



Fair Work Commission - s 157 Variation Application

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

SUBMISSIONS

AUSTRALIAN BUSINESS INDUSTRIAL

- and -

THE NSW BUSINESS CHAMBER LTD

25 JUNE 2020

BACKGROUND

1. We refer to the Directions issued by the Commission on 28 May 2020. These Submissions are made in response to the material filed the Australian Services Union on 20 May 2020.

MATERIAL FILED BY UNIONS

Summary

2. Further to our submissions dated 1 May 2020, we submit that, in order to provide a proper basis for the Application, the unions would need to establish (among other things) that:
 - a) in circumstances where the allowance would apply, employees are being required to perform significant additional work that requires new skills, qualifications or experience (work value);
 - b) in circumstances where the allowance would apply, the working conditions of employees have become disproportionately onerous due to some disabling phenomenon; and
 - c) there is a material difference between infection control protocols associated with COVID-19 and infection control protocols associated with other infectious diseases.
3. The union's material does not provide probative evidence to support for any of the above propositions.

Evidence about additional work

Ms Brown

4. Ms Brown gives evidence that, in the context of the pandemic, she has been required to: explain social distancing rules to clients;¹ organise staggered times for showers, toilet trips and meals;² use PPE, conduct cleaning tasks, replace used soap and towels;³ and deal with clients who are stressed or confused.⁴
5. Ms Brown gives no evidence that, in performing those tasks, she was required to use skills, experience or qualifications that she did not already use in her employment. Moreover, Ms Brown gives no evidence that would allow the Commission to assess any net increase in the value of work being performed by Ms Brown during the pandemic in comparison to the value of work that was being performed by Ms Brown prior to the pandemic.

Ms Fata

6. Ms Fata gives evidence that, for three days, she worked alongside a colleague who was later diagnosed with COVID-19.⁵ In that scenario, it was a fellow employee, not a client, who was

¹ Statement of Angela Brown at [14] and [40].

² Statement of Angela Brown at [41] and [43].

³ Statement of Angela Brown at [42] and [47] and [52].

⁴ Statement of Angela Brown at [42] and [51] to [52].

⁵ Statement of Giovanna Fata at [13].

diagnosed with COVID-19, which means that the proposed allowance would not have applied. Therefore this evidence is of no probative value to the application.

7. Ms Fata gives evidence about work she performed while in self-isolation.⁶ During this period, Ms Fata was not being required to work in personal contact with the client who had been diagnosed with COVID-19, which means that the proposed allowance would not have applied.
8. During this time, the employees reporting to Ms Fata (over the phone) may have been performing work that would have attracted the allowance. However, those employees are anonymous, and Ms Fata did not witness any work they performed. Therefore this evidence is of no probative value to the application.
9. Ms Fata also gives evidence that, in the context of the pandemic, she has been required to wear PPE and perform cleaning tasks⁷ and deal with questions from clients.⁸ Ms Fata gives no evidence that, in performing those tasks, she was required to use skills, experience or qualifications that she did not already use in her employment.

Mr Richardson

10. Mr Richardson gives evidence that, at Aruma, employees are required to take certain steps under Aruma "COVID-19 protocols and policies".⁹ The steps relate to "using and cleaning vehicles", "cleaning and disinfecting rooms", "cough and sneezing etiquette" and "hand hygiene".
11. Mr Richardson gives no evidence that, in performing those tasks, employees are required to use skills, experience or qualifications that they did not already use in their employment.

Mr Hyland

12. Mr Hyland describes the steps that employees are required to take under his organisation's "COVID-19 protocols".¹⁰ The steps relate to wearing PPE and washing hands. Employees may also be required to deal with clients who are stressed or aggressive.¹¹
13. Mr Hyland gives no evidence that, in performing those tasks, employees are required to use skills, experience or qualifications that they did not already use in their employment.
14. Indeed, in relation to managing client behaviour, Mr Hyland states that:

*"Behaviour management is a significant part of a support workers job. It requires the support worker to build a relationship of trust with the customer over time. When the customer displays a challenging behaviour, they will then use techniques to de-escalate the situation."*¹²

⁶ Statement of Giovanna Fata at [13] to [34].

