

Australian Industry Group

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

**Submission**  
(AM2024/15)

**28 June 2024**

**Ai**  
**GROUP**

## AM2024/15

# APPLICATION TO VARY THE SOCIAL, COMMUNITY, HOME CARE AND DISABILITY SERVICES INDUSTRY AWARD 2010

## 1. INTRODUCTION

1. An application has been made by Mr Darren Hay (**Applicant**) to the Fair Work Commission (**Commission**) to vary the *Social, Community, Home Care and Disability Services Industry Award 2010* (**Award**).
2. In the material filed, the Applicant describes his claim as seeking the introduction of an obligation to make a payment to casual employees where a client cancels a scheduled service (**Client Cancellation**), pursuant to 25.5(f) of the Award (**Cancellation Clause**) (**Claim**). The Cancellation Clause currently applies to permanent employees only.
3. The specific proposal advanced by the Applicant is of broader import than his stated intent. It is as follows:

### (f) Client cancellation

- (i) Clause 25.5(f) applies where a client cancels a scheduled home care or disability service, within 7 days of the scheduled service, which a full-time, ~~or~~ part-time or casual employee was rostered to provide. For the purposes of clause 25.5(f), a client cancellation includes where a client reschedules a scheduled home care or disability service.
- (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 or the affected part of the 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 or part of the shift not been cancelled; or



5. The Applicant relies on the following grounds in support of his Claim:
  - (a) Casual employees have previously been paid (and some are still paid) for Client Cancellations.
  - (b) The National Disability Insurance Scheme's [Pricing Arrangements and Price Limits 2023-24](#) (**NDIS Pricing Guideline**), in respect of '*short notice cancellations*' is inconsistent with the Award.<sup>2</sup>
  - (c) The exclusion of casual employees from receiving payments under the Cancellation Clause is unfair, unlawful and discriminatory.
  - (d) The exclusion of casual employees from receiving payments under the Cancellation Clause discourages casual employees from seeking employment in the disability sector, which leads to labour shortages.
6. The Applicant has filed the following materials in support of his Claim:
  - (a) An application dated 14 March 2024; and
  - (b) Submissions dated 20 March 2024, 12 April 2024 and 9 May 2024.

**(Applicant's Material)**

7. The Australian Industry Group (**Ai Group**) files this submission in response to the matters raised in the Applicant's Material and in accordance with paragraph [1] of the directions issued by the Commission on 31 May 2024.
8. Ai Group strongly opposes the Claim and the Proposed Variation, for the reasons articulated in this submission. As we set out below, the Applicant's Material does not disclose any probative reason for varying the Cancellation Clause in the manner proposed; nor does it demonstrate that the Proposed Variation is necessary to ensure that the Award achieves the modern awards objective.

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<sup>2</sup> Applicant's submissions dated 20 March 2024, 12 April 2024, and 9 May 2024.

## 2. THE STATUTORY FRAMEWORK

9. It is not clear whether the Applicant is currently employed under the Award. In particular, the following submission suggests that the Applicant is potentially no longer employed by an employer covered by the Award: '*[w]hen I was working in the disability sector 3 years ago...*'.<sup>3</sup> To that end, it is not clear whether the Applicant has standing to make an application under s.158 of the *Fair Work Act 2009* (Cth) (**Act**).
10. In any event, s.157 of the Act empowers the Commission to vary the Award as sought by the Applicant only if it is satisfied that making a determination to that effect is necessary to achieve the modern awards objective.
11. The modern awards objective is defined at s.134(1) of the Act:
- (1) The FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:
    - (a) relative living standards and the needs of the low paid; and
    - (aa) the need to improve access to secure work across the economy; and
    - (ab) the need to achieve gender equality in the workplace by ensuring equal remuneration for work of equal or comparable value, eliminating gender-based undervaluation of work and providing workplace conditions that facilitate women's full economic participation; and
    - (b) the need to encourage collective bargaining; and
    - (c) the need to promote social inclusion through increased workforce participation; and
    - (d) the need to promote flexible modern work practices and the efficient and productive performance of work; and
    - (da) the need to provide additional remuneration for:
      - (i) employees working overtime; or
      - (ii) employees working unsocial, irregular or unpredictable hours; or
      - (iii) employees working on weekends or public holidays; or

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<sup>3</sup> Applicant's submissions dated 9 May 2024.

