Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Reply Submission – Claims Concerning Travel

Social, Community, Home Care and Disability Services Industry Award 2010 (AM2018/26)

16 September 2019

Ai GROUP

AM2018/26 SOCIAL, COMMUNITY, HOME CARE AND DISABILITY SERVICES AWARD 2010

CLAIMS CONCERNING TRAVEL

1. INTRODUCTION

1. The Australian Industry Group (**Ai Group**) advances these submissions in response to the Australian Services Union (**ASU**) United Voice and the Health Services Union (**HSU**) claims relating to the payment of travel undertaken by employees (**Travel Time Claims**) and the HSU's proposed variation to clause 20.5(a), which relates to the vehicle allowance provided by the *Social, Community, Home Care and Disability Services Industry Award 2010* (**Award**).

2. The submission addresses the following matters:

   (a) The context in which the claims are advanced, including a consideration of the relevant circumstances of the industry and the other claims being pursued by the unions.

   (b) The nature and effect of the proposed variations.

   (c) The operation of relevant current award provisions.

   (d) Considerations associated with the merit of the claims, including:

      (i) The current funding arrangements;

      (ii) Concerns over the workability of the Travel Time Claims; and

      (iii) The modern awards objective.

   (e) Specific arguments relating to the HSU's proposed amendments to the current award provisions governing when a vehicle allowance is payable.

2. THE CONTEXT IN WHICH THE CLAIMS ARE ADVANCED

3. It is uncontentious that the work of some employees covered by the Award requires employees to work at different locations during the course of a single day.

4. Moreover, we doubt that it is contentious that in some instances employees will travel directly and immediately between consecutive clients in order to undertake such work. In other instances, employees may, during the course of a single day, undertake work at different locations but at times which mean that there is a substantial break between the time spent undertaking client facing work.

5. It should be uncontentious that the above described working arrangements are widespread and long standing in the context of this sector. This is both reflected in the material filed in these proceedings and the provisions of various predecessor instruments to the Award.

6. The implementation of the National Disability Insurance Scheme (**NDIS**) and the resulting necessity for the implementation for client-orientated working arrangements in the sector has, we argue, been an even greater catalyst for the adoption of such practices than traditional funding arrangements. This is because:

   (a) Employers now have reduced capacity to schedule the manner in which clients are serviced; and

   (b) There are limits on the amount an employer in this sector can charge for time spent travelling.

7. In thiss context, United Voice, the ASU and the HSU have advanced claims and submissions that variously assert that time spent travelling between clients either is or should be regarded as ‘work’ and that it should attract a relevant payment. The HSU has also sought to expand the circumstances in which the vehicle allowance currently provided under the Award applies, so as to make employers liable for an employee’s costs associated with getting to and from work.

8. In assessing the unions' claims, the Full Bench should consider the degree of interconnectedness between them and the other claims advanced in the context of these proceedings. In this regard we point in particular to the claims advanced by the unions relating to minimum engagements and restrictions on the use of broken shifts. Without accepting that any of the proposed variations are warranted, we observe that granting any of the proposed changes would lessen the force of any argument that the other changes are necessary, in the sense contemplated by s.138 of the *Fair Work Act 2009* (**Act**).

9. The various proposed changes may be seen as different mechanisms to address many of the unions' underlying concerns about employees undertaking short periods of work that do not provide sufficient remuneration for the associated effort and cost of getting to and from such work and the associated disutility of performing such work. For example, the granting of a minimum engagement period would negate the validity of arguments that there is a need to also provide additional entitlements directed at compensating employees for travel that they undertake to or from work.

3. THE CLAIMS

10. The HSU, ASU and United Voice have all proposed provisions dealing with payment for travel undertaken by employees covered by the Award. In certain respects, the claims are relatively similar, although it is important that the Full Bench appreciates that they do reflect subtly different approaches. In the section below we identify what we perceive to be the effect of the relevantly overlapping proposed variations.

11. As previously mentioned, the HSU has also proposed a variation to the current provisions of clause 20.5(a), which provides for the payment of a vehicle allowance. It appear that it is intended to operate in addition to the entitlements that would flow from the Travel Time Claims.

The HSU’s Travel Time Claim

12. The HSU has proposed a variation to the Award provisions regulating broken shifts to provide a payment for travel that may be undertaken in the course of a break during a broken shift:

> **(d)** Where an employee works a broken shift, they shall be paid at the appropriate rate for the reasonable time of travel from the location of their last client before the break to their first client after the break, and such time shall be treated as time worked. The travel allowance in clause 20.5 also applies.

13. A number of observations can be made about the effect of the proposed provision.

14. *Firstly*, it only operates in the context of a broken shift. In this regard, the claim varies from that advanced by other unions.

15. *Secondly*, the clause requires payment for the “reasonable time of travel from the location of [an employee’s] last client before the break to their first client after the break”. In this regard, the provision does not appear to require payment for time an employee actually spends travelling between the aforementioned locations. Instead, it appears to contemplate an assessment of what constitutes “reasonable time of travel” between such locations. This might serve to create a basis for calculating an entitlement where an employee does not travel directly between such clients (given the employee is on a break and free to undertake other activities in the interim); an arrangement that is likely not uncommon.

