[2020] FWCFB 2343

STATEMENT

Fair Work Act 2009
s.157—Variation of a modern award to achieve the modern awards objective

Application to vary the Social, Community, Home Care and Disability Services Industry Award 2010
(AM2020/18)

Health services industry

JUSTICE ROSS, PRESIDENT
DEPUTY PRESIDENT CLANCY
COMMISSIONER LEE

MELBOURNE, 5 MAY 2020

Application to vary the Social, Community, Home Care and Disability Services Industry Award 2010.

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ABBREVIATIONS

ABI	Australian Business Industrial and the New South Wales Business Chamber
ABS	Australian Bureau of Statistics
Ai Group	Australian Industry Group
AFEI	Australian Federation of Employers and Industries
ASU	Australian Services Union
Applicants	Australian Services Union, Health Services Union, United Workers Union, National Disability Services
Characteristics of Employment	CoE
Commission	Fair Work Commission
CDC	Consumer Directed Care
EEH	Survey of Employee Earnings and Hours
FW Act	*Fair Work Act 2009* (Cth)
HSU	Health Services Union
NDIA	National Disability Insurance Agency
NDIS	National Disability Insurance Scheme
NDS	National Disability Services
NES	National Employment Standards
PPE	Personal Protective Equipment
SCHADS Award	*Social, Community, Home Care and Disability Services Industry Award 2010*
USU	United Services Union

1. Background

[1] An application to vary the *Social, Community, Home Care and Disability Services Industry Award 2010* (MA000100) (the SCHADS Award) was jointly filed by - the Australian Services Union (ASU), Health Services Union (HSU), United Workers Union (UWU) and National Disability Services (NDS) (collectively, the Applicants) on 28 April 2020 (the Application).

[2] The Applicants have been in discussions directed at reaching a consent position on changes to the SCHADS Award to mitigate the impact of COVID-19 on employees and employers covered by the award. The Application is the product of those discussions. As we note later, the consent of NDS is conditional upon funding support.

[3] The Application seeks to insert a new clause, X.3 COVID-19 Care Allowance, into Schedule X of the SCHADS Award.

[4] A copy of the proposed draft variation determination is attached (**Attachment A**).

[5] On 28 April 2020, the following Directions were issued:

1. The Applicants file with the Commission any submission and evidence by 4:00 pm on Wednesday, 29 April 2020.

2. Any persons opposing the Applications file with the Commission any submissions and evidence by 4.00 pm, Friday 1 May 2020.

3. The matter be listed for hearing at 9.30 am on Monday, 4 May 2020.

4. All submissions and evidence is to be filed in Word format only and sent by email to chambers.ross.j@fwc.gov.au.

5. Liberty to apply.

[6] The following submissions have been filed:

- Applicants' submissions and a witness statement by Mr David Moody;
- ABI;
- Ai Group; and
- AFEI.

[7] The Application is opposed by ABI, Ai Group and AFEI.

[8] A hearing took place on Monday 4 May 2020 during which Mr Moody was cross examined. The transcript of that hearing is available here.

[9] A further hearing is to be held at 11am on Monday 11 May 2020. This Statement is intended to facilitate the efficient hearing and determination of the Application. It does not purport to be a comprehensive summary of all the submissions or issues involved and nor does

it represent our concluded views on any issue. It has been prepared to facilitate the hearing and determination of the claim. We have posed a number of questions in the material that follows and have expressed some *provisional* views.

2. COVID-19 Pandemic

[10] The Application arises from the unique set of circumstances pertaining to the COVID-19 pandemic. The Commission has published an Information Note about measures taken in response to the COVID-19 pandemic, which can be accessed here.

[11] In a series of decisions the Commission has granted consent applications to vary the:

- *Hospitality Industry (General) Award 2010*[1]
- *Clerks – Private Sector Award 2010*[2]
- *Restaurant Industry Award 2010*[3]
- *Educational Services (Schools) General Staff Award 2010*[4]

[12] These decisions inserted short term measures to provide additional flexibilities to address the consequences of the COVID-19 pandemic.

[13] On 8 April 2020 a Full Bench of the Commission issued a decision[5] (the *April 2020 Decision*) varying 99 modern awards to insert a new Schedule – 'Schedule X - additional measures during the COVID-19 pandemic'. Schedule X provides an entitlement to unpaid 'pandemic leave' and the flexibility to take twice as much annual leave at half pay. The following documents informed the Commission's decision:

- Information Note on modern awards and industries;
- Information Note on bargaining by business size;
- Information Note on Government responses to the COIVD-19 pandemic; and
- Expert report by Professor Borland.

[14] In the *April 2020 Decision* the Full Bench also encouraged industrial parties to continue (or enter into) discussions directed towards consent applications to vary modern awards.

3. The SCHADS sector and the NDIS

[15] We dealt with the key features of the SCHADS sector and the NDIS (National Disability Insurance Scheme) in our decision[6] of 2 September 2019, dealing with certain substantive claims to vary the SCHADS Award (the *September 2019 Decision*). Relevantly, we noted that in the home care sector, Federal Government reforms announced in 2012 created Consumer Directed Care (CDC). CDC is a service delivery model designed to give more choice and

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[1] [2020] FWCFB 1574

[2] [2020] FWCFB 1690

[3] [2020] FWCFB 1741

[4] [2020] FWCFB 2108

[5] [2020] FWCFB 1837

[6] [2019] FWCFB 6067

flexibility to consumers, by allowing individuals to have more control over the types of care and services they access and the delivery of those services (including who delivers the services and when).

[16] CDC was first piloted as a model of care in 2010-11 and since July 2015, all Home Care Packages have been delivered on a CDC basis.

[17] Prior to the introduction of CDC, Home Care Packages were provided as a bundled set of services relatively tightly-specified by government. Availability of Commonwealth funding for these services had been capped by the allocation of funded "places" to a limited group of approved providers (as provided for in the Aged Care Act 1997), by the funding levels prescribed and by a cap on consumer fees.

[18] Home Care Packages are generally available to older persons who need coordinated services to help them to stay in their home, and to younger persons with a disability, dementia or other special care needs that are not met through other specialist services.

[19] The NDIS was established under the *National Disability Insurance Scheme Act 2013* with the objectives of:

(a) supporting the independence and social and economic participation of people with disability;

(b) providing reasonable and necessary supports, including early intervention supports, for participants;

(c) enabling people with disability to exercise choice and control in the pursuit of their goals and the planning and delivery of their supports;

(d) facilitating the development of a nationally consistent approach to the access to, and the planning and funding of, supports for people with disability; and

(e) promoting the provision of high quality and innovative supports to people with disability.

[20] The NDIS supports people under the age of 65 who have a permanent and significant disability. Under the NDIS, individual consumers (eligible 'participants') have greater choice and control over how their services are delivered, which includes control over what services are provided to them, when those services are provided, where those services are provided, and by whom those services are provided. Participants have the ability to choose their service providers, and to terminate their service arrangements at their discretion.

[21] Each participant's supports are set out in a 'NDIS Plan' which is developed by the National Disability Insurance Agency (NDIA) in consultation with the individual participant. Service providers do not have any control over, or input into, the NDIS Plans. NDIS Plans specify a 'global' funding amount for different categories of 'fixed' and/or 'flexible' supports, but typically do not specify details of how or when those supports are to be provided.

