Australian Federation of Employers & Industries

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
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A. AFEI Submissions

1.1 The Fair Work Commission ("the Commission") has significant information and materials for consideration in the 4 Yearly review of the *Social, Community, Home Care and Disability Services Industry Award 2010* ("the Award") including:

a) A number of written submissions (including submissions in support and submissions in reply to various claims) from the Health Services Union (HSU), United Workers Union (UWU), Australian Services Union (ASU), Australian Business Industrial and The NSW Business Chamber Ltd (ABI), Ai Group and The National Disability Services (NDS);[1]
b) evidence from the HSU, UWU, ASU and ABI;
c) evidence heard in proceedings before the Full Bench of the Commission from 15 October 2019 to 18 October 2019;
d) written submissions to findings sought by interested parties in these proceedings; and
e) responses to questions posed in the Background Paper issued by the Commission on 6 January 2020.

1.2 In respect of the above, AFEI have previously filed written submissions on 3 July 2019, 23 July 2019, 17 September 2019, 19 November 2019 and 11 February 2020. AFEI continue to rely on these submissions.

1.3 This submission is therefore ***firstly*** in response to clause [3] of the Directions issued by the Fair Work Commission on 5 December 2019 and ***secondly*** serves to act as a summary of the relevant facts the Commission should take into account in reaching its decision, in respect of the union's proposals to vary the award.

B. The Legislative Framework for Award Variation

1.4 In conducting the 4 Yearly Review, the Commission is obliged to ensure that the Award together with the National Employment Standards, provide a fair[2] and relevant[3] minimum safety net of terms and conditions, taking into account the matters contained in section 134 of the Fair Work Act, which include:

a) The need to promote social inclusion through increased workforce participation (section 134 (c)); and

b) The need to promote flexible modern work practices and the efficient and productive performance of work (section 134 (d)); and

c) The likely impact of any exercise of modern award powers on business, including on productivity, employment costs and regulatory burden (section 134 (f)); and

d) The need to ensure a simple, easy to understand, stable and sustainable modern award system of Australia that avoids unnecessary overlap of modern awards (section 134 (g)).

[1] The Court Book (CB).

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

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

1.5 Section 138 of the Fair Work Act emphasises the importance of the modern awards objective:

> *"138 Achieving the modern awards objective*
>
> *A modern award may include terms that it is permitted to include, and must include terms that it is required to include, only to the extent necessary to achieve the modern awards objective"*

1.6 The Commission is also required to take into account the objects of the Fair Work Act as set out in section 3 of the Fair Work Act, which include the following:

a) Providing workplace relations laws that are flexible for businesses; and

b) Acknowledging the special circumstances of small and medium sized businesses.

1.7 The 4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues decision made before the Full Bench on 17 March 2014 provides:

> 'The need for a 'stable' modern award system suggests that a party seeking to vary a modern award in the context of the Review must advance a merit argument in support of the proposed variation. The extent of such an argument will depend on the circumstances. Some proposed changes may be self-evident and can be determined with little formality. However, where a significant change is proposed it must be 1) supported by a submission which addresses the relevant legislative provisions and 2) be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation. In conducting the Review, the Commission will also have regard to the historical context applicable to each modern award.'

C. Overtime for Part-time Employees Working Additional Hours

1.8 The HSU seek to vary clause 28.1(b)(iii) of the Award to require all time worked by part-time employees which exceed hours agreed in clause 10.3(c) to be treated as overtime and paid at the rate of time and a half for the first two hours and double time thereafter.

1.9 This clause applies to part-time and casual employees and reads "*time worked up to the hours prescribed in clause 28.1(b)(ii) will, subject to clause 28.1(b)(i), not be regarded as overtime and will be paid for at the ordinary rate of pay (including the casual loading in the case of casual employees).*"

1.10 For completeness, clause 28.1(b)(ii) states:

> *"All time worked by part-time or casual employees which exceeds 10 hours per day, will be paid at the rate of time and a half for the first two hours and double time thereafter, except on Sundays when overtime will be paid for at the rate of double time, and on public holidays at the rate of double time and a half."*

1.11 Clause 28.1(b)(i) states:

> *"All time worked by part-time or casual employees in excess of 38 hours per week or 76 hours per fortnight will be paid for at the rate of time and a half for the first two hours*

and double time thereafter, except that on Sundays such overtime will be paid for at the rate of double time and on public holidays at the rate of double time and a half."

1.12 Clause 10.3(c) states:

"Before commencing employment, the employer and employee will agree in writing on:
(i) *on a regular pattern of work including the number of hours to be worked each week, and*
(ii) *the days of the week the employee will work and the starting and finishing times each day."*

1.13 This claim constitutes a proposal to make a substantive change to the Award and thus requires the advancement of a merit argument supported by probative evidence.

