Australian Industry Group

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

Submission

(AM2023/28, AM2024/16 & AM2024/30)

17 January 2025

AM2023/28, AM2024/16 & AM2024/30

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

1. INTRODUCTION

1. This submission of the Australian Industry Group (**Ai Group**) concerns the material produced by the Fair Work Ombudsman (**FWO**) in response to a request from the Fair Work Commission (**Commission**) (**Material**).

2. THE CONTEXT

2. During proceedings before the Commission on 6 November 2024, Vice President Gibian indicated that a request may be made by the Commission to the FWO for *'historical versions'* of the guidance material now found on its website regarding the question of how the *Social, Community, Home Care and Disability Services Industry Award 2010* (**Award**) applies to the performance of work before and after a sleepover.[1]

3. The purpose of any such request was explained by the Vice President as follows:

> … I think it is relevant to the application so far as it seeks to retrospectively vary the award. I am probably simplifying what's said in the submissions, but on the basis that there's some recent change of understanding to know – and I just was directed to Justice Dowling's decision and saw that there was a reference to it dating back somewhat longer than seemed to be recorded in the witness statement material.
>
> It seemed to us to be relevant to know if there was advice to that effect published at a somewhat earlier date. …[2]

4. Later in the proceedings, the Vice President, during an exchange with counsel for Ai Group, stated that *'part of [Ai Group's] case on retrospectivity at least is that everyone was sort of blind sided'* by the FWO's view.[3]

[1] Transcript of proceedings on 6 November 2024 at PN2654.

[2] Transcript of proceedings on 6 November 2024 at PN2656 – PN2657.

[3] Transcript of proceedings on 6 November 2024 at PN2812.

5. In this context, the Vice President made observations regarding the extent to which there is evidence before the Commission regarding the FWO's compliance activity.[4] He also asked the following question:

> If the only evidence we have is that a relatively small number say that they didn't understand the award to work in a particular way isn't that relevant for us to take into account?[5]

3. AI GROUP'S POSITION AS TO RETROSPECTIVITY

6. Ai Group's submissions in support of why the variations it seeks should be made retrospectively are set out primarily at [51] – [55] of its submission in chief.[6] Counsel for Ai Group elaborated on these submissions during proceedings before the Commission on 6 November 2024.[7]

7. The arguments advanced do *not*, as such, rest on the proposition that employers have been *'blindsided'* by the FWO's position or that *'there's some recent change of understanding'*. Rather, our key submissions can best be summarised as follows:

   (a) There is a practice in the care sector of rostering work on both sides of a sleepover and treating them as separate periods of work.[8]

   (b) The Award is ambiguous and / or uncertain in a manner that is likely to have, and has in fact, misled persons as to its proper construction. The Commission can infer that a large quantum of past entitlements ride on that misconception.[9]

   (c) A substantial amount of disputation on the competing constructions of the Award has occurred, is occurring and is foreshadowed.[10]

[4] Transcript of proceedings on 6 November 2024 at PN2818 and PN2820.

[5] Transcript of proceedings on 6 November 2024 at PN2814.

[6] HB 46 – 47.

[7] Transcript of proceedings on 6 November 2024 from PN2807.

[8] Ai Group submission dated 11 June 2024 at [54] (HB 46).

[9] Ai Group submission dated 11 June 2024 at [52] (HB 46).

[10] Ai Group submission dated 11 June 2024 at [53] (HB 46).

8. The following aspects of the evidence are relevant to the above propositions (particularly those at paragraphs (b) and (c)):

   (a) On 21 June 2022, Ai Group wrote to the FWO in relation to the guidance material on its website and Facebook page concerning the manner in which work performed immediately before and after a sleepover was to be treated under the Award.[11] That correspondence was sent on the basis of concerns raised with us by employers covered by the Award about the FWO's interpretation.

   (b) On 5 October 2023, Ai Group again wrote to the FWO regarding the guidance material regarding work performed before and after a sleepover appearing on its website.[12] Despite urging the FWO to alter its position, it refused to do so.