[22] Participants then typically enter into a service agreement with one or more service providers for the delivery of services outlined in their NDIS Plan.

[23] In the *September 2019 Decision* we made the following observations about the NDIS:

1. The NDIS may be characterised as a move from a block funded welfare model of support to a fee-for-service market based approach.[7]

2. The initial roll out targets for the NDIS have not been met. The NDS submits that the current rate of roll out is about 75 per cent of the level originally planned in 2011 and that the rollout will extend 'well into 2019-20 and is unlikely to be completed before then'.[8] Similarly, the HSU submits 'The rollout targets have not been met and it can be expected that the rollout will continue well into 2020'.[9]

3. According to the NDIA Quarterly Report, as at 31 March 2019:

- there were 277,155 NDIS participants, of whom 85,489 were receiving support for the first time;
- the total number of registered providers was 20,208, of whom 57 per cent (11,418) were 'active' as at 31 March 2019, meaning that they had claimed a payment from the NDIA for delivering a service. 45 per cent of the total number of providers were individual/sole traders.[10]

4. The NDS (2019), Australian Disability Workforce Report of July 2018 notes that:

- 48 per cent of disability support workers are permanent (full time or part time) and 46 per cent are casual
- the trend towards casualisation is not universal across the sector and is more prevalent in small and medium organisations and absent in large organisations.[11]

5. The NDS has developed a data metrics tool called 'Workforce Wizard', to assist disability organisations track workforce trends. This was the source of the data referred to by the Part time and Casual Employment Full Bench at [633] of its July 2017 decision. Since the NDS July 2018 Workforce Report the NDS has obtained data from the 'Workforce Wizard' for the December 2018-19 quarter (including from 187 organisations comprising 41,119 workers in the disability and allied health sectors), which shows that:

- the average proportion of casual employment increased from 40.9 per cent in September 2015 to 45.2 per cent in December 2018 (but has remained at around 45 per cent since September 2017, with the exception of the September 2018 quarter, at 47.3 per cent).

[7] Productivity Commission Study Report, October 2017, National Disability Insurance Scheme (NDIS) Costs, p8.

[8] NDS submission 17 May 2019 at [35].

[9] HSU submission 17 May 2019 at [27].

[10] Ibid at [28]; AFEI submission 22 May 2019 at [32].

[11] NDS (2018) Australian Disability Workforce Report July 2018 at p6.

4. The Application

[24] As mentioned earlier, the Application seeks to insert a new clause X.3 – COVID-19 Care Allowance into Schedule X of the SCHADS Award. On Friday 1 May the Applicants filed an amended claim, in the following terms:

X.3 COVID-19 CARE ALLOWANCE

(a) This clause applies to social and community services employees undertaking disability services work.

(b) Clause X.3 reflects the additional responsibilities and disabilities associated with specific duties that may arise due to the COVID-19 pandemic and does not set any precedent in relation to award entitlements after its expiry date.

(c) This clause operates from 4 May 2020 until 28 September 2020. The period of operation can be extended on application.

(d) Where an employer requires an employee to work with a client who:

(i) is required by government or medical authorities to self-isolate or self-quarantine due to a reasonable suspicion, pending testing, that the client is likely to have COVID-19; or

(ii) is required on the advice of a medical practitioner to self-isolate or self-quarantine due to a reasonable suspicion, pending testing, that the client is likely to have COVID-19; or

(iii) the employer reasonably suspects has COVID-19; or

(iv) has COVID-19;

the employee will be paid an hourly allowance of 0.5% percent of the Standard Rate.

(e) In this clause, the following words:

- self-isolate; and
- self-quarantine

has the meaning given to them by the government of the state or territory where the work described in clause X.3(d) is performed, and is distinct from general requirements for members of the community to stay at home during the COVID-19 pandemic.

[25] The proposed new allowance is to operate until 28 September 2020.

[26] The Standard Rate is defined in clause 3.1 of the SCHADS Award as follows:

‘**standard rate** means the minimum wage for a Social and community services employee level 3 at pay point 3 in clause 15.3’

[27] The current ‘standard rate’ is $988.80 per week. The allowance in proposed clause X.3 is an hourly allowance of 0.5% of the standard rate which equates to an amount of $4.94 per hour.

[28] The Applicants contend that the value of the allowance ‘has been set to compensate for both the additional responsibilities and the additional disability associated with working with clients who have or might have contracted COVID-19.’[12]

[29] The essence of the merit case put in support of the proposed allowance is at [12] and [18] of the Applicants’ Outline of Submissions,:

‘[12] Employees who are required to work with clients in the circumstances set out by the draft determination are likely to be low paid workers eligible for Jobkeeper payments which reduce the economic incentive to undertake such work, and the proposed variation contributes to providing such an incentive and ensuring continuity of supply of relevant workers.

[18] The variation proposed will compensate Disability Services Employees for the increased responsibilities associated with working with clients who may have contracted the virus, including the responsibility performing enhanced hygiene procedures and using PPE.’

[30] In particular, the Applicants contend that:

1. The use of Personal Protective Equipment (‘PPE’), enhanced infection control measures, and the requirements of physical distancing will make much of the disability support role more physically demanding. Physical interactions for the purpose of personal care of clients will be physically more difficult, and there may be personal discomfort associated with the prolonged use of PPE. The witness statement of David Moody refers to the experience of providers in relation to the requirements in the Covid-19 context.[13]

2. In addition to enhanced infection control procedures and the use of PPE, there are also additional tasks involved where a client is required to self-isolate. Disability support employees may be required to help the client to understand and adjust to significant changes in their routine, including explaining the need for self-isolation, why they cannot leave the house, why they cannot see their friends, and why they can no longer attend their regular activities. Disability support workers may need to create new routines and programs for these clients. This can be especially difficult for clients with intellectual disability who do not cope well with changes to routine.

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[12] Applicants’ Outline of Submissions 29 April 2020 at [9].

[13] Witness statement of David Moody, 29 April 2020

3. In a group home environment, a disability support worker may have to work on educating their client about self-isolation procedure, and ensuring this is followed by their client to ensure that other residents in the group home are not exposed to the virus. This may also involve managing interactions and relationships between multiple clients resident in the same home.

4. Clients with disabilities in self-isolation may also exhibit challenging behaviours and need increased emotional support from their disability support workers. Such behaviour changes, and responses such as frustration or depression in clients often arise from a change or routine, and can be exacerbated in situations such as self-isolation.

[31] The central material grounds in support of the Application are contained in Grounds 12, 13, 17 and 18 in the Application, as follows:

> Ground 12: Employees who are required to work with clients in the circumstances set out by the draft determination are likely to be low paid workers eligible for JobKeeper payments which reduce the economic incentive to undertake such work, and the proposed variation contributes to providing such an incentive and ensuring continuity of supply of relevant workers.
>
> Ground 13: Employees who are required to work with clients in the circumstances set out by the draft determination are at an increased risk of subsequently being required to self-isolate and/or take leave and the variation is, in part, intended to compensate for the economic cost to such employees of foregoing their usual payment for work including shift penalty rates while isolated or on leave.
>
> Ground 17: The variation proposed will compensate Disability Services Employees for the disability associated with working with clients who may have contracted the virus, including the necessity of being subject to enhanced hygiene procedures and using personal protective equipment (‘PPE’).
>
> Ground 18: The variation proposed will compensate Disability Services Employees for the increased responsibilities associated with working with clients who may have contracted the virus, including the responsibility performing enhanced hygiene procedures and using PPE.

