
Fair Work Commission: 4 yearly Review of modern awards

SUBMISSION

**4 YEARLY REVIEW OF MODERN AWARDS: (AM2018/26)
SOCIAL, COMMUNITY, HOME CARE AND DISABILITY SERVICES
INDUSTRY AWARD 2010 - SUBSTANTIVE ISSUES**

FILED ON BEHALF OF:

- **AUSTRALIAN BUSINESS INDUSTRIAL**
- **THE NSW BUSINESS CHAMBER LTD**
- **AGED & COMMUNITY SERVICES AUSTRALIA**
- **LEADING AGE SERVICES AUSTRALIA**

2 JULY 2019

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1. INTRODUCTION

1.1 This submission is made on behalf of:

- (a) Australian Business Industrial (**ABI**);
- (b) the New South Wales Business Chamber Ltd (**NSWBC**);
- (c) Aged & Community Services Australia (**ACSA**); and
- (d) Leading Age Services Australia Limited (**LASA**),

collectively, '**our clients**'.

1.2 ABI is a registered organisation under the *Fair Work (Registered Organisations) Act 2009* and has in excess of 4,000 members. ABI represents the interests of businesses in a variety of industries including the social, community, home care and disability services industry. Its primary role is to develop workplace policy and to shape debate on major workplace relations issues.

1.3 NSWBC is a recognised State registered association pursuant to Schedule 2 of the *Fair Work (Registered Organisation) Act 2009* and has some 18,000 members. NSWBC is the State's peak business organisation and represents all businesses from small enterprises to large corporations across a variety of industries including the social, community, home care and disability services industry.

1.4 ACSA is the leading peak body supporting church, charitable, other not-for-profit and government providers of residential care services, community care services and retirement living for older people in Australia.

1.5 LASA is the national peak body representing and supporting providers of age services across residential care, home care and retirement living. LASA's membership base is made up of private, not-for-profit, faith-based and government operated organisations providing care, support and services to older Australians.

1.6 This submission is filed in accordance with the Amended Directions of the Fair Work Commission (**Commission**) issued on 7 June 2019. This submission is made in support of the proposed variations advanced by our clients, as recorded in a Draft Determination filed on 2 April 2019 (**Draft Determination**).

- 1.7 By way of summary, our clients are seeking three categories of variations to the *Social, Community, Home Care and Disability Services Industry Award 2010* (the **Award**):
- (a) a variation to clause 25.5(f) of the Award dealing with client cancellation, to extend the scope of the clause to all types of disability services, and to provide a more structured and balanced regime for employees working make-up time;
 - (b) a proposal to introduce a 'remote response' allowance to provide a fair and relevant compensation regime for employees performing remote response duties outside of their normal working hours; and
 - (c) a variation to clause 25 of the Award dealing with hours of work and rostering, to remove unnecessary prescription around when ordinary hours are to be worked, and to clarify when a roster may be altered under clause 25.5(d)(ii).
- 1.8 These submissions are supported by witness statement and other documentary evidence, as well as other material that has been filed in these proceedings which goes towards the nature of the operating environment in the industry.

2. LEGISLATIVE FRAMEWORK OF THE FOUR YEARLY REVIEW

- 2.1 The legislative framework applicable to the 4 Yearly Review has been considered in detail in *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 (**Preliminary Issues Decision**), and *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 (**Penalty Rates Decision**).
- 2.2 More recently, the legislative framework applicable to the 4 Yearly Review was considered in *4 yearly review of modern awards – plain language re-drafting – standard clauses* [2018] FWCFB 4177 issued on 18 July 2018¹ and summarised in *4 yearly review of modern awards – Alpine Resorts Award* [2018] FWCFB 4984.
- 2.3 We rely on the summary of the applicable legal principles as set out in the reply submissions filed by our clients in this matter on 5 April 2019.²
- 2.4 We also refer to, and agree with, the summary contained in the document titled ‘Legislative framework relevant to the Review’ published by the Commission in this matter on 12 April 2019.³

¹ [2018] FWCFB 4177 at [3]-[13].

² See [2.1]-[2.4].

³ Published pursuant to a Statement issued on 12 April 2019 ([2019] FWCFB 2514).