1.14 AFEI submit that the HSU have failed to meet the requisite test for the Commission to vary the Award as sought:

a. ***Firstly***, AFEI submit that the HSU has failed to advance a merit argument as to how "the overtime functions under the Award do not meet the Modern Award objective". The Commission will find that no evidence was advanced in the proceedings by the HSU about the impact of the current overtime provisions at Clause 28.1(b)(i) and Clause 28.1(b)(ii) of the Award. This finding was not challenged by the Unions.[4] To this end, AFEI submit that the Award clearly already provides additional remuneration for part-time employees who perform overtime[5] and accordingly, the Award already achieves the modern awards objective.

b. ***Secondly***, AFEI submit that the HSU has failed to advance probative evidence in support of its claim. It is notable that the HSU rely on the evidence of three direct employee witnesses, Heather Waddell, Bernie Lobert, and Scott Quinn. ***A)***, the evidence of three employees is not representative of the entire industry and to this end, we say the evidence in respect of this claim is limited. ***B)***, Ms Waddell's and Mr Quinn's employment is covered by an enterprise agreement; the Award does not apply to them. ***C)***, Mr Lobert is a casual employee; this claim only applies to part-time employees. On this basis, neither the evidence of Ms Waddell, Mr Lobert or Mr Quinn is directly relevant to the HSU's claim and accordingly, does not amount to probative evidence justifying the proposed variation.

c. ***Thirdly:***

i. The rationale for part-time employment, as a type or category of employment under the Award, can be gleaned from the Metal and Engineering Industries Award 1998 – Part 1[6] (Metals Case), there the Full Bench stated:

> "*Types of employment provided for in an award <u>are foundational to the award's regime, and therefore to the award safety net</u>…A type of employment specified in an award is the subject to which the terms and conditions for that type of employment are awarded. Usually an award applies to one or more main or primary types of employment; each other type, in concept at least, is exempt from some or all of the*

[4] Joint submissions of the Unions dated 10 February 2020.
[5] Clause 28, the Award.
[6] (2000) 110 IR 247.

conditions awarded to apply to the primary category or categories. For purposes of the Award, weekly hire, in effect a form of continuing employment for standard hours, has long been the primary category provided for under the Award's predecessors. Each other type of employment may be seen as a response to operational, employment market, or perhaps special case needs. Those needs have been met by making provision as the need arose for the extra type of employment contract to which specific exemptions or peculiar conditions were then awarded."

The rationale for the introduction of part-time employment in modern awards is further analysed in the *Casual and Part-Time Employment Case*.[7]

ii. AFEI's proposed finding that 'part-time employees want to work additional hours'[8] is not disputed by the HSU.

iii. Further, the evidence of three witnesses does not establish that part-time employment is not a type of employment preferred by certain employees.

iv. AFEI submit that the overwhelming evidence from employer witnesses is that this claim would not only have significant detrimental (including financial) impact on organisations covered by the award but also on the ability to offer part-time employment as a result.[9]

v. Accordingly, the HSU's claim, if granted, would limit the opportunities for employers to make part-time employment available and limit the viability for employers to make additional hours available to part-time employees (as opposed to casual employees), thereby imposing unnecessary barriers to employment and workforce participation, inconsistent with section 134(c) Fair Work Act. It would also result in unfairness as compared to full-time employees who only receive overtime after 38 hours per week.

vi. To this end, it is not appropriate for the Award to discourage or block access to part-time employment. To do so would have a substantial adverse impact on both employees who prefer part-time work and have no desire to work full-time and employers who need the flexibility that part-time employment arrangements offer.

d. ***Fourthly***, the unjustified cost that would flow from this claim would not be fair[10] or relevant[11], inconsistent with the modern awards objective.

e. ***Finally,*** AFEI refer to and rely upon its written submissions dated 23 July 2019 at paragraphs 33 to 59.

1.15 Accordingly, this claim should be dismissed.

Overtime after 8 hours per day (HSU)

[7] [2017] FWCFB 3541 at [86] – [97].

[8] AFEI submissions dated 19 November 2019 at [A-3].

[9] Statement of Shanahan at [29] – [32]; Statement of Harvey at [49] – [52]; Statement of Collins at [37] – [43]; Statement of Ryan at [54] – [59]; Statement of Wang at [43] – [50].

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

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

1.16 The HSU continue to press their claim to vary clause 28.1(b)(ii) so that all time worked by part-time or casual employees which exceeds 8 hours per day will be paid at the rate of time and a half for the first two hours and double time thereafter.

