



2 April 2019

BY EMAIL chambers.ross.j@fwc.gov.au

The Associate to the Hon. Justice Ross
President
Fair Work Commission
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Dear Associate

**AM2018/26: SOCIAL, COMMUNITY, HOME CARE AND DISABILITY SERVICES AWARD 2010 -
SUBSTANTIVE ISSUES**

We refer to the above proceedings, in which we act for Australian Business Industrial (**ABI**), the NSW Business Chamber Ltd (**NSWBC**), Aged & Community Services Australia (**ACSA**) and Leading Age Services Australia Limited (**LASA**).

Please find **enclosed** a Draft Determination which our clients seek leave to file in this matter.

Relevant background

We set out below the background to this matter which is relevant to the Draft Determination our clients seek leave to file.

1. In May 2017, our clients reached a consent position with interested parties in this matter regarding a number of proposed variations to the *Social, Community, Home Care and Disability Services Industry Award 2010* (the **Award**).
2. That consent position was recorded in a Joint Report dated 8 May 2017, which was filed with the Commission in accordance with specified directions. The consent package as set out at Annexure A to the Joint Report was reached following an extensive conciliation process convened by DP Booth between approximately August 2016 and May 2017.
3. One of the elements of the consent position was that certain parties agreed to withdraw certain claims that they had previously foreshadowed. This is recorded in Annexure B of the Joint Report. Each of our clients agreed to withdraw claims as part of the consent position.
4. Another aspect of the consent position was that parties were also free to pursue other claims which fell outside the scope of the matters addressed in the consent package: see [6] of the Joint Report.

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5. Directions in relation to the contested substantive claims were issued on or around 30 October 2018, which required parties seeking variations to the Award to file Draft Determinations by 7 November 2018. A number of parties filed Draft Determinations in accordance with those directions.
6. Further directions in relation to the programming of the substantive claims were issued on 13 November 2018, and later amended on 4 February 2019. Those directions set the matter down for hearing on 12 April 2019.
7. In the context of the programming of the contested claims, various parties raised the issue of the consent package with the Commission and, in particular, sought that the Commission reach a view regarding the consent position: see transcript of mention on 9 November 2018 and the Report issued on 13 November 2018.
8. On 15 February 2019, the Health Services Union (the **HSU**) filed its submission and evidence in support of the contested claims it was advancing. At the time of filing its submission, the HSU also filed an Amended Draft Determination. To our knowledge, the HSU did not seek leave to file the Amended Draft Determination, nor did they otherwise explain the basis for the amended claims.
9. The Amended Draft Determination included additional claims to those which were contained in their Draft Determination filed on 9 November 2018. Importantly, the Amended Draft Determination also included claims which the HSU had agreed to withdraw in accordance with the Joint Report. For example, see items [13], [14], [16], [17] and subclause (d) of item [3].
10. Having regard to the Amended Draft Determination filed by the HSU, our clients considered that the HSU were acting in a manner inconsistent with the consent package recorded in the Joint Report, such that there was no longer a consent position on foot between the parties. Accordingly, on 15 March 2019 our clients requested that the matter be re-listed for mention.
11. A mention was held before Commissioner Lee on 20 March 2019. During that mention, it became clear that the consent position recorded in the Joint Report had fallen over. Further, a number of parties including our clients indicated during the mention that they would be pursuing (or reserved their rights to pursue) further claims in light of the consent position having fallen over.
12. During the mention before Commissioner Lee, we requested that a timetable be set for the programming of the claims that our clients wished to pursue, however that request was declined, with Commissioner Lee determining that any procedural issues arising from the matters raised during the mention would be considered by the Full Bench at the hearing on 12 April 2019.

Our clients' claims

13. Given that the consent position is no longer on foot (by reason of the HSU's conduct), our clients now wish to pursue claims which they had agreed to withdraw as an element of the consent position. These claims have not been advanced prior to this date by reason of the existence of the consent position recorded in the Joint Report.
14. Our clients now wish to pursue the claims set out in the **enclosed** Draft Determination.
15. We wish to inform the Commission that our clients will be seeking directions on 12 April 2019 for the programming of these claims, consistent with the determination made by Commissioner Lee on 20 March 2019.
16. The enclosed Draft Determination has been filed in advance of 12 April 2019 so as to give the Commission and other interested parties the opportunity to consider the nature of the claims, as this may inform the parties as to the approach they may wish to take. In this regard, we note that the claims advanced by our clients are directly related to some of the union party claims that are listed to be heard on 12 April 2019.

Please do not hesitate to contact Kyle Scott on (02) 4989 1010 if you have any questions.

Yours faithfully



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Encl.



DRAFT DETERMINATION

Fair Work Act 2009

s.156 - 4 yearly review of modern awards

4 YEARLY REVIEW OF MODERN AWARDS – SOCIAL, COMMUNITY, HOME CARE AND DISABILITY SERVICES INDUSTRY AWARD 2010

(AM2018/26)

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XXXX

XXXX

XXXX, XX XXXX 201X

*4 yearly review of modern awards – Social, Community, Home Care and Disability Services
Industry Award 2010.*

A. Further to the decision issued on XXX in AM2018/26 ([201X] FWCFB XXXX), the above award is varied as follows:

1. By deleting clause 25.1 and inserting in lieu thereof:

25.1 Ordinary hours of work

- (a) The ordinary hours of work will be 38 hours per week or an average of 38 hours per week over the employee's roster period, up to a maximum of four weeks.
- (b) Subject to clause 25.1(c), the maximum ordinary hours that can be worked per shift is 8.
- (c) By agreement between an employer and an individual employee, ordinary hours may be worked up to 10 hours per shift.