3. OPERATING ENVIRONMENT IN WHICH THESE VARIATIONS ARE SOUGHT

- 3.1 There is considerable material before the Commission going to the challenges currently facing service providers in the industry and, in particular, the disability services and home care sectors.
- 3.2 Broadly speaking, the reforms in both the disability sector and the aged care / home care sectors have involved a deregulation of the markets through a move away from the traditional 'block funding' approach to a 'consumer-directed care' approach whereby individual consumers receive a tailored, individualised care plan (with individualised funding), under which consumers have a far greater ability to choose how care services are provided to them (including what, when, where, and by whom those services are provided).
- 3.3 These reforms are significant, with many describing the introduction of the National Disability Insurance Scheme for example as the most significant social policy reform in Australia since the introduction of Medicare.
- 3.4 The key features of the National Disability Insurance Scheme (the **NDIS**) and the similar reforms in the home care sector have been detailed in materials filed in the course of the review of this Award, including in:
- (a) the Reply Submission filed by our clients on 5 April 2019;⁴
 - (b) the Reply Submission filed by Ai Group on 8 April 2019;⁵
 - (c) the Productivity Commission Position Paper 'National Disability Insurance Scheme (NDIS) Costs' published in June 2017;⁶
 - (d) the Productivity Commission Study Paper 'National Disability Insurance Scheme (NDIS) Costs' published in October 2017;⁷
 - (e) the 'Independent Pricing Review: National Disability Insurance Agency' Final Report published in February 2018 by McKinsey & Company;⁸
 - (f) the 'Australian Disability Workforce Report' published in February 2018 by National Disability Services;⁹

⁴ At paragraphs 3.1-3.19.

⁵ At pages 39-69.

⁶ Filed by the ASU, 18 February 2019.

⁷ Filed by the HSU, 15 February 2019.

⁸ Filed by the HSU, 15 February 2019.

⁹ Filed by the HSU, 15 February 2019.

- (g) the 'State of the Disability Sector Report' published by National Disability Services in 2018;¹⁰
- (h) the publication 'Australia's Welfare 2017', published by the Australian Institute of Health and Welfare;¹¹
- (i) the report 'Reasonable, necessary and valued: Pricing disability services for quality support and decent jobs', by the Social Policy Research Centre of the UNSW;¹² and
- (j) the article 'Wage theft, underpayment and unpaid work in marketised social care', by Fiona Macdonald, Eleanor Bentham and Jenny Malone, The Economic and Labour Relations Review 2018, Vol. 29(1) 80–96.¹³

3.5 While these consumer-directed-care reforms are widely supported by all stakeholders (including by our clients and their respective memberships), their implementation has (perhaps unsurprisingly) caused significant uncertainty and disruption to the operations of service providers. One of the major areas of change for service providers (and one of the major challenges) has been in the area of workforce management and, in particular, rostering.

3.6 At the workplace level, the consumer-directed-care reforms have caused employers to lose a degree of control over the organisation of work, by reason of consumers having more control over the delivery of their services. This has led to the disaggregation of working patterns, and challenges around organising a series of discrete (and often short) customer engagements into a block of work for a particular employee. For example, service providers are required to coordinate three or four (or more) short customer engagements (e.g. 30 minute home care services) and turn it into a shift for an employee. This involves having regard to factors such as:

- (a) the geographical location of the work (i.e. organising the work in an efficient manner having regard to the locations of the clients, while also trying to meet the clients' preferences around times of services);
- (b) the timing of each of the separate customer services so the work can be done in an efficient manner so as to minimise the unproductive time and ensure a 'utilisation' rate that is viable; and

¹⁰ Filed by the HSU, 15 February 2019.

¹¹ At pages 175-180 (in respect of home care/aged care) and pages 301-310 (in respect of the disability services sector).

¹² Filed by the HSU, 15 February 2019.

¹³ Attachment 'FM2' to the Statement of Dr Fiona Macdonald, filed by the HSU on 15 February 2019.

- (c) matching employees and clients based on factors such as client needs, employee capability, and also client preference.
- 3.7 This is particularly challenging in rural and remote areas where the demand is less consistent, the volumes are lower and distances between clients greater.
- 3.8 The above challenges around workforce flexibility have then been compounded by funding constraints, which have also been well publicised. Many of the reports referenced at paragraph 3.4 above detail the funding inadequacies in various areas of the system and the consequential pressures being felt by service providers. The reports referred to above have also been supplemented by other materials filed in these proceedings, including:
 - (a) The StewartBrown 'Aged Care Financial Performance; Survey Sector Report (2018 Financial Year)', published in 2018; and
 - (b) the StewartBrown 'Aged Care Financial Performance; Survey Sector Report (Six months ended December 2018)', published in 2019.
- 3.9 Those publications were summarised at part 4 of our clients' Reply Submission of 5 April 2019.
- 3.10 The state of the operating environment, as outlined above, is critically relevant, at least contextually, to the Commission's review of the Award.
- 3.11 Our clients (and their memberships) support the proposition that the Award should provide a fair and relevant minimum safety net of terms and conditions. However, such terms must operate in harmony (or at the very least not in direct conflict) with the regulatory and funding environment.
- 3.12 It is in this context that our clients pursue the following variations to the Award.