   (c) The FWO has made statements in the media (including in an article dated 10 October 2023) that she is proactively auditing employers covered by the Award.[13]

   (d) In July 2024, the FWO identified that improving compliance in the care sector, including the disability support services sector, is one of its enforcement priorities.[14]

   (e) In its written submissions, Parkerville Children and Youth Care Inc (**Parkerville**) stated that there is ongoing disputation between it and the FWO regarding the proper interpretation of the relevant provisions in the Award.[15]

[11] Witness statement of Dean Keep dated 10 June 2024 at Annexure DK-5 (HB 320).

[12] Witness statement of Dean Keep dated 10 June 2024 at Annexure DK-5 (HB 316).

[13] Witness Statement of Brent Ferguson dated 29 July 2024 at [18].

[14] Witness statement of Brent Ferguson dated 29 July 2024 at [18].

[15] Parkerville submissions dated 11 June 2024 at [39](b) (HB 683).

(f) On 9 April 2021, Community Living Options (**CLO**) received advice from the FWO that a sleepover under the Award does not count as time worked, however if an employee worked before and after a sleepover this constitutes one continuous shift.[16] On 17 May 2021, CLO received further advice from the FWO in relation to the *Community Living Options Inc Enterprise Agreement 2019* (**CLO 2019 EA**) that, consistent with its position in relation to the Award, work before and after a sleepover was to be treated as one shift.[17]

(g) Accordingly, CLO sought to change its rostering arrangements, such that employees would be given fewer hours of work after a sleepover.[18] Between May and October 2021, the United Workers' Union (**UWU**) disputed the FWO's interpretation of the CLO 2019 EA and the proposed roster change.[19]

(h) During bargaining for a new enterprise agreement in 2023, CLO received feedback from a number of employees stating their preference to perform more hours of work after a sleepover compared to the two to three hours that was being offered by CLO as a consequence of the aforementioned roster change.[20] The UWU also expressed the same views during bargaining in June 2023.[21]

(i) In or around August 2023, the FWO contacted Anglicare Southern Queensland (**ASQ**) regarding an issue that had been raised with it by one of ASQ's employees concerning how they were to be paid when they performed work immediately before and after a sleepover under the Award. The FWO's interpretation of the Award different from that of ASQ.[22]

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[16] Witness Statement of Brett Rankine dated 11 June 2024 at [26] (HB 61).

[17] Witness Statement of Brett Rankine dated 11 June 2024 at [28] - [31] (HB 61 – 63).

[18] Witness Statement of Brett Rankine dated 11 June 2024 at [32] – [34] (HB 63 - 64).

[19] Witness Statement of Brett Rankine dated 11 June 2024 at [34] – [44] (HB 64—65) and Annexure BR-4 (HB 241) Annexure BR-5 (HB 243), Annexure BR-6 (HB 245) and Annexure BR-7 (HB 247).

[20] Witness Statement of Brett Rankine dated 11 June 2024 at [47] (HB 65-66).

[21] Witness Statement of Brett Rankine dated 11 June 2024 at [48] (HB 66).

[22] Witness Statement of Tammy Lloyd at [35]-[38] (HB 600); Annexure TL2 (HB 641).

(j) Rylea Considine gave evidence that in approximately July 2023, after raising issues with his manager at ConnectAbility regarding payment for overtime, he was advised by his employer that a sleepover is a break.[23]

(k) On 3 May 2023, the Australian Services Union (**ASU**) initiated a dispute in the Commission against All Care Australia (**ACA**) in relation to the manner in which care workers were remunerated for work performed before and after a sleepover.[24]

(l) On 11 September 2023, the FWO served ACA with a compliance notice (**First ACA Compliance Notice**) in relation to work performed immediately before and after a sleepover.[25] The First ACA Compliance Notice alleged that ACA had not correctly applied the Award to this work because it had failed to pay appropriate overtime and night shift penalty rates. The First ACA Compliance Notice was issued in relation to work performed between approximately July 2021 and February 2023. At this time, ACA rostered employees to perform a shift of ordinary hours from 2:00 pm – 10:00 pm before a sleepover, followed by a sleepover between 10:00 pm and 6:00 am, followed by a separate shift of ordinary hours from 6:00 am – 2:00 pm. Employees were paid on the basis that the two shifts constituted separate periods of work.[26]

