BEFORE THE FAIR WORK COMMISSION

Fair Work Act 2009 (Cth)

Title of matter: 4 yearly review of modern awards—*Social, Community, Home Care and Disability Services Industry Award 2010*—Tranche 2 Proceedings

Matter Number: AM2018/26

Document: Responses to Background Papers 2 & 3 (and AFEI Amended submission—Mobile Telephone Claims)

Date: 11 March 2020

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A. Responses to Questions in Background Paper 2

Supplementary Questions 1 - 3: Not directed at AFEI

Supplementary Question 4: Do the parties challenge the proposition that a significant proportion of employees covered by the SCHADS Award are part-time employees? (See BP2 at [13]).

A-1. The meaning of the term "significant proportion" is unclear. AFEI does not however challenge that a significant proportion of employees covered by the SCHADS Award are in either part-time or casual employment.

Supplementary Question 5: The Joint Union's contend that the nature of the work required to be performed by employers in the sector has not undergone fundamental change and that those employers provide the same or similar services as is the point (i.e. pre NDIS), albeit that the extent and scope of their work has expanded. Do the other parties challenge this contention? If so, on what basis? (See BP2at [17]).

A-2. This contention is challenged. AFEI refer to written submissions dated 23 July 2019.[1] The NDIS policy objective of consumer-directed-care and giving consumer's choice and control in relation to when and how services are provided to them has fundamentally changed the operating environment and service provision by employers in the sector.[2] While certain tasks performed by disability/home care workers – (e.g. client personal care, housekeeping, shopping, accompanying on recreational outings etc.) have remained the same, clients are now being able to request a much broader range of services, to be delivered in a manner and at a time of the client's choosing.[3] This has fundamentally changed the nature of the employer's operations, both in service delivery and administration.

[1] Paragraphs 21 to 32.

[2] This is supported by Dr Stanford, whose evidence provides "the individualised, marketbased system which the NDIS uses to deliver services to participating clients is creating a profound fragmentation and instability in the nature of delivered services. Demand for specific services fluctuates constantly due to changes in the number of clients, their approved budgets, their specific choices of services, and other factors" – page 1447 CB at [8].

[3] AFEI submissions dated 19 November 2019 at [B-1] & [B-2].

B. Responses to Questions in Background Paper 3

Question 1: Are there any additions or corrections to Attachment 1? Parties are also asked to advise of the evidence which they rely upon for the community language allowance claim and the 24 hour clause matter respectively (See BP3 at [15])

B-1. Please note below additions and or corrections to Attachment 1:

Claim	**Additional evidence referred to in AFEI submissions**
ASU – Broken Shift Penalty Rate	Evidence referenced in AFEI submissions dated 11 February 2020 (paragraphs 2-39 to 2-45)
UWU – Broken Shifts	Evidence referenced in AFEI submissions dated 11 February 2020 (paragraphs 2-46 to 2-60)
HSU – Broken Shifts	Evidence referenced in AFEI submissions dated 11 February 2020 (paragraphs 2-33 to 2-38) AFEI submissions dated 26 February 2020 (paragraphs 1.33 to 1.34)
HSU – Minimum Engagement	Evidence referenced in AFEI submissions dated 23 July 2019 (paragraph 70) Evidence referenced in AFEI submissions dated 26 February 2020 (paragraphs 1.26 to 1.29)
HSU – Travel Time	Evidence referenced in AFEI submissions dated 19 November 2019 (paragraphs G-1 to G-5) Evidence referenced in AFEI submissions dated 11 February 2020 (paragraphs 1-30 to 1-31) Evidence referenced in AFEI submissions dated 26 February 2020 (paragraphs 1.36 to 1.42)
HSU – Telephone Allowance	Evidence referenced in AFEI submissions dated 11 February 2020 (paragraphs 2-91 to 2-92) Evidence referenced in AFEI submissions dated 26 February 2020 (paragraphs 1.33 to 1.34)
HSU – Client Cancellation	Attachment 1 of Background Paper 3 refers to "witness statement of Scott Harvey" and "PN31316". The correct reference is "oral evidence of Scott Harvey" at "PN3136" Oral evidence of Mr Wright on 17 October 2019 at "PN2651" is missing from Attachment A of Background Paper 3 Attachment 1 of Background Paper 3 refers to "witness statement of Joyce Wang" and "PN31316". The correct reference is "oral evidence of Joyce Wang" at "PN3612"

