BEFORE THE FAIR WORK COMMISSION

Fair Work Act 2009 (Cth)

Title of matter: 4 yearly review of modern awards – *Aged Care Award 2010* – Substantive Issues

Matter Number: AM2018/13

Section: s.156

Document: Submission in relation to proposed substantive variations to the Aged Care Award 2010

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Background

1.1 On 13 November 2018, President Justice Ross of the Fair Work Commission ("**Commission**") published amended directions for parties to file evidence and submissions in reply responding to the substantive claims made by United Voice and the Health Services Union ("**HSU**") in respect of the *Aged Care Award 2010* arising from the 4 Yearly Review of Modern Awards.

1.2 These submissions are made on behalf of Australian Federation of Employers and Industries ("**AFEI**") in accordance with the Commission's amended directions.

1.3 Members of AFEI include small and medium sized businesses. AFEI has members in the Aged Care Industry and who are covered by the Aged Care Award.

A summary of the proposed variations

1.4 United Voice and the HSU seek to vary the Aged Care Award by introducing a mobile telephone allowance[1] and or mechanism for employees directed to use or maintain a mobile phone for work purposes[2] to receive reimbursement of costs associated with the purchase of a mobile telephone and or for the employer to provide the employee with a mobile phone with full payment of associated charges.[3]

1.5 United Voice presses the amendment of the Classification Definition of 'Aged Care Employee – level 4' under Schedule B Aged Care Award, by replacing:

> "*In the case of a Personal care worker, **is required** to hold a relevant certificate III*"
>
> with
>
> "*In the case of a Personal care worker, **holds** a relevant Certificate III qualification or possess equivalent knowledge and skills gained through on-the-job training".*

1.6 The HSU also seek to vary the Aged Care Award by:

1.6.1 Amending clauses 23.2 and 29.2(c)(i) and (ii) to specify that casual loading is payable in addition to weekend and public holiday rates; and

1.6.2 Amending the Broken Shift clause 22.8 to insert a new provision requiring employers to provide minimum payment of two hours for each engagement of a broken shift attended to by casual and part-time employees.

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1 Paragraph 5, Submissions of Health Services Union of 23 January 2019.

2 "*purposes of being on call, the performance of work duties, to access their work rosters or for other work purposes*" – Paragraph 7, Submission of United Voice dated 18 January 2019, Paragraph 7 Submissions of Health Services Union of 23 January 2019.

3 Paragraph 7, Submission of United Voice dated 18 January 2019.

Legislative Framework for Award Variation

1.7 Pursuant to the Fair Work Act 2009 (Cth) ("**Fair Work Act**"), the Commission may, inter alia, make one or more determinations varying the award. This forms part of the Commission's "modern award powers".[4]

1.8 The modern awards objective[5] applies and is central to the performance or exercise of the Commission's modern award powers.[6] That is, the Commission is obliged to ensure that the awards together with the National Employment Standards, provide a *fair*[7] and *relevant*[8] minimum safety net of terms and conditions, taking into account the matters contained in section 134 of the Fair Work Act.

1.9 The Commission is also required to take into account the objects of the Fair Work Act as set out in section 3 of the Fair Work Act, which include the following:

1.9.1 Providing workplace relations laws that are flexible for businesses; and

1.9.2 Acknowledging the special circumstances of small and medium sized businesses.

1.10 The 4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues decision made before the Full Bench on 17 March 2014 provides:

> '*The need for a 'stable' modern award system suggests that a party seeking to vary a modern award in the context of the Review must advance a merit argument in support of the proposed variation. The extent of such an argument will depend on the circumstances. Some proposed changes may be self-evident and can be determined with little formality. However, where a significant change is proposed it must be 1) supported by a submission which addresses the relevant legislative provisions and 2) be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation.*
>
> *In conducting the Review the Commission will also have regard to the historical context applicable to each modern award.*'[9]

1.11 The claims pressed by United Voice and the HSU constitute proposals to make substantive changes to the Aged Care Award and require the advancement of a merit argument.

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4 Section 156(2)(b)(i) Fair Work Act.
5 Section 134(1) Fair Work Act.
6 *Four yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [37] ('**Penalties Rates Case'**).
7 'Fairness' is to be assessed from the perspective of the employees and employers – Penalties Rates Case at [37].
8 'Relevant' is intended to convey that a modern award should be suited to contemporary circumstances – Penalties Rates Case at [37].
9 *Re Four Yearly review of Modern Awards – Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [23] – [24] ('**Jurisdictional Issues Decision'**).

