Fair Work Commission: 4 yearly Review of modern awards

SUBMISSION: SUPPLEMENTARY QUESTIONS

4 YEARLY REVIEW OF MODERN AWARDS: (AM2018/26) SOCIAL, COMMUNITY, HOME CARE AND DISABILITY SERVICES INDUSTRY AWARD 2010 - SUBSTANTIVE ISSUES

FILED ON BEHALF OF:

- **AUSTRALIAN BUSINESS INDUSTRIAL**
- **THE NSW BUSINESS CHAMBER LTD**
- **AGED & COMMUNITY SERVICES AUSTRALIA**
- **LEADING AGE SERVICES AUSTRALIA**

11 MARCH 2020

BACKGROUND

1. This submission is made on behalf of Australian Business Industrial (**ABI**), the New South Wales Business Chamber Ltd (**NSWBC**), Aged & Community Services Australia (**ACSA**), and Leading Age Services Australia Limited (**LASA**) (collectively, "our clients").

2. This submission is filed in response to the Statement of 4 March 2020.[1]

ANSWERS TO SUPPLEMENTARY QUESTIONS

Supplementary Question 4

3. No.

Supplementary Question 5

4. There appears to be a disconnect between the finding in question that was proposed by our clients, the Unions' response to that proposed finding, and the supplementary question.

5. The finding proposed by our clients was that the consumer-directed care reforms have "fundamentally changed the operating environment" in a range of specified ways.[2]

6. In response, the Unions challenged this proposed finding and submitted that the proposed finding "overstates the reality". In particular, the Unions then drew a distinction between "changes to the funding arrangements applicable within the sector" and "changes to the nature and conditions of the work required to be performed within the sector". The Unions then commented on the work undertaken by "workers within the sector" [emphasis added].

7. Supplementary Question 5 appears to mischaracterise the Unions' submission, insofar as the question focuses on the "work required to be performed by employers" [emphasis added]. With respect, it is unclear whether the focus of the Commission's query is about the work performed by employees, or the work performed by employers.

8. To the extent that the focus is on the work of employees, we accept the Union contention that the work undertaken by employees has not fundamentally changed.[3] We did not suggest that to be the case. It should be uncontroversial that frontline home care workers and disability support workers continue to perform the same or similar work under the consumer-directed reforms as they did

[1] [2020] FWCFB 1185.
[2] See [2.9] of our clients' submission of 19 November 2019.
[3] We note that the Unions appear to have mischaracterised the finding sought by our clients, at [114] of their submission, by focussing their attention on the work undertaken by employees rather than the "operating environment" for employers or the operating environment generally.

under previous delivery models. That is, they continue to provide personal care to individuals, and the work has not materially changed.

9. However, we maintain that there has been a "fundamental change" to the "operating environment" in the ways specified in our submission.

10. The phrase "operating environment" is intended to be a reference to the environment in which home care and disability services businesses operate. The operating environment refers to the internal and external factors which impact on a business's operations. Such factors include customers, suppliers, government policy and regulation, their workforce, the approaches of stakeholders such as the NDIA or other regulatory agencies, competition, legal requirements, technology, etc.

11. Our clients' proposed finding about "fundamental change" to the "operating environment" is not focussed on the day-to-day work performed by employees, but rather on the way in which work is secured, organised and delivered by employers.

ANSWERS TO BACKGROUND PAPER 3 QUESTIONS

Question 1

12. We refer to our submission of 19 November 2019 and to the table included in that submissions.

13. In relation to the UWU broken shift claim, the list should also include the same evidence relied upon by our clients in respect of the other broken shift claims. This is as follows:

    (a) Witness Statement of Joyce Wang (p.200 of the Court Book)

    (b) Witness Statement of Darren Mathewson (p.211 Court Book)

    (c) Witness Statement of Jeffrey Wright (p.470 of the Court Book)

    (d) Witness Statement of Wendy Mason (p.477 of the Court Book)

    (e) NDIA Efficient Cost Model for Disability Support Workers (p.489 of the Court Book)

    (f) NDIA Efficient Cost Model (p.501 of the Court Book)

    (g) StewartBrown - Aged and Financial Performance Survey - Sector Report - Financial Year 2018 (p.503), and

    (h) StewartBrown - Aged and Financial Performance Survey - Sector Report - December 2018 (p.541 of the Court Book).

14. In relation to the telephone allowance claim by HSU, the list is missing the following document:

    (a) StewartBrown - Aged and Financial Performance Survey - Sector Report - December 2018 (p.541 of the Court Book).

15. In relation to the HSU client cancellation claim, the list is missing the following evidence:

    (a) Witness Statement of Graham Shanahan (p.155 of the Court Book)

(b) Witness Statement of Scott Harvey (p.162 of the Court Book)

(c) Witness Statement of Deb Ryan (p.190 of the Court Book)

(d) Witness Statement of Joyce Wang (p.200 of the Court Book)

(e) Witness Statement of Darren Mathewson (p.211 of the Court Book)

(f) Witness Statement of Jeffrey Wright (p.470 of the Court Book)

(g) Witness Statement of Wendy Mason (p.477 of the Court Book)

(h) NDIA Efficient Cost Model for Disability Support Workers (p.489 of the Court Book)

(i) NDIA Efficient Cost Model (p.501 of the Court Book)

(j) StewartBrown - Aged and Financial Performance Survey - Sector Report - Financial Year 2018 (p.503), and

(k) StewartBrown - Aged and Financial Performance Survey - Sector Report - December 2018 (p.541 of the Court Book).