[32] We return to some of these grounds later.

Q1. Do the Applicants agree with the summary of their claim and the grounds advanced in support of it?

5. The Evidence

[33] The Applicants rely on the witness statement of David Moody, CEO of NDS, and the following documents:

- Department of Health ‘Environmental cleaning and disinfection principles for health and residential care facilities’, Version 2 26 March 2020.
- Department of Health ‘COVID-19 Guide for Home Care Providers’.

- Infection Control Expert Group, 'COVID-19 Infection Prevention and Control for Residential Care Facilities', 2 April 2020.
- NDIS Quality and Safeguards Commission, Regulated Restrictive Practices.
- NDIS Quality and Safeguards Commission, 'Coronavirus (COVID-19): Behaviour support and restrictive practices', March 2020.

Q2. Which particular aspects of these publications are relied upon? What propositions are the publications said to support?

[34] Mr Moody's statement describes the operations of the NDS (at [7] – [10]) noting that it has 1000 members across Australia and that:

> 'Collectively, NDS members operate several thousand services for Australians with all types of disability.
>
> NDS is the only organisation that represents the full spectrum of disability service providers. Members range in size from small support groups to large multi-service organisations and are located in every region of Australia'.[14]

[35] Mr Moody's evidence as to disability support work in the COVID-19 context is set out at [11] – [17] of his statement, as follows:

> '[11] I am aware of a range of Government directives relating to the public health aspects of providing disability support in the context of the Covid-19 pandemic.
>
> [12] To date, only a small number of participants of the National Disability Insurance Scheme (NDIS) have tested positive for Covid-19.
>
> [13] Where participants have tested positive and have continued to require disability support, significant changes to how work is performed has been required.
>
> [14] The changes include a need to implement heightened infection control procedures, the use of Personal Protective Equipment, and physical distancing.
>
> [15] The use of PPE makes the performance of personal care such as showering, toileting, administration of medication and PEG tubing, and feeding physically more difficult.
>
> [16] The changes in procedures can be confronting and upsetting to participants, particularly where they have intellectual disability. This in turn can lead to challenging behaviours outside the normal range of behavioural issues.
>
> [17] The advice from NDS members who have had to deal with participants directed to self isolate has been that the changes in work procedures are significant and difficult for the staff who have to implement them.'[15]

[36] In its initial submission ABI contends that, at its highest, Mr Moody's evidence stands for the following propositions:

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[14] Witness Statement of Mr Moody at [7] – [8].

[15] Witness Statement of Mr Moody at [11] – [17].

(a) only a small number (not identified) of clients have tested positive for COVID-19;
(b) employers have had to introduce heightened infection control procedures;
(c) employees have had to use PPE;
(d) the use of PPE makes some activities more "physically difficult"; and
(e) clients may exhibit challenging behaviours outside of the normal range.

[37] ABI submits that these propositions amount to unsupported generalisations which lack specificity and that 'the evidence to support the Application is probative of very little and is largely unhelpful.'[16] In particular, ABI submits that the evidence lacks any consideration of:

(a) the actual numbers of clients who have tested positive;

(b) what heightened infection control procedures have actually been introduced and by whom;

(c) whether the heightened infection control procedures are in any way different from dealing with a client with another form of infectious disease such as Hepatitis C or a Staph infection;

(d) what level of PPE is currently used generally when working with a client;

(e) what level of PPE is currently used when working with a client with another form of infectious disease;

(f) the number of employers applying for JobKeeper;

(g) the number of employees of such employers declining to attend for work;

(h) the character of any asserted additional responsibility and how they manifest and impact working with a client;

(i) any explanation of how wearing PPE makes work physically more difficult; and

(j) any explanation of the extent or frequency of behavioural changes of clients in comparison to scenarios unaffected by COVID-19.

[38] As we have mentioned, Mr Moody was cross-examined on Monday 4 May 2020. The central aspect of Mr Moody's written statement was the observation (at [13]) that in circumstances where a participant has tested positive to COVID-19 (or has COVID-19) and continues to require disability support 'significant changes' have been required 'to how work is performed'. The nature of these 'significant changes' is elaborated upon in [14] of the statement as including:

> 'a need to implement *heightened* infection control procedures, the use of Personal Protective Equipment and physical distancing.' (emphasis added)

[39] The use of the word 'heightened' in this context suggests a change in the context of the COVID-19 pandemic - the adoption of more onerous procedures than had been the case in the past. It emerged during Mr Moody's cross-examination that he had little, if any, direct knowledge of the nature of the infection control procedures which have been put in place when working with participants who have tested positive to COVID-19. Nor did Mr Moody have any understanding of the specific control procedures in place *prior* to the COVID-19 pandemic.

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[16] Ibid at 7.1 and 7.4.

[40] It is our *provisional* view that Mr Moody's evidence is of little or no probative value to our consideration of the Application.

Q3. All parties are invited to comment on our *provisional* view.

[41] ABI submits that the Applicant has failed to support the proposition that the use of PPE for a client that is self-isolating or in fact has COVID-19 is any different from the use of PPE for clients not in that class.

[42] As to making working with a client more physically difficult ABI submits:

> 'The use of PPE will always bring with it some level of challenge when it is worn and the employee is utilising fine motor skills; again the evidence fails to assist the Commission in this regard. The use of PPE in the context of working with a client who is self-isolating is unlikely to be any more of any issue that working with a client with an infectious disease other than COVID-19.'[17]

[43] As to the asserted 'heightened infection controls' ABI submits that 'it would be wrong to assume that infection controls of varying degrees are not operating for clients with various health issues other than COVID-19'.[18]

[44] ABI concludes as follows:

> 'in so far as the Application seeks to compensate employees for a disability beyond the ordinary course of their duties and one which is implicitly asserted as currently not contemplated within the scope of the current award, that disability and the requirement for the allowance should be established through evidence before the Commission. There is no such evidence.'[19]

[45] Similarly, Ai Group submits that the material presented by the Applicants fails to establish that employees who perform duties in relation to a client that has or is suspected of having COVID-19 would experience a disability warranting the introduction of a new allowance or is required to undertake additional responsibilities or utilise skills that are not already contemplated in the SCHADS Award.

[46] It seems to us that the nature and extent of the 'significant changes' which are said to have occurred are central to the Applicant's case. In short, to make good their claim the Applicants must, among other things, adduce evidence or other material which establishes:

- the infection control procedures required when working with a COVID-19 infected participants;
- the extent to which those procedures differ from procedures used in other types of infections (such as Hepatitis B); and
- how these infection control procedures make the work performed more difficult.

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[17] Ibid at 8.6.

[18] Ibid at 9.1.

[19] ABI submission at [17.5].

Q4. The Applicants (and any other party) are invited to adduce evidence directed at these matters.

