



IN THE FAIR WORK COMMISSION

Matter No.: AM2014/285

**S 156 – Four Yearly Review of Modern Awards - Social, Community,
Home Care and Disability Services Industry Award 2010**

SUBMISSION IN REPLY OF THE AUSTRALIAN SERVICES UNION

| | |
|----------------------|---|
| Submitter: | Robert Potter, Acting National Secretary |
| Organisation: | Australian Services Union |
| Address: | 116 Queensberry Street Carlton South, Victoria, 3053 |
| Phone: | 03 9342 1400 |
| Fax: | 03 9342 1499 |
| Email: | info@asu.asn.au |
| Date: | Monday 16 th September, 2019 |

Contents

| | |
|-------------------------------------|----|
| I - INTRODUCTION | 3 |
| II – VARIABILITY CLAIMS | 8 |
| III – CLIENT CANCELLATION..... | 11 |
| IV – REMOTE RESPONSE | 15 |
| V – DELETION OF PERIOD OF WORK..... | 15 |

Attachment

Annexure A – Judith Wright Witness Statement

I - INTRODUCTION

1. This submission is made in reply to various submissions filed by employer groups in support of variations to the *Social, Community, Homecare and Disability Services Industry Award 2010* (**'Award'**) proposed by Australian Business Industrial, the NSW Business Chamber, Aged & Community Services Australia and Leading Age Services Australia, (**'collectively ABI'**) as set out in the Draft Determination filed on 2 April 2019 (**'ABI Claims'**). It is made in accordance with the amended Directions issued on 11 July 2019. ABI is supported, broadly, by National Disability Services (**'NDS'**), the Australian Federation of Employers and Industries (**'AFEI'**) and Business SA (**'collectively the Employers'**). Australian Industry Group's (**'AIG'**) position is unclear.
2. The variations proposed by the Employers can be grouped into three categories.
 - a. Firstly, there are the claims for additional 'flexibility'. However, this 'flexibility' is entirely the employer's: employees will experience this 'flexibility' as arbitrary variability. These include a claim to remove the protections for the regularity working hours for full-time employees at cl 25.1; a claim to change rosters by agreement; and the removal of the requirement to roster 10 hour breaks between rostered periods of non-working duty such as sleepover or 24 hour care.
 - b. Secondly, the Employers seek the extension of the cl 25.5(f) (**'the Home Care client cancellation term'**) to social and community services employees undertaking disability services (**'disability services employees'**). The purpose of this claim is to shift risk from the employer to the employee. This puts the cost of client choice on the person least capable of bearing the costs or mitigating the risk.
 - c. Finally, the Employers seek to impinge on the employee's private time, by instituting a 'remote response' term that would permit an employer to require employees to work from home outside of ordinary hours. This provision also undermines the on call arrangements of the Award.
3. The Australian Services Union (**'ASU'**) opposes each of the ABI claims. If the Award were varied in the manner proposed by the Employers it would not provide fair and relevant safe terms and conditions. The Employers have not provided the Commission with the substantial evidentiary case or the comprehensive submissions necessary to satisfy it that the proposed

variations should be made. In many cases, the Employers evidence and submissions suggest that they misunderstand significant elements of their case, including the coverage of the Award and the operation of the NDIS.

The Employers are unrepresentative of the industries covered by the Award

4. The Award covers a diverse industry with a number of related, but quite different sectors. The Employers appear to largely represent home care sector and social and community services ('SACS') employers operating disability services. Certainly, this is where they have directed their evidence. But home care and disability services are only part of the industry covered by the Award.
5. The Award also covers the Family Day Care and Crisis Accommodation sectors. These sectors will be also be affected by the proposed variations to the arrangement of ordinary hours for full-time employees, rostering and remote response. Further, disability services are not the only organisations covered by the SACS stream of the Award. The SACS sector also covers: sexual assault, domestic and family violence services; women's domestic violence court advocacy services; youth and child protection services; out of home care for children and young people at risk services; homelessness, housing and tenancy services; family support services; health and mental health services; alcohol, gambling and other drugs of addiction and rehabilitation services; aged care services; first nation people's services; migrant and settlement services; prisoner rehabilitation; community legal services; community and neighbourhood services; policy, research and advocacy services; and community transport organisations.
6. These organisations operate under different funding arrangements, work with different clients and engage different types of employees than disability services. The Employers' proposed variations regarding the arrangement of ordinary hours for full-time employees, rostering and remote response will affect these organisations and their employees. The Employers have nothing to say about these sectors. In the absence of submissions and evidence about the full breadth of the Award's coverage, the Commission should not make the variations proposed by the Employers.

The implementation of the NDIS is a period of opportunity and growth for the disability sector, not a crisis

7. The Employers generally assert that their claims are necessary because of changes in the disability sector driven by the implementation of the NDIS. From the employer submissions, it would appear that there is a crisis in the disability sector. They argue that employers have lost control of their businesses and so the minimum safety net of the Award needs to be reduced. However, while the disability sector is clearly changing in response to the NDIS, the variations proposed by the Employers are a knee-jerk overreaction.
8. Firstly, it is apparent from the Employers' evidence that organisations in the sectors are successfully adapting their operations to the new NDIS model. From the Employers' evidence, it is apparent that employers in this sector are experimenting with new operational models and innovating in response to the challenge of the NDIS. This is desirable, and appears to be uninhibited by the safety net provided by the Award. There is no evidence of any genuine hardship on the employer's behalf.
9. However, these organisations appear to be unused to their clients acting as 'customers' with the right to choose, but also the obligation to negotiate and compromise. Unused to dealing with their clients as empowered economic actors, employers are lashing out at their employees. This appears to be the real basis of the Employer's claims and it is not a reason to reduce the Award safety net.
10. Secondly, the NDIS is still relatively new. It is going through a process of implementation, review and revision. It is not in its final form and its administrator, the NDIA, has shown itself to be willing to change the system in response to feedback from clients, support providers and workers. For example, the Employers have made many submissions about the inadequacy of funding arrangements under the NDIS. However, they ignore the fact that pricing is reviewed annually, and the pricing structure has been updated several times in response to employee feedback. As the NDIA notes on their website:

