

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

Section: s.156 *Fair Work Act 2009 (Cth)*

Matter Number: AM2018/26

Document: Submission as to findings to be made by the Full Bench

Filed: Pursuant to Directions issued 23 October 2019

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Background

1. From Monday 14 – Friday 18 October 2019, a Full Bench of the Fair Work Commission (the **Commission**) heard claims by the United Voice, the Health Services Union (the **HSU**) and Australian Services Union (the **ASU**), collectively “**the unions**”, for variations to the Social, Community, Home Care and Disability Services Industry Award 2010 (“**the Award**”), in Tranche 2 of the proceedings (“**Tranche 2 proceedings**”).
2. The Commission issued directions on 23 October 2019 which provided parties the opportunity to file a submission setting out the findings they seek to have made based on the evidence before the Full Bench, and requested that parties identify the relevant extracts of the evidence which is said to support the findings.
3. AFEI opposes the following claims advanced by the unions in the Tranche 2 proceedings:
 - a. Overtime for part-time employees working additional hours (HSU)
 - b. Overtime for part-time and casual employees working more than 8 hours (HSU)
 - c. Minimum engagement periods (HSU)
 - d. Rosters (United Voice)
 - e. Broken shifts (United Voice, HSU, ASU)
 - f. Recall to work (HSU)
 - g. Remote response (ASU)
 - h. Client cancellation (HSU)
 - i. Telephone allowance (United Voice, HSU)
 - j. Clothing Allowance (United Voice, HSU)
 - k. Sleepovers (HSU)
 - l. Travel time (HSU, United Voice)

Relevant material and findings

4. AFEI relies on its written submissions of 3 July 2019¹, 23 July 2019² and 17 September 2019.³
5. Whilst these submissions will address further findings which are available on the evidence adduced in these proceedings (including with reference to the respective evidence/material), AFEI reiterates its position that certain findings are inappropriate in light of the absence of evidence in support of various claims.
6. In relation to all claims, AFEI relies on paragraphs 6-11 of its 23 July 2019 submissions, concerning the relevant legislative framework.
7. Also in relation to all claims, AFEI relies on paragraphs 12 – 32 of its 23 July 2019 submissions, outlining the nature of the SCHADSI Industry.
8. In relation to all part-time employment claims, AFEI relies on paragraphs 55-58 of its 23 July 2019 submissions, concerning the relevance of the increase in cost of part-time employment to the current workforce composition.
9. Where AFEI doesn't respond to specific claims in these submissions, AFEI relies on its written submissions already filed.

A. Overtime for part-time employees working additional hours (HSU)

- A-1. AFEI relies on its submissions of 23 July 2019. Including in particular, paragraphs 33 – 59 of those submissions which reply to this claim. Further, findings available on the evidence include the following.
- A-2. **Firstly:** There are employees who work part-time because it suits them
 - a. Supported by evidence of United Voice of Ms Sinclair who clarified that her second job is the reason why her window of availability ceases at either 2:30pm or 3:00pm on Mondays, Wednesdays and Fridays.⁴
 - b. Supported by ABI evidence of Mr Wright, who states that “care workers put their availability at the beginning of the day and the end of the day. So they’ve determined – in effect getting a broken shift because they’re not available between a shift in the morning and a shift in the afternoon, because that suits their particular circumstances or responsibilities.”⁵

¹ Pages 585 – 587 of the Court Book (“CB”).

² Pages 588 – 618 CB.

³ Pages 619 – 623 CB.

⁵ PN2623.