- (iv) employees working shifts; and
- (e) the principle of equal remuneration for work of equal or comparable value; and
- (f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and
- (g) the need to ensure a simple, easy to understand, stable and sustainable modern awards system for Australia that avoids unnecessary overlap of modern awards; and
- (h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

This is the ***modern awards objective***.

12. Section 138 of the Act requires that a modern award can contain provisions only to the extent that they are necessary to achieve the modern awards objective:

A modern award may include terms that it is permitted to include, and must include terms that it is required to include, only to the extent necessary to achieve the modern awards objective and (to the extent applicable) the minimum wages objective.

13. Section 138 of the Act limits the scope of provisions that may be included in a modern award. Ultimately, a modern award cannot include a term if it is not *necessary* to achieve the modern awards objective.
14. Later in this submission, we address why the Proposed Variation is not necessary to ensure that the Award achieves the modern awards objective.

### 3. THE CANCELLATION CLAUSE PRIOR TO THE 4 YEARLY REVIEW

15. The Award was first made on 4 December 2009, following the Part 10A Award Modernisation process.<sup>4</sup> Relevantly, the Cancellation Clause as found in the Award at that time stated as follows: (emphasis added)

#### 25.5 Rosters

...

##### (f) Client cancellation

- (i) Where a client cancels or changes the rostered home care service, an employee will be provided with notice of a change in roster by 5.00 pm the day prior and in such circumstances no payment will be made to the employee. If a full-time or part-time employee does not receive such notice, the employee will be entitled to receive payment for their minimum specified hours on that day.
- (ii) The employer may direct the employee to make-up time equivalent to the cancelled time, in that or the subsequent fortnightly period. This time may be made up working with other clients or in other areas of the employer's business providing the employee has the skill and competence to perform the work.<sup>5</sup>

16. It is apparent that the Cancellation Clause as found in the Award when it was first made, confined the obligation to make a payment for a cancelled shift to permanent employees. The Cancellation Clause remained unchanged up until the conclusion of the 4 yearly review of the Award<sup>6</sup> (which we turn to below).

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<sup>4</sup> [PR991066](#).

<sup>5</sup> [PR991066](#).

<sup>6</sup> [PR737905](#).

## 4. THE 4 YEARLY REVIEW

17. The 4 yearly review of the Award involved major proceedings, in which a Full Bench of the Commission considered a suite of significant proposed changes to the Award, including to the Cancellation Clause.
18. In particular, during the 4 yearly review of the Award, Australian Business Industrial (**ABI**) and the Health Services Union (**HSU**) relevantly sought to vary the Cancellation Clause in the following manner:
  - (a) ABI sought to expand the operation of the clause to disability services, remove the right for an employer to withhold payment for rostered work in the event of a Client Cancellation that occurred by 5pm on the preceding day, and attain more flexibility around the timetabling of make-up time.<sup>7</sup>
  - (b) The HSU sought to delete the Cancellation Clause in its entirety, or alternatively, amend the clause to ensure that the cancellation payment be made where 48 hours' notice had not been provided.<sup>8</sup>
19. Whilst various elements of the aforementioned claims were disputed by the participating parties, there was no contest as to whether the Cancellation Clause should also apply to casual employees.
20. The Commission ultimately determined to substantially vary the Cancellation Clause in a manner which gave effect (in broad terms) to ABI's claims.<sup>9</sup> The obligation to make a payment in the event of a Client Cancellation was not extended to casual employees.
21. In addition, as part of the 4 yearly review of the Award, the Commission also found that the changes made to minimum payment and broken shift provisions, amongst various other changes to the Award, would '*significantly impact businesses ... in particular they will increase employment costs; impose*

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<sup>7</sup> 4 yearly review of modern awards—Social, Community, Home Care and Disability Services Industry Award 2010—Substantive claims [2021] FWCFB 2383 (**May 2021 Decision**) at [795].