[47] ABI has filed the following documents in support of its submission:

- Summary of disability allowances and PPE-related terms in Modern Awards;[20]
- Infection Control Expert Group, COVID-19 Infection Prevention and Control for Residential Care Facilities, 2 April 2020;
- Australian Government Department of Health, Fact Sheet: In-Home Care Workers, 29 April 2020;
- Australian Government Department of Health, Information on the use of surgical masks;
- Australian Government Department of Health, Management and Operational Plan for people with Disability, April 2020;
- Australian Government Department of Health, Communicable Diseases Intelligence 2020, Volume 44: COVID-19, Australia: Epidemiology Report 12, Reporting Week Ending 19 April 2020; and
- Australian Government Department of Health, COVID-19 Guide for Home Care Providers.

Q5. Question for ABI: Which particular aspects of these publications are relied upon and for what purpose?

[48] In its submission ABI acknowledges that the following issues are uncontroversial:

(a) the general epidemiological pattern of COVID-19 in the broader Australian community;

(b) the impact the Government measures to limit the spread of COVID-19 have had on the Australian economy and employment;

(c) the claim will not have general application to employees under the Award;

(d) people with a disability have an inherent right to life and its enjoyment on the same basis as others;

(e) people with a disability are entitled to the same standard of health care as other persons;

(f) some persons with a disability may have poor health literacy, which may affect an individual's ability to comply with the evolving and complex COVID-19-related prevention and management measures; and

(g) people with a disability will often rely on other people including family members, carers and support workers to provide essential support at close contact, often on a daily basis.

Q6. Question for all other parties: Does any party take issue with this aspect of ABI's submission?

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[20] See Attachment to ABI submission.

6. The ABI, Ai Group and AFEI Submissions

[49] The Application is opposed by ABI, Ai Group and AFEI. The submissions advanced can be conveniently grouped into 8 broad lines of argument.

(i) Nature of the allowance claimed

[50] The allowance is paid when an employee 'works with' a client that:

(a) is required to self-isolate because of COVID-19;
(b) is suspected (by the employer) of having COVID-19; or
(c) has been diagnosed with COVID-19.

[51] ABI contends that the allowance sought is 'misconceived both in quantum and in purpose'.[21] ABI addresses the nature of the allowance claimed in section 6 of its submission. The central point advanced is that the claimed allowance 'operates in distinction to some of the grounds advanced in support of it'. In particular, ABI submits that *nothing* in the allowance proposed deals with:

- enhanced hygiene procedures and the need to follow them;
- the need to wear PPE; and
- any asserted responsibility in following enhanced hygiene procedures or wearing PPE.

[52] As ABI puts it (at 6.8):

> 'It might be said that the allowance simply provides more money to an employee working with a client in the circumstances [set out] but this begs the question what "disability" the employee is experiencing.'

[53] ABI also observes that *nothing* in the terms of the Allowance creates a pre-requisite that the employee is in close personal contact with the client. This is said to be 'a strange omission', given that some types of support work, such as purchasing and delivering grocery items or speaking with a client via telephone or video call, could presumably be done by a support worker without any personal contract with the client.

[54] Similarly, Ai Group points out that there is no definition of the phrase 'disability services work' and submits:

> 'if a monetary entitlement is to be payable on an hourly basis for the performance of a particular type of work it is essential that the nature of the work is precisely defined so that it can be delineated from other tasks that might be performed by the employee but not attract the payment.'

Q7. *Provisional* view: We think there is some force in the points advanced by ABI and Ai Group. The Applicants are invited to reframe their claim to address the issues raised at [51] to [54] above.

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[21] ABI submission, at 17.1.

[55] Ai Group also notes that clause X.3(d) creates an obligation to pay the allowance where an employer requires an employee to work in certain circumstances and that the practical application of the clause would be 'very problematic'. The central point raised is that the employer will not always be aware of when such circumstances arise.

Q8. Question for the Applicants: Proposed clause X.3(d) creates an obligation to provide a payment where an employer requires an employee to work in certain circumstances. How will an employer be aware when such circumstances arise?

(ii) Quantum of the allowance

[56] Those opposing the claim submit that there is no apparent justification for the quantum of the proposed allowance, and nor has there been any attempt in the Applicants' material to explain why the particular amount proposed has been selected.

[57] ABI has filed a document outlining various other allowances found in modern awards.

Q9. Question for the Applicants: What is the basis for the quantum claimed? Can you identify any comparable allowance in the material provided by ABI or in any other modern award?

(iii) Paying for safety or risk

[58] ABI notes Industrial Tribunals have long adopted the view that employees should not be paid more because a work situation has increased safety risk. Rather the employer is under an obligation (a statutory obligation) to take all reasonable steps to make the situation safe or as safe as is reasonable and this should be the focus. In support of this proposition ABI refers to the following extract from *Ermani Constructions Pty Ltd v Australian Workers Union* [1988] NSWIRComm 1; [1988] NSWIRC 1 (15 March 1988) (references omitted):

> '[We] consider that this case should not turn on the limited evidence under review in this appeal because we think there is a more fundamental reason why a site allowance should not be based on safety considerations. It is our considered view that if safety aspects arise, it is most inappropriate for payment to be ordered, whether retrospectively or otherwise, in relation to safety. The correct approach to safety problems is to have them investigated and rectified. It is wrong in principle, in our view, that safety of workers should be commuted to money payments. This position has for many years been the firm doctrine of this Commission.
>
> …
>
> As Ferguson J. said in *The Gangers (State) Conciliation Committee Case* in 1949:
>
>> I do not think it is desirable to provide extra payment for working in bad or dangerous ground. It is much more desirable to remove or minimise the danger. It is the duty of the employer to see that employees are not called upon to work under dangerous conditions or, if this is unavoidable, to take care that special precautions are observed.
>
> This approach has been repeated by the Commission on various occasions since (see Leighton Contractors Site Allowance Case. It is a principle which we think should be adhered to, the more so in that in the intervening period, the legislature has addressed

in some detail the obligations of employers in relation to occupational safety and welfare.'[22]

[59] AFEI advances a similar point.

Q10. Question for ABI: ABI is invited to identify any relevant authority in the Federal jurisdiction.

[60] ABI goes on to submit:

> 'Whether any actual safety risk exists is not evident from the evidence. In fact it would be counter intuitive to assume that risk is amplified as it is asserted PPE and hygiene controls are introduced to minimise any risk.'

Q11. Question for the Applicants: Is it any part of the case that the allowance is justified by what is said to be the heightened risk of infection when working with COVID-19 infected participants? If so, what do the Applicants say about the authorities referred to by ABI?

(iv) A disability allowance?