Changes to prices are updated to respond to market trends and changes in costs and are generally identified through an Annual Price Review. The Annual Price Review is undertaken by the NDIA in the lead up to new financial year, with any new prices outlined in an updated price guide, effective 1 July each year.¹

¹ 'Price Guides and Information', *National Disability Insurance Agency*, (Web page, 13 September 2019), <<https://www.ndis.gov.au/providers/price-guides-and-information>>.

11. Further, the NDIA has also commissioned external research into NDIS pricing and updated their pricing arrangements accordingly. In 2019, NDIS pricing was reviewed by McKinsey and Company on behalf of the Board of the NDIA. In their *NDIA Independent Pricing Review Report* they identified a number of changes to funding in response to input from NDIS participants, NDIS providers and disability advocates. These recommendations were progressively adopted by the NDIA in the 2018 and 2019 NDIS Price Guides.² The recommendations included, amongst other items, funding for 45 minutes of travel time in rural areas, a new client cancellation policy (discussed in detail below), a third pricing tier to account for higher skilled workers (SACS employees Level 3) for more complex care.³ The Commission should not accept a submission that changes in the disability sector since the introduction of the NDIS means that disability services employees should not be protected by the same modern award safety net as other employees. The NDIS has evolved significantly since it was first introduced and continues to evolve in response to the concerns of providers and participants.
12. In any case, the statutory duty of the Commission is to ensure that the Award, along with the NES, provides a fair and relevant safety net. As the Commission noted in the Decision of 2 September 2019, '*The Commission's statutory function should be applied consistently to all modern award employees*'.⁴ The Employers have not supported their claim with probative evidence or cogent arguments about why the NDIS (or consumer directed care) should mean that employees in the SCHDS industry should have lower terms and conditions than those in other industries.

The Award is already unusually flexible, and the minimum safety net does not need to be lowered further

13. The Employers have proposed a number of variations to increase the variability of working hours under the Award. These claims are unnecessary because the Award is already so flexible that the ordinary hours, overtime and rostering terms may not meet the modern awards

² National Disability Insurance Agency, *Price Guide 2018-2019*; National Disability Insurance Agency, *Price Guide 2019-2020*.

³ 'Price Guides and Information', *National Disability Insurance Agency*, (Web page, 13 September 2019), <<https://www.ndis.gov.au/providers/price-guides-and-information>>.

⁴ *Four Yearly Review of Modern Awards* [2019] FWCFB 6067, [142].

objective.⁵ The Award has the following unique features which provide employers with significant flexibility:

- a. the roster of part-time employees may be changed at any time under cl25.5 (d) (iii) which provides that the restrictions on changing the roster do not apply to mutually agreed additional hours worked by part-time employees;
 - b. Home care employees and SACS employees undertaking disability services may work broken shifts with no restrictions (cl 25.6);
 - c. part-time employees are not paid overtime until they work 10 hours in a day or 38 hours in a week or 76 hours in a fortnight;⁶
 - d. there is no minimum engagement for part-time or full-time employees;
 - e. employers are not required to roster meal breaks if they require an employee to have a meal with a client or clients;⁷
 - f. casual disability services employees are only entitled to a 2 hour minimum engagement;⁸
 - g. casual home care employees are only entitled to a 1 hour minimum engagement;⁹ and
 - h. if a client cancels a rostered home care service, a home care employee's roster can be changed if the client is notified that their roster is being changed because of a client cancellation before 5.00 pm the day before, they will not be paid for the shift if they are notified about the client cancellation after that time, they will only be paid for the minimum specified hours, an employee can also be directed to work make up time sometime in that roster period or the next;¹⁰
14. The evidence of the ASU's witnesses is that they experience significant variability in their hours of work and are willing to agree to their employer's requests out of a sense of duty to their clients and a need to maximise their income. The Employer's variations will only further weaken the safety net for these employees. The detail of these claims will be discussed below, but the Employers have not advanced any evidence that proves that these claims are necessary to

⁵ See the various ASU, HSU and United Voice claims regarding paid travel time, broken shifts, overtime for part-time employees and minimum engagements.

⁶ SCHDS Award, Cl 28.1(b).

⁷ SCHDS Award, Cl 27.1(c).

⁸ SCHDS Award, Cl 10.4(c)(iii).

⁹ SCHDS Award, Cl 10.4(c)(ii).

¹⁰ SCHDS Award, cl 25.5(f).

achieve the modern awards objective. The Commission should not accept that employers need to impose more variability upon Award employees.

15. Further, the Commission has found that some SCHDS Award employees are low paid. The extreme variability of working time under this Award means that low paid workers seek to maximise their income by working longer hours, acceding to employer requests and working penalty hours, even though working those hours has negative personal and social effects. The evidence of Augustino Encabo is that he seeks to maximise his hours of work, overtime and working during periods of time that attract a penalty rate to maximise his income. In contrast, Tracy Kinchin gives evidence that, at least before the introduction of broken shifts in her workplace, her fulltime job offered her stability of income and work/life balance.