1.17 AFEI refer to and rely upon its written submissions dated 23 July 2019.[12]

D. Changes to Rosters

1.18 The UWU press their claim to vary clause 25.5(d)(i) so that full time and part-time employees will be entitled to payment of overtime for roster changes where seven days' notice is not provided.

1.19 For completeness, Clause 25.5(d)(i) provides:

> "*Seven days' notice will be given of a change in a roster*."

1.20 There are exceptions to clause 25.5(d)(i) at:

a) clause 25.5(d)(ii) which provides "*a roster may be altered at any time to enable the service of the organisation to be carried on where another employee is absent from duty on account of illness, or in an emergency*"

b) clause 25.5(d)(iii) which provides that clause 25.5(d)(i) "*will not apply where the only change to the roster of a part-time employee is the mutually agreed addition of extra hours to be worked such that the part-time employee still has four rostered days off in that fortnight or eight rostered days off in a 28 day roster cycle, as the case may be*"

1.21 Further, clause 25.5(f) provides:

> "*Client cancellation*
>
> (i) *Where a client cancels or changes the rostered home care service, an employee will be provided with notice of a change in roster by 5.00 pm the day prior and in such circumstances no payment will be made to the employee. If a full-time or part-time employee does not receive such notice, the employee will be entitled to receive payment for their minimum specified hours on that day.*
>
> (ii) *The employer may direct the employee to make-up time equivalent to the cancelled time, in that or the subsequent fortnightly period. This time may be made up working with other clients or in other areas of the employer's business providing the employee has the skill and competence to perform the work."*

1.22 The UWU propose to amend clause 25.5(d)(i) as follows (UWU's proposed amends are emphasised in bold):

> "Seven days' notice will be given of a change in a roster. **Full-time and part-time employees will be entitled to the payment of overtime for roster changes where seven days' notice is not provided**"

1.23 The UWU's claim constitutes a proposal to make a substantive change to the Award and thus require the advancement of a merit argument supported by probative evidence.

[12] Paragraphs [60] – [66].

1.24 AFEI submit that the UWU have failed to meet the requisite test for the Commission to vary the Award as sought:

a) ***Firstly***, as the rationale for the UWU's proposed variation, they submit "*the Award does not explicitly identify what the consequence is for the employer for failing to providing (sic) seven days' notice of a roster change in a situation where the exceptions in clause 25.5(d)(ii) and (iii) do not apply*".[13]However, the UWU failed to advance direct employee witness evidence demonstrating that employers have, in practice, been changing employee rosters in situations not already covered by the Award. For example the UWU rely solely on the witness evidence of Sinclair, Fleming and Stewart. The changes to rosters described by these employees are either permissible at clauses 25.5(d)(ii) and 25.5(f) of the Award or the employee agrees to the changes, which is permissible under clause 25.5(d)(iii).[14]

b) ***Secondly***, it is not in dispute that roster changes can be due to client cancellations. In these circumstances, the unjustified cost that would flow from this claim (i.e. overtime payable each time a service is cancelled)[15] would not be fair[16] or relevant[17] and would be inconsistent with section 134(f) Fair Work Act – the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden.

c) ***Thirdly,*** this claim fails to take into account the unique nature of this industry. AFEI refer to paragraph B of its submissions dated 19 November 2019. AFEI submits this claim is inconsistent with:

   i. section 134(d) Fair Work Act – the need to promote flexible modern work practices and the efficient and productive performance of work;

   ii. Section 3(a) Fair Work Act – providing workplace relations laws that are flexible for businesses.

d) ***Finally,*** AFEI refer to and rely upon its written submissions dated 23 July 2019 at paragraphs 96 to 104.

1.25 Accordingly, this claim should be dismissed.

[13] CP p4430 at [67].

[14] AFEI submissions dated 11 February 2020 at [2-102].

[15] Mr Shanahan's evidence provides that i) client cancellations for NSW Home Support Services are on a 'regular basis' (Shanahan Statement at [20] and ii) between the months of March 2019 to May 2019, cancelled services range from 64 hours per month to 184 hours per month (Statement of Shanahan – Appendix A); Mr Harvey's evidence is that ConnectAbility Australia Limited experiences client cancellations on a 'daily basis' (Statement of Harvey at [32]).

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

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

E. Minimum Engagements and Broken Shifts

Minimum Engagements (HSU)

1.26 The HSU press their claim to vary the Award to provide all employees with a minimum engagement of three hours. This claim thus affects casual employees, part-time employees and full-time employees in all sectors covered by the award.