Claim	Additional evidence referred to in AFEI submissions
HSU – Overtime for part-time and casual workers beyond rostered hours/8 hours	It is unclear where the references to the evidence relied upon by AFEI in Attachment 1 comes from. AFEI notes as follows: The oral evidence of Ms Sinclair on 15 October 2019 at PN717 – PN723 and PN674 and PN612-PN613 is missing from Attachment 1 of Background Paper 3 The oral evidence of Mr Wright on 17 October 2019 at PN2623; PN2659; PN2727 is missing from Attachment 1 of Background Paper 3 The witness statement of Ms Thames (HSU 28) at paragraph 9 is missing from Attachment 1 of Background Paper 3 The witness statement of Ms Fleming (UV 4) at paragraph 17 is missing from Attachment 1 of Background Paper 3 The witness statement of Ms Stewart (UV 1) at paragraph 11 is missing from Attachment 1 of Background Paper 3 Oral evidence of Ms Wang is missing from Attachment A of background paper 3 (PN3603; PN3604) The witness statement of Mr Wright (ABI 3) at paragraph 36 is missing from Attachment 1 of Background Paper 3 Evidence referenced in AFEI submissions dated 23 July 2019 (paragraph 40 and 64) Evidence referenced in AFEI submissions dated 11 February 2020 (paragraph 1-40) Evidence referenced in AFEI submissions dated 26 February 2020 (paragraphs 1.8 – 1.17)
HSU – Damaged Clothing Allowance	Evidence referenced in AFEI submissions dated 11 February 2020 (paragraphs 2-61 to 2-64)
UWU – Variation to clothing and equipment allowance	Evidence referenced in AFEI submissions dated 23 July 2019 (paragraphs 158 - 159) Evidence referenced in AFEI submissions dated 11 February 2020 (paragraph 2-66)

Claim	Additional evidence referred to in AFEI submissions
UWU – Travel time	Evidence referenced in AFEI Submissions dated 19 November 2019 (paragraphs G-1 to G-5) Evidence referenced in AFEI submissions dated 11 February 2020 (paragraphs 1-7 to 1-18) Evidence referenced in AFEI submissions dated 26 February 2020 (paragraphs 1.36 to 1.42)
UWU – Variation to Rosters	Evidence referenced in AFEI submissions dated 23 July 2019 (paragraph 103) Evidence referenced in AFEI Submissions dated 19 November 2019 (paragraphs E-1 to E-4) Evidence referenced in AFEI submissions dated 11 February 2020 (paragraphs 2-102 to 2-106) Evidence referenced in AFEI submissions dated 26 February 2020 (paragraphs 1.18 to 1.25)
UWU – Mobile Telephone Allowance Claim	Evidence referenced in AFEI submissions dated 11 February 2020 (paragraphs 2-81 to 2-85) Evidence referenced in AFEI submissions dated 26 February 2020 (paragraphs 1.47 to 1.49)

B-2. At this stage of the proceedings, AFEI do not rely on any evidence in respect of the community language allowance claim and the 24 hour clause.

Question 2: Are the findings proposed by ASU challenged? (See BP3 at [25])

B-3. AFEI have previously made submissions in response to this question and relies on Final Submissions dated 11 February 2020.[4]

Question 3: Are the findings proposed by UWU challenged? (See BP3 at [27])

B-4. AFEI have previously made submissions in response to this question and relies on Final Submissions dated 11 February 2020.[5]

B-5. Further and additionally, AFEI make the following submissions:

B-6. *Employees are routinely expected to use their own car to travel in between work sites*

B-7. This finding is far too generalised. There is evidence from these proceedings that some employees are provided with a vehicle for work. For example, Ms Anderson.[6]

[4] Paragraphs 1-1 to 1-24.