II – VARIABILITY CLAIMS

Roster Changes

16. ABI proposes that clause 25.5(d) of the Award should be varied to permit rosters to be changed at any time by agreement and in certain other circumstances where an employee takes leave. This claim is supported by the other employer groups, except that AFEI submits that employers should not have to keep written records of the agreed change. The Employers have little to say in support of this claim. ABI simply describes the proposed variation as ‘*relatively minor*’¹¹ and make no submissions about the merits of this claim other than to refer to a Decision¹² regarding the rostering clause of the *Nurses Award 2010*. They do not offer evidence or submissions about why this decision is relevant to their proposed variation. This is unsurprising because in that Decision, the Commission rejected a claim to change rosters at any time by agreement.¹³

The rostering term of the Award is already sufficient flexible

17. As noted in above in Part 1 of these submissions, the Award is already very flexible, which has a significant impact on employees. The proposed variation would only further undermine the already sparse safety net for hours of work. It is unclear what issue the Employers hope to address through the proposed variation. Under the current terms and conditions of the Award, an employer could engage a casual employee or offer a permanent part-time employee voluntary additional hours if they needed staff at short notice. The evidence before the

¹¹ ABI, Submission of 2 July 2019, [4.13]

¹² *Four Yearly Review of Modern Awards* [2018] FWCFB 7347

¹³ *Four Yearly Review of Modern Awards* [2018] FWCFB 7347, [158].

Commission shows that part-time employees are generally willing to work additional hours unless doing so would interfere with another commitment. Further, the evidence before the Commission shows that employees are worried that if they do not agree to requests to work additional hours they will not be offered additional hours in the future.

Employees are likely to feel pressured to agree to change their roster if the proposed variation is made

18. Further, if the proposed variation were made, it is likely that some employees would feel pressured to change their roster at short notice.
19. This is consistent with findings of the Commission regarding similar applications in other Modern Awards. In making the Aged Care Award, the Australian Industrial Relations Commission ('AIRC') expressly rejected part-time employment arrangements like those proposed by the Employers.¹⁴ Instead, they created a clause which balanced the need to protect the part-time employee without preventing an employer from offering additional hours of work. The Full Bench noted that they held reservations regarding the nature of consent where a supervisor requests an employee to work additional hours. The AIRC said (at [148]):

*We have some reservations about the nature of the consent in circumstances where a supervisor directly requests a change in hours on a day where the part-timer had otherwise planned to cease work at a particular time. Existing provisions require that any amendment to the roster be in writing and we have retained this provision. We also have no doubt that many part-time employees would welcome the opportunity to earn additional income. **However, there may also be part-timers who would be concerned to ensure that their employment is not jeopardised by declining a direct request from a supervisor to work additional non-rostered hours at ordinary rates. From the submissions of the employers this is a major cost saving and used widely.***

20. In a 2018 Decision regarding the *Nurses Award*, the Commission rejected a claim to allow an employer to ask an employee to agree to a change in the roster within the 7 day period before the commencement of the roster period. The Commission said '*we have considered the ANMF's submission concerning the possibility that an employee may feel pressured to agree to*

¹⁴ *Re Award Modernisation* [2009] AIRCFB 345, [147]-[149].

a change to the roster within the 7 day period and we agree with it.¹⁵ The Commission then echoed the AIRC in *Re Award Modernisation*, saying:

'We consider that the nature of the employer-employee relationship is such that if a supervisor asks an employee to change rosters within the 7 day period before the commencement of the roster period the employee's decision making may be compromised by fear (even if unwarranted) of repercussions if the request is declined'.¹⁶

21. In the absence of probative evidence and cogent submissions about the merit of ABI's claim, the Commission should adopt the approach of previous Full Benches which protect employees covered by the Award from undue pressure to change their rosters at short notice.

Ordinary hours of work

22. ABI is seeking a variation to clause 25.1 Ordinary Hours of work. If the proposed variation were made by the Commission, the Award would not provide a fair and relevant safety net for full-time employees covered by the Award.

23. Currently, clause 25.1 provides as follows:

(a) *The ordinary hours of work will be 38 hours per week or an average of 38 hours per week and will be worked either:*

(i) *in a week of five days in shifts not exceeding eight hours each;*

(ii) *in a fortnight of 76 hours in 10 shifts not exceeding eight hours each; or*

(iii) *in a four week period of 152 hours to be worked as 19 shifts of eight hours each, subject to practicality.*

(b) *By agreement, the ordinary hours in clause 25.1(a) may be worked up to 10 hours per shift.*

24. The Employers propose a new clause that removes the restrictions on the arrangement of ordinary hours at clause 25.1(a)(i)-(iii). ABI describe this proposal as a '*minor or technical variation rather than a substantive amendment*'.¹⁷ However, because the Award's working time protections are relatively weak, the full-time employees need the protections of clause 25.1(a). Otherwise, employers would be able to structure a full-time employee's ordinary hours in a

¹⁵ *Four Yearly Review of Modern Awards* [2018] FWCFB 7347, [156].

¹⁶ *Four Yearly Review of Modern Awards* [2018] FWCFB 7347, [157].

¹⁷ ABI, Submission of 2 July 2019, [4.9].

highly irregular manner. The Commission should not make this variation without evidence of the impact on employees.

III – CLIENT CANCELLATION

25. Australian Business Industrial has proposed that the Commission should delete clause 25.5(f) Client Cancellation and replace it with a new clause. The proposed variation would make several changes to the current entitlement, the most significant of which is to extend the coverage of 25.5(f) to social and community sector employees when undertaking disability services.