⁷ Statement of Giovanna Fata at [35].

⁸ Statement of Giovanna Fata at [37].

⁹ Statement of Andrew Richardson at [16] to [18].

¹⁰ Statement of Andrew Hyland at [20] to [21].

¹¹ Statement of Andrew Hyland at [24].

¹² Statement of Andrew Hyland at [25].

15. This evidence appears to contradict a claim that employees are now required to use new skills, qualifications or experience in managing client behaviour.

Conclusion

16. On this basis we submit that the union material contains no probative evidence to suggest that, in circumstances where the allowance would apply, employees are being required to perform work that requires any new skills, qualifications or experience.

Alleged disability associated with using PPE

17. Ground 17 for the Application refers to the “disability” associated with “using personal protective equipment”.
18. The union material does not contain any probative evidence about how wearing PPE makes work physically more difficult.
19. We therefore submit that has not established that working conditions have become disproportionately onerous due to a disabling phenomenon that warrants additional payment.

PPE contemplated by Award

20. We have previously submitted that:
- a) Modern Awards do not provide allowances for the wearing of PPE because the wearing of such PPE is implicitly part of the work performed and as such contemplated within the minimum rate of pay for the classification the employee is employed in under the relevant Modern Award;¹³ and
 - b) the SCHADS Award specifically contemplates that an employee maybe required to wear and use PPE (see clause 20.2 (d) of the Award);¹⁴
21. Nothing in the union’s material suggests that existing conditions and minimum rates of pay under the SCHADS Award do not contemplate employees being required to wear PPE.

Other infectious diseases

22. The union material does not describe the infection control protocols associated with any infectious diseases other than COVID -19.
23. Ms Fata asserts (without elaborating) that “*the workplace is already set up to cater for the care needs of [people with Hepatitis and HIV]*”.¹⁵ Ms Fata does not describe the relevant care needs or how they are met by employees or why COVID-19 is any different from these.
24. Mr Hyland states that:

“The COVID-19 protocols are different from normal infection control procedures. Normal infection control procedures do not include the same level of social-distancing and self-

¹³ Submissions of ABI and NSWBC dated 19 May 2020 at [1.12].

¹⁴ Submissions of ABI and NSWBC dated 4 May at [8.1] and [8.2].

¹⁵ Statement of Giovanna Fata at [40].

isolation as those for COVID-19. Where existing policy is relevant to COVID-19, we include those in our policy and expand on them where necessary.”¹⁶

25. However, Mr Hyland does not explain what is required of employees under “normal infection control procedures”. Moreover, it is not clear which of the many infectious diseases can be dealt with using “normal infection control procedures”.
26. Mr Richardson states that *“Other infectious diseases have not caused the same level of anxiety when staff are asked to mix in the community during supports that COVID-19 has caused. Other infectious diseases are not subject to Public Health Orders.”¹⁷* While it may be true that employees are more anxious about COVID-19, or that governments have enacted laws designed to stop the spread of the disease, do not assist with a comparison of the work required under different infection control protocols.
27. We therefore submit that the evidence does not establish that there is a material difference between the infection control protocols associated with COVID-19 and the infection control protocols associated with other infectious diseases to warrant the allowance claimed.

Labour market impact

28. The union evidence does not establish that employees in the sector have resigned, or are likely to resign, due to the prospect of providing support to a client who has, or is suspected of having, COVID-19.
29. At best, the union evidence suggests that, like most people in society in recent months, employees in the sector have experienced stress or anxiety about the pandemic. This does not provide a proper basis for granting the application.

Suppression of COVID-19 in Australia

30. The union material reflects the fact that COVID-19 has been suppressed in Australia.¹⁸
31. Mr Richardson gives evidence that:

“We [Aruma] currently work with approximately 5,300 people with disability.”