<sup>8</sup> May 2021 Decision at [774] – [775].

<sup>9</sup> 4 yearly review of modern awards—Social, Community, Home Care and Disability Services Industry Award 2010—Substantive claims [2021] FWCFB 5244 at [143] – [218] (**August 2021 Decision**).



*constraints on working arrangements (in particular they will have the consequence of reducing employer flexibility in rostering); and will result in increased regulatory burden.*<sup>10</sup>

22. In the circumstances, the Commission should approach any proposal to extend the operation of the Cancellation Clause to casual employees with caution. The cumulative impact of any such change, when coupled with the extensive variations made to the Award during the 4 yearly review, may have a significant adverse impact on employers. This is particularly so given the funding constraints facing many employers in the sector; a matter that we return to later in this submission. It is pertinent to note that whilst some changes were made to the NDIS funding model after the aforementioned variations were determined by the Commission, those changes do not extend to all of the variations that were made to the Award.

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<sup>10</sup> August 2021 Decision at [312].

## **5. RESPONSES TO THE APPLICANT'S CLAIM**

### **A. Purported Past and Current Practices**

23. The Applicant submits that he is aware that:
- (a) Last year, a casual employee had been paid for a Client Cancellation;
  - (b) Three years ago, when the Applicant was working in the disability sector, casual employees were paid for a Client Cancellation; and
  - (c) Some employers still pay casual employees for a Client Cancellation.<sup>11</sup>
24. The matters above do not rise beyond bare assertions and they are not supported by probative evidence. In particular:
- (a) The Applicant's Material does not disclose the identity of the relevant employer(s) and employee(s), which therefore precludes any assessment of the veracity of the assertions, as well as whether such employer(s) and employee(s) were / are in fact covered by the Award and whether the purported payments were made pursuant to the Award, an enterprise agreement, other industrial instrument or employment contract.
  - (b) The basis upon which the Applicant has the relevant knowledge is not apparent.
25. Even if such matters were properly substantiated by evidence, past and current practices of a certain employer, or a small number of employers, do not establish or demonstrate that the purported practice of paying employees for Client Cancellations is commonplace. We certainly do not accept that that is so.
26. For these reasons, the material before the Commission does not establish the assertions made by the Applicant. Even if such matters were established, they would be of limited (if any) relevance to the present matter.

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<sup>11</sup> Application dated 14 March 2024, response to Q2.4 and Q2.5. Applicant's submissions dated 9 May 2024.

## B. The Alleged Inconsistency between the NDIS Pricing Guideline and the Award

27. The following is stated in the current edition of the [NDIS Pricing Guidelines 2023-24](#), at page 23: (emphasis added)

### Short Notice Cancellations

Where a provider has a Short Notice Cancellation (or no show), they can claim 100% of the agreed fee associated with the activity from the participant's plan, subject to the *NDIS Pricing Arrangements and Price Limits* and the terms of the service agreement with the participant.

A cancellation is a short notice cancellation if the participant:

- Does not show up for a scheduled support within a reasonable time, or is not present at the agreed place and within a reasonable time when the provider is travelling to deliver the support; or
- Has given less than seven (7) clear days' notice for a support.

...

Providers can only claim from a participant's plan for a Short Notice Cancellation of the delivery of a support item to the participant if all of the following conditions are met:

- The NDIS Pricing Arrangements and Price Limits indicates that providers can claim for Short Notice Cancellations in respect of that support item; and
- The proposed charges for the activities comply with the NDIS Pricing Arrangements and Price Limits; and
- The provider has the agreement of the participant in advance (that is, the service agreement between the participant and provider should specify that Short Notice Cancellations can be claimed); and
- The provider was not able to find alternative billable work for the relevant worker and are required to pay the worker for the time that would have been spent providing the support.

28. The Applicant submits that the final dot point of the above extract is inconsistent with the Award. This submission seems to be premised upon a misunderstanding. Under the Award, there is currently no requirement to pay a casual employee in the event of a Client Cancellation. Accordingly, an employer cannot claim from a participant's plan where a cancelled service was to be fulfilled by a casual employee. Thus, the alleged inconsistency between the NDIS Pricing Guideline and the Award does not in fact exist.