2. By deleting the words 'or period of work' in clause 25.4(a).

3. By deleting clause 25.5(d)(ii) and inserting in lieu thereof:

(ii) However, a roster may be altered at any time:

- A. by agreement between the employer and relevant employee, provided the agreement is recorded in writing;
- B. to enable the service of the organisation to be carried out where another employee is absent from work on account of personal/carer's leave,

compassionate leave, community service leave, ceremonial leave, leave to deal with family and domestic violence, or in an emergency; or

- C. where the change involves the mutually agreed addition of hours for a part-time employee to be worked in such a way that the part-time employee still has four rostered days off in that fortnight or eight rostered days off in a 28 day roster cycle.

4. By deleting clause 25.5(f) and inserting in lieu thereof:

(f) Client cancellation

- (i) This clause applies where a client cancels or changes a scheduled home care or disability service which a full-time or part-time employee was rostered to provide.
- (ii) Where a service is cancelled by a client under clause 25.5(f)(i), the employer may either:
- A. direct the employee to perform other work during those hours in which they were rostered; or
- B. cancel the rostered shift.
- (iii) Where clause 25.5(f)(ii)(A) applies, the employee will be paid the amount payable had the employee performed the cancelled service or the amount payable in respect of the work actually performed, whichever is the greater.
- (iv) Where clause 25.5(f)(ii)(B) applies, the employer must either:
- A. pay the employee the amount they would have received had the shift not been cancelled; or
- B. subject to clause 25.5(f)(v), provide the employee with make up time in accordance with clause 25.5(f)(vi).
- (v) The make up time arrangement cannot be utilised where the employee was notified of the cancelled shift after arriving at the relevant place of work to perform the shift. In these cases, clause 25.5(f)(iv)(B) applies.
- (vi) Where the employer elects to provide make up time:
- A. the make up time must be rostered in accordance with clause 25.5(a);
- B. the make up time must be rostered to be performed within 3 months of the date of the cancelled shift;

- C. the employer must consult with the employee in accordance with clause 8A regarding when the make up time is to be worked prior to rostering the make up time; and
- D. the make up shift can include work with other clients or in other areas of the employer's business provided the employee has the skill and competence to perform the work.

5. By deleting clause 20.9 and inserting in lieu thereof:

20.9 On call allowance

An employee required by the employer to be on call (i.e. available for recall to duty at the employer's or client's premises and/or for remote response duties) will be paid an allowance of:

- (i) \$17.96 for any 24 hour period or part thereof during the period from the time of finishing ordinary duty on Monday to the time of finishing ordinary duty on Friday; or
- (ii) \$35.56 in respect of any other 24 hour period or part thereof on a Saturday, Sunday, or public holiday.

6. By inserting new clause 20.10 as follows:

20.10 Remote response

- (a) In this award, remote response duties means the performance of the following activities by an employee outside of hours at the direction of, or with the authorisation of, their employer:
 - (i) responding to phone calls, messages or emails;
 - (ii) providing advice ('phone fixes');
 - (iii) arranging call out/rosters of other employees; and
 - (iv) remotely monitoring and/or addressing issues by remote telephone and/or computer access,

in circumstances where the employee is not required to attend their employer's premises, or any other particular place of work, and at a time when the employee is either on call or has not otherwise been rostered to work.
- (b) Subject to clause 20.10(f), where an employee is directed or authorised by their employer to perform remote response duties between 6.00am and 10.00pm, the employee will be paid at the applicable rate of pay specified in this Award for

any such work performed between these hours, with a minimum payment of 15 minutes.

- (c) Where an employee undertakes multiple separate instances of remote response duties during a particular period referred to in clause 20.10(b), and the total time spent performing such duties does not exceed 15 minutes, only one minimum payment is payable.
- (d) Subject to clause 20.10(f), where an employee is directed or authorised to perform remote response duties between 10.00pm and 6.00am the employee will be paid at the applicable rate of pay specified in this Award for any such work performed between these times, with a minimum payment of one hour. Where such work exceeds one hour, payment will be made at the applicable rate for the duration of the work.
- (e) Where an employee undertakes multiple separate instances of remote response duties during a particular period referred to in clause 20.10(d), and the total time spent performing duties does not exceed one hour, only one minimum payment is payable.
- (f) Subject to clause 20.10(g), an employee who performs remote response duties must maintain and provide to their employer a time sheet specifying the time at which they commenced and concluded performing any remote response duty and a description of the work that was undertaken. This record must be provided to the employer prior to the end of the next full pay period or in accordance with any other arrangement as agreed between the employer and the employee.
- (g) An employer may implement an alternate method or system for the recording and notification of the details referred to in clause 20.10(f).
- (h) An employer is not required to pay an employee for any time spent performing remote duties if the employee does not comply with the requirements of clause 20.10(f) or any alternate method or system pursuant implemented under clause 20.10(g).
- (i) For the purposes of this clause, remote response duties do not include employees undertaking administrative tasks such as (but not limited to) reviewing or inquiring about their roster or seeking changes to their roster.
- (j) Clause 28.3 does not apply where an employee performs remote response work in accordance with this clause.

7. By deleting clause 28.4 and inserting in lieu thereof:

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.

- B. This determination comes into operation from XX XXXX 201X. In accordance with s.165(3) of the Fair Work Act 2009 these items do not take effect until the start of the first full pay period that starts on or after XX XXXX 201X.

[Insert the Seal of the Fair Work Commission]

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