1.27 For completeness, minimum engagements under the Award currently apply to casual employees at clause 10.4 of the Award:

> *"Casual employees will be paid the following minimum number of hours, at the appropriate rate, for each engagement:*
>
> (i) *social and community services employees except when undertaking disability services work—3 hours;*
>
> (ii) *home care employees—1 hour; or*
>
> (iii) *all other employees—2 hours."*

1.28 This means that the HSU's claim would have the effect of:

a) Increasing the minimum engagement period for casual employees performing home care, disability services work, crisis accommodation work and family day care employees to three hours.

b) Introducing a minimum engagement period for full-time and part-time employees of three hours.

1.29 On the basis of materials listed at [1.1] – [1.2] above, the Commission should dismiss this claim:

a) ***Firstly,*** the Full Bench of the Commission has already considered the proposal for a generic minimum engagement period for casual and part-time employees and determined that it is not appropriate as a general standard,[18] taking into consideration the following factors:

- Longer minimum engagement periods may prejudice those persons who wish to and can only work for short periods of time because of family, study or other commitments, or because they have a disability;
- The need for and length of a minimum engagement period may vary from industry to industry, having regard to differences such as rostering practices and whether there are broken shifts;
- An excessive minimum engagement period may cause employers to determine that it is not commercially viable to offer casual engagements or part-time work, which may prejudice those who desire or need such work; and
- A minimum daily engagement period for part-time employees might not need to be as long as for casual employees, because part-time employees are likely to enjoy the greater security of a guaranteed number of weekly hours of work.

[18] [2017] FWCFB 3541 ("Casual and Part-Time Employment Case").

It is notable that the Full Bench in the Casual and Part-Time Employment Case commented "*it is clear that that the minimum engagement periods were intended to meet the peculiar circumstances of special types of work or workers."*[19]

b) ***Secondly***, the history concerning minimum engagement in the award and its particularity to this industry is relevant. To this end, we refer to AFEI submissions dated 23 July 2019.[20]

c) ***Thirdly***, the HSU's claim amount to a substantive variation of the Award; the HSU have failed to advance probative evidence in support of its claim. The HSU relies on the evidence of four direct employee witnesses, three of whom are part-time employees (Ms Waddell, Ms Thames and Mr Quinn) and one casual employee (Mr Lobert):

i. Four employees is not representative of the entire industry; and indeed, none of the employee witnesses are covered by the crisis accommodation stream or family day care stream of the Award;

ii. Ms Waddell and Mr Quinn are both employed under enterprise agreements and thus the Award do not apply to these employees;

iii. Mr Lobert's evidence is that his shifts range from between five hours to seven and a half hours in length[21] and is thus not supportive of a 'short shift' to whom a 3 hour minimum engagement period would be applicable;

iv. Whilst there is evidence from three part-time employees that they undertake shifts as little as 30 minutes in length, there is also evidence from the same employees that their shifts can go up to four hours in length and thus, there is very little evidence before us of any actual exploitation of employees in practice;

v. There is no evidence of employers in this industry rostering full-time employees for very short shifts.

d) ***Fourthly***, we do not consider that a case has been made out for a minimum engagement period of casual employees and part-time employees to be aligned, since part-time employment is not only a different type of employment as expressed by Part 3 of the Award "Types of Employment", by virtue of clause 10.3 and clause 10.4 of the Award, part-time employment is treated differently to casual employment. As concluded by the Full Bench in *the Casual and Part-Time Employment Case,* part-time employment is distinct in terms of income security from those of casual employees.[22] In particular, part-time employees are entitled to reasonably predictable hours per week.[23]

e) ***Finally,*** AFEI refer to and rely upon its written submissions dated 23 July 2019 at paragraphs 76 to 95.

Broken Shifts (HSU, ASU)

1.30 Clause 25.6 provides as follows:

"Broken shifts
This clause only applies to social and community services employees when undertaking disability services work and home care employees.

[19] Casual and Part-Time Employment Case at [405].
[20] Paragraphs [71] to [75].
[21] Statement of Lobert at [11]
[22] Casual and Part-Time Employment Case at [406].
[23] Clause 10.3(a), the Award.

*(a) A **broken shift** means a shift worked by an employee that includes one or more breaks (other than a meal break) and where the span of hours is not more than 12 hours.*

(b) Payment for a broken shift will be at ordinary pay with penalty rates and shift allowances in accordance with clause 29 – Shiftwork, with shift allowances being determined by the finishing time of the broken shift.

(c) All work performed beyond the maximum span of 12 hours for a broken shift will be paid at double time.

(d) An employee must receive a minimum break of 10 hours between broken shifts rostered on successive days."

1.31 Clause 25.6 therefore currently:

a) apply to all social and community services employees, that is full-time, part-time and casual employees, when undertaking disability services work and home care employees;

b) permit multiple breaks in a broken shift over a 12 hour span;

c) regulate shift allowances payable under clause 29 of the Award; and

d) regulate payment for all work performed beyond the 12 hour span.