[61] ABI acknowledges that some circumstances (although not this one) may warrant the granting of a special allowance and notes that special rates have traditionally been intended as compensation for abnormal conditions not compensated for by minimum rate of pay. The right to such special rates will be limited to circumstances in which these abnormal conditions exist:[23]

> 'The general rule followed by this Commission in respect to disability rates is that they are awarded only when the disability cannot be provided for in the ordinary rate. It is the practice also to make such a payment depends on the worker's actual exposure to the disability concerned.'[24]

[62] ABI contends that it is difficult (on the evidence) to discern any material disability experienced by employees that is not already comprehended by the Award or likely to be experienced before COVID-19 and that:

> 'There is certainly no warrant for the quantum of allowance sought as a "disability" allowance. By way of illustration, the Award itself already provides guidance in the context of a disability in clause 20.7 Heat Allowance. This allowance for working in a situation that is likely to be truly physically challenging provides for an allowance at one tenth of that claimed in this matter. At best, this Application is simply to encourage employees to come to work, reward them for wearing PPE and applying health controls the likes of which are likely to be largely in operation for some circumstances before COVID-19. [25]

[63] ABI and AFEI submit that the use and wearing of PPE is already comprehended in the minimum classification rates in the SCHADS Award. ABI's submission is advanced on the

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[22] ABI also refers to *Re Liddell Power Station Project* (1967) AILR Rep 161.

[23] *Re Disability Allowance at Inner Harbour, Port Kembla* 1965 AR 387.

[24] *Re Painters (State) Award* 1964 AR 204 (Sheehy J).

[25] ABI submission at [14.5] – [14.6], [15.4].

basis that the award already contemplates that an employee may be required to wear and use PPE, in that clause 20.2(d) of the award provides:

> **20.2 Clothing and equipment**
>
> …
>
> (d) Where an employer requires an employee to wear rubber gloves, special clothing or where safety equipment is required for the work performed by an employee, the employer must reimburse the employee for the cost of purchasing such special clothing or safety equipment, except where such clothing or equipment is provided by the employer.

[64] AFEI contends that the award already takes into account the responsibilities upon which the applicants rely in support of the claim. The responsibilities of Social and community services employee level 2 and Social and community services employee level 3 are expressed in broad terms and include particular responsibilities which resonate with the tasks identified by the applicants. In the case of Social and community services employee level 2, these are (with underlining for emphasis):

> a. perform tasks of a sensitive nature including the provision of more than routine information, the receiving and accounting for moneys and assistance to clients;
>
> b. implementing client skills and activities programmes under limited supervision either individually or as part of a team as part of the delivery of disability services;
>
> c. supervising or providing a wide range of personal care services to residents under limited supervision either individually or as part of a team as part of the delivery of disability services.

[65] In the case of Social and community services employee level 3, these are:

> a. assist in a range of functions and/or contribute to interpretation of matters for which there are no clearly established practices and procedures although such activity would not be the sole responsibility of such an employee within the workplace;
>
> b. in the delivery of disability services as described in subclauses B.1.2 or B.2.2, taking overall responsibility for the personal care of residents; training, co-ordinating and supervising other employees and scheduling work programmes; and assisting in liaison and co-ordination with other services and programmes.

Q12. Question for the Applicants: The Applicants are invited to respond to the proposition that the use of PPE is already comprehended within the minimum classification rates specified in the SCHADS Award.

(v) Responses to Ground 12

Ground 12: Employees who are required to work with clients in the circumstances set out by the draft determination are likely to be low paid workers eligible for Jobkeeper payments which

reduce the economic incentive to undertake such work, and the proposed variation contributes to providing such an incentive and ensuring continuity of supply of relevant workers.

[66] ABI submits that there is 'no evidence of employees claiming Jobkeeper and no evidence of employees refusing to attend for work' and, in any event, 'this line of argument is entirely ill conceived'. ABI notes that:

> '12.8 Nothing in the JobKeeper scheme permits an employee to absent themselves from work and still receive the minimum $1500 payment per fortnight or any other payment for that matter.
>
> 12.9 An employee who fails to attend for work and is not otherwise on authorised leave will simply expose themselves to not being paid and also facing disciplinary action.
>
> 12.10 The notion that the allowance is needed because employees intend to cease attending work as directed (at a time when unemployment is over 10%) because they can simply receive JobKeeper as an alternative is extremely shallow at best.'[26]

Q13. Question for the Applicants: The Applicants are invited to respond to the argument put and to adduce evidence in support of its assertion in ground 12. In particular, why is it necessary for the Award to be varied to provide an incentive to undertake this work? If an incentive is required what prevents an employer from making an over award payment?

[67] ABI also observes that Industrial Tribunals have resisted providing 'attraction rates' and cites *Re Steel Works Employees (BHP Co Ltd) Award* 1947 AR 431 in support of this proposition.

Q14. Question for ABI: ABI is invited to identify any relevant authority in the Federal jurisdiction.

(vi) Responses to Ground 13

Ground 13: Employees who are required to work with clients in the circumstances set out by the draft determination are at an increased risk of subsequently being required to self-isolate and/or take leave and the variation is, in part, intended to compensate for the economic cost to such employees of foregoing their usual payment for work including shift penalty rates while isolated or on leave.

[68] In substance ground 13 says that the allowance can serve to compensate employees for the prospect that they may be required to self-isolate or take leave as a result of COVID-19 exposure.

[69] ABI submits that advancing this ground is 'mischievous for the Applicants (with the exception of the NDS) in circumstances where there is also a claim for isolation leave and increased COVID-19 sick leave already before the Commission in Matter AM2020/13.' ABI also submits that there is no evidence before the Commission on the taking of leave associated with COVID-19 and notes that the Commission has already provided for some isolation leave (closing the regulatory gap) in Matter AM2020/12.

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[26] Ibid at 12.8-12.10.

Q15. Question for the Applicants: The Applicants are invited to respond to the points raised by ABI.

(vii) Cost impact of the claim

[70] In order to assess the cost impact of the claim we need to have some understanding about the extent to which there are current clients who are in the circumstances defined in proposed clause X.3(d).

[71] ABI submits that the economic capacity of an industry to pay is a relevant consideration in the context of section 134 (1) (f), (h) but notes that these considerations are unlikely to be alive in the context of the Allowance which by its nature will not apply at large to all employees under the Award.

Q16. Question for all parties: How many clients of the employers you represent have been required to self-isolate or self-quarantine for the reasons specified in proposed clause X.3(d)?

(viii) Funding

[72] The Applicants advance the following submission in relation to funding:

> 'The parties have been in discussion with the Commonwealth about this matter with a view to securing funding support for such an allowance, on the basis that it will help to meet public health objectives and secure ongoing quality support for people with disability....
>
> In the absence of funding for the allowance, the overall burden on the sector is likely to be small provided levels of infection remain low, however the burden on individual employers may be significant.
>
> The joint application has been made in the context of ongoing discussions with the Commonwealth about funding support through the NDIS pricing structure in order to ensure that the allowance is able to operate effectively and deliver the public health outcomes being sought.[27]

[73] The question of whether or not any allowance we may determine is funded by the Commonwealth is plainly a matter of some significance for the parties. Indeed, in the proceedings on 4 May 2020 NDS indicated that if there was no increased funding to compensate employers for the increased costs associated with the proposed allowance then they would no longer support the Application.

[74] ABI refers to the issue of Commonwealth funding in the following way:

> 'The Allowance is unlikely to impose a large aggregate cost on the sector as a whole. However, in the absence of funding, the Allowance is likely to impose a significant cost on an employee by employee basis. This cost will increase significantly with any increase in the level of COVID-19 infection.

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[27] Applicants' Outline of Submissions at [11 and [38] – [39].