The proposed variation unfairly shifts risk from the employer to the employee

26. The purpose of a client cancellation clause is to transfer the risk associated with a client's cancelling their services from the employer to the employee. It does so by allowing an employer to vary the roster or withhold payment from an employee where a client cancels their service. This is unfair to the employee and presents a moral hazard to the employer.
27. The employer is best placed to manage the risk of client cancellation and to absorb any unavoidable costs. Employers can draw on institutional knowledge and expertise that employees cannot access. They have oversight of their entire workforce. Employers also have control over operational matters such as rostering and staffing levels. Employers also have a contractual relationship with the client that allows them to influence the client's behaviour. In the extreme case, they may choose to terminate an agreement with a client. The employer is also able to draw income from a multiple sources, and have access to commercial financial products. Most employers in this sector are not for profit organisations and do not pay income tax. Some are charitable organisations with deductible gift status.
28. In contrast, the employee does not have access to the employer's institutional knowledge or expertise. Even if they did, employees are obliged to follow the lawful and reasonable directions of the employer. They do not control when they are required to work, who they are required to work with, or how the work of the organisation is structured. They are also more likely to draw income from one source, their wages; have less money in reserve; and pay tax. Many disability services employees are low paid. They already seek to maximise their income by working additional hours and working hours that attract overtime or a penalty rate. If the proposed clause were adopted they would be at risk of losing vital income at a moment's notice. They

would then be forced to work even longer hours to replace this income. The employee cannot control the client relationship, cannot mitigate the risk of cancellations and cannot absorb the cost of lost income. The employer can. Why then should the employee bear the burden? More importantly, how can a safety net of terms and conditions be *'fair and relevant'* if it shifts risk to the party least able to bear it?

29. The ASU is not advancing a claim to delete clause 25.5(f) from the Award. However, we do suggest that clause 25.5(f) in its current state does not achieve the Modern Awards Objective. The Commission should consider whether clause 25.5(f) should be varied to offer better protections, if not deleted.

Funding arrangements for client cancellation under the NDIS

30. Finally, if the proposed variation were made, employers would lose any incentive to work with their clients to manage cancellations or to modernise their business practices so as to effectively utilise their staff. This would mean that that Award promotes inefficient and unproductive business practices *while* reducing participation in the workforce.
31. From 1 July 2019, the following arrangements will apply where a client cancels their service:

Client Cancellation

Where a provider has a short notice cancellation (or no show) they are able to recover 90% of the fee associated with the activity, subject to the terms of the service agreement with the participant.

A cancellation is a short notice cancellation (or no show) if the participant has given

- less than 2 clear business days' notice for a support that is less than 8 hours continuous duration and worth less than \$1000; and*
- less than 5 clear business days' notice for any other support.*

There is no limit on the number of short notice cancellations (or no shows) that a provider can claim in respect of a participant.

However, providers have a duty of care to their participants and if a participant has an unusual number of cancellations then the provider should seek to understand why they are occurring.

*The NDIA will monitor claims for cancellations and may contact providers who have a participant with an unusual number of cancellations.*¹⁸

32. The new client cancellation arrangements were set by reference to the existing terms and conditions that apply to Social and Community Services employees undertaking disability services work. They have been designed to minimise the impact of client cancellations on employers, while also encouraging those employers to reduce the incidence of cancellations.
33. The current arrangements were adopted by the NDIA in response to a recommendation in the *Independent Pricing Review Report*. In their report, McKinsey and Company set out the reasoning for their proposed cancellation policy:

*This revised policy minimises the financial loss incurred by providers on short-notice cancellations and recognises that while providers should work with participants to minimise short notice cancellations, providers should also not bear financial risk for these incidents. It also incentivises positive behaviour by all actors in the market: participants are incentivised to give sufficient notice, while providers are incentivised to work with participants and implement processes to minimise risk of cancellations. It is not expected that this change in policy will have an adverse impact on participant outcomes or Scheme costs. In most cases, the cost of cancellations will be absorbed by participants' budgets. If the nature of a participant's disability makes him or her more susceptible to cancellations, then the participant's budget should be increased accordingly. It is expected this will be a small proportion of participants.*¹⁹ (Emphasis added)

34. The NDIS client cancellation policy was consciously designed, with reference to the current award provisions, to promote the efficient and productive performance of work in the sector. The proposed variations would in fact promote less efficient and productive working practices. They would also permit an employer to 'double dip', because it would permit the employer to bill the NDIA for a cancelled service, but also require the employee to work make up time, for which the employer could claim further fees.
35. Disability services employers do not need a Home Care style client cancellation clause, because they may claim 90 percent of the price of a cancelled service in most circumstances. This will cover the cost of the employee's wages. The claim is not relevant to the circumstances

¹⁸ National Disability Insurance Agency, NDIS Price Guide 2019-2020, p 12.

¹⁹ McKinsey and Company, *Independent Pricing Review Final Report*, ('**NDIS Pricing Report**'), p76.

of employers covered by the Award. In any case, for the reasons discussed above, any client cancellation clause would not meet the modern awards objective.

ABI submissions about the coverage of Clause 25.5(f)

36. ABI have wrongly asserted that the clause presently applies to disability services provided in the home. This 'mistake' obscures the true significance of ABI's claim. Clause 25.5(f) does not apply to any disability services work, whether that service is provided in a private residence, a residential facility, a group home or in a community setting. Consequently, the claim is not simply a matter of extending client cancellation from one group of employees providing disability services to another. The proposed variation is a much more significant change than ABI's submissions would suggest.

37. ABI bases their assertion on the definition of '*home care sector*' at clause 3.1 of the Award, which provides:

'home care sector means the provision of personal care, domestic assistance or home maintenance to an aged person or a person with a disability in a private residence'

38. ABI correctly says that the application of clause 25.5(f) is strictly limited to employees covered by the Home Care classification definitions at Schedule E of the Award. However, they wrongly say that the reference to '*person with a disability*' means that all work with a person with a disability in a private residence is covered by Schedule E. However, this ignores the clear distinction made by the Award between disability services work and home care work.