16. This element of the clause appears to potentially place some limitation on the payment an employer is liable to make under the clause. It might, for example, mean that an employer is not required to pay the entirety of the period of time that an employee spends travelling between such locations if they elect to undertake such travel by means of car during peak hour conditions if it could have been undertaken more efficiently at a different time. It might also mean that an employer is not put to the costs of paying for time spent travelling via an inefficient route or mode of transport.

17. *Thirdly*, there is no articulation of how or when such travel is to be undertaken. It does not specify the mode of transportation or the route that must be undertaken for the purposes of making the relevant assessment.

18. *Fourthly***,** the clause provides that the "reasonable time of travel" is to be "treated as time worked". This appears to reflect an appropriate acknowledgment by the HSU that travel between clients in the context of a broken shift will not be work and will not attract a payment under the Award, where it occurs during a break. It also appears that the intent is for the clause to effectively deem the reasonable travel time as being time worked by force of the Award, or at least to compel an employer to treat the time as though it was spent working.

19. The purpose for which such time is to be treated as time worked is not clear; but we assume that it is to be so treated at least for all purposes under the Award. Accordingly, we assume that it is to be treated as time worked so as to attract a relevant payment under the Award.

20. It is unclear as to whether the HSU intends that such time to be treated as time worked in a broader sense. For example, is such time intended to be regarded as time worked in the context of the Act or other legislative or regulatory schemes, such as relevant workers compensation and workplace health and safety laws. We return to this issue in section 6 of our submission.

The United Voice & ASU Travel Time Claim

21. The ASU and United Voice have proposed the following variation:

25.7 Travel time

(a) Where an employee is required to work at different locations they shall be paid at the appropriate rate for reasonable time of travel from the location of the preceding client to the location of the next client, and such time shall be treated as time worked. The travel allowance in clause 20.5 also applies.

(b) This clause does not apply to travel from the employee's home to the location of the first client nor does it apply to travel from the location of the last client to the employee's home.

22. The claim advanced by the ASU and United Voice is, in various respects, similar to that advanced by the HSU. As such, most of the observations pertaining to the HSU's proposed clause are apposite to the United Voice proposal.

23. The claim advanced by these unions is however different in that it does not only apply in relation to travel undertaken during breaks that occur in the context of a broken shift.

24. It is not clear whether the proposed clause applies in the context of notional travel between the "preceding" and "next" client when the work is undertaken on a single day, single shift, single engagement or some other unspecified context. This issue does not arise in the context of the HSU provision given it operates in the context of a broken shift, as defined in the Award.

25. It is particularly unclear how the proposed provision would operate in the context of casual employment. It is arguable that under the Award, a casual employee may be able to be employed on entirely separate engagements on the same day without attracting the application of the broken shift provisions. On one view, where this occurs the minimum engagement provisions of the Award would have application. If the proposed variation was adopted, such a casual employee might also receive the benefits flowing from the proposed clause.

26. We do however acknowledge that ASU and United Voice proposal also expressly, and in our view appropriately, excludes travel between an employee's home and the location of a client. This does not however clarify what occurs if the employee does not travel from their "home" to work or from work to "home".

27. Put simply, the operation of the proposed clause 25.7(b) is not clear. The provision does not actually reference the context in which a client is to be assessed as being either the first or last client. It may be that it is the first and/or last client per engagement that is excluded. If so, this would negate the potential application of the clause to casual employees who are engaged to perform work for particular clients.

The HSU's Additional Claim

28. The HSU has proposed a variation to clause 20.5(a) so that it provides as follows:

> **(a)** Where an employee is required and authorised by their employer to use their motor vehicle in the course of their duties, the employee is entitled to be reimbursed at the rate of $0.78 per kilometre. Disability support workers and home care workers shall be entitled to be so reimbursed in respect of all travel:
>
> **(i)** from their place of residence to the location of any client appointment;
>
> **(ii)** to their place of residence from the location of any client appointment;
>
> **(iii)** between the locations of any client appointments on the basis of the most direct available route.

29. We understand the effect of the proposed variation to be that travel which does not occur in the course of an employee's duties would attract the payment of the vehicle allowance.

30. The claim only provides for payment in relation to travel that is actually undertaken, although clause 20.5(a)(iii) appears to provide an alternate "basis" for calculating the amount that is payable to a mechanism that is simply linked to the kilometres actually travelled.