> We note that the Allowance is not expressed to be conditional on government funding. Moreover, we are not aware of any public statements by the Commonwealth in which it expressed support for funding the proposed Allowance via the NDIS.'[28]

[75] Ai Group submits that:

> 'In the absence of a change to funding arrangements that would alleviate any additional cost burden on employers as a result of the proposed allowance, it is strongly opposed by Ai Group. Should the position in respect of the funding arrangements change, Ai Group may seek an opportunity to revise its position'.[29]

[76] We note that we dealt with the relevance of the NDIS funding arrangements in our decision of 2 September 2019 dealing with certain substantive claims to vary the SCHADS Award, as follows:

> 'We accept that the impact of granting the claims on business and on employment costs is a relevant consideration and weighs against making the variations proposed by the Unions. But we reject the notion that the constraints placed on employers by the NDIS funding arrangements should be given determinative weight.
>
> In the context of the provision of social services where employers are largely dependent on government funding, or, in the case of the NDIS, a fixed price, we are cognisant of the fact that significant unfunded employment cost increases may result in a reduction in services to vulnerable members of the community – a point made by the NDS. But such outcomes are a consequence of current funding arrangements, which are a matter for Government…
>
> The Commission's statutory function is to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net. It is not the Commission's function to make any determination as to the adequacy (or otherwise) of the funding models operating in the sectors covered by the SCHADS Award. The level of funding provided and any consequent impact on service delivery is a product of the political process; not the arbitral task upon which we are engaged…
>
> The Commission's statutory function should be applied consistently to all modern award employees, while recognising that the particular circumstances that pertain to particular awards may warrant different outcomes. The fact that a sector receives government funding is not a sound basis for differential treatment. Further, given the gendered nature of employment in many government funded sectors such differential treatment may have significant adverse gender pay equity consequences.
>
> The impact upon business and employment costs of any proposed variation is one of a number of considerations to be taken into account. In the context of the matters before us we are not persuaded that such considerations should be given determinative weight.'[30]

[77] It was evident during the proceedings on Monday 4 May 2020 that there is a dispute about whether any additional funding has in fact been provided. The ASU representative referred to some recent funding announcements in this regard.

Q17. The ASU, NDS and ABI are directed to confer and file an agreed factual statement regarding recent funding announcements in the sector.

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[28] ABI submission at [16.3] – [16.4].

[29] Ai Group submission at [10].

[30] [2019] FWCFB 6067 at [136] – [143].

Q18. Question for the Minister: What is the Commonwealth's position in respect of the provision of increased funding to the sector to compensate employers for the increase in costs in the event that the present application was granted?

7. The statutory framework

[78] The Commission may make a determination varying a modern award if the Commission is satisfied the determination is necessary to achieve the modern awards objective. The modern awards objective is in s.134 of the *Fair Work Act 2009 (Cth)* (the Act) and provides as follows:

> '*What is the modern awards objective?*
>
> 134(1) The FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:
>
> (a) relative living standards and the needs of the low paid; and
>
> (b) the need to encourage collective bargaining; and
>
> (c) the need to promote social inclusion through increased workforce participation; and
>
> (d) the need to promote flexible modern work practices and the efficient and productive performance of work; and
>
> (da) the need to provide additional remuneration for:
>
> (i) employees working overtime; or
>
> (ii) employees working unsocial, irregular or unpredictable hours; or
>
> (iii) employees working on weekends or public holidays; or
>
> (iv) employees working shifts; and
>
> (e) the principle of equal remuneration for work of equal or comparable value; and
>
> (f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and
>
> (g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and
>
> (h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.'
>
> This is the **modern *awards objective***.
>
> *When does the modern awards objective apply?*
>
> (2) The modern awards objective applies to the performance or exercise of the FWC's ***modern award powers***, which are:
>
> (a) the FWC's functions or powers under this Part; and
>
> (b) the FWC's functions or powers under Part 2-6, so far as they relate to modern award minimum wages.
>
> Note: The FWC must also take into account the objects of this Act and any other applicable provisions. For example, if the FWC is setting, varying or revoking modern award minimum wages, the minimum wages objective also applies (see section 284).'

[79] The modern awards objective is to 'ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions', taking into account the particular considerations identified in ss.134(1)(a)–(h) (the s.134 considerations).

[80] The modern awards objective is very broadly expressed.[31] It is a composite expression which requires that modern awards, together with the National Employment Standards (NES), provide 'a fair and relevant minimum safety net of terms and conditions', taking into account the matters in ss.134(1)(a)–(h).[32] Fairness in this context is to be assessed from the perspective of the employees and employers covered by the modern award in question.[33]

[81] The obligation to take into account the s.134 considerations means that each of these matters, insofar as they are relevant, must be treated as a matter of significance in the decision-making process.[34] No particular primacy is attached to any of the s.134 considerations[35] and not all of the matters identified will necessarily be relevant in the context of a particular proposal to vary a modern award.

[82] It is not necessary to make a finding that the award fails to satisfy one or more of the s.134 considerations as a prerequisite to the variation of a modern award.[36] Generally speaking, the s.134 considerations do not set a particular standard against which a modern award can be evaluated; many of them may be characterised as broad social objectives.[37] In giving effect to the modern awards objective the Commission is performing an evaluative function taking into account the matters in s.134(1)(a)–(h) and assessing the qualities of the safety net by reference to the statutory criteria of fairness and relevance.

[83] Section 138 of the Act emphasises the importance of the modern awards objective:

> **'Section 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 and (to the extent applicable) the minimum wages objective.'

[84] What is 'necessary' to achieve the modern awards objective in a particular case is a value judgment, taking into account the s.134 considerations to the extent that they are relevant

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[31] *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* (2012) 205 FCR 227 at [35]

[32] (2017) 265 IR 1 at [128]; *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161 at [41]–[44]

[33] [2018] FWCFB 3500 at [21]-[24]

[34] *Edwards v Giudice* (1999) 94 FCR 561 at [5]; *Australian Competition and Consumer Commission v Leelee Pty Ltd* [1999] FCA 1121 at [81]-[84]; *National Retail Association v Fair Work Commission* (2014) 225 FCR 154 at [56]

[35] *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161 at [33]

[36] *National Retail Association v Fair Work Commission* (2014) 225 FCR 154 at [105]-[106]

[37] See *National Retail Association v Fair Work Commission* (2014) 225 FCR 154 at [109]-[110]; albeit the Court was considering a different statutory context, this observation is applicable to the Commission's task in the Review

having regard to the context, including the circumstances pertaining to the particular modern award, the terms of any proposed variation and the submissions and evidence.[38]

Q19. Question for all parties: Does any party take issue with the summary of the statutory framework?

[85] We set out the parties' submissions in respect of the s 134 considerations below and express some *provisional* views.

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

[86] A threshold of two-thirds of median full-time wages provides 'a suitable and operational benchmark for identifying who is low paid,'[39] within the meaning of s.134(1)(a).

[87] The most recent data for median earnings is for August 2019 from the ABS Characteristics of Employment (CoE) survey. Data on median earnings are also available from the Survey of Employee Earnings and Hours (EEH) for May 2018. On the basis of the data from the CoE survey for August 2019, two-thirds of median weekly earnings for full-time employees is $920.00. Data on median weekly full-time earnings are also available from the EEH survey for May 2018, and two-thirds of median earnings is equal to $973.33.

