FAIR WORK COMMISSION

Title of Matter:	Four yearly review of modern awards
Section:	s.156 -4 yearly review of modern awards
Subject:	Aged Care Award 2010–substantive issues
Matter Number:	AM2018/13

SUBMISSIONS BY AGED CARE EMPLOYERS

A. ABOUT AGED CARE EMPLOYERS

1. These submissions are made on behalf of Aged Care Employers, consisting of:
   a. Aged & Community Services Australia, and
   b. Leading Age Services Australia.
2. Aged & Community Services Australia (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.
3. Leading Age Services Australia (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 organisations providing care, support and services to older Australians. Members include private, not-for-profit, faith-based and government operated organisations providing age services.

B. THE CLAIMS

4. There are four substantive claims remaining before the Commission in relation to the *Aged Care Award 2010*:
   a. Introducing a telephone allowance, sought by United Voice and the Health Services Union;

b. Changes to the classification definition of Personal Care Worker Level 4, sought by United Voice;

c. Amending the broken shift clause to require each part of a broken shift to be at least 2 hours; and

d. An increase in the rates payable to casual employees on weekends and public holidays sought by the Health Services Union.

5. The position of the Aged Care Employers is that neither United Voice nor the Health Services Union have established a merit case sufficient to warrant any variation of the *Aged Care Award*.

C. PRINCIPLES

6. The principles to be adopted in relation to the conduct of a 4 yearly review are now well established, having been set out in the following decisions of a full bench of the Commission:

a. Preliminary Jurisdictional Issues Decision;[1]

b. Annual Leave Decision;[2] and

c. Penalty Rates Decision.[3]

7. These principles may be summarised as follows:

a. The Commission must take into account the objects of the Act set out in s.3 and the object of Part 2-3 as expressed in s.134,[4] and relevant provisions of the Act;[5]

b. The Review is conducted on the Commission's own motion, it is not constrained by the terms of a particular application and may vary a modern award in whatever terms it considers appropriate, subject to its obligation to accord interested parties procedural fairness and the application of relevant statutory provisions;[6]

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[1] Preliminary Jurisdictional Issues Decision [2014] FWCFB 1788 at [19]-[27].
[2] Annual Leave Decision [2015] FWCFB 3406 at [11]-[38].
[3] Penalty Rates Decision [2017] FWCFB 1001 at [95]-[141], [162]–[165], [230]–[270].
[4] Annual Leave Decision [2015] FWCFB 3406 at [24].
[5] Penalty Rates Decision [2017] FWCFB 1001 at [105].
[6] Penalty Rates Decision [2017] FWCFB 1001 at [110].

c. where a significant change is proposed it must be supported by a submission which addresses the relevant legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation;[7]

d. Each of the matters set out in paragraphs 134(1)(a) to (h) must be treated as a matter of significance in the decision-making process;[8]

e. There is a degree of tension between some s.134 considerations. The Commission's task is to balance the various considerations and ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions;[9]

f. In the context of s.134, the expression 'a fair and relevant minimum safety net of terms and conditions' includes that :

   i. fairness is to be assessed from the perspective of the employees and employers covered by the modern award in question;[10]

   ii. 'relevant' is intended to convey that a modern award should be suited to contemporary circumstances;[11]

   iii. the award safety net is of a protective nature.[12]

g. The party seeking a variation must demonstrate that the modern award, if varied as proposed, would only include terms to the extent necessary to achieve the modern awards objective. What is "necessary" in a particular case is a value judgment based on an assessment of the s.134 considerations having regard to the submissions and evidence directed to those considerations;[13]

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[7] Preliminary Jurisdictional Issues Decision [2014] FWCFB 1788 at [23].
[8] Annual Leave Decision [2015] FWCFB 3406 at [18].
[9] Annual Leave Decision [2015] FWCFB 3406 at [20].
[10] Penalty Rates Decision [2017] FWCFB 1001 at [117].
[11] Penalty Rates Decision [2017] FWCFB 1001 at [120].
[12] Penalty Rates Decision [2017] FWCFB 1001 at [121]-[128].
[13] Annual Leave Decision [2015] FWCFB 3406 at [23].
Penalty Rates Decision [2017] FWCFB 1001 at [136].