4. THE CURRENT AWARD PROVISIONS

31. Before responding to the individual claims, it is convenient to address the current Award provisions.

32. It must firstly be observed that the Award already provides a travelling allowance:

> **20.5 Travelling, transport and fares**
>
> **(a)** Where an employee is required and authorised by their employer to use their motor vehicle in the course of their duties, the employee is entitled to be reimbursed at the rate of $0.78 per kilometre.
>
> **(b)** When an employee is involved in travelling on duty, if the employer cannot provide the appropriate transport, all reasonably incurred expenses in respect to fares, meals and accommodation will be met by the employer on production of receipted account(s) or other evidence acceptable to the employer.
>
> **(c)** Provided that the employee will not be entitled to reimbursement for expenses referred to in clause 20.5(b) which exceed the mode of transport, meals or the standard of accommodation agreed with the employer for these purposes.

(d) An employee required to stay away from home overnight will be reimbursed the cost of reasonable accommodation and meals. Reasonable proof of costs so incurred is to be provided to the employer by the employee.

33. On its face, this provision is directed at compensating an employee for the costs of travel undertaken in the course of their duties. No party appears to have undertaken an analysis of the history of the provision.

34. This application of clause 20.5 was considered by Commissioner Saunders in *Re Alzheimer's Australia WA Ltd*[1]*.* Here, an application was made for approval of an enterprise agreement that contained a provision similar to clause 20.5(a). Commissioner Saunders noted that both provisions provided for a travel allowance of not less than $0.78 per kilometre to be paid to an employee when the employee is required and authorised to use their motor vehicle in the course of their duties. Although it was not necessary for him to decide this point, Commissioner Saunders stated:

> **[7]** The SACS Award does not specify when an employee commences their duties, whereas the Agreement does. Clause 18.8 of the Agreement makes clear that an employee commences their duties each day on arrival at the first place of work and finishes work on departure from the last place of work for the day. For a Support Worker who travels to and between the residences of clients, the residences of the clients are the Support Worker's places of work (clause 18.9 of the Agreement).
>
> **[8]** Although the SACS Award does not expressly state when an employee commences their duties, if an employee made a claim under the SACS Award for the payment of a travel allowance in respect of their travel from their home to the residence of their first client for the day in circumstances where the employee's usual practice was to travel from their home directly to the residence of a client, I am of the view that such a claim would not succeed. That is because an employee's duties do not commence until they arrive at their workplace. For an employee who is engaged to provide services at the residences of clients, the employee's places of work are the residences of their clients. Accordingly, the SACS Award would, in my view, be given the same interpretation as clauses 18.8 and 18.9 of the Agreement in the circumstances to which I have referred.
>
> **[9]** Because the Agreement confers on a Support Worker an entitlement to the payment of a travel allowance insofar as the Support Worker is required to travel more than 20km from their home to the residence of a client whereas the SACS Award does not, the Agreement provides a benefit over and above the SACS Award. Accordingly, in my view, the motor vehicle allowances in the Agreement are more beneficial than the motor vehicle allowances in the SACS Award.

[1] [2016] FWCA 4863.

35. The Award also compensates employees for the time they spend travelling where this occurs in the course of their work or duties. Such work would attract the application of award provisions providing for the remuneration of the performance of work (i.e. the minimum hourly rates and penalty rates etc). However, where an employee is engaged exclusively to undertake work at a client's premises, they would not receive payment under the Award for time that they spend travelling to or from such location. Relevantly, an employee would not receive such compensation in relation to travel undertaken during the breaks that occur in the course of a broken shift.

36. It also relevant to consider the provisions of the Award dealing with the arrangement of ordinary hours of work and rostering. This includes the provisions dealing with 'broken shifts' and any requirement to structure hours of work in a continuous manner. In simple terms, the relevance of such matters is that the Award provides mandatory payments for work performed. The pertinent issue for consideration in the context of the current proceedings is consequently the extent or manner in which an employee's employment may be structured such that activities performed either before or after assisting a client might be said to fall outside an employee's employment and therefore not attract payment under the Award on the basis that such activities do not constitute work.

37. Clause 25 deals with ordinary hours of work and rostering. It is relevant to observe that clause 25.1 deals with the arrangements of ordinary hours:

> **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 and will be worked either:
>
> **(i)** in a week of five days in shifts not exceeding eight hours each;
>
> **(ii)** in a fortnight of 76 hours in 10 shifts not exceeding eight hours each; or
>
> **(iii)** in a four week period of 152 hours to be worked as 19 shifts of eight hours each, subject to practicality.

(b) By agreement, the ordinary hours in clause 25.1(a) may be worked up to 10 hours per shift.

38. Significantly, although clause 25 provides for very restrictive limits on the span of ordinary hours that may be worked, it does not provide that ordinary hours must be worked *continuously*.

39. The ASU appears, arguably erroneously, to contend that the hours of work for employees other than disability service workers must be performed continuously. We understand that they contend that this is a product of clause 25.6, which deals with the issue of broken shifts in the following terms:

> **25.6** This clause only applies to social and community services employees when undertaking disability services work and home care employees.
>
> **(a)** A **broken shift** means a shift worked by an employee that includes one or more breaks (other than a meal break) and where the span of hours is not more than 12 hours.
>
> **(b)** Payment for a broken shift will be at ordinary pay with penalty rates and shift allowances in accordance with clause 29—Shiftwork, with shift allowances being determined by the finishing time of the broken shift.
>
> **(c)** All work performed beyond the maximum span of 12 hours for a broken shift will be paid at double time.
>
> **(d)** An employee must receive a minimum break of 10 hours between broken shifts rostered on successive days.