“Aruma has supported one customer with a confirmed case of the virus. However, we only provided support coordination to that customer and do not provide direct care. Previously, we would have met face-to-face previous with the customer. We had switched to remote support coordination well before the meeting.”

32. Mr Farthing gives evidence that:

“The data shows that as at 29 April 2020, the NDIS Quality and Safeguards Commission had been notified of 10 NDIS participants who had contracted COVID-19.”¹⁹

33. It is fair to assume that all 10 of those NDIS participants no longer have COVID-19.

¹⁶ Statement of Andrew Hyland at [19].

¹⁷ Statement of Andrew Richardson at [20].

¹⁸ Statement of Andrew Richardson at [11].

¹⁹ Statement of Mark Farthing at [7].

34. **Enclosed** as Annexure A is a graphic published by the Australian Government, which sets out key statistics on COVID-19 in Australia as at 22 June 2020. The graphic shows that, as at 22 June 2020, only several hundred people in Australia were infected with COVID-19.
35. While we do not seek to undermine the significance of the pandemic, we submit that, in the absence of a significant spike in COVID-19 cases in Australia, the proposed allowance will be of little to no relevance.

OTHER MATTERS

Payment of allowance by Aruma and Lifestyle Solutions

36. Mr Richardson and Mr Hyland give evidence that Aruma and Lifestyle Solutions are paying an allowance like the one sought by the unions.
37. If an employer, as a matter of discretion, decides to provide an additional payment to employees, that is a matter for the employer.
38. We submit that this does not provide a proper basis for varying a Modern Award to impose the payment on all employers in a sector.

Proper approach to safety risks at work

39. Further to our previous submissions, we submit that it is an established industrial principle that the awards system should not provide employees with additional payment in respect of a safety risk at work.
40. Rather, employees and employers are required to manage such risks in accordance with work health and safety legislation.

CONCLUSION

41. For the reasons set out above, we submit that the application should be dismissed.

On behalf of Australian Business Industrial and the NSW Business Chamber Ltd

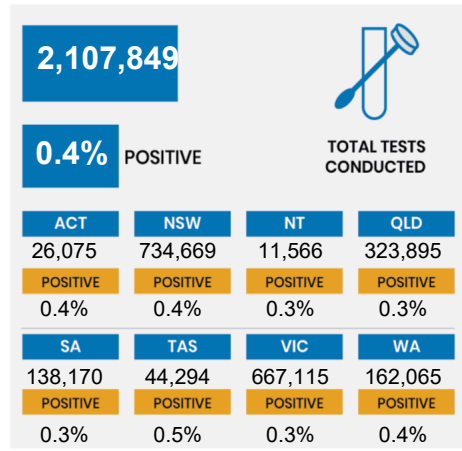
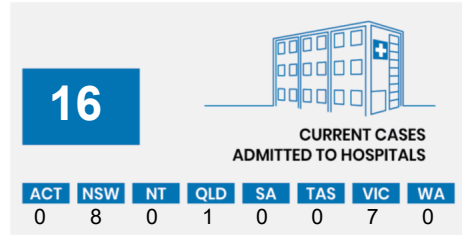
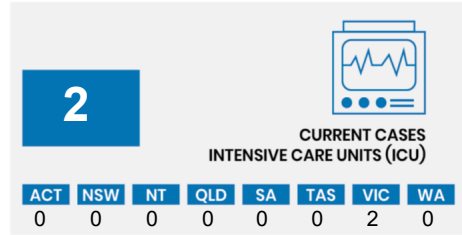
Nigel Ward
CEO + Director
Australian Business Lawyers & Advisors
(02) 9458 7005
Nigel.Ward@ablawyers.com.au

Sam Cahill
Senior Associate
Australian Business Lawyers & Advisors
(02) 9458 7005
Sam.Cahill@ablawyers.com.au