29. In addition to the above, the NDIS Pricing Guideline also imposes various other limitations on an employer's ability to claim from a client's plan in the event of a Client Cancellation.
30. Specifically, a claim can only be made if the client agrees to it. In many cases, there is no incentive for a client to consent to such an arrangement, as it would, as a consequence, diminish the amount of funding available to the client to utilise in respect of other services or supports. Further, the extract above suggests that such claims can only be made in respect of certain types of services.
31. Accordingly, any suggestion that the Proposed Variation would not adversely impact employers who rely on NDIS funding should not be accepted.
32. Further, in circumstances where clients agree to spend their funding in respect of cancellations of services that were to be delivered by casual employees, this may limit the extent to which they are able to access other services and essential care. This would plainly have an adverse impact on such clients. This is an important discretionary consideration that weights against the grant of the Proposed Variation.

### **C. Exclusion of Casual Employees is Unfair, Unlawful and Discriminatory**

33. As to the Applicant's submission that excluding casual employees from the Cancellation Clause is unfair, the current statutory definition under s.15A of the Act (as referenced in clause 3.1 of the Award) identifies, as one of the key elements of casual employment, that there was no '*firm advance commitment to continuing and indefinite work*' when the employment was offered and accepted. In other words, it is inherent to the nature of casual employment, that there is no guarantee of work being made available. It is therefore entirely appropriate and consistent with the nature of casual employment, that casual employees do not have the benefit of receiving any payment under the Award in respect of Client Cancellations. Similarly, the notion of '*make up time*' in the context of casual employees is paradoxical.

34. Indeed, in keeping with this notion, under clause 25.5(c) of the Award, there is also no requirement for an employer to display a roster of the ordinary hours of work for a casual employee. To the extent that any employer *elects* to identify work offered to casual employees, or work offered to and accepted by casual employees, on a roster, this does not and should not alter the position under the Cancellation Clause. The '*rostering*' of casual employees in such circumstances reflects nothing more than a method of communicating the offer (or, offer and acceptance) of work by casual employees. It does not amount to a guarantee of work which might, in turn, give rise to an entitlement to payment if the work is cancelled.
35. The above submissions would not, in our view, be impacted by the new statutory definition of a casual employee that is due to commence on 26 August 2024. The new definition also identifies, as a key element of casual employment, that the relationship be characterised by '*an absence of a firm advance commitment to continuing and indefinite work*'.<sup>12</sup>
36. As to the Applicant's submission that excluding casual employees from the Cancellation Clause is unlawful and discriminatory, this is entirely without basis. The statute (including s.153(1) of the Act) does not prohibit a term of a modern award from applying only to permanent employees. It is trite to observe that industrial instruments contain numerous provisions which apply only to permanent employees and not casual employees, and vice versa (for example, the casual loading under clause 10.4 of the Award).

**D. The Exclusion of Casual Employees Discourages them from Seeking Employment in the Disability Sector**

37. There is no evidence that the exclusion of casual employees from the Cancellation Clause is deterring them from seeking employment in the disability sector. The Applicant's assertion in this regard should be dismissed outright.

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<sup>12</sup> Section 15A of the *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* (Cth).

38. Further, during the 4 yearly review, the evidence showed that approximately 3.83% to 5.68% of services were cancelled at short notice.<sup>13</sup> This demonstrates that only a small proportion of services tend to be impacted by Client Cancellations. Any suggestion that a casual employee bases their decision as to whether to engage in employment in the disability sector on whether a payment will be made in a small number of potential instances is, in our submission, unpersuasive.

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<sup>13</sup> May 2021 Decision at [784](4).

## **6. SECTION 138 AND THE MODERN AWARDS OBJECTIVE**

39. Ai Group contends that the Applicant's Claim and Proposed Variation are not necessary in the sense contemplated by s.138 of the Act. In the submissions below, we address the mandatory considerations contemplated by s.134(1) of the Act. In essence, it is our submission that a case has not been made out for the Proposed Variation and it should not be made.