4. PROPOSED VARIATION TO HOURS OF WORK AND ROSTERING CLAUSES

4.1 Our clients propose some relatively minor amendments to the hours of work and roster provisions in the Award. The proposed variations are designed to achieve the following:

- (a) remove unnecessary prescription around the structuring of hours of work; and
- (b) clarify the operation of clause 25.5(d)(ii).

Proposed variation to clause 25.1

4.2 Clause 25.1 sets out the ordinary hours of work. Under that clause, the ordinary hours of work are expressed to be 38 hours per week or an average of 38 hours per week.

4.3 Clause 25.1(a) then continues by prescribing how those ordinary hours are to be worked. It expressly prescribes that the hours “will be worked” in one of three different ways as set out in items (i), (ii) and (iii) of clause 25.1(a).

4.4 The effect of items (i), (ii) and (iii) of clause 25.1(a) is to require ordinary hours to be worked in a particular way. The main element of these clauses is to prohibit shifts exceeding 8 hours each.

4.5 However, when one considers clause 25.3 of the Award, it is unclear what other work items (i), (ii) and (iii) of clause 25.1(a) have to do.

4.6 This is because clause 25.3 provides that employees, other than casuals, will be free from duty for not less than two full days in each week or four full days in each fortnight or eight full days in each 28 day cycle.

4.7 Our clients propose a simplified clause 25.1, that retains all of the key elements of the existing provision, but which removes unnecessary and superfluous prescription which does not actually have any operative effect.

4.8 Our clients propose a new clause 25.1 in the following terms:

25.1 Ordinary hours of work

- (a) The ordinary hours of work will be 38 hours per week or an average of 38 hours per week over the employee’s roster period, up to a maximum of four weeks.
- (b) Subject to clause 25.1(c), the maximum ordinary hours that can be worked per shift is 8.

(c) By agreement between an employer and an individual employee, ordinary hours may be worked up to 10 hours per shift.

4.9 This variation is more in the nature of a minor or technical variation rather than a substantive amendment. However, in our submission, the variation has the benefit of being simpler and easier to understand, without reducing employees' entitlements in any way.

Proposed variation to clause 25.4(a)

4.10 Equally, our clients propose the deletion of the words 'or period of work' in clause 25.4(a) as a minor and technical variation rather than any substantive amendment. The words "period of work" do not appear to have any work to do, and seem to be an unnecessary duplication of the concept of "shift". That phrase is not used throughout the rest of the Award, and is unnecessary as any "period of work" that falls outside the bounds of a "shift" is addressed separately in clause 28, which deals with rest breaks after overtime.

Proposed variation to clause 25.5(d)

4.11 Clause 25.5 deals with rostering for permanent employees. Under clause 25.5(a) ordinary hours of work of full-time and part-time employees are required to be displayed on a fortnightly roster which is to be posted at least two weeks before the commencement of the roster period.

4.12 Under clause 25.5(d), an employee's roster can only be changed in certain specified circumstances. Clause 25.5(d)(ii) provides that:

However, a roster may be altered at any time to enable the service of the organisation to be carried on where another employee is absent from duty on account of illness, or in an emergency.

4.13 Our clients propose a relatively minor variation to clause 25.5(d)(ii) to:

- (a) permit rosters to be altered at any time by agreement between the employer and the relevant employee (provided the agreement is recorded in writing); and
- (b) clarify the operation of the existing provision allowing for roster changes in the event of another employee being absent from duty on account of "illness".

4.14 The wording proposed is consistent with the Full Bench decision in 4 yearly review of modern awards - *Nurses Award 2010* [2018] FWCFB 7347.

5. PROPOSED VARIATION TO CLIENT CANCELLATION CLAUSE

Background

- 5.1 Our clients propose that the scope of the client cancellation clause at 25.5(f) of the Award be expanded to capture the provision of disability services in the community (for example, care services provided in the community to people with a disability).
- 5.2 The current client cancellation clause 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*. However, there is no reason for distinguishing between supports provided to persons with a disability in their home and services provided in the community.
- 5.3 Other than the location, there are clear similarities between care services provided by support workers in the home and care services provided in the community, including that:
- (a) community-based services are just as susceptible to client cancellation as in-home care services;
 - (b) community-based services are subject to the same cancellation rules under the NDIS as attendant care in the home; and
 - (c) the nature of the work is the same or very similar.
- 5.4 There is no good reason why the Award should provide a regime for dealing with client cancellations of rostered “home care” services, but not provide any such regime for client cancellations of attendant care services in the community for people with a disability.