40. Clause 25.6 is limited in its application to social and community service employees undertaking disability services work and home care employees. On its face, clause 25.6 appears to do four things:

(a) Define a broken shift[2];

(b) Provide for payment for hours of work on a broken shift[3];

(c) Set a maximum span of hours for a broken shift beyond which double time rates apply[4]; and

[2] Clause 25.6(a).

[3] Clause 25.6(b).

[4] Clause 25.6(c).

(d) Provided a minimum 10 hour beak between broken shifts rostered on successive days.[5]

41. On a literal reading of the Award, clause 25.6 does not permit the working of broken shifts but instead regulates the use of broken shifts that may otherwise be worked under the terms of the Award. It is, on one view, the flexibility afforded under clause 25.1, and in particular the absence of any requirement for ordinary hours of work to be performed in a continuous manner that enables work to be structured under the award around 'breaks'.

42. The above framework is relevant to a determination of whether time spent undertaking travel currently attracts a payment under the Award.

43. In simple terms, time spent travelling by an employee at the direction of their employer, and in the course of their employment, will already attract payment and constitute time worked. That is, where an employer directs an employee to travel in the course of their employment it will constitute work and must be paid.

44. However, time that an employee spends travelling, either before or after work, will not attract a payment. This is not a novel proposition. It represents the manner in which most awards typically operate. Further, time spent travelling during a break on a broken shift will not attract payment.

5. THE CURRENT FUNDING ARRANGEMENTS

45. Ai Group has previously filed detailed written submissions regarding the operation of the NDIS funding arrangements.[6]

46. In addition, we draw the Commission's attention to the following information displayed on the NDIS' website as at the time of drafting this submission which

[5] Clause 25.6(d).

[6] Chapter 5 of the Ai Group Submission dated 8 April 2019.

summarises the funding arrangements in relation to travel undertaken by employees:

Provider travel

The length of time providers can claim for travel has changed, effective 1 July 2019.

If agreed by participants, providers can claim for the time spent travelling to each participant, for core supports—as indicated by the travel column in the Support Catalogue 2019–20. Only the actual travel time can be claimed, up to a maximum of:

- 30 minutes within city areas (MMM 1–3)
- 60 minutes in regional areas (MMM 4–5).

This is an increase from 20 and 45 minutes, respectively. Examples are provided to help give further clarification. Refer to the NDIS Price Guide 2019–20.

Providers delivering capacity-building supports are also able to claim time spent travelling from the last participant to their usual place of work. The maximum amount that can be claimed for return travel is 30 minutes within city areas and 60 minutes in regional areas.

Before providers can charge for travel, they must first discuss and get agreement on any changes with the participant. Once an agreement is reached, providers will need to update the relevant service bookings to reflect the changes agreed.

47. As is apparent from the above extracts, NDIS funding in respect of travel undertaken by employees providing 'core supports' is constrained in the following ways:

    (a) Funding is available only if the client / participant agrees that the provider may claim the funding. Such agreement would diminish the amount of funding available to the participant to utilise in respect of other services or supports. Unless an employer declines to provide the relevant services if the participant does not agree to the funding being claimed, there is, as such, no imperative for a participant to consent to the funding being claimed.

    (b) A maximum of 30 minutes of travel can be claimed in respect of travel in 'city areas' and up to 60 minutes can be claimed in 'regional areas'. In the context of large cities that suffer from significant congestion (such as Sydney and Melbourne) it is readily apparent that 30 minutes of travel time may fall well short of the time an employee actually spends travelling from

one client to the next. The same can be said of long distances travelled in regional areas.

48. We acknowledge the Commission's recent decision[7] in relation to the 'tranche 1' claims and the observations it made about Ai Group's previous submissions about the constraints imposed by the NDIS funding arrangements. We understand that these funding arrangements are not determinative of the matter. In our submission, however, they weigh heavily against the grant of the claim for the reasons articulated later in this submission in relation to the modern awards objective. We emphasise the unfairness that will be visited upon employers in circumstances where they are prohibited under the NDIS from recovering the costs that would be associated with paying an employee for time spent travelling pursuant to the unions' claims unless the relevant prerequisites are satisfied.

6. WORKABILITY OF THE PROPOSED TRAVEL TIME CLAUSES

49. The claims advanced by the unions have been the subject of extensive conferencing before the Commission. Since the commencement of Ai Group's involvement in these proceedings, we have openly and consistently expressed concern about the workability, from a practical perspective, of proposals that are intended to require payment for travel undertaken in the context of beaks or non-work time. [8]

50. There has ultimately been no serious attempt or indeed willingness by the unions to grapple with such issues or to address them through the refinement or amendment of the claims they are seeking to propose. Consequently, the unions have proposed provisions directed at establishing a new and significant entitlement to payment for travel which are not only in various respects unjustifiable, but also manifestly unworkable.