1.12 Additionally, if the proposed variations are accepted, these changes will likely increase costs for, and regulatory burdens on, employers. On this basis, AFEI considers the proposed variations to be a significant change that require the support of probative evidence. AFEI notes that:

1.12.1 Whilst United Voice has filed supporting materials of 379 pages in length, these materials do not clearly nor specifically address **each** of the changes sought and thus have not provided probative evidence demonstrating facts supporting the proposed variations; and

1.12.2 HSU has not filed evidence or materials in support of their claims.

Mobile Telephone Allowance

1.13 The Aged Care Award does not contain a payment or reimbursement provision for an employee directed to use a mobile telephone for work purposes.

1.14 United Voice and the HSU propose to vary the Aged Care Award by inserting a new clause 15.8:

> ***Phone allowance***
>
> *Where the employer requires an employee to use a mobile phone for the purpose of being on call, for the performance of work duties, to access their work roster or for other work purposes, the employer will either:*
>
> *(i) Provide a mobile phone and cover the cost of any subsequent charges; or*
>
> *(ii) Refund the cost of purchase and the subsequent charges on production of receipted accounts*

1.15 Submissions from United Voice provide quotes obtained from a variety of articles on how the use of technology and digital platforms are on the rise in the workplace. AFEI submits that:

1.15.1 **First**, various quotes are obtained from outdated articles and reports[10] and thus not suited to contemporary circumstances;

1.15.2 **Second**, based on the source of the information (including articles from The Conversation, an online journal), AFEI questions the reliability of this data;

1.15.3 **Third**, United Voice merely draws a presumption that aged care workers have a greater reliance on mobile phone technology, it fails to provide probative evidence demonstrating the facts supporting the presumption.

[10] Paragraphs 21 &22, Submission of United Voice dated 18 January 2019.

1.16 Although the requirement for the employer to contact an employee who is on-call and for the performance of work duties is not unreasonable, the proposed variation places a requirement on employers to provide a mobile telephone or to reimburse the cost of the purchase of a mobile telephone where employees are required to use a phone '*to access their work rosters or for other work purposes'*:

1.16.1 **First**, AFEI is uncertain as to why an employer should be exposed to an obligation to cover the cost of an employee accessing their work roster on a phone when there are alternative means for the employee to obtain this information at no additional cost to the employer (for example, on a notice board, by email etc.); and:

1.16.2 **Second**, United Voice and the HSU provides no definition of the meaning of '*other work purposes'*. Such words could therefore be open to wide interpretation. For example, 'work calls' can be taken to mean anything including an employee's call because they are sick, will be late for work, train delays etc. Such 'work' calls places an obligation on employers that is simply not fair nor relevant, and is thus inconsistent with the modern awards objective.

1.17 The proposed variation creates a new entitlement that does not currently exist. If accepted, the effect will increase the regulatory burden and increase costs for employers, particularly small to medium sized enterprises including members of AFEI. The proposed variation is therefore substantive and significant in nature. On this basis, United Voice and the HSU are required but have failed to put forward an argument of merit and, as indicated above, adduce probative evidence demonstrating facts supporting the proposed changes.

1.18 In light of the above, United Voice and HSU's claim should be rejected.

Classification Definition of 'Personal Care Worker'

1.19 United Voice seek to amend the current classification definition of aged care employee level 4, which currently reads:

> '*in the case of a personal care worker, <u>is required</u> to hold a relevant Certificate III qualification'*
>
> to read:
>
> *'in the case of a personal care worker, <u>holds</u> a relevant certificate III qualification <u>or possesses equivalent knowledge and skills gained through on-the-job training'</u>*

1.20 The effect of the proposed variation means that, in classifying an employee under the Aged Care Award – level 4, the certificate III qualification will no longer be required where an employee holds knowledge and skills that are equivalent to a certificate III qualification that has been obtained through on-the-job training. AFEI submits that:

1.20.1 **First**, United Voice provides no explanation as to how the '*knowledge and skills that are equivalent to a certificate III qualification*" is to be assessed and by whom to ensure a consistent approach is applied to all employees; and

1.20.2 **Second**, aged-care employees at level 4 are employed in positions that typically require trade qualifications (i.e. maintenance/handy persons, gardeners and cooks). The proposed variation is inconsistent with the intention behind the classification of employees under the Aged Care Award.

1.21 United Voice takes the position that the variation sought is a clarification of the classification structure and thus is not a substantive change.