h. In the Review the Commission will proceed on the basis that prima facie the modern award being reviewed achieved the modern awards objective at the time that it was made.[14]

i. Previous Full Bench decisions should generally be followed,[15] but there may be cogent reasons for not doing so, including changes in the legislative context, the extent of evidence and submissions and the absence of detailed reasons in a previous decision;[16]

j. It is not necessary to demonstrate a "material change in circumstances" since the making of the modern award. Although it is not a condition precedent, a material change may warrant the variation of a modern award;[17]

k. The Review must be conducted by reference to the particular terms and the particular operation of each particular award rather than by a global assessment based upon generally applicable considerations;

l. If a variation to minimum wages is sought, the effect of ss.135, 156(3) & (4) is that such a variation can only be made if the Commission is satisfied that the variation is justified by work value reasons.[18]

D. TELEPHONE ALLOWANCE

8. A modern award may include terms about allowances for expenses incurred in the course of employment pursuant to section 139(g)(i) of the *Fair Work Act* section 139(g)(i).

9. Both United Voice and the Health Services Union seek payment in relation to mobile phones. The unions seek a similar clause in relation to the Social, Community, Home Care and Disability Services Industry Award. Despite the description of it as an allowance, it is not about the reimbursement of an expense incurred in the course of employment.

[14] Preliminary Jurisdictional Issues Decision [2014] FWCFB 1788 at [24].
[15] Preliminary Jurisdictional Issues Decision [2014] FWCFB 1788 at [27].
[16] Preliminary Jurisdictional Issues Decision [2014] FWCFB 1788 at [27].
[17] Penalty Rates Decision [2007] FWCFB 1001 at [230]-[264].
[18] Penalty Rates Decision [2017] FWCFB 1001 at [244].

10. The United Voice submissions start from the premise of the ubiquity of mobile phones in general and smart phones in particular. Despite the increasing ownership of mobile phones, there is no evidence however that employees covered by the *Aged Care* Award are:

    a. Purchasing and maintaining a mobile phone in order to perform their work; nor

    b. Using that mobile phone for the purpose of performing their work.

11. Their submissions rise no higher than the assertion, unsupported by evidence, that a mobile phone is in some way a "tool of trade" in the residential Aged Care industry.

12. The proposed clause commences by reference to a mobile phone being used for the purposes of being on-call. There is however no evidence of employees being required to use their personal mobile phone for that purpose.

13. Similarly, the clause is based on an assertion, unsupported by evidence, that employees are required to use a mobile phone to access their work roster nor that the employee in doing so incurs any additional expense.

14. The Commission may conclude from the Unions failure to call any evidence in this regard that employees covered by the Aged Care Award who have a mobile phone have done so for reasons unrelated to the performance of their work.

15. Neither United Voice nor the Health Services Union have made any attempt identify the extent that a mobile phone might be used for the purpose of performing their work nor that any particular expense is incurred in relation thereto.

16. This may be contrasted with another item common expense related allowance for the use of a personal motor vehicle. There is no provision in any modern award that an employer is required to pay the entire cost of purchasing and maintaining a motor vehicle if at any time that vehicle may be used in the performance of work.

17. To the contrary, there is a settled approach to motor vehicle allowances that estimate the cost to the employee per kilometre the vehicle is actually used,

such that the allowance is referable to the extent of the work use of the vehicle.

18. Even if United Voice or the Health Services Union had led evidence about the work need for a mobile phone, the Commission would not make a clause in the terms sought.

19. This is because the proposed clause is inherently uncertain about the type of phone, the cost of the particular phone plan including data, calls etc and the frequency in which a phone might need to be replaced.

20. The proposed clause would necessarily give to disputes about its application, disputes that can only be determined by a court, in which there is no basis set out on which the court could determine those issues.

