

Australian Industry Group

Application to vary the
Social, Community, Home Care and
Disability Services Industry Award
2010

Reply Submission
(AM2020/18)

25 June 2020

Ai
GROUP

AM2020/18 APPLICATION TO VARY THE SOCIAL, COMMUNITY, HOME CARE AND DISABILITY SERVICES INDUSTRY AWARD 2010

1. The Australian Services Union, Health Services Union and United Workers' Union (collectively, **Applicants**) have filed an application in the Fair Work Commission (**Commission**) seeking a variation to the *Social, Community, Home Care and Disability Services Industry Award 2010* (**Award**). Specifically, the Applicants seek the introduction of a new allowance, titled the 'COVID-19 Care Allowance'.
2. The Australian Industry Group (**Ai Group**) opposes the claim and files this submission in response to material advanced by the Applicants regarding the questions posed and provisional views expressed by the Commission in its statement¹ of 5 May 2020 (**Statement**).
3. These submissions should be read in conjunction with our submissions of 2 May 2020 and 20 May 2020. They deal only with the matters raised in the Applicants' aforementioned submissions that have not already been addressed in those previous submissions.

¹ *Application to vary the Social, Community, Home Care and Disability Services Industry Award 2010* [2020] FWCFB 2343.

The Modern Awards Objective

Fair and Relevant Safety Net

4. The Applicants submit that the Award “provides no recognition of the disabilities occasioned by the COVID-19 pandemic for disability support workers”.
5. It is not in our submission unusual for employees to perform work with clients who suffer from an infectious disease. The evidence does not establish that any disabilities associated with the performance of work in the context of the COVID-19 pandemic when compared to the performance of work in the context of other infectious diseases justifies a specific treatment of those circumstances in the minimum safety net.
6. Further, the proposition that the pandemic is “a matter which impacts on the work of Disability Services Employees engaged under the Award” is equally applicable to employees and indeed employers covered by a raft of awards in countless industries and occupations. The existence of there being some impact is not of itself sufficient to ground a variation to an award.
7. The Applicants submit that the allowance is relevant “as it is in aid of public health objective [sic] and the minimisation of risk”. It is not clear how the proposed allowance aids public health objectives or minimises the risk of infection. The allowance would simply result in the relevant employees being remunerated at a higher rate of pay.

Section 134(1)(c): The Need to Promote Social Inclusion through Increased Workforce Participation

8. The Applicants submit that “part-time employees may lack an economic incentive to take on additional shifts where a client has been required to self-isolate due to potential or known COVID-19 infection”. The proposition is speculative without any evidentiary basis.

Section 134(1)(d): The Need to Promote Flexible Modern Work Practices and the Efficient and Productive Performance of Work

9. The Applicants' submissions in relation to s.134(1)(d) are plainly irrelevant to the consideration mandated by that provision of the Act. They appear to misunderstand the matters to which it is directed.

The Applicants' Responses to the Commission's Questions contained in the Statement

The Applicants' Response to Question 1

10. The Applicants allege that "disability support employees have been provided with no support to deal with the evident increased disability occasioned by the increased use of PPE, risk of infection in comparison with others and the psychological stress occasioned by work during this pandemic". The submission is made in the context of assertions about financial assistance afforded by the Commonwealth Government to the aged care sector and community expectations. We respond as follows.
11. *First*, the contention that disability support workers have not been provided with any government support is untrue. For example:
- (a) A 'Disability Information Hotline' has been established by the Australian Government. The hotline offers free information and referrals (including to counsellors) to disability support workers.²
 - (b) Information about how and when PPE should be worn, including a video training session conducted by the Chief Nursing and Midwifery Officer.³

² Department of Social Services, [Information and referrals for people with disability and their supporters about coronavirus \(COVID-19\)](#) (accessed 24 June 2020).

³ Department of Health, [Coronavirus \(COVID-19\) wearing personal protective equipment for disability support workers video](#) (accessed 24 June 2020).

- (c) Employees may be eligible for financial support from the Commonwealth Government if they are unable to work due to sickness or injury.⁴
12. *Second*, measures of the nature outlined above are, in our submission, more appropriate and better designed to deal with the alleged consequences faced by disability support workers. For instance, the Applicants submit that disability support workers may suffer from greater stress due to the conditions in which they are required to work. Put simply, additional compensation for time worked does not properly address the issue. The provision of counselling, advice and / or health care, however, is better suited to deal with the concern raised by the Applicants.
13. *Third*, the evidence reveals that some employers are providing additional support to employees at this time, including financial assistance.
14. In our submission, the issues raised by the Applicants are more appropriately dealt with at the enterprise-level and / or by Governments. It is not 'fair' in the sense contemplated by s.134(1) or 'necessary' in the sense contemplated by ss.138 and 157 of the Act, that the Award mandate that employers pay the proposed allowance to their employees in the relevant circumstances. The proposed allowance will increase the regulatory burden and introduce additional (unfunded) employment costs at a time that employers are also facing many challenges, additional costs and adverse impacts as a result of COVID-19. Employers are of course not precluded from providing above-award assistance and support to their employees where they are in a position to do so in addition any financial or other support afforded by Governments and Government agencies.

⁴ Services Australia, [Jobkeeper Payment, Who Can Get It](#) (accessed 24 June 2020).