Employees providing disability services are covered by Schedule B of the Award

39. Disability services are exclusively covered by the SACS classification definitions at Schedule B. '*Disability Services*' are not defined by the Award. However, the definition of Social Community Sector explicitly references '*disability services*'. Clause 3 of the Award relevantly provides:

social and community services sector means the provision of social and community services including social work, recreation work, welfare work, youth work or community development work, including organisations which primarily engage in policy, advocacy or representation on behalf of organisations carrying out such work and the provision of disability services including the provision of personal care and domestic and lifestyle support to a person with a disability in a community and/or residential setting including respite centre and day services. To avoid doubt, an employee will not be precluded from

being engaged under Schedule B, instead of another schedule, merely because they provide services in a private residence or in outreach. (emphasis added)

40. ABI fails to cite the definition of the Social and Community Sector in their submissions regarding the coverage of clause 25.5(f) and Schedule E of the Award. Presumably because to do so would be fatal to their argument.
41. The work of Home Care (Schedule E) employees is distinct from the work of SACS (Schedule B) employees undertaking disability services. Disability services may include the provision of personal care or domestic assistance, but it also involves a significant element focused on building the client's capacities and supporting their life choices. This includes either teaching, promoting or maintaining living skills, client, advocacy, promoting or supporting community access and social inclusion or developing or assisting in developing care or support plans including assessment of client needs. The complexity of this work and the prerequisite higher skill and qualification is reflected in the classification definitions at Schedule B.
42. In contrast, Home Care work is strictly limited to '*personal care, domestic assistance or home maintenance*'. Home care is simply the provision of personal and household services, and the classification system covers handy men as much as it covers care workers. The classification definitions at Schedule E do not refer to capacity-building or lifestyle support.
43. The distinction between disability services and home care services provided to a person with a disability was at issue in the 2010-2012 Equal Remuneration Case. In that case, AFEI tendered a document setting out an agreed position between it and the ASU regarding the distinction between home care and disability services. This was not challenged by any party to the proceeding. The witness statement of Judith Wright, Deputy Secretary of the ASU New South Wales and Australian Capital Territory (Services) Branch (see Annexure A), describes this history and the differences between home care and disability services work.

IV – REMOTE RESPONSE

44. We have not filed evidence or submissions in respect of the ABI Remote Response Claim due to a without prejudice settlement. We reserve our rights to file evidence and submissions in the case that the settlement does not progress.

V – DELETION OF PERIOD OF WORK

45. Clause 25.4 (a) provides as follows:

An employee will be allowed a break of not less than 10 hours between the end of one shift or period of work and the start of another.

46. ABI proposes that the words '*period of work*' should be deleted from the clause. They say that these words have no work to do.
47. This is incorrect. Clause 25.7 Sleepovers and cl 25.8 24 hour care provide for working time arrangements that do not fit comfortably with the word 'shift'. The purpose of '*period of work*' is to ensure that 24 hour care shifts and sleepovers are not worked back to back.

BEFORE THE FAIR WORK COMMISSION

MATTER NO. AM2014/286

S. 156 - Four yearly review of modern awards – Social, Community, Home Care and Disability Services Industry Award 2010

STATEMENT OF JUDITH WRIGHT

I, Judith Wright, Union Official, of [REDACTED]

[REDACTED], say;

1. I am the Deputy Secretary of the Australian Services Union, NSW & ACT (Services) Branch ('the NSW Branch'). I am also a member of the Australian Services Union National Executive. I have held these positions since April 2015. I have been an official of the Branch for ten years. Prior to taking up the position of Deputy Secretary, I was a Senior Industrial Officer from 2009 then Assistant Secretary responsible for industrial services from 2012.
2. Prior to working for the NSW Branch I practiced as a solicitor in New South Wales then New Zealand.
3. I have responsibility, amongst other things, for the legal and industrial activities of the NSW Branch. I have significant experience dealing with the Social and Community Services Sector (SACS), in:
 - a. Being responsible for ten years for the NSW Branch's Industrial Services Team which provides advice and representation to ASU members in the SACS sector in relation to workplace grievances, disciplinary matters, unfair dismissal cases, Award and Agreement entitlements, classification issues, workplace health and safety, discrimination and bully and harassment matters.
 - b. Representing SACS members in Enterprise Bargaining.
 - c. Appearing in the Fair Work Commission in a range of matters affecting SACS members including disputes, adverse action and unfair dismissal matters, and the 2012 and 2015 SCHADS Award Reviews.
4. In my position as Senior Industrial Officer, I was involved in the Social, Community and Disability Services Industry Equal Remuneration Case. I worked extensively on the case from the time the application was lodged in March 2010 until the final order was made in June 2012. I briefed and instructed Counsel throughout the hearing, organised all of the workplace

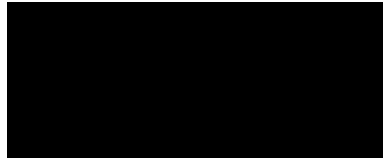
inspections in New South Wales, attended all of the workplace inspections in New South Wales and Queensland, prepared all of the witness statements for witnesses based in New South Wales and the ACTU and some in other states and territories, engaged all of the expert witnesses called by the ASU and assisted with research and written submissions.