1.32 **The HSU** seek to significantly vary clause 25.6 as follows:

a) Limiting the clause to part-time and casual employees, preventing full-time employees from working broken shifts;

b) that the shift may be broken once only;

c) Requiring that each portion of a broken shift be subject to the proposed 3-hour minimum engagement;

d) Requiring broken shifts only to be worked where there is mutual agreement between the employer and individual employee; and

e) the shift allowance to be determined by either the starting time or the finishing time of the broken shift, whichever is greater.

1.33 On the basis of materials listed at [1.1] – [1.2] above, this claim should not be accepted:

a) ***Firstly***, there is a need for broken shifts in this industry.

i. The evidence in these proceedings do not dispute the use of broken shifts in the industry. To the contrary, 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.[24]

ii. AFEI also seek the following findings that provide an insight into how the industry work in practice, that it is desirable for clients to be cared for by the same employee;[25] and each portion of work in a broken shift is typically less than three hours in length.[26]

b) ***Secondly***, there is no supported basis to justify departure from the current Award terms.

i. The HSU submit "the only current restraint on the utilisation of broken shifts is that the shift may not span more than 12 hours."[27]

ii. The current clause is limited to social and community services employees when undertaking disability services work and home care employees.[28] This clause is thus based on an arrangement specific to the needs of the sector.

iii. Further, the current clause provides safeguards relating to i) work undertaken during shift work hours with the payment in accordance with clause 29 of the Award[29], ii) hours beyond the 12-hour span, by the payment of double time.[30] 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.[31]

iv. The current clause therefore provides safeguards for employees working broken shifts.

v. The HSU submit the proposed variations would prevent exploitation of employees.[32] However, 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".[33] 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.[34]

c) ***Thirdly***, the relevance of the HSU's employee witnesses is wholly insufficient to be relied upon to justify such significant departure from the status quo.

i. The HSU seek to rely on evidence of five employee witnesses, being Ms Waddell, Ms Wilcock, Ms Thames, Mr Lobert and Mr Quinn. It is of note that four out of the five witness's employment (i.e. Ms Waddell, Ms Wilock, Ms Thames and Mr Quinn) are covered by an enterprise agreement and thus the Award does not apply to them.

ii. Mr Lobert works three different jobs on a casual basis, of which one job is covered by an enterprise agreement. Mr Lobert's evidence is that his shift lengths are between

[24] AFEI submission dated 19 November 2019 at paragraph D.
[25] AFEI submission dated 19 November 2019 at paragraph B-3.
[26] AFEI submission dated 19 November 2019 at paragraph B-4.
[27] CB, pg 2848.
[28] Clause 25.6, the Award.
[29] Clause 25.6(b) the Award.
[30] Clause 25.6(c).
[31] Clause 25.6(d).
[32] CB, pg 2848.
[33] Statement of Elrick at [21].
[34] PN461; PN525.

5.5 hours to 7 hours in length and that he is not able to have a break,[35] as opposed to having too many breaks.

iii. Further, the HSU has advanced no evidence from full time employees working broken shifts or the effect of broken shifts provisions on full-time employment.

d) ***Finally,*** AFEI refer to and rely upon its written submissions dated 23 July 2019 at paragraphs 105 to 125.

1.34 ***In summary***, existing arrangements for broken shifts in the Award are appropriate to the industry.[36] That is, clause 25.6 achieves the modern awards objective by virtue of section 134 of the Fair Work Act. Further, the HSU has not only failed to advance a merit argument supported by probative evidence as justification for the proposed variations to the broken shift clause but the unjustified restrictions and cost that would flow from this claim would not be fair[37] or relevant[38] and thus should be dismissed.

1.35 **The ASU** proposes the inclusion of a 15% loading on the ordinary rate of pay for each hour worked in addition to penalty rates and shift allowances on broken shifts. AFEI submit as follows:

a) ***Firstly***, the 15% loading appears to be an arbitrary amount sought without justification as to how the current provisions do not meet the modern awards objective.

b) ***Secondly***, the proposed variation would be inconsistent with section 134(f) of the Fair Work Act – the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden.

c) ***Finally,*** AFEI refer to and rely upon its written submissions dated 23 July 2019 at paragraphs 121 to 125. Accordingly, this claim should be dismissed.