[5] Paragraphs 1-25 to 1-29.

[6] Statement of Anderson – Annexure A (pg 1400 CB).

B-8. *Employees covered by the Award can be travelling to and from clients for significant periods of time without payment*

B-9. First, it is unclear as to the meaning of the term "significant periods of time". Second, in making this finding, the UWU relies on one direct employee witness, Ms Stewart. The evidence of one employee witness is insufficient to justify such a broad finding applicable to all employees covered by the Award particularly when there is also evidence heard in these proceedings whereby 90% of Ms Waddell's last client visits have been in the same suburb where she lives.[7]

B-10. *The non-payment of travel time creates a disincentive for employees to stay in the sector*

In making this finding, the UWU relies on one direct employee witness, Ms Stewart. The evidence of one employee witness is insufficient to justify such a broad finding applicable to all employees covered by the Award.

B-11. *The notion that travel time cannot be paid as it is difficult to calculate is counter factual; several of the employer witnesses indicated that they already pay travel time*

This finding is challenged on the basis that it oversimplifies the reality of the claim. We refer to our submissions dated 17 September 2019 which highlight difficulties including where an employee is engaged in travel from one client to another, an employer has no control over such travel including which travel route is taken and at what times, the means of travel, the time taken and whether costs are incurred.[8]

B-12. *Under the NDIS travel time is claimable. Providers can claim up to 30 minutes for the time spent travelling to each participant in city areas, and up to 60 minutes in regional areas*

NDS[9] have identified limitation to this finding, including that funding is only available where the client agrees to use some of their funding package for this purpose, rather than for time spent delivering a service to themselves.

B-13. Additionally, not all end users of home care services are funded through the NDIS. We refer to our submissions dated 17 September 2019,[10] the Commonwealth Home Support Program (CHSP) 'helps senior Australians access entry-level support services to live independently and safely at home'.

Question 4: Are the findings proposed by HSU challenged? (See BP3 at [33])

B-14. AFEI have previously made submissions in response to this question and relies on Final Submissions dated 11 February 2020.[11]

[7] PN1406-PN1409.
[8] Submissions dated 17 September 2019 at paragraph 14.
[9] NDS submissions dated 7 February 2020 at [15].
[10] Paragraphs 17 – 18.
[11] Paragraphs 1-30 to 1-31.

B-15. Further and additionally, AFEI make the following submissions:

B-16. *Possession of a functioning motor vehicle is all but a pre-condition for the work of disability support and home care workers*

This finding is inconsistent with the witness evidence of Mr Rathbone[12] and Ms Kinchin.[13] Mr Rathbone's and Ms Kinchin's job description (and her contract) as a disability support worker does not mention possession of a motor vehicle being an essential criterion of their roles.

B-17. *Their clients can also change from day to day, so the locations of their first and last appointments will rarely be the same each day and are not always predictable*

We refer to our submissions dated 19 November 2019 referencing proposed finding sought, that "employees in this sector typically work with the same clients on an ongoing basis".[14]

Further, evidence was heard in these proceedings from Ms Waddell that it is common for her to care for her first and last client in the suburb where she lives.[15]

The above is inconsistent with the proposed finding sought by the HSU.