- A-3. **Secondly:** Part-time employees want to work additional hours
- a. Supported by United Voice evidence of Ms Sinclair, who acknowledges that she would welcome additional hours at [PN674].
 - b. Supported by HSU evidence of Ms Thames.⁶
 - c. Supported by United Voice evidence of Ms Fleming.⁷
 - d. Supported by United Voice evidence of Ms Stewart.⁸
 - e. Supported by evidence of Mr Wright who states “care workers actually try and do what they can to get additional hours”⁹
- A-4. **Thirdly:** Part-time employees are not being forced to work additional hours where they do not agree to them
- a. Supported by evidence of Mr Wright who states “work the additional hours is by agreement.”¹⁰
 - b. Supported by the evidence of ABI witness, Ms Wang, who state “only when they agree, we roster them to work the additional hours.”¹¹
 - c. Supported by evidence of Ms Sinclair.¹²
- A-5. **Fourthly:** If the Award is varied as sought, this would have a detrimental impact on both the availability of part-time employment as a flexible yet permanent work option for employees, and on employer costs
- a. We rely on our submissions of 23 July 2019 at [51] that it is plain the variation would result in a substantially additional cost to employers for offering any additional hours to part-time employees, as compared to casual employees. As a result casual employment would be a more cost-effective form of employment where flexibility is required for both the employer and employee.
 - b. We further rely on our submissions of 23 July 2019 at [53] illustrating how the variation would result in part-time employment being a far more costly form of employment than full-time employment. This would inevitably impact the viability of offering part-time employment for those who would prefer reduced permanent hours due to family or other personal commitments.

⁶ Thames Statement (Exhibit HSU28) at [9].

⁷ Fleming Statement (Exhibit UV4) at [17].

⁸ Stewart Statement (Exhibit UV1) at [11].

⁹ PN2659.

¹⁰ PN2727.

¹¹ PN3603.

¹² PN612-PN613

- c. Evidence of Mr Wright states that the company “would be required to explore other options instead of providing additional hours and have part-time employees only work their contracted hour. This would have a number of negative impacts, including a) a decrease in operational flexibility which assists us in meeting ever changing client demands and needs, b) disadvantaging part-time staff seeking additional hours above their contracted hours, and c) may lead to an increase in casual staff in place of part time employees”.¹³
- d. Evidence of Ms Wang state “if we guarantee more hours for the part-time workers, we may face the situation we don’t have enough work for them in some occasion”.¹⁴

A-6. **Fifthly:** No evidence was provided in the proceedings about the impact of the current provisions at Clause 28.1(b)(i) and 28.1(b)(ii).

B. Minimum engagement period to apply to each period of work in a broken shift (HSU)

B-1. AFEI relies on its submissions of 23 July 2019. Including in particular, paragraphs 109, and 112-115 of those submissions which reply to this claim. Further, findings available on the evidence include the following.

B-2. **Firstly:** Employees covered by the Award provide services which are unique to this sector; services are dictated by client needs

- a. Supported by evidence of HSU of Ms Waddell that her work is rostered around specific times, namely breakfast, lunch and dinner and times specific to client’s need to take medication.¹⁵
- b. Supported by evidence of ASU of Mr Steiner. Mr Steiner’s shifts are dictated by client needs such as assisting the client with medication and dinner.¹⁶
- c. Supported by the evidence of Mr Wright who states “rostering takes place around the preferred times of clients as is required by Consumer Directed Care.”¹⁷
- d. Supported by the evidence of Ms Mason who state “broken shifts are applied based on the needs of our clients...potentially there could be three portions because we might go out in the morning, again at lunch and again in the evening”.¹⁸

¹³ Wright Statement (Exhibit ABI3) at [36].

¹⁴ PN3604.

¹⁵ PN1453-1455.

¹⁶ PN1566.

¹⁷ Wright Statement at [37].

¹⁸ PN3315.

