

## FAIR WORK COMMISSION

Matter No. AM2014/196 & AM2014/197

Part Time Work & Casual Employment Common Issues

### JOINT UNION PARTIES OBJECTIONS

#### Summary

1. These objections are made on behalf of the Australian Services Union, the Health Services Union and United Voice ('the **Union Parties**) to evidence filed by the St Ives Group Pty Ltd, the Australian Business Industrial, NSW Chamber of Commerce and Jobs Australia Inc (collectively: '**the Employers**') in AM2014/196 and 197 in accordance with the direction made on 29 February 2016, as amended on 10 March 2016.
2. These objections concern material filed by the Employers in relation to the *Aged Care Award 2010*, the *Nurses Award 2010*, and the *Social, Community, Homecare and Disability Industry Award 2010* ('the **Awards**').
3. Our objections are made mindful of the Full Bench's statements that it would does not intend to take a technical approach and where possible will deal with objections on the basis of the weight to be attributed to the material. Accordingly, our objections are intended to eliminate material of no probative value or material that is prejudicial and or misleading and to facilitate the efficient conduct of the hearings.
4. A table identifying objectionable evidence is attached.
5. The objections made by the Union Parties to the employers' lay evidence fall into the following general categories:
  - (a) hearsay;
  - (b) relevance;
  - (c) opinion, speculation and conclusion; and
  - (d) argument.
6. Each group of objections are addressed below.

#### Hearsay

7. Objections to evidence on the basis of hearsay are made consistent with section 59 of the *Evidence Act 1995* (Cth) that the evidence is objectionable because it allows evidence of an out of court representation relevant to a fact in issue to be made without the maker of the statement being subject to the rigors of cross examination and an oath or affirmation.

8. Our hearsay objections fall into two broad categories.

#### *Evidence of employee preferences*

9. First, where the maker of the statement makes assertions about the preferences or opinions of their employees, *for example*, ‘*my staff want to work at this time because they are mothers caring for children*’. The clear object of providing this sort of evidence is to establish the truth of employee preferences, or in the language of the *Evidence Act*, an asserted fact: see section 59(2) of the *Evidence Act*. Where the Employers have failed to file a statement from the employee such material should be excluded. Particularly when it is impossible to identify who the maker of the out of court statement is. Inclusion of this material may compel, the Union Parties to seek further disclosure from the Employers and potentially require the attendance of additional persons to give evidence and subvert the clear directions made concerning the filing of evidence.

#### *Evidence of consumer/client preferences*

10. The second category of hearsay evidence contains statements in the Employer lay witness statements that makes assertions about the expectations and/or responses of their customer, clients or patients to matters that the maker of the statement claims are related to part time employment, for example, “my customers will change their service if they do not get the carer they want”, or “clients expect care when and where they want it”. The concerns noted above are relevant.

#### Relevance

11. Where the ground of objection is identified as relevance, the material should be excluded because the the maker of statement has traversed facts or matters that are not part of the issues for determination by the Full Bench in this proceeding. There two main categories of irrelevant evidence are noted below.

#### *Matters outside the scope of the part time and casual employment review*

12. Several witnesses identify a “need” for reform to the Awards, or the system of workplace regulation in Australia more generally. Evidence of this type is also objectionable on the grounds of argument.

13. If evidence is not relevant, it is not admissible in a proceeding: Evidence Act s. 56(2). Evidence is relevant if, assuming it were accepted; it could rationally affect, directly or indirectly, the assessment of the probability of the existence of a fact in issue in the proceeding: Evidence Act s. 55(1).
14. Other matters under the Awards are the subject of separate hearings by the Commission as part of its four yearly review of the modern awards.<sup>1</sup> Evidence that relates to matters outside the scope of the review of part time and casual employment provisions are irrelevant and not admissible in this proceeding. Parties have foreshadowed that they intend to rely on evidence filed in the review of part time and casual employment provisions at the Award stage. These objections are made in so far as that evidence relates to claims made in these proceedings.<sup>2</sup>
15. Matters such as the definition of the shift worker under the National Employment Standards, rationally or irrationally, affect the assessment of the Full Bench in determining whether the proposed amendments to the part time and casual employment in the Award meet the modern awards objective in section 134 of the Fair Work Act.