16. In relation to the UWU variation to roster clauses the list is missing the following evidence:

(a) Witness Statement of Darren Mathewson (p.211 of the Court Book)

(b) NDIA Efficient Cost Model for Disability Support Workers (p.489 of the Court Book)

(c) NDIA Efficient Cost Model (p.501 of the Court Book)

(d) StewartBrown - Aged and Financial Performance Survey - Sector Report - Financial Year 2018 (p.503), and

(e) StewartBrown - Aged and Financial Performance Survey - Sector Report - December 2018 (p.541 of the Court Book).

17. In relation the UWU mobile phone allowance claim, the list is missing the following evidence:

(a) Witness Statement of Darren Mathewson (p.211 of the Court Book)

(b) Witness Statement of Jeffrey Wright (p.470 of the Court Book)

(c) Witness Statement of Wendy Mason (p.477 of the Court Book)

(d) NDIA Efficient Cost Model for Disability Support Workers (p.489 of the Court Book)

(e) NDIA Efficient Cost Model (p.501 of the Court Book)

(f) StewartBrown - Aged and Financial Performance Survey - Sector Report - Financial Year 2018 (p.503), and

(g) StewartBrown - Aged and Financial Performance Survey - Sector Report - December 2018 (p.541 of the Court Book).

18. In relation to the ABI client cancellation claim, the list is missing the following evidence:

(a) NDIA Efficient Cost Model (p.501 of the Court Book), and

(b) StewartBrown - Aged and Financial Performance Survey - Sector Report - December 2018 (p.541 of the Court Book).

19. In relation to the ABI remote response claim, the list is missing the following evidence:

    (a) NDIA Efficient Cost Model (p.501 of the Court Book), and

    (b) Transcript PN1005-1007 (this may be incorrectly listed as being evidence that Ai Group relies on).

Question 2

20. We have already responded to many of these proposed findings.

21. Further, in our view many of the proposed "findings" are generic, somewhat vague, and in the nature of submissions rather than findings of fact. See for example items 3, 5, 8 and 9. Those 'findings' should not be made.

22. In relation to finding 1, we generally accept the proposition that it is, or will be, a condition of employment for many employees in the SCHCDS industry that they are required to have a current driver's licence. However, we do not accept that every employer imposes a condition precedent on employees that they have a valid driver's licence in order to obtain or continue employment in the industry.

23. In relation to finding 2, we agree that certain employers utilise broken shifts in such a way that the employee undertakes travel during the break portion of the shift. However, to the extent that the proposed finding infers some intention or motive on the part of employers (see the phrase "so that"), we dispute the proposed finding. In the vast bulk of cases, broken shifts are utilised because there is no meaningful work for the employee to be doing in between client appointments.

24. We dispute finding 3. We do not agree that the unpaid time is "effectively controlled by the employer".

25. In relation to finding 4, see items 105-106 of the table in Part A of our submission of 10 February 2020 and [58] of Part B of that submission.

26. In relation to finding 5, we refer to [23]-[29] of our 10 February 2020 submission.

27. In relation to finding 6, see [86]-[90] of our 10 February 2020 submission.

28. In relation to finding 7, we do not dispute that NDIS providers may claim up to 30 minutes for the time spent travelling to each participant, and up to 60 minutes in regional areas.

29. In relation to finding 8, we disagree with that submission.

30. In relation to item 9, the passage of Dr MacDonald's report is vague and generalised. It is also unclear *how* the ASU contends the "gendered character of caring work" impacts "work practices", or even *what* work practices are being referred to.

31. In relation to item 10, we do not consider that any broad-based finding can be made about the treatment of work travel in various industries.

Question 3

32. These proposed findings are largely addressed in our submission of 10 February 2020. See:

    (a) items 125-136 of the table in Part A of that submission; and

    (b) paragraphs [77]-[95] of Part B of that submission.

33. We agree with proposed finding 3.

34. In relation to proposed finding 8, we do not disagree with the first sentence. The second sentence is a vague submission.

Question 4

35. These proposed findings are partly addressed in our submission of 10 February 2020. See items 102-110 of the table in Part A of that submission and paragraphs [54]-[61] of Part B of that submission.

36. In relation to proposed finding 1, we refer to paragraph 22 above.

37. In relation to item 4, the proposed finding is not clear. Rather, the paragraph appears to simply summarise parts of the evidence.

38. In relation to item 6, the proposed finding is not clear. Rather, the paragraph appears to simply summarise parts of the evidence. While Mr Friend's evidence may have been 'uncontradicted', this part of his evidence was generalised and of a hearsay nature without the basis being disclosed, and so should be given little if any weight.