B-18. *Particularly for workers in regional areas, considerable distances may be required to be travelled. For example, Heather Waddell*

Ms Waddell's evidence does not support the proposed finding. We refer to our submissions dated 19 November 2019.[16]

Proposed findings at [12] & [13] *BP 3 (at page 16)*

We have previously responded to these proposed findings and refer to our submissions dated 11 February 2020.[17]

B-19. *The requirement to travel long distances during the course of the working week is not limited to workers in regional areas*

We disagree with the assumption that arises from this proposed finding, that <u>all regional workers</u> are required to travel long distances and refer to our submissions dated 19 November 2019, in particular the cross-examination evidence of Ms Waddell.[18]

B-20. *Distance alone is not the only difficulty associated with travel. Geography and traffic flows may compound the demands of travel*

This finding is vague and unspecific

[12] Statement of Rathbone, Attachment A (pg 1175 – 1177 CB).
[13] Statement of Kinchin (pg 1192 – 1220).
[14] AFEI submissions dated 19 November 2019 at [B-3].
[15] PN1408.
[16] Paragraphs [G-1] – [G-3].
[17] Paragraphs [1-30] – [1-31].
[18] Paragraphs [G-2] – [G-3].

B-21. *The evidence before the Commission showed that under the NDIS, providers can now claim for up to 30 minutes in travel time in city areas and up to 60 minutes in travel time in regional areas and home care providers may charge clients for travel*

NDS[19] have identified limitation to this finding including that the funding is only available where the client agrees to use some of their funding package for this purpose, rather than for time spent delivering a service to themselves.

Additionally, not all end users of home care services are funded through the NDIS. We refer to our submissions dated 17 September 2019.[20]

B-22. *Proposed findings at [4], [6] BP 3 (at page 15) and [7], [8], [9], [10], [11], BP3 (at page 16) and [15], BP3 (at page 17), [19] – [21] BP3 (at page 18)*

B-23. It is unclear how these paragraphs are proposed findings

Question 5: Are the findings proposed by ABI challenged? (See BP3 at [40])

B-24. AFEI does not challenge the findings set out at [40] of the Background Paper 3.

Question 6: Directed at ABI

B-25. Not applicable to AFEI

Question 7: Is the alternative variation proposed by ABI opposed (See BP3 at [41] – [46])

B-26. It is AFEI's primary position that "existing arrangements for broken shifts in the Award are appropriate to the industry"[21]

B-27. AFEI do not however oppose the alternative variation in principle, save that AFEI would seek the opportunity to respond to any draft determination of the alternative variation.

Question 8: Are the findings proposed by Ai Group challenged? (See BP3 at [48])

B-28. AFEI do not challenge proposed findings by Ai Group

Question 9: Are the findings proposed by HSU challenged? (See BP3 at [53])

B-29. AFEI have previously made submissions in response to this question and relies on Final Submissions dated 11 February 2020.[22]

Question 10: Not directed at AFEI

B-30. Not applicable to AFEI

[19] NDS submissions dated 7 February 2020 at [15].
[20] Paragraphs 17 – 18.
[21] AFEI submissions dated 19 November 2019 at [B-4].
[22] Paragraphs 1-32 to 1-40.

Question 11: Not directed at AFEI

B-31. Not applicable to AFEI

Question 12: Are the findings proposed by ABI challenged? (See BP3 at [60])

B-32. AFEI do not challenge proposed findings by ABI

Question 13: Are the findings proposed by Ai Group challenged? (See BP3 at [61])

B-33. AFEI do not challenge proposed findings by Ai Group

Question 14 Are the findings proposed by the HSU challenged? (See BP3 at [66])

B-34. AFEI challenges the following proposed findings of the HSU:

B-35. *By defining "work" time as only the contact time between the worker and the client, minimum wage obligations are avoided*

This is more in the nature of a submission rather than a proposed factual finding. In any event, the HSU do not seek to support the proposition "minimum wage obligations are avoided" with any direct employee evidence. On the contrary, AFEI submit that the evidence actually demonstrate that employers attempt to maximise work time of employees engaged on broken shifts, where this is able to correspond with daily client requirements, and afford time to employees as breaks between periods of work where in-home care work is not required. For example:

- Ms Mason states[23]:
  "*Rostering and scheduling procedures are undertaken with the objective of scheduling home care employees with "blocks" of work wherever possible. These "blocks" will vary from 2 hours to possibly 5 hours depending, amongst other things, on the regional location, the distances to travel between clients, the availability of care staff, and the flexibility or otherwise of clients in setting service times*"
- Endeavours are made by employers to roster employees on longer shifts (or "runs").[24]

As to the unique nature of this sector, AFEI further rely on submissions dated 19 November 2019.[25]

B-36. *The absence of a minimum engagement period for part-time employees in disability or home care, combined with an unregulated capacity to work broken shifts (clause 25.6), creates a situation which is open to abuse*

The current clause 25.6 of the Award provides safeguards relating to:

i) The industry sectors which are able to utilise broken shifts;
ii) work undertaken during shift work hours with the payment in accordance with clause 29 of the Award;
iii) hours beyond the 12-hour span, by the payment of double time;
iv) There is a further restriction on the utilisation of broken shifts via the requirement for there to be a 10 hour break between broken shifts rostered on successive days;

These safeguards are sufficient.

[23] Statement of Mason at [71].
[24] PN2070; Statement of Harvey at [57-58]; Statement of Mason at [60-61]; Statement of Ryan at [65].
[25] Paragraphs [B-1 – B-4].

B-37. *As a consequence, the circumstances described in the Casual and Part-Time Employment Case as verging on exploitative*

The evidence in these proceedings conflict with the suggestion that employees are being exploited in practice. For example, Mr Elrick states "some workers enjoy working broken shifts, as they provide them with the ability to undertake personal tasks during the breaks".[26] Additionally, we heard evidence from employees who undertake broken shifts that they can and do undertake personal errands during their breaks in a broken shift.[27]

B-38. *It is difficult to imagine new workers entering the industry being in a position to resist a requirement to perform short shifts*

This proposed finding is presumptive and unsupported by evidence.

B-39. *Even where enterprise agreements establish minimum engagements, these may be broken into smaller parts, thereby significantly counteracting the benefit of the minimum engagements required.*

We highlight the unique nature of this sector and rely on submissions dated 19 November 2019.[28]

B-40. *The Commission would be satisfied on the evidence that the breaking of shifts is routine and widespread for homecare and disability workers*

The evidence in these proceedings do not dispute the use of broken shifts (for home care and disability workers) in the industry. To the contrary, AFEI seek the finding that broken shifts are required in the industry due to the unique nature of this sector, that services are dictated by client needs.[29]

B-41. *A consequence of the capacity to break shifts at will (without any quid pro quo of a minimum period of work) is that a large part of the day may be taken up accumulating disproportionately few hours of paid work.*

AFEI submit that the evidence actually demonstrate that employers attempt to maximise work time of employees engaged on broken shifts, where this is able to correspond with daily client requirements, and afford time to employees as breaks between periods of work where in-home care work is not required. For example:

- Ms Mason states[30]:
  "*Rostering and scheduling procedures are undertaken with the objective of scheduling home care employees with "blocks" of work wherever possible. These "blocks" will vary from 2 hours to possibly 5 hours depending, amongst other things, on the regional location, the distances to travel between clients, the availability of care staff, and the flexibility or otherwise of clients in setting service times*"
- Endeavours are made by employers to roster employees on longer shifts (or "runs").[31]

[26] Statement of Elrick at [21].
[27] PN461; PN525.
[28] Paragraphs [B-1 – B-4].
[29] AFEI submission dated 19 November 2019 at paragraph D.
[30] Statement of Mason at [71].
[31] PN2070; Statement of Harvey at [57-58]; Statement of Mason at [60-61]; Statement of Ryan at [65].

B-42. *This approach of employers shifts the burden and risk of delay and downtime onto employees*

The HSU rely on the evidence of Ms Thames (who, pursuant to an enterprise agreement, is not paid for gaps between 10 minutes to 1 hour but is otherwise paid $10.74 per break). However, evidence was also heard in these proceeding where a broken shift allowance under an enterprise agreement is paid for every break in the employee's shift,[32] and thus demonstrate that circumstances differ between employees and Ms Thames evidence is not representative of all employees in this sector.

