and-fast rules that automatically deem a particular employee to be of a particular classification based on their holding a qualification, without any reference to the duties they are actually required to perform, is problematic and goes against the overall system of classifying employees and would lead to unreasonable outcomes.

6.8 In our submission, employees should be classified based on their skills and knowledge, and the nature and complexity of the duties which they are required to perform.

6.9 The proposed claim would have the likely effect of having two employees who perform identical duties be entitled to different minimum wages merely because one employee possesses a qualification which the other does not possess, in circumstances where the work does not require the person to possess or use the qualification. This will lead to perverse and unfair outcomes.

6.10 It will also likely lead to wage outcomes that are inconsistent with the principle of equal remuneration for work of equal or comparable value, where employees of different genders are being paid differently for the same work merely because of one employee possessing an unnecessary qualification.[38]

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[35] Ibid at [51]
[36] Ibid at [52]
[37] Ibid at [53]
[38] s.134(1)(e) FW Act

6.11 The proposed variation would also likely encourage employees who are classified as level 3 to obtain a Certificate III in order to receive a higher rate of pay, even when it is not required in the role they are performing.

Conclusion

6.12 If successful, the claim is likely to have significant implications across the industry, and result in an unknown number of employees being entitled to a higher minimum wage merely by reason of possessing a particular qualification, irrespective of the duties actually being performed.

6.13 For those reasons, the claim should be dismissed.

7. CONCLUSION

7.1 For the reasons outlined in this reply submission, each of the Unions' claims should be dismissed.

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