1.22 AFEI submits that this is an inaccurate interpretation in view of the ordinary meaning of the words used in the Aged Care Award.

1.23 There are well-established principles for award interpretation, which briefly include:

> *The construction of an award, like that of a statute, begins with a consideration of the ordinary meaning of its words. As with the task of statutory construction regard must be paid to the context and purpose of the provision or expression being construed. Context may appear from the text of the instrument taken as a whole, its arrangement and the place in it of the provision under construction. It is not confined to the words of the relevant Act or instrument surrounding the expression to be construed. It may extend to '... the entire document of which it is a part or to other documents with which there is an association'. It may also include '... ideas that gave rise to an expression in a document from which it has been taken'.*

1.24 The current definition of aged care employee level 4 is clear and unambiguous. To fall within this classification, a personal care worker is required to hold a relevant Certificate III qualification. 'On-the-job training that is equivalent to a Certificate III qualification' is not intended to be captured within this classification, in the case of a personal care worker.

1.25 AFEI opposes the variation sought on the basis that the amendment would:

1.25.1 **First**, reduce the incentive for specified employees to obtain a qualification deemed relevant for the role within the existing classification structure;

1.25.2 **Second,** as stated above, cause confusion and inconsistency in the classification of personal care workers; and

1.25.3 **Third,** as stated above, be inconsistent with the intention behind the classification of employees under the Aged Care Award; and

1.25.4 **Fourth**, by removing the requirement for a Certificate III qualification, would require employers to make a payment to an employee without the certification at the same rate that an employer would pay to an employee with the certification, thus increasing costs for the employer (including an increase in minimum wage). This variation is inconsistent with section 134(f) Fair Work Act.

1.26 In respect of paragraph 1.25.4 above, the Commission may only make a determination varying modern award minimum wages where the Commission is satisfied that such a variation is justified by work value reasons.[11] On the basis that United Voice argues this is not an application to vary minimum wage, but rather a clarification of the classification structure, it has failed to provide probative evidence demonstrating justifiable work value reasons.[12]

Casual loading in addition to weekend and public holiday penalties

1.27 The HSU presses the claim where casual employees undertake work on weekends and public holidays, the penalty rates apply in addition to casual loading.

1.28 For the purposes of clarity, we set out the relevant provisions below:

Weekend Penalties

Clause 23.1 of the Aged Care Award provides

Employees whose ordinary working hours include work on a Saturday and/or Sunday, will be paid for ordinary hours worked between midnight on Friday and midnight on Saturday at the rate of time and half and for ordinary hours worked between midnight on Saturday and midnight on Sunday at the rate of time and three quarters. These extra rates will be in substitution for and not cumulative upon shift premiums prescribed in clause 26 – Shift work.

Clause 23.2 of the Aged Care Award provides:

Casual employees will be paid in accordance with clause 23.1. The rates prescribed in clause 23.1 will be in substitution for and not cumulative upon the casual loading prescribed in clause 10.4(b).

Public Holiday penalty

Clause 26.2(c)(i) of the Aged Care Award provides:

A casual employee will be paid only for those public holidays they work at the total rate of 250% for hours worked.

[11] Section 156(3) Fair Work Act.
[12] Section 156(4) Fair Work Act.

Clause 26.2(c)(ii) of the Aged Care Award provides:

Payments under clause 29.2(c)(i) are payable instead of and replace any casual loading otherwise payable under this award.

Casual Loading

Clause 10.4(b) of the Aged Care Award provides:

A casual employee will be paid per hour worked at the rate of 1/38th of the weekly rate appropriate to the employee's classification. In addition, a loading of 25% of that rate will be paid instead of the paid leave entitlements accrued by full-time employees.

1.29 The HSU propose to vary clauses 23.2 and clause 26.2 so that casual employees are paid casual loading in addition to weekend and penalty rates.

1.30 The Commission will have regard to the historical context applicable to each modern award.'[13] Thus, the history of penalty rate provisions for casual employees in the Aged Care Award must be considered.[14]

1.31 When the Aged Care Award first came into effect on 1 January 2010, it provided for neither weekend nor overtime penalty rates for casual employees. In respect of Saturday and Sunday work, the Aged Care Award provided:

Clause 23.1:

Employees whose ordinary working hours include work on a Saturday and or Sunday, will be paid for ordinary hours worked between midnight on Friday and midnight on Saturday at the rate of time and a half, and for ordinary hours worked between midnight on Saturday and midnight on Sunday at the rate of time and three quarters. These extra rates will be in substitution for and not cumulative upon the shift premiums prescribed in clause 26 – shift work.