B-43. *Proposed findings at [10] BP 3 (at page 34), [11], [12], [13] BP3 (at page 35)*

It is unclear how these paragraphs are proposed findings

B-44. *Proposed findings at [14] – [16] BP3 (page 35 – 36) regarding exploitation of employees*

This is addressed above. AFEI also rely on submissions dated 26 February 2020.[33]

Question 15 Are the findings proposed by NDS challenged? (See BP3 at [66])

B-45. AFEI do not challenge the proposed findings by NDS

Question 16: Not directed at AFEI

B-46. Not applicable to AFEI

Question 17: Are the findings proposed by ABI challenged? (See BP3 at [69])

B-47. To clarify, AFEI does not oppose in principle the alternative variation to part-time minimum engagements set out at [68] of Background Paper 3, save that AFEI would seek the opportunity to respond to any draft determination of the alternative variation.

B-48. In respect of the proposed findings, AFEI comment as follows:

B-49. First, ABI repeatedly uses the phrase "short shifts" and or "services of a short duration" in its proposed findings. The meaning of these terms remains unclear and what might appear "short for one person may not be "short" for another.

B-50. Second, AFEI submit that the evidence in these proceedings do not dispute the use of broken shifts (for home care and disability workers) in the industry. AFEI seeks the finding that broken shifts are required in the industry due to the unique nature of this sector, that services are dictated by client needs.[34]

B-51. Third, AFEI relies on submissions dated 19 November 2019.[35]

[32] PN1411-PN1413
[33] Paragraphs [1.26] – [1.29].
[34] AFEI submission dated 19 November 2019 at paragraph D.
[35] Paragraphs [B-1] – [B-7].

Question 18: Do you support or oppose NDS' proposal to clarify the meaning of 'regular'? (See BP3 at [129])

B-52. AFEI remains opposed to ABI's proposal to extend the additional annual leave entitlement to employees who regularly work 24 hour shifts. For this reason, it opposes NDS' proposal.

Question 19: Not directed at AFEI

B-53. Not applicable to AFEI

Question 20: Not directed at AFEI

B-54. Not applicable to AFEI

Question 21: Does it oppose any other aspect of ABI's proposal? (See BP3 at [138])

B-55. We refer to paragraph [5] of the draft report prepared by Commissioner Lee dated 14 November 2019, which provides as follows:

B-56. AFEI's position is for clause 25.8(e) of ABI's preferred draft to be varied consistent with the draft below. For ease of reference, the differences in the AFEI position to ABI's preferred draft are underlined below:

> "*If the employee is required to and the employee performs more than eight hours' work during a 24 hour care shift, all work performed by the employee in excess of eight hours per shift shall amount to accrual of time that the employee will be entitled to take off: (i) within the period of 3 months after the overtime is worked; and (ii) at a time or times within that period of 3 months agreed by the employee and employer*"

C. AFEI amended submissions—Mobile Telephone Claim

C-1. AFEI acknowledge that the HSU have withdrawn its mobile phone claim and instead adopts the UWU's revised mobile phone claim at paragraph [252] of Background Paper 1.

C-2. For the purpose of clarification, AFEI do not rely on submissions made on 26 February 2020 that expressly reference the HSU's (now withdrawn) mobile phone claim. However, it continues to rely on the remainder of the submissions (that do not reference the HSU's now withdrawn mobile phone claim) on the basis that those submissions are applicable to the UWU's revised mobile telephone claim.