- B-3. **Secondly:** Employees in this sector typically work with the same clients on an ongoing basis
- a. Supported by the evidence of Mr Steiner who gave evidence that it is important for him to be the consistent carer at different points in the day,¹⁹ that this level of consistency is important for clients with psychosocial disabilities²⁰, consistency is important for the clients routine.²¹
 - b. Mr Steiner mostly work with the same clients both before and after the break in the shift with the effect that he would go to “one client, go to another and then come back in the afternoon”²²
 - c. Supported by the evidence of Ms Stewart.²³
 - d. Supported by evidence of Ms Fleming.²⁴
 - e. Supported by the evidence of Mr Shanahan who states “they always demand certain staff members at certain times...you ring client B and Client B says ‘No, because I just want Mary to come every week’....the client and the consumer is a centre focus and their choice is paramount now so there’s a more of an emphasis on that than ever before”.²⁵
- B-4. **Thirdly:** Each portion of work in a broken shift is typically less than three hours in length
- a. Supported by evidence of Ms Sinclair.²⁶
 - b. Supported by evidence of Ms Waddell.²⁷
 - c. Supported by evidence of Mr Steve Miller.²⁸
- B-5. **Fourthly:** Existing arrangements for broken shifts in the Award are appropriate to the industry
- a. On the basis of findings 1-3 above, as well as our 23 July 2019 submissions.
- B-6. **Fifthly:** The variation sought by the HSU would detrimentally impact on the provision of services in this sector, ultimately affecting service users
- a. The evidence of Mr Wright states “if the Company was required to provide a three hour minimum shift to all employees this would remove a significant amount of flexibility and would result in an increase in makeup time where client preference change and cancellation of services occur”.²⁹

¹⁹ PN1568.

²⁰ PN1555.

²¹ PN1556.

²² PN1562.

²³ PN469.

²⁴ PN518.

²⁵ PN2885.

²⁶ PN739.

²⁷ Waddell Statement (Exhibit HSU4) at [22].

²⁸ PN2050.

²⁹ Wright Statement at [42].

- b. The evidence of Mr Wright states “if we were required to provide a minimum of three hour engagement it may also lead to clients not being able to access 30 minute visits”.³⁰
- c. The evidence of Mr Steiner clarifies that where there is no consistent carer for the client, the consequence would be that it would break up “the order of how things are done”³¹ as consistent client means that the employee is able to develop an understanding of the client’s needs.³²

B-7. **Seventh:** The variation could result in an employer being liable to pay an employee for hours during which no productive work is being performed

- a. Supported by evidence of Ms Stewart.³³
- b. Supported by evidence of Ms Fleming.³⁴

D. Broken shifts may only be broken once and not multiple times (HSU)

AFEI relies on its submissions of 23 July 2019. Including in particular, paragraphs 109-111 of those submissions which reply to this claim. Further, findings available on the evidence include the following.

- D-1. Employees covered by the Award provide services which are unique to this sector; services are dictated by client needs
 - a. Supported by evidence of Ms Waddell that her work is rostered around specific times, namely breakfast, lunch and dinner and times specific to client’s need to take medication.³⁵
 - b. Supported by evidence of Mr Steiner. Mr Steiner’s shifts are dictated by client needs such as assisting the client with medication and dinner.³⁶
 - c. Supported by the evidence of Mr Wright who states “rostering takes place around the preferred times of clients as is required by Consumer Directed Care.”³⁷
 - d. Supported by the evidence of Ms Mason who state “broken shifts are applied based on the needs of our clients...potentially there could be three portions because we might go out in the morning, again at lunch and again in the evening”.³⁸

³⁰ Wright Statement at [43].

³¹ PN1558.

³² PN1559.

³³ PN461; PN464; PN468.

³⁴ PN525; PN527.

³⁵ PN1453-1455.

³⁶ PN1566.

³⁷ Wight Statement at [37].

³⁸ PN3315.

