

## BEFORE THE FAIR WORK COMMISSION

*Fair Work Act 2009 (Cth)*

**Title of matter:** 4 yearly review of modern awards – *Social, Community, Home Care and Disability Services Industry Award 2010* – Tranche 2 proceedings

**Section:** s.156 *Fair Work Act 2009 (Cth)*

**Matter Number:** AM2018/26

**Document:** Written Submission in response to i) The Australian Services Union's Draft Determination dated 19 September 2019 and ii) the amended claims filed by Australian Business Industrial, the NSW Business Chamber, Aged & Community Services Australia and Leading Age Services Australia on 15 October 2019

**Filed:** Pursuant to Directions issued 23 October 2019

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## Background

- 1.1 On 2 April 2019, Australian Business Industrial, the NSW Business Chamber, Aged & Community Services Australia and Leading Age Services Australia ("**ABI**") filed a Draft Determination with the Fair Work Commission ("**the Commission**") that sets out the claims ABI are pursuing in Commission proceedings in matter number AM2018/26 ("**original ABI Draft Determination**") in respect of the 4-Yearly review of the Social, Community, Home Care and Disability Services Industry Award 2010 ("**the Award**").
- 1.2 On 3 July 2019, pursuant to directions issued by the Commission on 28 June 2019, The Australian Federation of Employers & Industries ("**AFEI**") filed written submissions in support of the claims pursued by ABI pursuant to ABI Draft Determination ("**AFEI July submissions**").
- 1.3 On 19 September 2019, the Australian Services Union ("**ASU**") filed a Draft Determination with the Commission ("**ASU Draft Determination**").
- 1.4 On 15 October 2019, ABI sought leave from the Commission to file an Amended Draft Determination ("**ABI Amended Draft Determination**").
- 1.5 The Commission issued directions on 23 October 2019 which provided parties the opportunity to file a submission that responds to the ASU Draft Determination in respect of the 'remote response' claim and ABI Amended Draft Determination.
- 1.6 These submissions respond to the 'remote response' claim in the ASU Draft Determination and ABI Amended Draft Determination.

## ASU Draft Determination

### Clause 28.4 – Recalled to work overtime

- 1.7 AFEI oppose the ASU Draft Determination. Our reasons for objecting to this claim are the same as those set out at paragraphs 129-133 of our 23 July 2019 Submissions in reply to the HSU claim to vary the recall to work provisions.
- 1.8 Further, it is noted that the ASU Draft Determination proposes that, at proposed Clause 28.4(b) and 28.4(c), remote response applies where an employee is:

"requested or required to perform work by the employer via telephone or other electronic communication away from the workplace"

- 1.9 The remote response provisions in the ASU Draft Determination appear to take effect when an employee is simply requested to perform work by the employer via telephone or other electronic communication away from the workplace. This would widen the application of the provision from response work (i.e. being ‘recalled to work’ due to a specific instruction or direction from an employer on a particular occasion and for a more particular purpose.<sup>1</sup>), to potentially circumstances where an employee undertakes routine/general overtime work (potentially as part of their core responsibilities, pursuant to a general instruction or requirement) from home.
- 1.10 This feature of the ASU’s proposed variation could potentially cause confusion in respect of whether an employee is performing overtime or remote response work, and thus whether remote response provisions will apply.
- 1.11 The ASU’s proposed variation would appear to increase regulation of parties including employees who routinely undertake overtime work as part of the nature/seniority of the position. The SCHADSI Award is also somewhat atypical in that it contains classifications for very senior levels of staff, including at Level 7 and 8. The ASU’s proposed variation could foreseeably result in employers requiring senior staff to remain at work to complete work unable to be completed during ordinary hours, and for this to be done in a continuous block of hours, rather than risk the incident of multiple minimum payments arising if overtime work is instead undertaken at a time (or times) that suit the individual’s personal circumstances from home.