C-3. In the light of the above, AFEI seek to amend paragraph G of submission dated 26 February 2020 as follows:

G. Mobile Telephone Allowance (HSU, UWU)

~~The HSU and UWU continue to press their claim to vary clause 20.6 of the Award, in respect to telephone allowance.~~

~~Clause 20.6 of the Award currently provides:~~

> ~~*"where the employer requires an employee to install and/or maintain a telephone for the purpose of being on call, the employer will refund the installation costs and the subsequent rental charges on production of receipted accounts"*~~

~~The HSU seeks to replace the current provision so that it states:~~

> ~~*"where the employer requires an employee to use a mobile phone for any work related purpose, the employer will either:*~~
> ~~*a. Provide a mobile phone fit for purpose and cover the cost of any subsequent charges; or*~~
> ~~*b. Refund the cost of purchase and subsequent usage charges on production of receipts."*~~

~~The UWU seek to vary the current provision so that it states *"where the employer requires an employee to install and/or maintain a telephone or mobile phone for purpose of being on call or to access work related information, the employer will refund the installation costs and the subsequent rental charges on production of receipted amounts".*~~

The Commission should not be satisfied that it is necessary to vary the Award in the manner proposed by the HSU and the UWU in order to achieve the modern awards objective for several reasons:

a) ***Firstly***, the material before the Commission does not establish that the clauses proposed by the HSU or UWU are <u>*necessary*</u> to ensure the Award achieves the modern awards objective. Indeed, the proposed clauses go beyond the modern awards objective inconsistent with section 134(f) of the Fair Work Act with potential significant impact on employment costs and regulatory burden, particularly in circumstances where an employer has to provide employees with a mobile phone, cover the cost of any subsequent usage and or to reimburse the cost of a mobile phone and subsequent usage charges, as proposed by the unions.

Further and additionally, the evidence before the Commission demonstrate that employees in this sector either already own a mobile phone and already use them for work purposes at no additional cost to the employee,[36] or they are provided with a device by their employer,[37] and thus does not amount to evidence in support of a need for the proposed variation.

b) ***Secondly,*** the proposed variations would likely result in significant unjustified and disproportionate costs for employers. ~~For example, in respect of the HSU's claim, "any work related purpose" could mean an employee calling in sick, and this would result in the employer providing them with a mobile phone or refunding the cost of a mobile phone.~~

c) ***Thirdly,*** the claim fails to resolve issues with the practicalities of this clause in practice. For example:

   ~~i. how would the employer disaggregate reimbursement of costs between work-related and private usage? The evidence in these proceedings is that employees use their mobile phones for both work and personal use.[38] The requirement for employers to pay for costs (and in some instances, significant costs) incurred by employees' personal usage of mobile phones would not be fair to employers. For example, Ms Stewart's monthly phone bill is $170. Ms Stewart gave evidence that she normally makes "*two to three phone calls per day to clients*" and she uses the phone for personal purposes.[39]~~

   ii. What happens to the phone when the employee leaves the employment?

   iii. How would an employer control usage of the device that it has covered the cost for?

   ~~iv. What happens in instances where mobile phone usage was not authorised or required by the employer?~~

   v. What happens in instances where the employee has more than one job?[40]

d) ***Fourthly,*** there is no financial limit or cap on the amount the employer would be required to pay in respect of this claim. The reimbursement of a mobile phone purchased at the employee's choice is clearly unfair to employers.

e) ***Finally,*** AFEI refer to and rely upon its written submissions dated 23 July 2019 at paragraphs 136 to 146.

In the light of the above, the unjustified cost and complexity that would flow from this claim would not be fair[41] or relevant[42] and is inconsistent with:

a) Section 134(d) – the need to promote flexible modern work practices; and

b) Section 134(f) – the likely impact on the exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden.

Accordingly, this claim should be dismissed.

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[36] AFEI submissions dated 19 November 2019 at [F].

[37] Statement of Sheehy at [12] – [13].

~~[38] PN441; PN534; PN535; PN536; PN537.~~

~~[39] PN440 – PN441.~~

[40] Mr Lobert, for example.

[41] 'Fairness' is to be assessed from the perspective of the employees and employers – Penalties Rates Case at [37].

[42] 'Relevant' is intended to convey that a modern award should be suited to contemporary circumstances – Penalties Rates Case at [37].