E. Client Cancellation (HSU) and Rosters (United Voice)

- E-1. AFEI relies on its submissions of 23 July 2019. Including in particular, paragraphs 96-104, and 134-135 of those submissions which reply to this claim. Further, findings available on the evidence include the following.
- E-2. **Firstly:** Client cancellations are usually late notice
- a. Supported by evidence of ABI of Mr Harvey who states “72 percent of the cancellations were late notice cancellations or no shows”.³⁹
 - b. Supported by the evidence of Mr Shanahan who states “a lot of the cancellations happen on the day or just the night before services commence due to a family member going to hospital or someone going into permanent care or sadly they pass away”.⁴⁰
- E-3. **Secondly:** Cancellation fees are not always charged to the client
- a. Supported by evidence of Mr Wright who states that, despite there being a cancellation clause in a service agreement, “we may not charge them, depending on the circumstances...it is determined on a case by case basis”.⁴¹
 - b. Supported by evidence of Mr Wright who states “There cannot be a cancellation fee charged under the CHSP scheme.”⁴² Mr Wright further states “CHSP – get block funding; it’s spent on the service for the client. What’s not spent goes back to the government. There’s no provision in that funding for charging the client cancellation fees”⁴³
 - c. Supported by evidence of Mr Shanahan who states “We have to monitor the sensitivity if charging people’s packages (monies comes out of the client’s package, funded by the government) but people are price sensitive and the organisation has to be weary of that, for example, under the agreement, the organisation can charge four hours for a four hour service but they won’t, and a lot of the time, the fee is waived”⁴⁴
 - d. Supported by evidence of Ms Mason who states that Baptiste Care can charge the client a cancellation fee but they are not obliged to.⁴⁵ Ms Wendy further states “There are a lot of circumstances where Baptiste Care won’t apply a cancellation charge if it’s less than 24 hours. Obviously dealing with a frail and vulnerable group of people and their health circumstances can change quickly. If they have a health event that forces a cancellation, then we won’t apply the cancellation charge”⁴⁶

³⁹ PN3136.

⁴⁰ PN2897.

⁴¹ PN2651.

⁴² PN2702.

⁴³ PN2704.

⁴⁴ PN2897.

⁴⁵ PN3274.

⁴⁶ PN3321.

- E-4. **Thirdly:** Employers do not benefit financially from a cancelled service
- a. Supported by evidence of Ms Wang who states “When the client cancels a service, we don’t have an income”.⁴⁷

F. Telephone Allowance (United Voice, HSU)

- F-1. AFEI relies on its submissions of 23 July 2019. Including in particular, paragraphs 136-146 of those submissions which reply to this claim. Further, findings available on the evidence include the following.
- F-2. **Firstly:** Employees in this sector already own a mobile phone and already use them for work purposes at no additional cost to the employee
- a. Supported by the evidence of Ms Stewart and Ms Fleming.⁴⁸ Ms Stewart has, as part of her phone plan, unlimited standard calls and SMS messages and up to 10 gigabytes usage without additional charges.⁴⁹ Ms Fleming has, as part of her phone plan, unlimited standard national calls and texts with 20 gigabytes of data and she doesn’t get separately charged for any data used for accessing her roster.⁵⁰
- F-3. **Secondly:** There are difficulties with disaggregating between work and personal use of the mobile phone
- a. Supported by the evidence of Ms Anderson concerning including monitoring issues such as how long and or how often an employee spends using a mobile phone or device for work purposes⁵¹, what happens in instances where phone usage was not authorised nor required by the employer⁵² and how to differentiate between personal and work use of the phone.⁵³

G. Travel Time (United Voice, HSU)

- G-1. AFEI relies on its submissions of 17 September 2019. Including in particular, paragraphs 7-25 of those submissions which reply to this claim. Further, findings available on the evidence include the following.
- G-2. **Firstly:** Firstly, 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 work⁵⁴

⁴⁷ PN3612.

⁴⁸ Stewart Statement at [21].

⁴⁹ PN448; PN452.

⁵⁰ PN547-PN549.

⁵¹ PN1005.

⁵² PN1011 – PN1013.

⁵³ PN441.

⁵⁴ PN1391; PN1392; PN1405; PN1407; PN1408; PN1409.

- G-3. **Secondly:** Where employees do travel a considerable distance, such travel is undertaken on an irregular basis⁵⁵
- G-4. **Thirdly:** Employees do not always use their breaks to travel from one client to another⁵⁶
- G-5. **Fourthly:** 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 to traffic⁵⁷

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⁵⁵ PN1389; PN1395; PN1398; PN1402.

⁵⁶ PN464; PN468;PN527; PN525; PN1572.

⁵⁷ PN460.