The Applicants' Response to Question 7 – 'close contact'

15. The Applicants have filed an amended draft determination. Relevantly, whilst the proposed allowance would previously have been payable “if an employer requires an employee to work with a client who” satisfies the criteria set out at clause X.3(d)(i) – (iv), under the amended proposal, the allowance would be payable in those circumstances only if the employee was required to work “in personal contact with a client”. The Applicants’ submissions suggest that the proposed amendment is intended to exclude from the application of the clause employees who, for instance, “in effect [have] an office job and their work does not bring them into some level of contract [sic]”.
16. The amendment to the proposed clause appears to have been made in response to submissions from parties opposing the claim that the proposed clause advanced would have applied regardless of whether there was any face-to-face contact between the disability support worker and the client.
17. The amendment made does not adequately address the issues previously raised about the proposed clause. In particular, the meaning of ‘personal contact’ is unclear. For instance, if a disability support worker purchases and delivers groceries to the home of a client, leaving the groceries near the front door with momentary but distant face-to-face contact with the client, is the employee eligible for the allowance? Does work that does not necessitate contravention of generally recommended social distancing practices constitute ‘personal contact’?
18. Moreover, a further issue arises as to the period of time over which the allowance is payable. Clause X.3(d) requires the payment of the allowance where the relevant criteria are satisfied, however the payment of the allowance is not limited to the period of time during which the employee is performing such work or satisfies the relevant criteria. Instead, it appears to require the payment of the allowance for all work performed by the employee. This is clearly unfair and unjustifiable.

The Applicants' Response to Question 7 – 'meaning of 'disability services''

19. In response to Ai Group's submissions about the absence of a definition of 'disability services' or 'disability services work', the Applicants have proposed a definition of 'disability services' which would have the effect of defining the term each time it is used in the Award.
20. It is not appropriate that the Applicants seek to define the term for the purposes of the Award in the context of the current proceedings. These proceedings have not included any consideration of how the term should be defined for the purposes of other entitlements contained in the Award or what impact the proposed definition would have on their practical application.
21. We also observe that the proposed definition would not be appropriate for the purposes of the clause advanced. It references the performance of certain types of work that appear to fall beyond the scope of work that the proposed allowance would be payable in respect of, such as 'client advocacy', which may not necessitate face-to-face contact with a client.

The Applicants' Response to Question 8

22. The Applicants submit that employers are "legally obliged to report COVID-19 infections to their regulatory body as a condition of registration". It is trite to observe that this requirement applies only to:
 - (a) Registered providers;
 - (b) Instances in which a client *contracts* COVID-19.
23. It does not apply to unregistered providers or to the circumstances described at clauses X.3(d)(i) or (ii). To this extent, the concerns previously raised by Ai Group (summarised at paragraph [55] of the Statement) about the proposed clause remain. At its highest, the Applicants argue that it is "unlikely" that an employer would not know when the circumstances in clause X.3(d) apply. This is clearly not a sound basis upon which an award-derived entitlement can or should be determined.

24. Moreover, the central issue raised in our earlier submissions about this element of the Applicants' proposal remains. The allowance would be required to be paid if a client has COVID-19. That requirement applies irrespective of whether the client informs the employer that they have contracted COVID-19. It is neither fair nor appropriate that an employer be liable for the payment of an award-derived entitlement where an employer will not necessarily know if the requisite circumstances arise and in circumstances where the Award does not provide a mechanism for dealing with this issue.

The Applicants' Response to Question 9

25. The Applicants' explanation for the quantum of the allowance sought remains, in our submission, unsatisfactory. No sensible basis for the quantum sought has been advanced.

The Applicants' Response to Question 13

26. As we have previously submitted, the evidence does not establish that the circumstances of the pandemic have created a disincentive to perform disability support work. None of the witnesses called by the Applicants testify to employees leaving the workforce, refusing to perform work in the relevant circumstances or being reluctant to join the disability support workforce due to the need to perform work in the circumstances described in clause X.4(d). Indeed the evidence of Fata and Ms Brown reveals the employees' commitment and dedication to their clients and workplace irrespective of the perceived difficulties and stress that they experienced.
27. Question 13 asked the Applicants why it is necessary for the Award to be varied to provide an incentive and what prevents an employer from making an over award payment if an incentive is required.
28. The Applicants have failed to respond to the central premise of the questions posed by the Commission. Self-evidently, nothing precludes an employer from making over award payments if they form the view that an incentive is required and they have capacity to pay it. In the absence of evidence about an industry-wide need to incentive employees to continue to provide care to persons with a

disability in the context of the pandemic, it is appropriate that the identification of such a need and the provision of any additional entitlement for the purposes of incentivising employees is left to individual enterprises.

29. Finally, though not directly relevant to the submissions above, we note that at the final sentence of paragraph 87 of their submissions, the Applicants extract part of Ms Fata's evidence absent its context in a way that is potentially misleading. Ms Fata described part of her experience as a "burden not like anything [she] had experienced in [her] 25 years as a house supervisor". As can be seen at paragraphs 86 – 87 of her statement, Ms Fata is there referring to the loss of one of her colleagues, who passed away after having contracted COVID-19. Ms Fata describes having to explain the circumstances of his death to colleagues and clients whilst also being required to self-isolate and await the results of a COVID-19 test before she and her colleagues could return to work. The sentence extracted from her statement does *not* relate to the "increased burden and stress of working with a client with COVID-19", as described at paragraph 87 of the submission.