[7] *4 yearly review of modern awards – Group 4 – Social. Community, Home Care and Disability Services Industry Award 2010 – Substantive Claims* [2019] FWCFB 6067.

[8] See, for example the transcript of the Conference before Commissioner Lee on 31 January 2019

51. In this section we identify the various problems that would flow from the proposed provisions. This is discrete from arguments that we will raise as to whether, from a broader merit perspective, it is appropriate to impose additional obligations upon employers covered by the Award to provide additional payment for travel undertaken by employees.

52. We also observe that these proceedings are being conducted through the prism of the specific proposals advanced. In this context, the unions have been given ample opportunity to refine their claims and the cases that they have advanced in support of their proposals. The Commission has already devoted significant resources to facilitating conferences concerning parties' claims.

53. If the Full Bench is not satisfied that a case for the specific variation proposed is made out, it is appropriate that the Full Bench exercise its discretion to not make the relevant variations for the reasons that follow. Put bluntly, while we accept that in the course of the current award review the Commission is not bound by the terms of a party's claim, it should similarly not be sufficient for a party in this review to propose an ill-thought-out proposal in the blatant hope that the Commission will, if not satisfied that the specific claim advanced is warranted or workable, undertake the process of developing an alternate provision to address the party's concerns over the operation of the Award. Such an approach unfairly requires respondent parties to expend their resources (including, where relevant, costs) to respond to multiple iterations of a claim.

54. In relation to the specific practical problems or deficiencies with the travel time claims proposed, we raise the following points.

55. *Firstly*, the unions' approach of requiring payment by reference to travel which is notionally, but not actually, undertaken is fundamentally flawed.

56. The approach would leave an employer in the difficult position of having to determine what the reasonable travel time in the relevant context would be absent any guidance as to how to approach this task. This is very problematic given that travel times between locations can vary wildly due to variables such as traffic conditions.

57. The unions have made no attempt to explain how an employer would calculate the reasonable travel time in circumstances where the travel is not actually undertaken.

58. *Secondly*, even if it were assumed that the provisions only require an employer to pay for time actually spent travelling, no effort has been made to consider how an employer would be able to verify what time was spent undertaking such travel.

59. It might be suggested that this could be achieved through monitoring the employee's location through electronic means. However, no effort has been made to establish through submission or evidence how this could occur. There are also limits under state legislation on the extent to which employers can undertake surveillance of their employees. For example, the *Workplace Surveillance Act 2005* (NSW) prevents surveillance of employees while they are not at work.[9]

60. *Thirdly*, it cannot be assumed that an employee engaged under the Award to perform work at different locations on the same day, but who is not directed to undertake the travel in the course of their duties will, as a matter of fact actually travel directly from one client to the next. Take, for example, the circumstances of an employee working a broken shift who may perform a couple of hours in the morning but then may not be required to perform work at another nearby location until several hours later. There is no reason to conclude that the employee will actually travel directly between the locations of the two clients without undertaking some deviation (such as to obtain lunch, return home or undertake some other activity).

61. *Fourthly*, if an employee has been engaged to perform work at two different locations on the same day but has not been directed to undertake the travel between such locations in the course of their duties, the employee will retain control over the time at which they travel. This could have a significant impact on

[9] Section 47.

the time they spend travelling. It is unclear how the requirement to only pay for reasonable travel time would address this issue.

62. The reference to "reasonable travel time" contained in the proposed clauses is also inherently imprecise and accordingly inappropriate for inclusion in the safety net, given that the provision potentially creates significant monetary entitlements.

63. *Fifthly*, there are a raft of problems, uncertainties and likely unintended consequences that will flow from a requirement to deem or "treat" time that is not work as work. Relevantly, the following question inevitably arise in relation to this aspect of the provision's proposed operation:

   - For what purposes will such time be considered time worked? Is it only for purposes under the Award or is the intended that it be regarded as time worked for the purposes of determining employer obligations under the Act and/or other legislation or regulation (this would include legislation dealing with workplace health & safety, workers compensation and long service leave)?
   - Will such work form part of the employee's ordinary hours of work?
   - Will employees accrue or be credited NES entitlements by reference to such time?
   - Will an employer, by virtue of the clause, have capacity to direct an employee's conduct during such time?

64. If the effect of the proposed clause is to deem time spent travelling as time worked, for all purposes under the Award, it may also give rise to a number of difficulties and potentially unintended consequences associated with the manner in which the provision interacts with other Award clauses. This would include provisions dealing with rostering, ordinary hours of work, types of employment, overtime and penalty rates. The current practical application of all of these provisions would potentially be altered by the proposed clause.

65. Ai Group doubts that an award clause can have the legal effect of causing a notional period of time to constitute work under any legislative scheme. However, at the very least, an award clause that has the effect of requiring an employer to treat such time as time worked, without specifying the purpose for which it should be so treated would be potentially very confusing.