F. Travel Time (HSU, UWU)

1.36 The HSU propose to insert the following provision into clause 25.6 (broken shift provision):

> *"where an employee works a broken shift, they shall be paid at the appropriate rate for the reasonable time of travel from the location of their last client before the break to their first client after the break, and such time shall be treated as time worked. The travel allowance at clause 20.5 also applies"*

1.37 The HSU proposes to insert, at the end of clause 20.5(a) of the Award, the following:

> *"Disability support workers and home care workers shall be entitled to be so reimbursed in respect of all travel:*
>
> *(a) From their place of residence to the location of any client appointment;*
>
> *(b) To their place of residence from the location of any client appointment;*
>
> *(c) Between the locations of any client appointments on the basis of the most direct available route."*

[35] Statement of Lobert.

[36] AFEI submission dated 19 November 2019 at paragraph B-5.

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

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

1.38 The UWU advance a similar claim to the HSU.

1.39 For information, clause 20.5(a) of the Award currently states:

> *"where an employee is required and authorised by their employer to use their motor vehicle in the course of their duties, the employee is entitled to be reimbursed at the rate of $0.78 per kilometre."*

1.40 The HSU submit:

> "*The evidence of the HSU discloses that disability support workers and home care workers are as a matter of course required to travel considerable distances during the course of their working days in order to perform their work for their employers, particularly in regional areas. The evidence suggests employers regard the travel to the first client and from the final client of the day as not travel which occurs in the course of the employee's duties. If that were correct, there would be a perverse incentive for employers to schedule the furthermost clients at the start and finish of each day. The evidence indicates this approach is already being taken by some employers. Such travel is a fundamental part of the duties performed by those workers. It is necessary in order to perform the principal caring duties, and well exceeds the usual travel engaged in by employees to and from their workplaces.*
>
> *The HSU's evidence demonstrates that the existing broken shift provision in the Award, combined with the absence of minimum shifts for part-time workers, enables employers to engage employees to perform a series of periods of work over the course of a day, with the expectation that the "break" in the shift will be used to travel on to the next client. Where such arrangements are utilised, workers are required to travel significant distances in the course of a day, on their own time, and in many cases, because the travel is not regarded as occurring in the course of duties because it occurs during a break in the shift, without any compensation."*

1.41 The proposed variation is therefore significant in nature and requires the advancement of a merit argument supported by probative evidence. AFEI submit that the unions have failed to establish a merit basis for variation of the Award as proposed for the following reasons:

a) ***Firstly,*** AFEI refer to and rely upon its written submissions dated 17 September 2019.

b) ***Secondly***, the HSU's submissions overstate the amount of travel being undertaken by disability support workers and home care workers. AFEI refer to submissions dated 19 November 2019[39] where the following findings (supported by evidence in these proceedings) are sought:

   i. Not all disability support workers and home care workers are required to travel considerable distances during the course of their working days in order to perform their work;

   ii. Where employees do travel a considerable distance, such travel is undertaken on an irregular basis;

   iii. Employees do not always use their breaks to travel from one client to another;

   In the light of the above, there is a lack of probative evidence in support of this claim.

[39] Paragraph [G].

c) ***Thirdly***, an employer has limited control over the time it takes for an employee to get from one client to another due to a number of factors, including traffic.[40]

d) ***Fourthly***, the evidence in these proceedings not only demonstrate that employers attempt to maximise work time of employees engaged on broken shifts,[41] but the breaks between shifts can be used by employees to undertake private activities and, where this is the case, it is not "work".[42] Further, travel between home and work is considered private travel by the Australian Tax Office.[43]

e) ***Fifthly***, the effect of treating private time that is not work as "work" would give rise to a number of difficulties including how such time would interact with other clauses of the Award such as rostering, ordinary hours of work, types of employment, overtime, shift penalties.

f) ***Sixthly,*** the NDIS pricing guide only allows for travel time to be claimed by a provider in certain set conditions.[44] Further, to the extent that some travel time may be claimable in certain circumstances, this is not a rationale for treating an employee's private time during a break as paid work. The resulting effect of this claim would not only be unjust and unfair on employers that is inconsistent with section 134(f) (the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden) but it could result in employers responding in a way to minimise exposure to any unrecoverable costs including minimising multiple engagements to an employee on the same day, ultimately having an impact on employees who want to work more hours.[45]

1.42 In the light of the paucity of evidence and the absence of cogent merit argument in support, this claim should be dismissed.

G. Mobile Telephone Allowance (HSU, UWU)

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

1.44 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"*

1.45 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:*

[40] AFEI submissions dated 19 November 2019 at [G-5].
[41] AFEI submissions dated 11 February 2020 at [1-7].
[42] AFEI submissions dated 11 February 2020 at [1-16].
[43] https://www.ato.gov.au/Individuals/Income-and-deductions/Deductions-you-can-claim/Vehicle-and-travel-expenses/Travel-between-home-and-work-and-between-workplaces/
[44] AFEI submissions dated 11 February 2020 at [1-17].
[45] Statement of Sinclair at [26]; PN678.