5. I have been shown the submissions filed by the Australian Business Industrial on 2 July 2019. I note that at paragraph 5.2, they assert that clause 25.5(f) '*already applies to a significant part of the disability services sector, as it applies to services provided to people with a disability in their home.*' They base this assertion on the description of '*Home Care Sector*' at clause 3.1 of the *Social, Home Care and Disability Services Award 2010* ('**the Award**').
6. Clause 25.5(f) does not apply to any part of the Disability Services sector, it only applies to employees classified under Schedule E of the Award as Home Care employees. Employees providing disability services are properly classified under the Social and Community Services Sector classification definitions (Schedule B of the Award). This work is distinct from work carried out by home care employees (covered by Schedule E of the Award) for people with a disability.
7. Clause 3 of the Award relevantly describes the Social and Community Sector as follows:

social and community services sector means the provision of social and community services including social work, recreation work, welfare work, youth work or community development work, including organisations which primarily engage in policy, advocacy or representation on behalf of organisations carrying out such work and the provision of disability services including the provision of personal care and domestic and lifestyle support to a person with a disability in a community and/or residential setting including respite centre and day services. To avoid doubt, an employee will not be precluded from being engaged under Schedule B, instead of another schedule, merely because they provide services in a private residence or in outreach. (emphasis added)

8. Disability services involves the provision of personal care and domestic and lifestyle support and/or training to a person with a disability including in a community setting whether residential or non-residential, a respite centre, a day service facility or in a private residence where work in that residence involves either teaching, promoting or maintaining living skills, client, advocacy, promoting or supporting community access and social inclusion or developing or assisting in developing care or support plans including assessment of client needs.

9. Disability services (classified under Schedule B of the Award) can be distinguished from the provision of home care services to people with a disability (classified under Schedule E). These are roles where the workers only provide personal care for a client.
10. The distinction between Home Care employees and Social and Community Services employees undertaking disability services was the subject of controversy during the Equal Remuneration Case 2010-2012. In that case, the Australian Federation of Employers and Industries sought to clarify that the proposed Equal Remuneration Order did not apply to employees covered by Schedule E of the Award.
11. The parties came to an agreed position, which was filed by AFEI and marked as Exhibit AFEI 6. Attached and marked **Annexure A** is a copy of Exhibit AFEI 6.



JUDITH WRIGHT

Dated: 12 September 2019

EXHIBIT: AFEI 6

Extract from transcript: 11 February 2011 —
PN5572–PN5583

AFEI Letter to ASU: 9 February 2010

ASU Letter to AFEI: 22 February 2011

Extract from transcript: 3 February 2011 —
PN3155–PN3177

Extract from Witness Statement – Sally
McManus: ASU Exhibit 34 – page 21 and 22

PN5572

JUSTICE GIUDICE: Very well. In the circumstances, what we'll do is vary the timetable to provide for the New South Wales government to file submissions by 30 March and for the Victorian - I'm sorry. Just a moment. What date does the caretaker period commence?

PN5573

MS DOUST: The caretaker period commences on 4 March.

PN5574

JUSTICE GIUDICE: Yes. So what I had in mind was an extra couple of days only which would take it to 2 March for the New South Wales submissions.

PN5575

MS DOUST: We would be grateful for that, your Honour.

PN5576

JUSTICE GIUDICE: In relation to Victoria, then that will be 21 March.

PN5577

MS DOYLE: Yes, your Honour.

PN5578

JUSTICE GIUDICE: Otherwise the timetable will not be varied. Yes, any other matters? Mr Warren, yes.

PN5579

MR WARREN: Your Honour, one short matter. I raised prior to the luncheon adjournment, I indicated there was a difficult issue that the AFEI had. We've had some discussions over the luncheon adjournment and it appears to have been resolved. In short frame, it grew out of the cross-examination of Mr Di Troia and his evidence with respect to the coverage of the home care industry by this proposed order. A letter has been written by AFEI to Mr Harvey. I understand that Mr Harvey or his union will be responding to AFEI next week in writing and that may well resolve the matter and we will inform the tribunal of that resolution.

PN5580

JUSTICE GIUDICE: Right.

PN5581

MS DOUST: I have (indistinct) relates to the questionnaires that Ms Lawson raised earlier on. I think she indicated that it's proposed to have them. I'll ultimately post it to the web site if that occurs on the basis that they de-identify (indistinct) witnesses who have been treated. That became contentious if we (indistinct) basically supported that position, but as I understand it there's going to be some more discussions occurring anyway between Ms Lawson and Mr Warren.

PN5582

JUSTICE GIUDICE: Yes.

PN5583

MS LAWSON: Your Honour, could I just put on the record my thanks to Judith Wright and Keith Harvey for the work that they've done during the course of these proceedings; in particular juggling witnesses and re-scheduling matters and arranged a couple of matters that has helped the matter proceed more smoothly.



9 February 2010

Mr Keith Harvey
National Industrial Officer
ASU National Office
Ground Floor, 116 Queensberry St.,
Carlton South VIC 3053

Via email: kharvey@asu.asn.au

Dear Mr Harvey,

Re: FWA Matter No.: C2010/3131 – Application for Equal Remuneration Orders

We write with regard to the above matter and in particular seek clarification of the intended scope of the Equal Remuneration Order (ERO) sought by the applicants.

We note with concern that the evidence of Mr David Di Troia given in cross examination to Fair Work Australia on 3 February 2010 (PN3170) indicated that he understood the application is intended to cover employees in the Home Care Industry.

We note also that, whereas the Social, Community, Home Care and Disability Services Industry Award 2010 contains a separate classification structure for Home Care Employees (Schedule E), the amended application dated 23 December 2010 does not.

The Home Care Industry, in our view, is comprised of a significant number of *for profit* organizations which operate on a fee for service basis without assistance through government funding.

We request, as a matter of urgency, clarification as to whether it is the intention of the applicants that the ERO sought by the applicants apply to the Home Care Industry.

If you require any further information, please call me on (02) 9264 2000.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'Tony Doyle', is written over a light blue circular stamp.