66. *Finally*, we would observe that none of the proposed clauses specify the mode of transport that is assumed to be adopted for the purposes of the clause.

7. SECTION 138 AND THE MODERN AWARDS OBJECTIVE – TRAVEL TIME CLAIMS

67. Ai Group contends that the Travel Time Claims are not necessary in the sense contemplated by s.138 of the Act. In the section below we address the mandatory considerations contemplated by s.134(1).

The relative living standards and the needs of the low paid (s.134(1)(a))

68. An assessment of whether this matter weighs either for or against the claim is not straight forward.

69. In its treatment of this issue, the ASU contends that “if employees are paid for travel time, their incomes will increase”. To the extent that this an accurate assessment of the outcome that would flow from the granting of the ASU or other unions claims, it might reasonably be asserted that the needs of the low paid would support the granting of the claim.

70. The evidence advanced does not permit the conclusion that employees will always benefit from the proposed variation.

71. As already identified, there are funding constraints that mean an employer may, in some circumstances, not be able to recover amounts paid pursuant to the proposed provisions. It is likely that some employers will accordingly respond to any such variation by seeking to minimise their exposure to such unrecoverable costs. This may mean that the employer either declines to provide a relevant service that it might otherwise provide, or that it allocates the work to its workforce in a manner that avoids the obligation to make the relevant payments. In the

second scenario it might, for example, minimise the extent to which it offers multiple engagements to an employee on the same day. Either way, it is entirely foreseeable that the proposed variation could have the perverse effect of actually reducing the amount that some employees earn under the Award.

72. Any assumption that employers will simply incur additional unrecoverable costs is unrealistic and ought not be adopted by the Full Bench in weighing the merits of the claim.

73. This matter we here identify temper the extent to which a consideration of the matters identified in s.134(1)(a) could be said to weigh in favour of the claims.

The need to encourage collective bargaining (s.134(1)(b))

74. To the extent that either employees or the relevant unions strongly support the adoption of enhanced entitlements pertaining to travel undertaken by employees, it can be argued that declining to afford such an outcome through the Award could encourage such employees to engage in collective bargaining to obtain such an outcome.

75. It is also arguable that the kinds of matters raised in the unions' claims are perhaps best dealt with at the enterprise level. This would, for example, enable parties to develop agreement provisions that reflect enterprise specific practices relating to travel. Such an approach might be more feasible than the development of provisions in a safety net that must be workable in the context of all employers.

76. In support of our contentions we observe that it appears that parties covered by the Award do bargaining over issues associated with payment for travel. Nonetheless, we accept that there is no evidence before the Commission to establish that these issues have, to date, themselves been a major catalyst for widespread collective bargaining in the sector.

77. Given the notoriously low margins in the sector, we also observe that the proposed variation would potentially discourage employers from bargaining as it would 'raise the bar' for the application of the "better off overall test".

78. Ultimately, we contend that a consideration of the need to encourage collective bargaining is matter that might be said to weigh against the claim, but we accept that it would by no means be a determinative consideration.

The need to promote social inclusion through increased workforce participation (s.134(1)(c))

79. This is not a matter that would weigh in favour of the claim. Indeed, it may weigh against the claim, although we accept that it is not possible to be definitive about the specific impact that the claim would have on such matters, based on the material advanced.

80. As already indicated, it is foreseeable that some employers will respond to being saddled with additional unrecoverable costs by limiting their exposure to such costs. This may take the form of a reduction in the services they provide or limiting the allocation of work to individual employees. Either outcome may reduce workforce participation.

81. The ASU contends that if workers are paid for the time actually worked, they may reduce their weekly hours of work. To the extent that this occurs it may actually reduce workforce participation.

82. The ASU optimistically submits that this will create opportunities for other workers to increase their hours. It is not clear how this will actually increase total employment. Moreover, it cannot be simplistically assumed that the labour of such workers is always readily substitutable or even available. Indeed, this is an especially problematic proposition given current and impending issues associated with labour shortages in the sector.

83. There is no merit to the ASU contentions that if employed workers are paid for the hours they actually work it will increase the hours that they work. The outcome will just result in additional pay, not additional labour force participation.

The need to promote flexible modern work practices and the efficient and productive performance of work (s.134(1)(d))

84. To the extent that the proposed clauses would cause employers to modify their rostering practices to negate the application of the provisions, a consideration of the matters identified in s.134(1)(d) would be inconsistent with the granting of the claim. It may mean that employees who could most efficiently and productively perform the relevant task cannot viably be utilised. To take a practical example, if an employee provides services to a particular client in the morning there may be a range of efficiencies that can be achieved by having the same employee provide services to the same client in the afternoon. However, the proposed clauses would incentivise, if not force, employers to consider allocating the discrete engagements to different employees in order to avoid the proposed new obligations.