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."

1.46 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".*

1.47 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 *necessary* 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,[46] or they are provided with a device by their employer,[47] 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.[48] 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.[49]

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?[50]

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

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

[48] PN441; PN534; PN535; PN536; PN537.

[49] PN440 – PN441.

[50] Mr Lobert, for example.

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.

1.48 In the light of the above, the unjustified cost and complexity that would flow from this claim would not be fair[51] or relevant[52] 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.

1.49 Accordingly, this claim should be dismissed.

H. Clothing Allowance

Clothing Allowance (HSU)

1.50 The HSU continue to press their claim for a 'damaged clothing allowance' as follows:

> *"(i) Where an employee, in the course of their employment suffers any damage or soiling of clothing or other personal effects (excluding hosiery), upon provision of proof of the damage, employees shall be compensated at the reasonable replacement value of the damaged or soiled item of clothing;*
>
> *(ii) This clause will not apply where the damage or soiling is caused by the negligence of the employee"*

1.51 AFEI refer to its written submissions dated 23 July 2019[53] and 12 February 2020.[54]

1.52 In the light of the paucity of evidence and the absence of cogent merit argument in support, this claim should be dismissed.

Clothing Allowance (AWU)

1.53 The UWU continue to press their claim to insert a new provision in clause 20.2, that '*an adequate number of uniforms should allow an employee to work their agreed hours of work in a clean uniform without having to launder work uniforms more than once a week*'.

1.54 AFEI refer to its written submissions dated 23 July 2019[55] and 12 February 2020.[56]

[51] 'Fairness' is to be assessed from the perspective of the employees and employers – Penalties Rates Case at [37].
[52] 'Relevant' is intended to convey that a modern award should be suited to contemporary circumstances – Penalties Rates Case at [37].
[53] Paragraphs [148] – [155].
[54] Paragraphs [2-61] to [2-64].
[55] Paragraphs [156] – [160].
[56] Paragraphs [2-66].

1.55 In the light of the paucity of evidence and the absence of cogent merit argument in support, this claim should be dismissed.

I. Sleepover (HSU)

1.56 The HSU continue to press their claim to vary the sleepover provisions at clause 25.7(c) to include additional prescription of facilities to be provided to an employee when performing a sleepover.

1.57 AFEI refer to its written submissions dated 23 July 2019[57] and 12 February 2020.[58]

1.58 AFEI submit the variation proposed by the HSU is not necessary and that the arrangement of appropriate facilities is a matter which is best determined at the workplace level.

J. Client Cancellation (HSU)

1.59 AFEI refer to its written submissions dated 3 July 2019[59], 23 July 2019[60] and 12 February 2020.[61]

K. Remote Response

1.60 AFEI refer to its written submissions dated 19 November 2019.

L. AFEI Submissions in reply—Community Language Skills Allowance Claim

1.61 On 7 February 2020, the ASU filed written submissions and a draft determination in regard to its amended claim for a community language allowance ("the amended claim").

1.62 This submission is in response to the Directions issued by Deputy President Clancy on 18 December 2019 in regard to the amended claim.

1.63 AFEI have previously filed written submissions on 8 April 2019 and 22 May 2019. AFEI continue to rely on these submissions.

1.64 For completeness, the ASU's original claim was:

20.10 Community Language and Signing Work

[57] Paragraphs [161] – [167].
[58] Paragraphs [2-94] – [2-100].
[59] Paragraphs [10] – [12].
[60] Paragraphs [134] – [135].
[61] Paragraphs [2-67] – [2-80].

20.10.1 Employees using a community language skill as an adjunct to their normal duties to provide services to speakers of a language other than English, or to provide signing services to those with hearing difficulties, shall be paid an allowance in addition to their weekly rate of pay.

20.10.2 A base level allowance shall be paid to staff members who's language skills are required to meet occasional demands for one-to-one language assistance. Occasional demand means that there is no regular pattern of demand that necessitates the use of the staff members language skills. The base level rate shall be paid as a weekly allowance of 4.90% of the standard rate.

20.10.3 The higher level allowance is paid to staff members who use their language skills for one-to-one language assistance on a regular basis according to when the skills are used. The higher level rate shall be paid as a weekly allowance of 7.35% of the standard rate.

20.10.4 Such work involves an employee acting as a first point of contact for non English-speaking service users or service users with hearing difficulty. The employee identifies the employee's area of inquiry and provides basic assistance, which may include face-to-face discussion and/or telephone inquiry.

20.10.5 Such employees convey straightforward information relating to services provided by the employer, to the best of their ability. They do not replace or substitute for the role of a professional interpreter or translator.

