

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: s156

Matter Number: AM2018/26

Document: Submissions of the Australian Federation of Employers and Industries (AFEI) in support of ABI proposed variations

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Submissions in support of ABI proposed variations

1. These submissions are filed pursuant to Directions of 28 June 2019, in matter AM2018/26, 4-yearly review of the Social, Community, Home Care and Disability Services Industry Award 2010 (SCHADS Award), and address the AFEI's support of discrete elements of the variations proposed by Australian Business Industrial, and NSW Business Chamber (**ABI**), as outlined in the draft determinations filed 2 April 2019.
2. To the extent any of the ABI proposed variations are opposed, AFEI intends to file materials in reply by 3 September 2019.

Clause 25.1 and 25.4(a) - Ordinary hours of work

3. AFEI supports the ABI proposed variation to Clause 25.1.
4. The current Award provisions do not provide flexibility for employers to customise its arrangement of shifts and hours for full time employees, beyond the arrangements listed in Clause 25.1. If an employer requires an arrangement of shifts that is not contemplated in Clause 25.1, the employer would need to employ part-time or casual employees, or incur overtime rates.
5. The current restrictions in the Award are not supported by historical provisions in the social and community services industry (at least in NSW), nor current industry needs. Rather,
 - a. Such restrictions were not included in the *Social and Community Services Employees (NSW) State Award*, which provided:

*ordinary hours of work shall be no more than 152 hours in any four week period exclusive of meal breaks, worked between the hours of 6am and 8pm Monday to Sunday inclusive.*¹
 - b. In the disability services sector in particular, work includes provision of daily services without fixed duration from client to client, and aims to 'maximum choice and control for [NDIS] participants'.²
6. AFEI also supports the ABI application to vary Clause 25.4(a) – rest breaks between rostered work.

¹ Clause 11.1

² NDIS Market Position Statement, NSW, 2016.

Clause 25.5(d)(ii) – Change in roster

7. AFEI supports the ABI application to vary Clause 25.5(d)(ii) to include an ability to alter a roster at any time *‘by agreement between the employer and relevant employee.’*
8. AFEI does not however support the proposed administrative requirement for the agreement between the employer and employee to be recorded in writing, in order for such an agreement to take effect as mutually intended.
9. AFEI supports the ABI application to vary Clause 25.5(d)(ii) to reflect the additional kinds of employee absences that could impact an organisation’s ability to enable effective service delivery, as outlined at 25.5(d)(ii)B of the draft determination.

Clause 25.5(f) - Client cancellation

10. AFEI supports the introduction of paragraph 25.5(f)(i) and (ii) as outlined in the draft determination, insofar as it includes disability services as being subject to client cancellation provisions, and outlining the actions that may be taken by an employer in the event of a client cancellation in A and B.
11. AFEI does not support the removal of the words from the current provision at 25.5(f)(i) that *‘in such circumstances no payment will be made to the employee.’*
12. AFEI reserves its position in respect to the proposed introduction of Clauses 25.5(f)(iii) – (vi) in the ABI draft determination.

Clause 20.10 - Remote response and Clause 28.5 - Recall to work overtime

13. AFEI supports the ABI’s proposed introduction of Clause 20.10 for remote response work.
14. AFEI supports the clarification provided in ABI’s proposed variation to Clause 28.5, including that recall to work does not apply to an employee performing remote response duties. Further in support, we say:
 - a. **Firstly**, the proposed variation is consistent with the ordinary meaning of the term ‘recalled,’ that *‘a person who is recalled is summoned to return to a place in a manner where there is a requirement for the person to return.’*³
 - b. **Secondly**, the remote response duties in the ABI proposed variation are also consistent with core responsibilities included in the Award’s classification structure. For example, a Level 2 Social and Community Services Employee’s responsibilities can include work allocation, rostering, and providing guidance.⁴ Performance of core responsibilities as part of an ongoing arrangement are rightly distinguished from being “recalled to work” involving a specific instruction or direction to an employee on a particular occasion and for a more particular purpose.⁵

³ [2018] FWC 4334 at [59]

⁴ B.2.2(n), SCHADS Award

⁵ See *Polan v Goulburn Valley Health* [2016] FCA 440 at [76]