[88] In the *September 2019 Decision* was concluded that a proportion of employees covered by the SCHADS Award are 'low paid' within the meaning of s.134(1)(a).

[89] The Applicants submit:

> 'Some of the employees in this sector earn low wages, with commencement rates for a social and community services employee level 2 (Level 2.1) is $22.69 per hour. There is currently an equal remuneration order in place covering the minimum weekly wages for social and community services employees and crisis accommodation employees. Some of the employees who will be able to access the COVID-19 care allowance do not fall within the accepted definition of being low paid but can be considered to earn a moderate wage in the context of the high level of responsibility required in their roles. The COVID-19 pandemic has amplified the responsibility of these employees as in many cases vulnerable citizens rely on these workers for their basic needs. Given the wage rates in the sector, it is not appropriate for employees to be expected to work in an environment that involves significant disability without any additional compensation.'[40]

[90] Ai Group submits that:

> 'The Applicants concede that only some employees covered by the Award are 'low paid'. They have not, however, established if or how the relative living standards and needs of the low paid would be impacted by the payment of the proposed allowance.
>
> The proposition that it is "not appropriate for employees to be expected to work in an environment that involves significant disability without any additional compensation" should

[38] See generally: *Shop, Distributive and Allied Employees Association v National Retail Association (No.2)* (2012) 205 FCR 227

[39] [2017] FWCFB 1001 at [166]

[40] Applicants' Outline of Submissions at [28].

> not be accepted. As earlier submitted, the Applicants have not established that the performance of work in the circumstances in which the proposed allowance would be payable involves significant additional disability. The matter is, in any event, irrelevant to the consideration described by s.134(1)(a) of the Fair Work Act 2009 (Act).
>
> Furthermore, the relative living standards and needs of the low paid are but one consideration that must be taken into account and weighed against various other countervailing considerations, as required by s.134(1).'[41]

[91] It is our *provisional* view that the payment of additional compensation in the form of an allowance would assist the low paid workers in this sector to better meet their needs. We would also observe that the fact that some of the employees who are the subject of a claim are 'low paid' is a relevant consideration, but is not, in and of itself, a sufficient consideration to warrant the variation of the award in terms sought. The claim must be justified on its merits.[42]

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

[92] The Applicants submit that granting the claim 'would neither encourage nor discourage collective bargaining'.

[93] It is our *provisional* view that it is likely that employee and employer decision making about whether or not to bargain is influenced by a complex mix of factors. It is also relevant that the proposed variation is time limited. We note that s 134(1)(b) speaks of 'the need to *encourage* collective bargaining'. It is our *provisional* view that the proposed insertion of Clause X.3 would not '*encourage* collective bargaining'. It follows that this consideration weighs against the variation proposed.

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

[94] This consideration is directed at obtaining employment. The Applicants submit that:

> 'The variation will be apt to promote social inclusion through increased workforce participation. A feature of the allowance is that it seeks to compensate Disability Services Employees for the disutility of having to apply enhanced hygiene protocols and use PPE to do their work.
>
> The allowance is also directed to the disincentives that have arisen concerning this group of workers' participation in work. The Federal Government has extended social welfare provision during the COVID-19 pandemic, including the creation of a Jobseeker Allowance and COVID Supplement to support unemployed workers. Social welfare payments to an unemployed worker range between $1,264.10 and $1,335.58 depending on their living arrangements and number of dependents. In many cases, the income from working as a part-time or casual Disability Support Worker classified at SACS Employee Level 2 or SACS Employee Level 3 would be comparable to income from social security payments. This may mean working in disability services during the pandemic will be less attractive, given the increased responsibilities and disabilities associated with working with clients who have or might have COVID-19.'[43]

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[41] Ai Group submission 2 May 2020 at paras 30-32

[42] See [2019] FWCFB 5078 at [62]

[43] Applicants' Outline of Submissions at [30] – [31].

[95] Ai Group submits that:

> 'The Applicants argue that the "variation will be apt to promote social inclusion through increased workforce participation" in the absence of any material in support of that proposition. As we have earlier submitted, there is no evidence before the Commission that might establish that the introduction of the proposed allowance would result in increased workforce participation. Nor is there material of any other nature in this regard. The Applicants' submission is merely speculative.
>
> To the extent that the Applicants seek to draw comparisons between the minimum rates prescribed by the Award and social welfare payments paid by the Commonwealth to unemployed persons, their submissions are speculative and based on assumptions that cannot properly be made.
>
> The Applicants assert that performing disability services work covered by the Award "will be less attractive" than unemployment for certain workers because the differential between the minimum wages prescribed by the Award and welfare benefits is in some circumstances limited.
>
> The extent of the difference between the relevant Commonwealth entitlements and an employee's entitlements under the Award will vary significantly, depending upon, for instance:
>
> (a) Whether the employee is engaged on a full-time, part-time or casual basis;
>
> (b) If the employee is engaged on a part-time or casual basis; the number of hours worked by the employee; and
>
> (c) Whether the employee performs work that entitles them to shift loadings, overtime rates, weekend penalty rates, allowances etc which have the effect of increasing their total earnings.
>
> The Applicants' submissions also suggest that an employee's decision-making process as to whether to participate in the labour force involves a simplistic equation comparing an employee's earnings as compared to the social welfare benefits that would be payable if they were unemployed. It is trite to observe that any such decision is multi-factorial and would also involve a consideration of the many indirect and non-financial benefits that flow from a person's employment.
>
> The Commission cannot be satisfied that the grant of the claim will promote social inclusion through increased workforce participation.'[44]

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

[96] It is convenient to deal with these considerations together. The Applicants submit that:

> 'The allowance provides an appropriate response to a critical change in the work environment of Disability Service Employees and in this sense can be characterised as providing for flexibility and the promotion of efficient work practises and the productive performance of work. We have sought to make the allowance as simple as possible. The allowance is closely related to the necessity for greater hygiene measures and the use of PPE in the performance of work and is therefore directed to the efficient and productive performance of work.

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[44] Ai Group submission 2 May 2020 at paras. 34-39

In terms of regulatory burden, the allowance is a proportionate and appropriate response to what is a complex and unresolved public health crisis.

In the absence of funding for the allowance, the overall burden on the sector is likely to be small provided levels of infection remain low, however the burden on individual employers may be significant.'[45]

[97] Ai Group submits that:

'The Applicants submissions appear to wholly misunderstand s.134(1)(d) of the Act and as a result they seek to inappropriately rely upon it. The payment of an additional allowance plainly does not advance the need to promote flexible modern work practices or the efficient and productive performance of work.'[46]

[98] Ai Group contends that granting the claim will have a negative impact on business and submits:

'As has been accepted by the Applicants, in the absence of funding, the grant of the claim would impose a significant cost on employers who are required to pay the proposed allowance of close to $5 per hour.

Whilst the "overall burden on the sector" is a relevant consideration, s.134(1)(f) also requires that consideration be given to the impact of the claim on individual employers. In any event, it cannot be assumed that the "overall burden on the sector is likely to be small". As acknowledged by the Applicants, that proposition is based on an assumption that the rate of infection will be low.