20.10.6 Such employees shall record their use of community language skills.

20.10.7 Where an employee is required by the employer to use community language skills in the performance of their duties a) the employer shall provide the employee with accreditation from a language/signing aide agency b) The employee shall be prepared to be identified as possessing the additional skill(s) c) The employee shall be available to use the additional skill(s) as required by the employer.

1.65 The ASU's amended claim is:

20.10 Community Language and Signing Work

(a) An employee who, in the course of their normal duties, uses a language other than English to provide services to speakers of a language other than English, or use sign language to provide services to those with hearing difficulties, shall be paid an allowance of 4.90% of the standard rate per week.

(b) The allowance in 20.10(a) will apply to eligible part time and casual employees on a pro rata basis on the basis that the ordinary weekly hours of work for full-time employees are 38.

1.66 The key differences between the original and amended claim are:

a) The amended claim replaces the term "community language skills". The new proposed clause 20.10 now applies to:

i. "an employee" covered by the Award; and

ii. in the course of the employee's "normal duties" i) uses a language other than English ii) to provide services of a language other than English or use sign language to provide services to those with hearing difficulties.

b) The amended claim clarifies that the proposed clause 20.10 applies to full-time and "eligible part-time and casual employees" on a pro-rata basis.

c) The ASU have removed:

i. the clauses that differentiate between staff who use language skills occasionally and on a more regular basis and replaced the allowance at 4.90% of standard rate (as opposed to having two different allowance rates depending on frequency of use of the second language);

ii. detailed descriptions of work to be undertaken by staff for the purposes of satisfying the applicability of the allowance. For example, references to "an employee acting as a first point of contact for non-English speaking service users, conveyance of straightforward information relating to services provided by the employer, to the best of their ability" have been removed;

iii. Employee obligation to undertake record-keeping; and

iv. Obligation on the employer to provide the employee with accreditation.

1.67 AFEI submissions

a. ***Firstly***, we observe that many of the concerns identified in our submissions[62] in respect of the original claim continue to apply in respect of the amended claim. Our concerns include:

i. The effect of the clause would mean that the payment of the allowance would apply irrespective of whether the employer has requested or required the employee to use a language other than English and or use sign language, and in circumstances where the employer has no verification of the employee's actual skill level;

ii. the limited evidence relied upon by the ASU in support of this claim;

iii. eligibility for the allowance would apply without the requirement for the employee to have a qualification and or proof of proficiency; and

iv. the allowance claimed in significantly higher than, and disproportionate to the majority of interpreter/language/translator allowances in other Modern Awards/Modern Enterprise Awards;

b. ***Secondly***, there are issues with proportionality in regard to the quantum that is being sought. For example, a social and community services employee level 2 who uses a language other than English in the course of their normal duties (persons at this level can hold a diploma) would be earning more than a social and community services employee level 3 (persons at this level include graduates with a three or four year degree).

c. ***Thirdly***, in respect of the lack of proof of formal qualifications/accreditation required from the employee's prior to the applicability of the proposed allowance, the ASU submit that such an imposition would be unfair.[63] However, verification of the utility of the skill is an important factor in establishing the value of the skill. Similar to the first aid allowance, at clause 20.4

[62] AFEI submissions dated 8 April 2019 at [31], [32], and [33]. AFEI submissions dated 22 May 2019 at [13] – [15], [18] – [19].

[63] ASU submissions dated 7 February 2020 at [7].

of the award, the employee must hold a certificate as one of the prerequisites prior to the first aid allowance becoming applicable. A similar imposition should apply to proposed clause 20.10 prior to the allowance being applicable.

d. ***Fourthly***, the amended claim, as currently drafted, could have far-reaching consequences and include an employee who speaks a language other than English only once or twice or a person who can recite a single phrase in a language other than English (for example "what is your name?"), in the course of the employee's normal duties, and would be entitled to the allowance on a weekly basis. Such a consequence would be inconsistent with section 134(f) of the Fair Work Act 2009 (Cth).

e. ***Fifthly***, there are issues with how usage of the language would be monitored given that a significant number of employees under the award in the social and community and home care stream work one-to-one with clients.

f. ***Sixthly***, this claim adds to the complexity of an already very complex award (for example, the resulting effect of this claim could be employers issuing directions to employees (who can speak a language other than English) to not speak in the other language in order to ensure that the allowance is only payable in circumstances where the second language is actually required by the employer). In addition, the extra formalities, obligations and administrative burden on employers are inconsistent with section 134(g) of the Fair Work Act in regard to the need to ensure a simple, easy to understand, stable and sustainable modern award system.

g. ***Finally***, the evidence does not establish that the proposed clause 20.10 is necessary to achieve the modern awards objective.

1.68 For these reasons, AFEI continue to strongly oppose the amended claim.