21. The Commission cannot be satisfied that the proposed clause is necessary to achieve the modern awards objective.

E. Personal Care Worker Level 4

22. United Voice seeks to amend the definition of Personal Care Worker Level 4 in two ways:

    a. The classification is due to possession of a certificate III, regardless of whether or not the work performed by the employee requires the skills and knowledge necessary to obtain the qualification;

    b. A person will be classified at that level if they are said to have knowledge and skills equivalent to a certificate III, however these have not been assessed in accordance with the Australian Qualifications Framework (AQF).

23. In considering the proposal by United Voice, the Commission must perform the balancing exercise inherent in the s.134 considerations, including:

    a. the principle of equal remuneration for work of equal or comparable value in s 134(1)(e);

    b. the impact on business, including employment costs in s 134(1)(f);

c. the requirement for skills-based classifications and career structure in s 139(a)(a)(i);

d. ss 156(3) and (4) which permits variation of minimum wages only if the FWC is satisfied that the variation is justified by work value reasons

Possession not requirement

24. United Voice make the assertion about the existence of employees who "possesses a certificate III qualification and utilises the qualification in their work as a personal care worker to be graded well below a level 4"[19] and yet they have chosen to lead no evidence of any such employee.

25. United Voice has failed to properly consider and explain the scope and impact of the variations they seek to classifications. In this regard, the United Voice proposed variations to the Personal Care Worker Level 4:

a. fail to have genuine regard to the Australian Qualifications Framework;[20]

b. will necessarily increase employment costs;

c. pay no regard to the requirement that the work value be assessed by reference to the level of skill or responsibility involved in doing the work;

d. would result in employees performing the same work being paid differently simply because one employee possessed a qualification that was not required

Equivalent knowledge & skills

26. The proposition that a person should get paid according to the skills and knowledge they are required to use in the performance of their work is well established.

27. The difficulties with this aspect of the claim by United Voice issues however are practical ones:

[19] United Voice submissions at paragraph 50.
[20] Australian Qualifications Framework, Second Edition, January 2013 at pp.9-18. Found at: https://www.aqf.edu.au/sites/aqf/files/aqf-2nd-edition-january-2013.pdf

a. who determines whether a person's knowledge and skills is equivalent to Certificate III;

b. on what basis does that person make that determination; and

c. In a claim for non-compliance with the award, how is a court to decide a person's knowledge and skills at any particular time and whether that is the equivalent of a certificate III?

28. The answer to these practical issues are found within the Australian Qualifications Framework, under which an employee is assessed, by a suitably qualified person, in accordance with objective competencies established by a recognised training provider, who then certifies that the person has that level of knowledge and skill. The result is known because the training provider issues a certificate III.

29. The recognition of prior learning is not new – it has been in place for more than 10 years. One of the fundamental shifts of the Australian Qualifications Framework has been from a focus on completion of course work to a focus on learning outcomes. Simply put, a certificate III is not the result of completing a particular course or apprenticeship, but rather an assessment of the skills and knowledge of the person regardless of how they were obtained.

30. United Voice has led no evidence about Personal Care Workers at Level 3 who are said to have the equivalent skills and knowledge but are unable to obtain certification of such.

31. The United Voice submissions do no more than point to what they say are the relevant considerations under s 134(1). There is no submission as to how the Commission should approach those considerations, nor why other considerations are irrelevant. Neither proposal in relation to the classification of Personal Care Worker Level 4 is supported by probative evidence properly directed to demonstrating the facts supporting the proposed variations.

32. Accordingly the United Voice variations to the classification should be dismissed.

F. Broken shifts

33. Under the Aged Care Award clause 22.8(b) a broken shift may only be worked by mutual agreement between the employer and the employer.

34. The claim by the Health Services Union is that an employee should be prevented from proposing or agreeing to a broken shift unless each part of the shift is at lease two hours.

35. One of the presently unknown issues is the impact of consumer directed care and the new quality standards upon any business imperatives to seek employees agreement to work broken shifts.

36. The Health Services Union have chosen to lead no evidence in support of their claim. In particular there is no evidence of abuse of broken shifts and that paragraph 17 of the Health Service Union's submission is simply rhetoric and speculation.

37. In the absence of any submission which addresses the relevant legislative provisions and probative evidence properly directed to demonstrating the facts supporting the proposed variation, the Health Service Union's proposed variations to broken shifts must be dismissed.