Tony Doyle
Manager – Workplace Relations



File/Our Ref: C2010/3131 KH
Your Ref:
Please quote in reply

Tuesday, 22 February 2011

Mr T Doyle
Manager – Workplace Relations
AFEI

By email: Tony.doyle@afei.org.au

Dear Mr Doyle,

Re: FWA Matter No.: C2010/3131 – Application for Equal Remuneration Order – Home care employees

I refer to your letter dated 9 February 2010 [sic].

The intended scope of the Application is clearly defined in paragraphs 3 and 4 of the Amended Application filed on 23 December 2010. It covers employers and employees engaged in:

The provision of personal care and domestic and lifestyle support and/or training to a person with a disability including in a community setting whether residential or non-residential, a respite centre, a day service facility or in a private residence where work in that residence involves either teaching, promoting or maintaining living skills, client advocacy, promoting or supporting community access and social inclusion or developing or assisting in developing care or support plans including assessment of client needs. [See definition of Disability Services Sector at paragraph 3.1 of the Amended Application].

and/or

The provision of social and community services including social work, recreation work, welfare work, youth work or community development work, including organisations which primarily engage in policy, advocacy or representation on behalf of organisations carrying out such work. [See definition of Social and Community Services Sector at paragraph 3.1 of the Amended Application].

The Application is not intended to cover employers and employees of "the home care sector" as defined in paragraphs 139 and 140 of Exhibit 34 (witness statement of Sally McManus) as follows:

There are some roles where workers are supporting people with a disability or an aged person which do not fit the definition of "disability services sector" or "social and community services sector" work. Therefore, these roles do not fall under the classification definitions in Schedule B of the Order sought in this matter. These are roles where the workers only provide personal or physical support for a client. A typical example of this is the type of support required for clients who have a physical disability but do not have an intellectual disability.

Australian Services Union

National Office
Melbourne & Sydney

All correspondence to:

Ground Floor
116 Queensberry St
Carlton South VIC 3053

T: (03) 9342 1400
F: (03) 9342 1499
E: asunatm@asu.asn.au
W: www.asu.asn.au

National Secretary
Paul Slape

Assistant National Secretaries
Greg McLean
Linda White

For example, a person who depends on a wheelchair may need assistance getting out of bed, showering, dressing and with housework. However, they may not need and are not provided with other support such as living skills. These clients would live in their own homes and otherwise live independently. The workers who provide this role would be considered to work in the home care sector.

The same example could be given where workers are providing only personal care, domestic assistance or home maintenance for an aged person in their own homes. These workers are part of the home care sector.

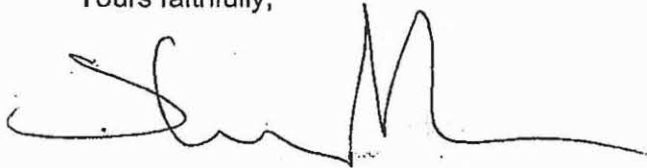
However the Application does cover the following work which may be performed at a client's home and which falls within the definitions of Disability Services Sector and/or Social and Community Services Sector:

- The provision of personal care and domestic and lifestyle support and/or training to a person with a disability involving either teaching, promoting or maintaining living skills, client advocacy, promoting or supporting community access and social inclusion or developing or assisting in developing care or support plans including assessment of client needs.
- Provision of outreach or home visiting for aged people to identify needs or to provide support of a social or welfare nature, which could include support with organising appointments, monitoring medications, assistance with communication, meal planning, accompaniment on outings and the coordination of home care services.
- Recruiting and organising volunteers or paid workers to visit aged people in their homes as part of overcoming social exclusion.

We understand that the term "Home Care Industry" has different meanings in different parts of Australia so we trust that the contents of this letter makes clear the scope of the Application.

Please contact me if you require further clarification.

Yours faithfully,

A handwritten signature in black ink, appearing to be 'Keith Harvey', written in a cursive style.

Keith Harvey
National Industrial Officer

PN3155

JUSTICE GIUDICE: Defer it, yes, very well. All right, we'll adjourn now until 2 o'clock.

<SHORT ADJOURNMENT [12.56PM]

<RESUMED [2.04PM]

PN3156

MS LOWSON: Your Honours, Commissioners, the next witness is David Di Troia.

PN3157

JUSTICE GIUDICE: Yes.

<DAVID DI TROIA, SWORN [2.05PM]

<EXAMINATION-IN-CHIEF BY MS LOWSON [2.05PM]

PN3158

MS LOWSON: Would you tell the tribunal your current occupation?---I'm the branch secretary of the LHMU's South Australian branch.

PN3159

Did you, for the purpose of these proceedings, prepare a statement?---Yes, I have.

PN3160

Do you have a copy of that with you?---Yes, I do.

PN3161

Can I just take you to paragraph 24 of that statement?---Yes.

PN3162

There's a reference there in the first line to "local government sector". Do you see that?---Yes, I do.

PN3163

Is that meant to refer to the state government sector?---Yes, the word "local" should be replaced with the word "state".

PN3164

With that amendment, is the content of your statement otherwise true and correct to the best of your knowledge and belief?---Yes.

PN3165

I tender that statement.

PN3166

JUSTICE GIUDICE: It will be exhibit ASU39.

EXHIBIT #ASU39 STATEMENT OF DAVID DI TROIA

PN3167

MS LOWSON: Yes, thank you, your Honour. I have no further questions.

<CROSS-EXAMINATION BY MR WARREN [2.07PM]

PN3168

MR WARREN: Mr Di Troia, you mention in your evidence in paragraph 2 of your statement that you speak of your branch membership. Does your branch membership spread across government and non-government employees, the non-government employees being in the SACS sector?---Yes, it does.