## ABI Amended Draft Determination

### Clause 25.1 – ordinary hours of work

- 1.12 AFEI do not oppose to the withdrawal of this claim.

### Clause 25.4(a) – rest breaks between rostered work

- 1.13 AFEI do not oppose to the withdrawal of this claim.

### Clause 25.5(d)(ii) – Change in roster

- 1.14 AFEI relies on paragraphs 7 to 9 of AFEI July submissions.

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<sup>1</sup> See Polan v Goulburn Valley Health [2016] FCA 440 at [76].

## Clause 25.5(f) – Client cancellation

1.15 AFEI relies on paragraphs 10 to 12 of AFEI July submissions.

## Clause 20.9 – On call allowance

1.16 AFEI neither support nor oppose this clause.

## Clause 3 – Definition of workplace

1.17 ABI proposes to insert the definition of “workplace” to mean “a place where work is performed except for the employee’s residence.”

1.18 AFEI neither support nor oppose this clause.

## Clause 28.4 – recall to work overtime

1.19 The original ABI Draft Determination proposed the following (the underlined sections of the proposal highlight the additions made to current Clause 28.4 of the Award):

**“28.4 Recall to work overtime at the employer’s or client’s premises**

An employee recalled to work overtime after leaving their place of work to attend at a premises where work is performed will be paid for a minimum of two hours’ work at the appropriate rate for each time recalled. If the work required is completed in less than two hours the employee will be released from duty. This clause does not apply to an employee performing remote response duties in accordance with clause 20.10 of this Award”.

1.20 The Amended Draft Determination proposes the following (the underlined sections highlight differences to the proposal made by ABI in the original Draft Determination):

**“28.4 Recall to work**

An employee who is recalled to work overtime after leaving the workplace and requested by their employer to attend a workplace in order to perform such overtime work will be paid for a minimum of two hours’ work at the appropriate rate for each time recalled. If the work required is completed in less than two hours the employee will be released from duty”.

- 1.21 AFEI submits that ABI’s proposal to vary clause 28.4 in the Amended Draft Determination provides some additional clarity as to when the recall to work clause comes into effect. That is, this clause is applicable when an employee returns to the workplace after having left work *and* at the request of the employer to perform such overtime work. AFEI does not oppose the proposed variation as provided in the Amended Draft Determination.

## Clauses 28.5 and 28.6 – Remote Response when on-call and not on-call

- 1.22 The ABI Amended Draft Determination also includes the same description for when remote response provisions would apply, as those contained in the ASU Draft Determination, as follows “requested or required to perform work by the employer via telephone or other electronic communication away from the workplace”
- 1.23 Our submissions above at paragraphs 1.8 - 1.11 in relation to the ASU Draft Determination are also relevant in respect to this feature of the ABI Amended Draft Determination.
- 1.24 AFEI would not oppose the ABI Draft Determination subject to clarification that the provisions only apply to ‘response’ duties, and does not apply to employees who are under a general instruction/requirement to undertake work from home, including routine overtime work (or simply to ensure projects are completed within deadlines), which is performed from home.
- 1.25 AFEI would not oppose the ABI Draft Determination, with the following amendments (amends underlined below):

### **“28.5 Remote response when not on call**

- (a) An employee who is not required to be on call and who is requested by the employer to perform work on a particular occasion for a particular unplanned incident ~~by the employer~~ where the work is a response via telephone or other electronic communication away from the workplace.”

### **“28.6 Remote response when on call**

- (a) This clause applies to an employee who is required to be on call and who is required by the employer to perform work on a particular occasion for a particular unplanned incident ~~by the employer~~ where the work is a response via telephone or other electronic communication away from the workplace.”

1.26 Subject to the above, AFEI do not oppose to the remainder of the amendments sought to ABI's proposed Clause 28.5 and 28.6. That is, in respect to payments made to the employee and record keeping requirements.

**Australian Federation Employers & Industries**

19 November 2019