85. Union submissions to the effect that the proposed provisions will cause employers to arrange work so that it can be undertaken continuously by an employee ignore the realities of the sector and in particular the impact of the NDIS on such matters. It should not be assumed that employers commonly elect to roster work in a manner which is inefficient. Instead, there are external pressures that dictate the manner in which work may be arranged, not the least of which is the client driven nature of work that is undertaken in the context of the NDIS.

86. Ultimately, we observe that the ASU submissions relating to s.134(1)(d) do not actually grapple with how the variation will encourage modern work practices or the efficient and productive performance of work. They instead appear to be directed towards the implicit contention that their claim might reduce unpaid waiting time which is not currently regarded as work under the Award.

87. At paragraph 31 of the ASU's submissions they point to a range of current Award provisions that are said to afford employers in the sector with a significant amount of flexibility. In response we observe that various union claims advanced in these proceedings seek to alter such provisions and undermine the "flexibility" afforded under the Award.

The need to provide additional remuneration for working overtime; unsocial, irregular or unpredictable hours; weekends or public holidays; or shifts (s.134(1)(da))

88. 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))

89. The ASU contends that “the failure to pay travel time” is an equal remuneration matter. The material advanced does not establish this proposition.

90. The comparison between conditions for disability support workers under the Award and the conditions under the *Business Equipment Industry Award 2010* (**Business Equipment Award**) is inaccurate and consequently unhelpful. Relevantly, the ASU has not acknowledged that the Business Equipment Award contains an exemption provision that has the effect of rendering many of the provisions of the award not applicable to employees in the technical stream if they are in receipt of a salary above a certain level.

91. Regardless, the limited material advanced does not allow a proper comparison of the work undertaken by employees covered by the two awards.

92. It should not be accepted that the approach to regulating brokens shifts or travel time is a product of any gender-based considerations. The provisions reflect the unique nature of the industry.

93. It must also be observed that not all travel that would attract payment under the travel time claims would constitute work, as contemplated under s.134(1)(f).

The likely impact of any exercise of modern award powers on business, including productivity, employment costs and regulatory burden (s.134(1)(f))

94. A consideration of s.134(1)(f) weighs heavily against the granting of the claims.

95. The unions’ proposed claims would have a dramatic impact on employers in this industry and the manner in which work in the sector is undertaken. The potential

imposition of new obligations relating to the payment for travel which are fundamentally out of step NDIS funding arrangements is a major concern for elements of the industry covered by the Award and has indeed been a significant catalyst for Ai Group's involvement in the proceedings.

96. It is axiomatic that the claims will have an adverse impact on business. They will impose new, and in many instances significant, costs on employers. For the reasons already explained, many employers will be prohibited from recovering such costs under current funding arrangements.

97. Ai Group accepts that the NDIS' funding arrangements are not of themselves determinative of whether the proposed provisions are a necessary element of the safety net. They are, nonetheless, a relevant consideration. The Full Bench should give careful consideration to whether it is *fair* to impose upon employers such a radical change to Award obligations in circumstances where it is apparent that the employers (for reasons beyond their control) are unable to recover such costs and where they will, at least in some circumstances, have no capacity to avoid incurring the costs.

98. The claims will also expose employers to costs that are potentially very difficult to foresee with precision. For example, the period of time that an employee may spend in traffic travelling might be expected to vary dramatically depending on variables such as the time of day which it is undertaken and the geographical location at which such travel occurs.

99. To the extent that the claims will require employers in the sector to measure or indeed calculate time spent travelling (or notionally travelling) by their workers, in circumstances where they are not currently so required, it will also impose an administrative burden on such employers.

100. The claims may also undermine an employer's capacity to undertake particular work if the costs of travel time cannot be recovered, thus resulting in a reduction in revenue. Such difficulties may also render it difficult for employers to afford their employees sufficient levels of work.

The need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards (s.134(1)(g))

101. The proposed clauses are far from simple or easy to understand. We here refer to earlier observations regarding the operation of the provisions and their "workability".

102. We also contend that the need to ensure a "stable and sustainable modern award system" weighs against granting such fundamental changes to the obligations that the Award imposes upon employers absent certainty around whether such entitlements can be met under current funding arrangements. Any submission that funding arrangement will change to mirror award obligation should be treated cautiously in the context of such a significant change to the Award. There are of course no certainties regarding whether funding arrangements will be altered to reflect the outcome of these proceedings.

103. We also here observe that it is not apparent how the funding arrangements could be altered to provide cost recovery for the kind of entitlements contemplated by the claims.

104. In advancing these submissions we accept that our arguments may have less force once the price caps that currently constitute such a substantial feature of NDIS funding arrangements are ultimately removed. However, in the current context, the potential impact of the claims on employers, and the extent to which the proposals would be simply unaffordable, should lead the Full Bench to declining to grant the claims.

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))

105. There is insufficient material before the Commission to enable a proper consideration of the matters identified in s.134(1)(g).