Clause 23.2:

Casual employees who work less than 38 hours per week will not be entitled to payment in addition to any casual loading in respect of their employment between midnight Friday and midnight on Sunday.

1.32 On 23 March 2010, a six-member Full Bench made an order[15] varying the Aged Care Award. The existing clause 23.2 was replaced with the following <u>current</u> provision:

Casual employees will be paid in accordance with clause 23.1. The rates prescribed in clause 23.1 will be in substitution for and not cumulative upon the casual loading prescribed in clause 10.4(b).

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13 [2014]FWCFB 1788 at [23] – [24].
14 [2014] FWCFB 379 at [22].
15 PR995161.

1.33 The reasoning behind the Full Bench decision in the making of the order is set out at paragraphs [50] – [59] of the decision in the light of the application brought to vary the modern award by Liquor, Hospitality and Miscellaneous Union, ACH Group and Others and Australian Super Pty Ltd.[16]

1.34 AFEI oppose the HSU's claim on the following grounds:

1.34.1 HSU have failed to provide cogent reasons, which are required when seeking a departure from previous Full Bench decisions;[17]

1.34.2 The effect of HSU's claim, if accepted, will increase costs and restrict employer flexibility in making recruitment decisions that best suit the needs of the organisation. This will have particular adverse consequences on small to medium enterprises including members of AFEI, and thus it is inconsistent with:

1.34.2.1 Section 134(f) Fair Work Act; and

1.34.2.2 Section 3 Fair Work Act.

Broken Shifts

1.35 The HSU seek to amend clause 22.8 within the **Broken shifts provision** of the Aged Care Award by inserting a new clause 22.8 (sub clause (g)) as follows:

(g) Each portion of the shift must meet the minimum engagement requirements in 22.7(b)

1.36 For completeness, clause 22.7(b) within the **Minimum engagements provision** provide:

Permanent part-time and casual employees will receive a minimum payment of two hours for each engagement

1.37 The effect of HSU's proposed variation is to ensure that casual and part-time employees working a broken shift[18] must receive a minimum payment of two hours for each portion of the broken shift attended to by the employee.

1.38 The HSU submit that their proposal represents a clarification rather than a substantive change to the Award.[19]

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16 [2010] FWAFB 2026.

17 [2014] FWCFB 1788 at [27].

18 Defined under the Award as "a shift worked by a casual or permanent part-time employee that includes breaks (other than a meal break) totalling not more than four hours and where the span of hours is not more than 12 hours" – clause 22.8(a) Aged Care Award

19 Paragraph 13 , Submissions of Health Services Union of 23 January 2019

1.39 AFEI do not agree that the proposed variation represents a clarification of the broken shift provision and submits that this is an incorrect interpretation in view of the fact that employees attending broken shifts are already compensated pursuant to:

> Clause 22.8(c):
>
> *Payment for a broken shift will be at ordinary pay with penalty rates and shift allowances in accordance with clauses 25 – Overtime penalty rates and 26 – Shift work, with shift allowances being determined by the commencing time of the broken shift.*
>
> Clause 22.8(d):
>
> *All work performed beyond the maximum span of 12 hours for a broken shift will be paid at double time.*

1.40 Adopting the HSU's interpretation would mean that part-time and casual employees performing a broken shift would receive payment of at least two hours per broken shift engagement, when in reality, such attendance can take under one hour of the employee's time. The proposed variation can therefore be substantially in excess of the time actually required for the employee to perform the work.

1.41 The proposed variation creates a new entitlement that does not currently exist. The effect of this entitlement is that it will increase the regulatory burden on employers, and has the potential to increase wage costs for employers (and will particularly affect small to medium businesses), which is inconsistent with the modern awards objective considerations at:

1.41.1 The need to promote flexible modern work practices and the efficient and productive performance of work;[20] and

1.41.2 The likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden.[21]

1.42 On this basis, AFEI denies that the effect of the proposal is not substantive. The HSU's claim should be rejected on the basis that it has failed to:

1.42.1 put forward a sufficient case to modify existing arrangements;

1.42.2 advance a merit argument; and

1.42.3 adduce probative evidence in support of their claim.

[20] Section 134(1)(d) Fair Work Act
[21] Section 134(1)(f) Fair Work Act

A Summary of AFEI's position

1.43 AFEI opposes each of the claims pressed by United Voice and the HSU in the Aged Care Award.

Australian Federation Employers & Industries
22 March 2019