

Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Reply Submission

Social, Community, Home Care and
Disability Services Industry Award 2010
(AM2018/26)

13 August 2020

Ai
GROUP

AM2018/26 SOCIAL, COMMUNITY, HOME CARE AND DISABILITY SERVICES INDUSTRY AWARD 2010

INTRODUCTION

1. The Australian Industry Group (**Ai Group**) files this reply submission in response to a statement ¹ (**Statement**) issued by the Fair Work Commission (**Commission**) on 10 July 2020 and submissions subsequently filed by the Health Services Union, Australian Services Union and United Workers Union (collectively, **Unions**). The Unions' submissions relate to a report by Dr Natasha Cortis and Dr Georgia van Toorn titled '*Working in new disability markets: A survey of Australia's disability workforce*' (**Report**).
2. The Unions' submissions outline the findings that they seek in relation to the various claims they have advanced in these proceedings. In the submissions that follow, we make some over-arching observations about the Report and subsequently respond to the submissions made by the Unions.
3. Ai Group does not seek to cross-examine the authors of the Report.

THE REPORT – GENERAL SUBMISSIONS

4. The Report is based on a survey of employees covered by the Award. The survey has various obvious limitations:
 - (a) The survey respondents are not a representative sample of employees covered by the Award.
 - (b) The survey respondents may have been covered by enterprise agreements. The Report does not disaggregate the results of survey respondents by reference to those to whom the Award applies vis-à-vis those to whom an enterprise agreement applies. Indeed, it is not clear if the Award applies to any of the respondents and if so, how many.

¹ 4 yearly review of modern awards—Social, Community, Home Care and Disability Services Award 2010 [2020] FWCFB 3634.

- (c) The survey results reflect the perceptions of employees only.
 - (d) The survey respondents are not identified and they have not been called to give evidence. Similarly, their employers have not been identified.
 - (e) The survey respondents were almost exclusively union members.
5. As a result of the aforementioned limitations, the Report should be attributed little if any weight, for the reasons that follow.
 6. *First*, the survey does not permit conclusions to be reached about the workforce or sectors covered by the Award at large. There is no basis for concluding that the responses to the survey are reflective of employees covered by the Award more generally. They cannot safely be extrapolated in that way. Accordingly, the survey results are reflective only of the cohort of employees who responded to the survey and the Report cannot be relied upon to make findings about employees, employers or the sectors covered by the Award at large.
 7. *Second*, the survey responses (and by extension, the Report) reflect no more than the *perceptions* of a group of employees covered by the Award. They do not establish that, as a question of fact, the arrangements, conditions or practices that they refer to are in fact in place or that the issues that they refer to in fact arise from their employment.
 8. *Third*, such perceptions are of limited if any probative value to the Commission's assessment of whether the provisions proposed for inclusion in the Award by the Unions are *necessary* to ensure that the Award achieves the modern awards objective.
 9. *Fourth*, respondent parties are unable to test the veracity of the survey respondents' responses because they have not been called to give evidence, they are not identified and their employers are not identified. The survey responses are essentially in the nature of hearsay from unidentified employees that cannot be tested.

10. *Fifth*, the extent to which the survey respondents' responses relate to the operation of the Award, if at all, cannot be discerned. Given that employees may have been covered by enterprise agreements, the terms and conditions applying to them by virtue of those enterprise agreements may have affected their responses.
11. For instance, it is unclear whether concerns raised by survey respondents about frequent changes to shifts and / or rosters is due to the application of enterprise agreement terms that afford employers greater flexibility in this regard than the relevant Award clauses. This can be seen from a survey respondent's comment quoted by the Unions at paragraph 50 of their submission:

[The roster] is put up less than a week in advance and only one week at a time. I would prefer a fortnightly roster at least 2 weeks in advance. Sometimes shifts change and it is impossible to make plans.
12. Clause 25.5(a) of the Award requires that employers prepare and provide a *fortnightly roster with two weeks' notice* in relation to full-time and part-time employees. Accordingly, the aforementioned survey respondent may be covered by an enterprise agreement that contains a different rostering regime or their employer may be in breach of the Award. Either way, that respondent's responses in relation to working patterns, rosters and consequential changes to their income are potentially not relevant to the Commission's consideration of the Unions' claims.
13. The opaqueness of the survey results renders it impossible to identify the extent to which the survey respondents' responses are in fact relevant to the proceedings.
14. *Sixth*, the Unions have for some time been advancing a sustained campaign for enhanced terms and conditions in the sectors covered by the Award. The survey responses, which have been provided primarily by union members, may have been coloured by such propaganda.

THE FINDINGS PROPOSED BY THE UNIONS

15. For the reasons outlined above, we submit that the findings sought by the Unions at the following paragraphs of their submissions should not be made:

- **Paragraph 9(a):** *Disability service employees work a significant amount of unpaid hours.*
- **Paragraph 9(d):** *Disability service employees feel that they are not adequately compensated for travel and use of their own vehicle.*

We note in addition that the perception of employees in this regard is not probative or relevant. It is not uncommon that employees feel that they should be entitled to enhanced benefits.

- **Paragraph 9(e):** *Disability service employees are under pressure to perform unpaid work in order to meet the needs of their clients.*
- **Paragraph 9(f):** *A significant number of disability service employees, particularly home-based support workers, feel that they spend too long waiting between paid shifts.*

We note in addition that the perception of employees in this regard is not probative or relevant. Further, the descriptor of the employees' concern is vague and unhelpful (i.e. how long is 'too long?').

- **Paragraph 9(g):** *The scheduling of discontinuous or broken shifts puts a strain on disability service employees.*
- **Paragraph 9(h):** *The capacity of employers to require employees to work broken shifts, and the lack of a minimum engagement, facilitates the use of unpaid hours and fragmentation of work schedules.*
- **Paragraph 9(i):** *These practices undermine the quality and sustainability of work in the sector, and the optimism of workers over their careers.*

- **Paragraph 9(j):** *The current Award provisions in relation to minimum engagements, broken shifts and travel are not adequate to meet the challenges facing disability workers in maintaining healthy work-life balance.*
- **Paragraph 25(a):** *Disability services employees, particularly those in home-based and community day program settings, have high incidences of short working hours, such as 20 hours or less paid work per week.*
- **Paragraph 25(b):** *For many employees, arrangement of hours of work in disability services are unpredictable, unstable and uncertain.*

Whilst we do not contest the proposition that many employees' hours of work will be subject to change and may vary from week to week; we note that the Award requires that agreement must be reached on engagement between an employer and part-time employee on a regular pattern of work² and that there is no Award-derived obligation on part-time employees to work additional hours. Further, there is also no Award-derived obligation on casual employees to work any hours of work offered to them.

- **Paragraph 25(c):** *Employees are regularly required to work additional hours above their contracted weekly or fortnightly hours. Some employees do not want to work additional hours but feel like they cannot say no.*
- **Paragraph 25(d):** *A significant number of part-time as well as casual employees in disability services do not feel secure in their working arrangements.*
- **Paragraph 25(e):** *Under current Award provisions there is little incentive for employers to review employees' guaranteed hours.*

There is simply no basis in the Report for this proposed finding (nor has one been identified by the Unions).

² Clause 10.3(c) of the Award.

- **Paragraph 35(b):** *The current clause does not provide sufficient protections to ensure employees have access to the basic requirements for a night's sleep during a sleepover shift.*

There is simply no basis in the Report for this proposed finding (nor has one been identified by the Unions).

- **Paragraph 39(a):** *Disability service employees work a significant amount of unpaid hours.*
- **Paragraph 43(b):** *Unstable working arrangements undermined the reliability of disability workers' incomes, and their ability to plan their work and organise other aspects of their lives.*