The administration of the proposed clause would also increase the regulatory burden.

The consideration required by s.134(1)(f) tells against the grant of the claim.'[47]

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

[99] The Applicants submit that:

'The disability and community sector is overwhelmingly female. The factual findings concerning a gendered undervaluation in *Re Equal Remuneration Case*7 are still relevant and reflected in the equal remuneration order that was made under section 302 of the Act.

Our proposed COVID-19 allowance concerns a variation to the Award that will form part of the safety-net of fair and relevant terms and conditions which is assessed against the modern awards objective. The fact that the allowances will be paid predominantly to women whose caring work is culturally undervalued due to gender is relevant as a consideration.'[48]

[100] Ai Group submits that:

'The Applicants have not established that a comparison of the remuneration paid to employees performing work that is of equal or comparable value to disability services work or, more

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[45] Applicants' Outline of Submissions at [32], [37] – [38].

[46] Ai Group submission 2 May 2020 at para. 40

[47] Ai Group submission 2 May 2020 at paras. 45-48

[48] Applicants' submission 28 April 2020 at paras 34-36

> specifically, to the work that would be performed by employees in the circumstances where the allowance would be payable, when compared to such work offends the principle espoused by s.134(1)(e) or that the proposed allowance would remedy this.'[49]

[101] We note that in support of a claim to vary the *Aged Care Award 2010*, United Voice (now the UWU) also relied on an assertion that there is a general undervaluation of the work of employees in the aged care sector. It appears that a similar proposition is being advanced in these proceedings. In the Aged Care Decision[50] we rejected the argument put, as follows:

> 'As to the first matter, Mr Bull advanced the following submission on behalf of United Voice:
>
> > 'It is also a sector which is predominantly female and the broad characterisation within the general, if you like, collection of considerations that comprise the modern award objective that there is a - the gendered profile sector can suggest that there is a gendered undervaluation of the work which is of some relevance. It is a consideration that just sits there.'[51]
>
> It is difficult to know what to make of this submission as it is expressed in such diffident terms and, in any event, no evidence was adduced in support of the asserted undervaluation. As set out in Table 1 (see [22] above), Aged Care industry employees are predominately female (84 per cent compared to 50 per cent of all employees), hence it may be said that the potential of gendered undervaluation of the award minimum wage rates warrants examination.
>
> Any claim to increase modern award minimum wages based on the proposition that the existing wage rates are the product of a gendered undervaluation of the relevant work can be the subject of an application under ss.156(3) or 157(2) of the Act. As the Full Bench observed in the *Equal Remuneration 2015 Decision*[52]*:*
>
> > 'The modern awards regime in the FW Act therefore involves the establishment of minimum wages which take into account work value. If it is considered that the minimum rate for any classification in a modern award does not properly take into account the value of the work performed by employees in that classification - that is, that the work is 'undervalued' by the modern award - then an application may be made to the Commission in the circumstances prescribed by ss.156(3) or 157(2) by an employer, employee or organisation covered by the relevant modern award, or an organisation that is entitled to represent the industrial interests of one or more employers or employees covered by the modern award, to vary that modern award to rectify the perceived undervaluation.
> >
> > . . .
> >
> > We see no reason in principle why a claim that the minimum rates of pay in a modern award undervalue the work to which they apply for gender-related reasons could not be advanced for consideration under s.156(3) or s.157(2). Those provisions allow the variation of such minimum rates for 'work value reasons', which expression is defined broadly enough in s.156(4) to allow a wide-ranging consideration of any contention that, for historical reasons and/or on the application of an indicia approach, undervaluation has occurred because of gender inequity. There is no datum point requirement in that definition which would inhibit

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[49] Ai Group submission 2 May 2020 at para. 43

[50] [2019] FWCFB 5078

[51] Transcript, 10 April 2019 at PN143

[52] [2015] FWCFB 8200

> the Commission from identifying any gender issue which has historically caused any female-dominated occupation or industry currently regulated by a modern award to be undervalued. The pay equity cases which have been successfully prosecuted in the NSW and Queensland jurisdictions and to which reference has earlier been made were essentially work value cases, and the equal remuneration principles under which they were considered and determined were likewise, in substance, extensions of well-established work value principles. It seems to us that cases of this nature can readily be accommodated under s.156(3) or s.157(2). Whether or not such a case is successful will, of course, depend on the evidence and submissions in the particular proceeding.'[53]

[102] It is our *provisional* view that s 134(1)(e) is not a relevant consideration in respect of the matter before us.

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

[103] Ai Group submits that the material presented by the Applicants 'does not establish that s.134(1)(h) supports the grant of the claim'[54].

[104] It is our *provisional* view that granting the application is not likely to have any appreciable impact on 'employment growth, inflation and the sustainability, performance and competitiveness of the national economy'. Accordingly, this consideration is neutral.

Q20. Question for all parties: Does any party oppose our *provisional* views in respect of the s 134 considerations?

Q21. All parties are invited to make further submissions directed at the s 134 considerations.

PRESIDENT

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<PR718815>

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[53] Ibid, at paras [274] and [292]

[54] Ai Group submission 2 May 2020 at para. 50

Attachment A

PRXXXX

DRAFT DETERMINATION

Fair Work Act 2009

s.157—FWC may vary etc. modern awards if necessary to achieve modern awards objective

Health Sector Awards – Pandemic Leave

(AM2020/18)

SOCIAL, COMMUNITY, HOME CARE AND DISABILITY SERVICES INDUSTRY AWARD 2010

MA000100

JUSTICE ROSS, PRESIDENT
DEPUTY PRESIDENT CLANCY
COMMISSIONER LEE

MELBOURNE, XX XXXX 2020

Schedule X—Additional measures during the COVID-19 pandemic.

A. Further to the decision [2020 FWCFB XXXX] issued by the Full Bench of the Fair Work Commission on XX XXXX 2020, the above award is varied as follows:

1. By inserting new clause X.3 in Schedule X as follows:

X.3 COVID-19 CARE ALLOWANCE

(a) This clause applies to social and community services employees undertaking disability services work.

(b) Clause X.3 reflects the additional responsibilities and disabilities associated with specific duties that may arise due to the COVID-19 pandemic and does not set any precedent in relation to award entitlements after its expiry date.

(c) This clause operates from 4 May 2020 until 28 September 2020. The period of operation can be extended on application.

(d) Where an employer requires an employee to work with a client who:

(i) is required by government or medical authorities to self-isolate or self-quarantine due to a reasonable suspicion, pending testing, that the client is likely to have COVID-19; or

(ii) is required on the advice of a medical practitioner to self-isolate or self-quarantine due to a reasonable suspicion, pending testing, that the client is likely to have COVID-19; or

(iii) the employer reasonably suspects has COVID-19; or

(iv) has COVID-19;

the employee will be paid an hourly allowance of 0.5% percent of the Standard Rate.

(e) In this clause, the following words:

- self-isolate; and
- self-quarantine

has the meaning given to them by the government of the state or territory where the work described in clause X.3(d) is performed, and is distinct from general requirements for members of the community to stay at home during the COVID-19 pandemic.

[Draft Determination]

PRESIDENT