**** DAVID DI TROIA

XXN MR WARREN

PN3169

So when you speak in paragraph 2 of your branch membership records - "64 per cent of these members are women" - that's a mix. Those women you are therein referring to are a mix of both SACS and government employees? ---I believe so.

PN3170

In paragraphs 3, 4 and 5 at least, you mention the home care classification stream. Is it your position that persons employed in home care would be covered by the order sought in these proceedings?---That's my understanding.

PN3171

Could I take you to annexure A to your statement please, Mr Di Troia?---Yes.

PN3172

Are you familiar with the enterprise agreements therein contained?---Other than seeing a final copy of those documents at the time of signing, I've not had any involvement in the negotiations of those agreements listed in attachment A. What I can say is that since tendering my statement in relation to the Minda agreement, I had some involvement in finalising the new agreement.

PN3173

There has been a new agreement?---Yes, there has.

PN3174

If I could just take you to attachment A?---Yes.

PN3175

I want to put a proposition to you. If you're unable to answer it, please say so. I'm suggesting to you that the enterprise agreements listed as Anglicare, Hills Community, Community Living Options, La Vida, Elizabeth Bowey Lodge, Helping Hand Aged Care, all specifically have a capacity of the employees covered by those agreements to have beneficial concessional tax with respect to fringe benefits tax within the agreements?---Look, I'm not in a position to answer that.

PN3176

**** DAVID DI TROIA

XXN MR WARREN

You're not in a position because you don't have particular knowledge of those agreements?---I don't have the knowledge of what I'm suggesting you're putting to me - is that there are some salary sacrifice arrangements.

PN3177

Yes?---I'm not aware as to the actual arrangements when it comes to salary sacrificing.

The Nature of Work in the Disability Sector

132. Over the last fourteen years of being an official at my Branch, I have had extensive interaction with workers and employers in the disability sector. I have visited many workplaces where our members in the disability sector work; these include residential facilities, day program facilities and offices. I have had discussions with hundreds of workers in the disability sector, I have met many clients who use the services our members work in, I have had discussions with all the major employers in the sector in NSW and been directly involved in many industrial disputes in the disability sector. For these reasons, I am very familiar with nature of work undertaken by our members in the disability sector in NSW.
133. Since November 2008 I have been a member of the National People with Disabilities and Carer Council. I was appointed by the Federal Government to this Council whose role is to advise the Australian Government on the needs of people with disability, their families and carers. Through this role, I have met and had many discussions with employers in other States, as well as people who advocate for service users (or clients) of these disability services.
134. According to our membership records our Branch has about 2000 members employed in the disability sector.
135. I have read the witness statements of W59, W60, W64, W65, W66, W67, and Lloyd Williams. The nature of the work they describe accurately reflects the work performed by the members of our Branch in the disability sector. There are some differences in terminology only, for example, in NSW residential services for people with disabilities are referred to as "group homes", not "community residential units".
136. W60 works at Kirinari Community Services (Kirinari). She works both in NSW and in Victoria. I have visited workplaces and met members and clients from Kirinari in Albury, the Blue Mountains and Inverell. I have also been involved in negotiating their enterprise agreements over many years. The nature of the work W60 describes is the same as the work performed by residential disability sector workers throughout NSW. The only differences are differences that come about because of the particular mix of clients.
137. Workers in the disability sector develop or implement individual or person plans for each of the clients they support.
138. Many workers in the disability sector will perform duties that are of a personal care nature, however this is only part of their role. They implement personal plans that cover all aspects of a person's life. They also perform work that includes teaching, promoting or maintaining living skills, client advocacy, promoting or supporting community access and social inclusion.
139. There are some roles where workers are supporting people with a disability or an aged person which do not fit the definition of "disability services sector" or "social and community services sector" work. Therefore, these roles do not fall under the classification definitions in Schedule B of the Order sought in this matter. These are

roles where the workers *only* provide personal or physical support for a client. A typical example of this is the type of support required for clients who have a physical disability but do not have an intellectual disability. For example, a person who depends on a wheelchair may need assistance getting out of bed, showering, dressing and with housework. However, they may not need and are not provided with other support such as living skills. These clients would live in their own homes and otherwise live independently. The workers who provide this role would be considered to work in the home care sector.

140. The same example could be given where workers are providing *only* personal care, domestic assistance or home maintenance for an aged person in their own homes. These workers are part of the home care sector.
141. There are roles within the social and community sector where workers will be providing outreach or home visiting aged people to identify needs or to provide support of a social or welfare nature. These workers are part of the social and community services sector. Similarly, there are roles within the social and community sector that involve recruiting and organising volunteers or paid workers to visit aged people in their homes as part of overcoming social exclusion. These workers are considered part of the social and community services sector. In NSW these workers are funded by the Home and Community Care (HACC) program or Federal Government Aged Care packages funding.

Public Sector Awards

NSW

142. The following public sector awards apply to persons performing the same or similar work as performed in the SACS industry in New South Wales:
- a. *Crown Employees (New South Wales Department of Ageing, Disability and Home Care) Community Living and Residential Award* – applies to Disability Support Workers and Team Leaders employed by the New South Wales Department of Ageing, Disability and Home Care;
 - b. *Crown Employees (Administrative and Clerical Officers - Salaries) Award 2007* - applies to Case Workers employed by the Community Services NSW, Client Service Officers employed by Housing NSW and Alcohol & Other Drug Officers, Welfare Officers and Accommodation Support Officers employed by Corrective Services NSW;
 - c. *Health & Community Employees Psychologists (State) Award 2008* – applies to Mental Health Workers (psychologist) and Sexual Assault Counsellors employed by NSW Department of Health;