The current position

- 5.5 Clause 25.5(f) of the Award permits employers to change an employee’s roster where a rostered “home care service” is cancelled or changed by a client.
- 5.6 It also provides that where a roster is changed, an employer is not obliged to make a payment to the employee where the requisite notice was given to the employee (being by 5pm on the day prior to the rostered shift in question).
- 5.7 The clause also entitles employers to direct employees to make-up time equivalent to the cancelled time in that fortnight or during the subsequent fortnight.
- 5.8 The phrase “home care service” is not defined in the Award. The phrase is only found once in the Award, at clause 25.5(f). However, the phrase “home care service” is most likely intended to mirror the scope of the “home care sector”, which is one of four defined sectors which the Award is expressed to cover.

- 5.9 The term “home care sector” is defined at clause 3.1 to mean the “provision of personal care, domestic assistance or home maintenance to an aged person or a person with a disability in a private residence” [emphasis added].
- 5.10 It is clear from that definition that the home care sector encompasses the provision of services to persons with a disability.

Funding arrangements for client cancellations

- 5.11 NDIS service providers are bound by a price cap. They are also bound to comply with rules relating to client cancellations.
- 5.12 Under those cancellation rules, service providers are prohibited from charging clients for cancelled services where the participant provides notice of cancellation prior to 3pm the day before the scheduled service (regardless of the reason for the cancellation).
- 5.13 Where a ‘short-notice’ cancellation (being a cancellation after 3pm on the day before the scheduled service or a ‘no show’ on the day), service providers are permitted to charge up to 90% of the agreed price. For personal care and community access supports, the fee may be charged against a participant plan up to 8 times per year. Beyond this threshold, the NDIS will require the provider to demonstrate they are taking steps to actively manage cancellations.
- 5.14 While the intention behind the NDIS cancellation rules is to attempt to strike a balance between the interests of service providers and participants, the reality is that the cancellation rules place service providers in a very difficult position.
- 5.15 Unless there is an ability to cancel the rostered shift (without being required to pay the employee), or redeploy the rostered employee to other available work, service providers will incur costs regardless of the scheduled service having been cancelled, yet will not derive any revenue.

The disconnect between the NDIS rules and the Award regarding cancellations

- 5.16 There is a clear disconnect between the terms of the Award and the funding arrangements under the NDIS when it comes to client cancellations. This disconnect is having a materially adverse impact on the viability of businesses operating in this sector.
- 5.17 Our clients acknowledge the desire of many employees in having job security, stability in income, and reasonably predictable hours of work. However, those interests need to be balanced against the interests of employers in being responsive to client needs.

- 5.18 Where it is not feasible to redeploy a permanent employee to other work in the event of a client cancellation event, the employer should have the ability to cancel the employee's rostered shift and offer them make-up time at a later date.
- 5.19 This type of regime is not new in the home care sector, including in situations where the in-home service is provided to a person with a disability. However, it should be extended to the broader disability sector where supports are provided in the community.
- 5.20 Under our clients' proposal, the make-up-time regime in the existing clause 25.5(f) would be replaced with a more robust and comprehensive clause, which allows for the make-up-time to be worked over a 3 month period rather than within a fortnight under the existing clause.

6. PROPOSAL FOR REMOTE RESPONSE WORK CLAUSE

Background

- 6.1 One of the issues raised during the review of this Award is how the Award operates in circumstances where an employee, who is not ‘at work’ or otherwise rostered to work or performing work at a particular time, is contacted and required to undertake certain functions remotely without having to physically attend the employer’s premises (such as providing information to the employer over the telephone).
- 6.2 This issue was raised by a number of parties at the commencement of the review process, including by:
- (a) Jobs Australia, which questioned whether the ‘recall to work overtime’ provision at clause 28.4 of the Award might apply to circumstances where an employee is not required to physically return to the workplace (e.g. where an employee takes a phone call while on-call);¹⁴
 - (b) AFEI, which proposed an amendment to clarify what constitutes a recall to duty to perform overtime, to ensure that employees (whether on-call or not) who answer telephone calls or respond to text messages are not deemed to have been recalled and thus entitled to two hours minimum pay at overtime, or alternatively to create a regime within the Award to accommodate employees receiving phone calls;¹⁵ and
 - (c) the HSU, which had flagged pursuing a variation to provide for an “on-call penalty payment” when an employee is telephoned while not receiving an on-call allowance.¹⁶
- 6.3 It was also raised by our clients at that time, who flagged proposals to clarify the operation of the ‘recall to work overtime’ provision at clause 28.4,¹⁷ as well as to introduce a “Telephone Advice Payment” where employees provide telephone advice outside of their rostered ordinary hours of work.¹⁸
- 6.4 There are now two competing proposals advanced on this subject in the current proceedings:
- (a) a proposal advanced by our clients; and