G. Casual loading in addition to shift penalties

38. The Health Services Union are seeking to increase the amount payable to casual employees with respect to weekend and public holiday shifts. The basis for this application is said to be the "default approach" identified in the 2017 Penalty Rates Decision by reference to the report of the Productivity Commission Final Report where the casual loading is paid separately to and distinct from penalty rates such as working weekends.[21]

39. Regrettably the Health Services Union omit to refer to an important qualification to the Productivity Commission Final Report, that "*the wage regulator should make the presumption that casual penalty rates should fully*

[21] Penalty Rates Decision [2017] FWCFB 1001 at [333]-[338].

take account of the casual loading, but should not adopt that principle without closely considering its impacts on such workers."[22]

40. Further the default approach is a conclusion that does not set out how that result should be achieved. The considerations were conveniently summarised by the Full Bench in the Penalty Rates Decision

> *[45] An assessment of 'the need to provide additional remuneration' to employees working in the circumstances identified requires a consideration of a range of matters, including:*
>
> *(i) the impact of working at such times or on such days on the employees concerned (i.e. the extent of the disutility);*
>
> *(ii) the terms of the relevant modern award, in particular whether it already compensates employees for working at such times or on such days (e.g. through 'loaded' minimum rates or the payment of an industry allowance which is intended to compensate employees for the requirement to work at such times or on such days); and*
>
> *(iii) the extent to which working at such times or on such days is a feature of the industry regulated by the particular modern award.*
>
> *[46] Assessing the extent of the disutility of working at such times or on such days (issue (i) above) includes an assessment of the impact of such work on employee health and work-life balance, taking into account the preferences of the employees for working at those times.*[23]

41. The simplistic approach of the Health Services Union is to seek to increase the penalties payable to casual employees on weekends and public holidays.

42. Aged Care Employers ask rhetorically why is it that the penalties payable to casual employees on weekends and public holidays should be increased, rather than decreasing the penalties payable to full time and part time employees, or some combination thereof?

43. Whilst it is true that Aged Care Employers have not sought to vary the *Aged Care Award* in this way, that is no answer in a review where the Commission is not constrained by the terms of a particular application and may vary a modern award in whatever terms it considers appropriate, subject to its

[22] Penalty Rates Decision [2017] FWCFB 1001 at [1719].
[23] Penalty Rates Decision [2017] FWCFB 1001 at [45]-[46]

obligation to accord interested parties procedural fairness and the application of relevant statutory provisions.

44. The real answer to that rhetorical question is found in the well established principles, including the prima facie approach that the Aged Care met the modern awards objective at the time it was made and the need for the Health Services Union to establish that the Award does not meet that objective.

45. The approach of the Health Services Union is too simplistic in that showing that a different approach has been adopted in other awards is insufficient, in the absence of probative evidence, for the Commission to be satisfied that the *Aged Care Award* needs to be varied to meet the modern awards objective.

46. In the Penalty Rates Decision, the Full Bench had before it detailed evidence in respect of most but not all of the industries in which applications had been made. The findings of the Full Bench were award specific and the Full Bench declined to vary two awards because the applicants had not established a merit case sufficient to warrant the granting of their claims where the evidentiary case was inadequate.[24]

47. Contrary to the approach adopted by the Health Services Union, in the *Hospitality Award* that result was achieved by a reduction in the weekend penalty rate payable to full time and part time employees.[25]

48. The Health Services Union have not established by probative evidence that the Award does not meet the modern awards objective and this claim should be dismissed.

[24] Penalty Rates Decision [2017] FWCFB 1001 at [993]-[994], [1151]-[1153] and [1155].
[25] Penalty Rates Decision [2017] FWCFB 1001 at [888]-[898].

H. Conclusion

49. As none of the claims have been demonstrated as necessary to ensure that the *Aged Care Award*, if varied as proposed, achieved the modern awards objective, there should be no variation to the *Aged Care Award* as a result of the substantive applications.

BRUCE MILES

Frederick Jordan Chambers

25 March 2019