Opinion, conclusion and speculation

16. A number of witnesses give opinions that the maker of the statement is not qualified to give. We note objections to this material. Material is also objected to on the grounds of speculation. Similarly, an objection identified as ‘conclusion’ is made on the basis that the evidence is inadmissible because it is the conclusions of the witness rather than evidence of facts known by the witness.
17. We note here our concerns about unqualified opinions, conclusions and speculative statements to highlight our concerns and that this material should be attributed little or no weight.
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**UNION PARTY OBJECTIONS TO THE EMPLOYER PARTIES' LAY WITNESS**  
**STATEMENTS**

**Table 1: Objections to evidence filed on behalf of St Ives Group Pty Ltd**

<b>Paragraphs</b>	<b>Part</b>	<b>Ground</b>
<b>Witness 1</b>		
18	Whole paragraph	Conclusion
22	first sentence 'for many aged care providers, including'	Speculation
37-38	Whole paragraph	Argument, conclusion
40	Whole paragraph	Argument
43	Whole paragraph	Argument
44	Whole paragraph	Speculation
45	Whole paragraph	Conclusion
49	Whole paragraph	Argument, conclusion
<b>Witness 2</b>		
20	Whole paragraph	Argument, conclusion
27	Whole paragraph	Argument, conclusion
31	Second sentence	Conclusion
38 - 39	Whole paragraph	Argument
<b>Lois Andrijich, St Ives Group Pty Ltd</b>		
10	Third sentence	Conclusion
13	Whole paragraph	Speculation
14	Whole paragraph	Opinion, speculation
17	Whole paragraph	Argument, speculation
18	Whole paragraph	Argument, speculation

**Table 2: Objections to evidence filed on behalf of Australian Business Industrial and the NSW Chamber of Commerce**

<b>Paragraphs</b>	<b>Part</b>	<b>Ground</b>
<b>Hugh Kenneth Packard, Valmar Support Services Ltd</b>		
21	2 <sup>nd</sup> and 3 <sup>rd</sup> sentence	Speculation, conclusion
22 (d)	Whole paragraph	Opinion, speculation, conclusion

30	Whole paragraph	Hearsay
31	Whole paragraph	Hearsay
32	Whole paragraph	Hearsay
34	Whole paragraph	Speculation
50	1 <sup>st</sup> sentence, from 'yet I...'	Speculation
51	Whole paragraph	Speculation
58	Whole paragraph	Argument
59	Whole paragraph	Argument
60	Whole paragraph	Argument
62	Whole paragraph	Conclusion
63	2 <sup>nd</sup> sentence	Argument, opinion, conclusion, speculation.
64	Whole paragraph	Hearsay
65	Whole paragraph	Argument, hearsay, conclusion
Documents liste		

**Table 3: Objections to evidence filed on behalf of Jobs Australia, Inc**

<b>Paragraphs</b>	<b>Part</b>	<b>Ground</b>
<b>Jennifer Fitzgerald, Scope (Aust) Ltd</b>		
9-10	Whole paragraph	Relevance
16	Whole paragraph	Opinion
20	Whole paragraph	Conclusion
32	Whole paragraph	Speculation, conclusion, hearsay
33	Whole paragraph	Conclusion
34	Whole paragraph	Opinion
41	Second sentence from 'is indicative'	Conclusion
42	Whole paragraph	Conclusion
49		Speculation
52	Whole paragraph	Argument, speculation, conclusion.
54	Whole paragraph	Argument
55	Whole paragraph	Speculation
56, 57, 58, 59		Relevance