¹⁴ Submission of Jobs Australia, 2 March 2015, at page 5.

¹⁵ Submission of AFEI, 5 March 2015, at page 3.

¹⁶ Submission of HSU, 2 March 2015, at page 5.

¹⁷ Submission of ABI and NSWBC, 2 March 2015, at page 2.

¹⁸ Submission of Aged Care Employers (which consisted of ACSA and LASA), 1 March 2015, at page 2.

(b) a proposal advanced by the HSU.

The HSU proposal

6.5 The HSU have proposed that clause 28.4 be varied to include a new sub-clause dealing with circumstances where an employee is required to perform work from home after leaving the employer's or client's premises. Under the HSU proposal, the employee would be entitled to a minimum of one hours' pay at overtime rates "for each time recalled".¹⁹

Our clients' proposal

6.6 In contrast, our clients' claim involves a proposed new clause 20.10, as well as consequential amendments to clauses 20.9 and 28.4. Under the proposed new clause 20.10, employees would be entitled to payment for performing remote response duties, with the quantum of such payment and the relevant minimum payment dependent on when the remote response duties are performed. Specifically, it is proposed that employees be paid:

- (a) at the applicable rate of pay for work performed between 6.00am and 10.00pm, with a minimum payment of 15 minutes; and
- (b) at the applicable rate of pay for work performed between 10.00pm and 6.00am, with a minimum payment of one hour.

6.7 While there is a large degree of overlap between the competing proposals, the key difference between the proposals relates to the scheme of remuneration to be applied when employees perform remote response work.

Our clients' proposal

6.8 The intention of our clients' proposal is to provide a scheme of remuneration for situations where an employee is required, outside of their working hours, to provide advice or assistance remotely.

6.9 This is not a novel claim or provision. Similar types of provisions appear in:

- (a) the *Local Government Award 2010* (at clauses 24.4(d) and 24.6(d));
- (b) the *Local Government (State) Award 2014* (NSW) (at clause 19E);
- (c) the *Water Industry Award 2010* (at clauses 26.4(d) and 26.6(d));
- (d) the *Business Equipment Award 2010* (at clauses 30.6(d) and 30.7); and
- (e) the *Contract Call Centres Award 2010* (at clauses 26.4(d), 26.6(d) and 26.7).

¹⁹ See [16] of Amended Draft Determination of HSU, filed 15 February 2019.

The disutility associated with performing remote response work

- 6.10 If the Commission was minded to insert such a provision into the Award, the Commission's task is to determine what an appropriate monetary entitlement is for this type of work.
- 6.11 In the scheme of a minimum safety net instrument, this task involves an assessment of the value of the work and the extent of disutility associated with the time at which the work is performed. In the Penalty Rates Decision, the Full Bench observed at [202]:
- A central consideration in this regard is whether a particular penalty rate provides employees with 'fair and relevant' compensation for the disutility associated with working at the particular time(s) to which the penalty attaches.
- 6.12 Unlike being physically recalled to the workplace in the traditional sense (or being on call to be recalled to work), the level of disutility associated with employees performing remote response work is significantly less, as employees are not required to:
- (a) stay in the vicinity of the workplace while on-call;
 - (b) keep themselves, their work clothes and transport in a state of readiness while on-call for a possible recall to work;
 - (c) spend time travelling to or from the workplace if recalled to work; or
 - (d) incur additional travelling expenses (such as public transport fares, petrol or road tolls) if recalled to work.
- 6.13 An employee can be on-call remotely from anywhere. They do not need to remain static at a particular location, be in readiness to attend work or be in (or change into) work clothing to perform the work.
- 6.14 Our clients' proposal provides a fair and relevant minimum safety net payment regime for this type of remote work, which is proportionate to the lower level of disutility associated with remote work.

7. CONCLUSION

7.1 For the reasons outlined above, our clients' proposed variations should be granted.

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On behalf of:

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