(m) On 17 January 2024, ACA received a further compliance notice from the FWO in relation to work performed immediately before and after a sleepover (**Second ACA Compliance Notice**).[27] This compliance notice also alleged that ACA had not correctly applied the Award provisions relating to overtime entitlements and night shift penalties for work

[23] Witness statement of Rylea Considine dated 29 July 2024 at [20] (HB 1218).

[24] Witness statement of Dean Keep dated 10 June 2024 at [50]-[54] (HB 259); Annexure DK-1 (HB 270; Annexure DK-2 (HB 297).

[25] Witness Statement of Dean Keep dated 10 June 2024 at [56] - [57] (HB 260); Annexure DK-4 (HB 302).

[26] Witness Statement of Dean Keep dated 10 June 2024 at [46] (HB 258).

[27] Witness Statement of Dean Keep dated 10 June 2024 at [58] (HB 260); Annexure DK-6 (HB 331).

performed after a sleepover pursuant to the rostering arrangements described above.

(n) On 12 February 2024, ACA commenced proceedings in the Federal Court of Australia (**FCA**) seeking that the Second ACA Compliance Notice be cancelled or declared invalid, and also that its operation be stayed pending the outcome of these proceedings.[28] The FCA issued a decision and order staying ACA's application, pending the hearing and determination of these proceedings.[29] In deciding to grant the stay, his Honour Justice Dowling was relevantly satisfied that Ai Group's application in these proceedings had some prospects of success, including in relation to retrospectivity.[30] His Honour also accepted that the issue of payment for shifts contiguous to sleepovers is an industry-wide issue.[31]

(o) Jats Joint Pty Ltd also commenced similar proceedings in the FCA concerning a compliance notice issued by the FWO alleging similar contraventions to those in the First and Second ACA Compliance Notices.[32]

(p) Shelley Wall gave evidence of differing views amongst employers as to how the Award applies in the relevant circumstances. Some employers take the view that the Award permits work to be performed on both sides of a sleepover as separate periods of work, however others consider that the Award requires this work to be treated as a single, continuous period of work.[33]

[28] Witness Statement of Dean Keep dated 10 June 2024 at [59] (HB 260).

[29] Witness Statement of Dean Keep dated 10 June 2024 at [60] (HB 261).

[30] *All Care Australia Pty Ltd v Fair Work Ombudsman* [2024] FCA 545 at [43].

[31] *All Care Australia Pty Ltd v Fair Work Ombudsman* [2024] FCA 545 at [49].

[32] Witness Statement of Dean Keep dated 10 June 2024 at [62] (HB 261).

[33] Witness Statement of Shelley Wall dated 10 June 2024 at [63] (HB 404 - 405).

4. THE MATERIAL

9. Notwithstanding the above; we make the following salient observations regarding the Material.

10. *First,* employers are not required to seek to identify or consult the FWO's position as to the proper interpretation of an award, nor do they in practice routinely do so. Thus, little can be made of the fact that a version of the article was available since 2016. It would not be reasonable to expect or conclude that employers ought to have been aware of the FWO's position since that time.

11. *Second* and in any event*,* the *'original version'* published in the FWO's online *'library'* in September 2016[34] was, at best, apt to confuse and at worst, misleading, as to the FWO's position on the matter.

12. On the one hand, the article stated that:

    (a) Work performed before and after a sleepover constitutes one shift; and

    (b) A sleepover did not count as a break between rostered periods of work.

13. On the other, it provided the following example: (emphasis added)

> **Example: sleepover and shift allowances**
>
> Bernie works from 5pm until 10pm Monday, does a sleepover from 10pm until 6am then works from 6am to 9am on Tuesday.
>
> Bernie's shift finishes at 9am. <u>This isn't an afternoon or night shift. Bernie gets paid ordinary pay rates for 5pm to 10pm on Monday and for 6am to 9am on Tuesday.</u>[35]

14. The example is plainly inconsistent with the position articulated earlier in the advice (as set out above).

[34] Page 4 of the Material.