### **The Relative Living Standards and the Needs of the Low Paid (s.134(1)(a))**

40. There is no evidence that the Applicant's Claim will materially improve the relative living standards and needs of the low paid. This is particularly so given the relatively low incidence of Client Cancellations (and, presumably, the even lower incidence of such cancellations affecting casual employees).

### **The Need to Improve Access to Secure Work across the Economy (s.134(1)(aa))**

41. This is a neutral consideration in this matter. The Proposed Variation would not improve *access to 'secure work'*.

### **The Need to Achieve Gender Equality in the Workplace (s.134(1)(ab))**

42. This is a neutral consideration in this matter.

### **The Need to Encourage Collective Bargaining (s.134(1)(b))**

43. Given the notoriously low margins in the sector, the Proposed Variation would potentially discourage employers from bargaining, as it would again raise the bar for the application of the better off overall test, in circumstances where this bar has already been significantly raised as a result of the changes flowing from the 4 yearly review of the Award.
44. This matter weighs against the Proposed Variation.

**The Need to Promote Social Inclusion through increased Workforce Participation (s.134(1)(c))**

45. This is a neutral consideration. There is no evidence that the Proposed Variation would increase workforce participation.

**The Need to Promote Flexible Modern Work Practices and the Efficient and Productive Performance of Work (s.134(1)(d))**

46. The Proposed Variation is not conducive to flexible modern work practices and the efficient and productive performance of work.<sup>14</sup> It would require payment to be made to an employee in circumstances where the employee is not engaging in productive work on account of a matter that is not within the employer's control.

47. This matter weighs against the Proposed Variation.

**The Need to Provide Additional Remuneration for Working Overtime; Unsocial, Irregular or Unpredictable Hours; Weekends or Public Holidays; or Shifts (s.134(1)(da))**

48. This is not a relevant consideration in this matter.

**The Principle of Equal Remuneration for Work of Equal or Comparable Value (s.134(1)(e))**

49. This matter is a neutral consideration.

**The Likely Impact on Business, including Productivity, Employment Costs and Regulatory Burden (s.134(1)(f))**

50. Many employers covered by the Award are small, not-for-profit organisations that rely very heavily on Government funding. The potential imposition of new obligations relating to payment for Client Cancellations for casual employees (that has never existed in the Award) would likely have an adverse impact on

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<sup>14</sup> Section 134(1)(d) of the Act.



businesses. They would impose new, potentially substantial costs on employers that may not be recoverable under the NDIS.

51. Employers would also likely need to expend time, resources and costs to amend and test payroll functionalities to capture Client Cancellations insofar as they impact casual employees. Further resources may need to be expended to consult affected, or potentially affected, clients.
52. This matter weighs heavily against the granting of the Applicant's Claim.

**The Need to Ensure a Simple, Easy to Understand, Stable and Sustainable Modern Award System (s.134(1)(g))**

53. As to the need to ensure a '*stable and sustainable modern award system*', this factor weighs against the grant of the Proposed Variation. There is no certainty for employers in being able to determine if, and to what extent, costs incurred as a result of the Cancellation Clause can be recouped under the current funding arrangements – given that funding for cancellation payments is entirely dependent on clients agreeing to pay for such costs. This issue may give rise to a need to reconsider the issue in due course (for example, on application by an employer covered by the Award or on behalf of such employers).
54. Further, the Cancellation Clause was recently considered and substantially redrafted by the Commission as part of the 4 yearly review of the Award. To that end, to revisit the ambit and operation of the Cancellation Clause as sought by the Applicant, would potentially undermine the maintenance of a stable and sustainable modern awards system.
55. Further, it is not clear how the elements of the Cancellation Clause that relate to make-up time could sensibly be applied to casual employees. Accordingly, the provision would not be simple and easy to understand.

**The Likely Impact of any Exercise of Modern Award Powers on Employment Growth, Inflation and the Sustainability, Performance and Competitiveness of the National Economy (s.134(1)(g))**

56. There is no material before the Commission to enable a proper consideration of this matter.