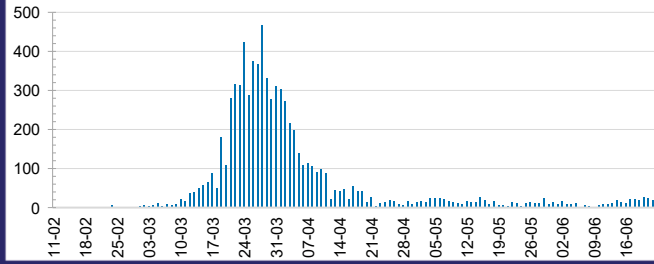
25 June 2020



CURRENT STATUS OF CONFIRMED CASES



DAILY NUMBER OF REPORTED CASES

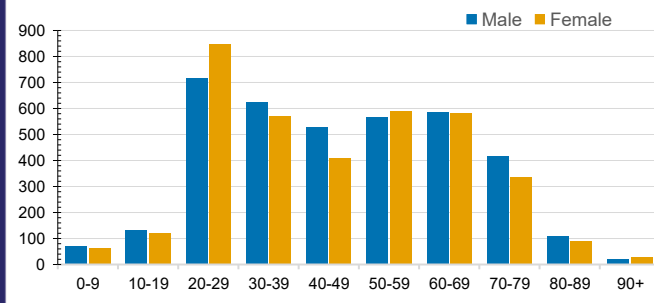


CASES IN AGED CARE SERVICES

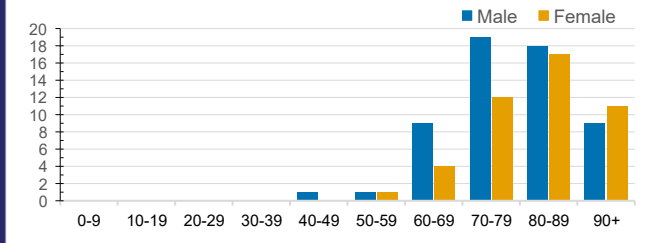
Confirmed Cases	Australia	ACT	NSW	NT	QLD	SA	TAS	VIC	WA
Residential Care Recipients	71 [39] (29)	0	61 [34] (27)	0	1 (1)	0	1 (1)	8 [5]	0
In Home Care Recipients	31 [28] (3)	0	13 [13]	0	8 [8]	1 [1]	5 [3] (2)	3 [3]	1 (1)

Cases in care recipients [recovered] (deaths)

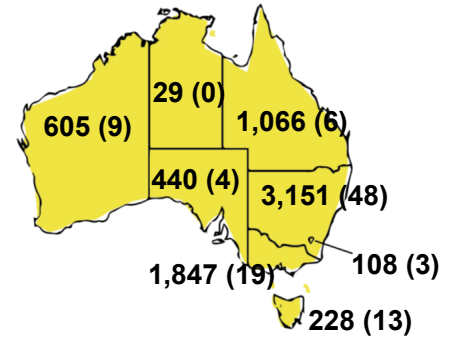
CASES BY AGE GROUP AND SEX



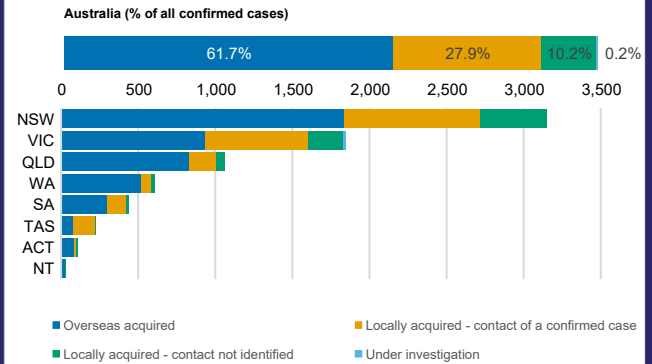
DEATHS BY AGE GROUP AND SEX



CASES (DEATHS) BY STATE AND TERRITORIES



CASES BY SOURCE OF INFECTION



PUBLIC HEALTH RESPONSE MEASURE