[35] Page 4 of the Material.

15. We also note that:

    (a) The article was available on the FWO's website for approximately one year (until October 2017).[36]

    (b) When it was republished in February 2018, the above example was amended such that it was consistent with the substantive position stated in the article: (emphasis added)

> **Example: sleepover and shift allowances**
>
> Bernie works from 5pm to 10pm Monday, does a sleepover from 10pm to 6am then works from 6am to 9am on Tuesday.
>
> A night shift is a shift finishing after midnight or starting before 6am Monday to Friday.
>
> As Bernie's shift finishes at 9am, Bernie gets paid the 15% night shift loading for the hours worked from 5pm to 10pm on Monday and 6am to 9am on Tuesday.[37]

16. It follows that the FWO's advice, when first published, was internally inconsistent. It was both confusing and misleading. An employer who sought to adopt the position described in the example would, in effect, have been led into error as to how the FWO regarded that the Award applied where an employee worked before and after a sleepover. Concerningly, it was available on the FWO's website for a considerable period of time.

17. Further, it is not apparent that the FWO alerted employers to the subsequent amendment made to its advice in February 2018 (or the publication of any of the subsequent iterations of the advice). To our knowledge, the FWO does not generally do so where revisions are made to articles published in its library. Certainly, the revised advice as published in February 2018 did not identify the relevant difference from the preceding article. Further, as we understand it, earlier iterations of such articles are not publicly available and thus, it would not have been possible for employers to compare and contrast the articles.

[36] Page 4 of the Material.

[37] Page 5 of the Material.

18. *Third,* in August 2024, after Ai Group's submission and evidence in support of its application had been filed,[38] the FWO revised the article in question. Relevantly, it inserted an example, for the first time, that deals with circumstances in which an employee preforms work (only) before a sleepover: (emphasis added)

> **Example: Work before or after a sleepover**
>
> Andrea works in disability support services.
>
> She is rostered to work 4pm-11pm on a Wednesday with a sleepover from 11pm to 7am.
>
> As the sleepover and the period of work is considered one shift, Andrea's shift starts at 4pm on Wednesday and finishes at 7am on Thursday.
>
> Andrea's shift is a night shift, because it finishes after midnight. She'll be paid the night shift penalty rate for the hours worked on Wednesday.[39]

19. This example goes to a separate and distinct proposition from the one that has been the focus of this proceeding and which was dealt with expressly in the earlier versions of the article; that is, how shift penalties are to be applied where work is performed on *both* sides of a sleepover. It has as a consequence become apparent that in the FWO's opinion, in such circumstances, the application of shift penalties is to be determined by reference to the start / finish times of the period that includes both the sleepover and the work before or after it. The rationale underpinning this is not clear, in circumstances where:

    (a) The Award defines an afternoon and night *'shift'* by reference to the time at which the *'shift'* starts and / or finishes;[40]

    (b) As acknowledged by the FWO, a sleepover does not *'count'* as ordinary hours;[41]

    (c) A sleepover does not constitute *'work'*;[42] and

[38] Which occurred on 11 June 2024.

[39] Page 17 of the Material.

[40] Clauses 29.2(a) and (b) of the Award.

[41] Page 17 of the Material.

[42] Ai Group submission dated 11 June 2024 at [21] (HB 37).

(d) By extension, a sleepover that follows or precedes a period of work cannot form part of a *'shift'* for the purposes of clause 29.2.

20. The circumstances are distinct from where two periods of *'work'* are performed on either side of a sleepover.

21. *Fourth,* the Material does not include a copy of the article that indicated that the advice set out therein was *'under review'*, between the period of approximately June 2022 – November 2022[43] - that is, some five to six months. This resulted in a period of considerable uncertainty as to the FWO's position regarding the proper interpretation of the Award.

[43] Referenced at HB 316.