39. In relation to items 7-11, the proposed findings are not clear. Rather, the paragraphs appear to simply summarise parts of the evidence. Much of it is also evidence of a generalised nature or hearsay and should be given little if any weight.

40. In relation to proposed finding 15, the proposed finding is not clear. Rather, the paragraph appears to simply summarise parts of the evidence. Further, the evidence of Mr Quinn about how frequently he returns home during the course of the day suggests most of his work is undertaken close to his home and that he is not required to undertake substantial travel.

41. In relation to items 18-19, these paragraphs are in the nature of submissions rather than any proposed findings. It is unclear what findings the Commission is being urged to make. In any event, we disagree with the submissions.

42. In relation to items 20-21, our clients' views in relation to the reasonable time of travel are addressed in our submission of 13 September 2019 at paragraphs [8.1]-[8.15].

Question 6

43. Yes.

44. We refer to our submissions of 12 July 2019 and 13 September 2019 respectively which set out our clients' position on this issue.

Question 8

45. These proposed findings are addressed in our submission of 10 February 2020. See items 24-30 of the table in Part A of that submission.

Question 9

46. These proposed findings are partly addressed in our submission of 10 February 2020. See items 111-114 of the table in Part A of that submission and paragraphs [62]-[63] of Part B of that submission.

47. In relation to items 2, 5 and 6, these are not proposed findings but rather simply summarise parts of the evidence. The evidence is not challenged, although we question the weight to be attributed to it in the context of the issues in dispute. In relation to item 5, we dispute the characterisation of Mr Steiner being 'on duty' or 'working for more than 10 hours per day'.

48. In relation to item 7, it is in the nature of a submission rather than a proposed finding of fact. We refer to our submission of 12 July 2019 at paragraphs [8.20]-[8.25].

Question 10

49. These proposed findings are mostly addressed in our submission of 10 February 2020. See items 60-63 of the table in Part A of that submission; and paragraph [18] of Part B of that submission.

Question 11

50. The mechanism we propose is set out in our submission of 12 July 2019 at paragraph [8.27].

Question 13

51. No.

52. These proposed findings are addressed in our submission of 10 February 2020. See items 31-33 of the table in Part A of that submission.

Question 14

53. Items 1-5 are in the nature of submissions rather than any proposed findings. In any event, we disagree with those submissions and the characterisation of issues contained therein. We dispute that 'minimum wage obligations are avoided'. We dispute that the Award creates situations that are 'open to abuse'. We have otherwise addressed these submissions in previous submissions.

54. In relation to proposed finding 6, we do not dispute that broken shifts are a common occurrence for home care and disability support workers.

55. In relation to proposed finding 7, we do not dispute that the ability to break shifts may lead to an employee accumulating only a few hours of paid work.

56. In relation to proposed finding 8, we disagree with the characterisation of shifting the' burden and risk of delay and downtime'.

57. In relation to proposed finding 9, we refer to item 101 of the table in Part A of that submission and paragraph [53] of Part B of that submission

58. In relation to items 10-13, the proposed findings are not clear, as the paragraphs simply summarise parts of the evidence.

59. In relation to items 14-16, these are submissions rather than proposed findings of fact. In any event, we refer to our submission of 12 July 2019 at paragraphs [5.9]-[5.10] in which we indicated that our clients are not opposed to minimum engagement periods for part-time employees.

Question 15

60. No.

Question 16

61. Our clients agree, save that we refer to our comment at paragraph [19] of Part B of our submission of 10 February 2020.

Question 18

62. We do not consider it necessary to clarify the meaning of 'regular'. This phraseology is a common feature of the modern awards system in respect of the definition of 'shiftworker' for the purposes of

the entitlement to an additional week's annual leave. The phrase exists in a number of modern awards and has done so without any obvious issue since 2010.[4]

63. However, to the extent that the Commission is minded to include a definition, we would suggest the language in 22.1(b) of the *Supported Employment Services Award 2010*, which prescribes that the term 'regularly rostered' means '(that is, not less than 10 in any 12 month period)'.

Question 19

64. Our clients offer the following amendment to its proposed new clause 25.8:

> (e) If the employee is required to perform more than eight hours' work during a 24 hour care shift, that work shall be treated as overtime and paid at the rate of time and a half for the first two hours and double time thereafter, except on Sundays when overtime will be paid for at the rate of double time, and on public holidays at the rate of double time and a half. An employer and employee may utilise the TOIL arrangement in accordance with clause 28.2.

65. The above proposal is broadly consistent with the existing overtime provisions for full-time, part-time and casual employees under clauses 28.1(a) and (b), save that the overtime rate is triggered where work is performed in excess of 8 hours for casual and part-time employees, rather than 10 hours as specified in clause 28.1(b)(ii). Our clients' proposal would therefore provide a more beneficial entitlement than currently provided for under clause 28.1 of the Award.

AUSTRALIAN BUSINESS LAWYERS & ADVISORS
11 March 2020

[4] See, by way of example, the *Cleaning Services Award 2010*, the *Clerks—Private Sector Award 2010*, the *Health Professionals and Support Services Award 2010*, the *Nurses Award 2010*, and the *Supported Employment Services Award 2010*.