8. THE HSU'S VEHICLE ALLOWANCE CLAIM

106. The HSU has proposed the following amendments to the current clause dealing with the payment of an allowance to employees using their own motor vehicle:

(a) Where an employee is required and authorised by their employer to use their motor vehicle in the course of their duties, the employee is entitled to be reimbursed at the rate of $0.78 per kilometre. Disability support workers and home care workers shall be entitled to be so reimbursed in respect of all travel:

(i) from their place of residence to the location of any client appointment;

(ii) to their place of residence from the location of any client appointment;

(iii) between the locations of any client appointments on the basis of the most direct available route.

107. The extent to which the proposed amendments would extend the current obligation is somewhat unclear. The last sentence of the provision is interconnected with the operation of the first sentence of the current clause. It relevantly provides that "Disability support workers and home care workers shall be entitled to be so reimbursed in respect of all travel". It is accordingly unclear whether the amended provision would merely operate to clarify that the identified instances of travel by an employee using their own motor vehicle would attract payment under the clause, when the threshold requirements that such travel be undertaken in the course of their duties and that it is authorised by the employer are met, or, whether it is simply intended that all use of an employee's motor vehicle in respect of any of the identified circumstances of travel would attract the payment regardless of whether it is undertaken in the course the employee's duties or is authorised.

108. The wording of the proposed amendment also fails to clarify whether an individual needs to utilise their own vehicle in order to receive the payment, or whether merely undertaking the identified travel is sufficient.

109. The provision is far from simple and easy to understand. As such a consideration of the matters referred to in s.134(1)(g) would weigh against granting the claim.

110. The union's submissions are similarly somewhat unclear as to whether the travel time needs to occur during work (that is, in the course of the employee's duties)

for the obligation to apply. Indeed, the intended operation of the proposed new provision is not directly explained in the submissions. In this regard they simply submit as follows:

> The HSU makes claims for variation of the Award to ensure that it achieves the modern awards objective by:
>
> > c) amending the "Travelling, transport and fares" clause, to ensure that employees are compensated appropriately for the cost of travel required to perform their duties – (Clause 20.5; ED 16.3(c)) – S19)

111. It might reasonably be inferred from the reference to "*the cost of travel required to perform their duties*" that the union intends for the clause to cover not only travel undertaken in the course of the employee's duties but also travel that enables the performance of the duties or which is a consequence of the performance of their duties.

112. The HSU's submissions do, however, address the manner in which the existing provision is applied in industry.[10] They contend, in effect, that the evidence suggests that disability support workers and home care workers perform work travelling to their first client and from the final client but that such work is not regarded by some employers as occurring in the course of their duties.

113. The union also identifies some limited evidence that they intend to lead that they contend, in effect, establishes that some employers regard travel undertaken in the context of a break that occurs during a broken shift as not being undertaken in the course of an employee's duties and therefore as not attracting compensation.[11]

114. Ai Group agrees that, subject to the terms of an individual employee's engagement, travel to an initial client and travel that occurs after servicing a final client for the day, are activities would not form part of an employee's duties.

115. Under the terms of the Award, it is open to an employer to engage an employee on the basis that they commenced work at the location of their first client and

[10] At paragraphs 41 and 42

[11] Ibid at 42 (we assume that the reference here to compensation is intended to cover reimbursement pursuant to clause 20.5)

conclude it at the location of their last client. In such circumstances, travel from wherever an employee may be prior to first commencing work for the day or to wherever they next go after finishing work for the day is not part of their duties, as contemplated by clause 20.5. The situation may be different in circumstances where an employee is required to attend a separate location (such as an employer's premises) before or after undertaking work for a client, or where an employer directs that the travel be undertaken in a particular manner.

116. It seems that the union's intent is to require the all travel undertaken by disability support workers and home care workers be paid for the rate of $0.78 per kilometre, regardless of whether or not it is undertaken in the course of their duties. That is, it is intended to compensate employees for the costs of getting to or from work.

Arguments against the claim

117. Imposing an obligation on an employer to reimburse or compensate an employee for the cost of getting to or from work would be a very significant change to the safety net.

118. The proposal would unfairly expose employers to potentially open ended and uncontrollable costs. Under the proposal, the amount an employee earns would in large part be dependent upon where they elect to live. Indeed, under the proposal an employee could move to a location a significant distance from the location of clients that their employer services and consequently impose unreasonable additional costs upon their employer.

119. The union appears to argue that travel undertaken by disability support workers "well exceeds the usual travel engaged in by employees to and from their workplaces". However, an evidentiary basis for such an assertion is not made out. The material does not identify the amount of travel typically undertaken by employees so as to enable such a comparative analysis.

120. The proposal is also out of step with NDIS funding arrangements. Accordingly, employers operating under this regime would not be able to recover the costs that would flow from the implementation of the proposed clauses 20.5(a)(i) or

20.5(a)(ii). Depending on the circumstances, the costs associated with the application of the proposed clause 20.5(a)(iii) would be similarly unfunded.

121. The HSU has not made out a sufficient case to establish that the proposed variations are necessary, in the sense contemplated by s.138.