IN THE FAIR WORK COMMISSION
AT SYDNEY
Matter No.: AM2018/26
S 156 – Four yearly review of modern awards – Social, Community, Home Care and Disability Services Industry Award 2010

JOINT SUBMISSION OF THE AUSTRALIAN SERVICES UNION, HEALTH SERVICES UNION, AND THE UNITED WORKERS UNION OF 10 FEBRUARY 2020

TABLE OF CONTENTS

INTRODUCTION

1. This submission is made according to the directions issued by the Fair Work Commission on 5 December 2019, and follows the order set out in those directions. This submission is made jointly by the ASU, HSU and UWU (**collectively** '**the Unions'**). Where a submission is made by only one or two of the unions, that is indicated.

FINDINGS SOUGHT BY OTHER INTERESTED PARTIES (5 December Directions (a) & (b))

ABI 19 November 2019 Submission

2. The Unions' responses to the General findings contended for by the ABI at [2.5] to [2.25] of its submission appear below in response to Question 4.

3. The Unions make some observations about those general findings.

4. First, whilst they accept that the change in approach to funding within both disability services and aged care in the home has given rise to different pressures on service providers, there is limited evidence before the Commission currently about the practical operation of block funding, such that a realistic comparison of the operation of services under the two models may be made. The Commission would not think that block funded service providers had no pressure to be responsive to client demands or preferences, nor that the change to a different model is only associated with a diminution of the available funding. In fact, both areas have benefitted from a massive investment of funds since the introduction of the schemes[1].

5. Second, the extent to which the change to funding models has caused changes in patterns of behaviour or demand from clients is not clear from the evidence before the Commission. The Commission would appreciate that for many persons requiring support by reason of disability or age, the fundamental requirements of daily living remain more or less the same.

6. Third, to the extent employers emphasise the mission and motivation of employees who work in the sector, that focus should not distract the Commission from the task of analysing whether the current terms and conditions of the Award provide fair and relevant minimum standards. The philanthropic are just as entitled to the benefit of section 134 as those who are merely trying to make a living. As the Full Bench accepted in the *Equal Remuneration Case* [2011] FWAFB 2700[2] in relation to the SACS industry, an undue focus on the caring nature of the work can disguise the level of skill and experience required in order to perform the work and contribute to undervaluation of the work. A focus on the laudable non-economic motivations of workers should not distract from the serious issue of burnout, and difficulties with attraction and retention in these industries.

AIG 18 November 2019 Submission

7. The findings contended for the AiG in its Submission which are contested by the Unions are set out in further detail herein.

NDS 19 November 2019 Submission

[1] Stanford CB 1451, [15]

[2] at [253] – [254]; the Full Bench appeared to implicitly accept the evidence of Professor Meagher which is referred to at [36] and [37] of that decision.

Broken Shifts and Minimum Engagement

8. On 19 November 2019, NDS filed a further unsigned statement of Mr Steven Miller, the Head of Operations – Service Delivery at the Endeavour Foundation. Mr Miller's additional statement was provided in circumstances where he had been asked a series of questions by the Commission when he gave his oral evidence on 17 October 2019.

9. That series of questions and his answers are set out following:

> *There is a final question for you. In response to a question from Mr Robson, I had understood your evidence to be, Mr Miller, that in relation to - I'm talking here about employee shifts that you would roster in response to client demand?---Yes.*
>
> *I had understood your evidence to be that the minimum duration of a shift would be two hours and that was the case for casual and part-time employees. Was that what you said?---No, that wasn't my intent behind that answer. Our minimum engagement is two hours, but that doesn't refer to a single shift length. That's my understanding of our - - -*
>
> *All right. So how do you see it working?---Again I'm not an expert on our industrial agreement so this is my interpretation of our wording if it's a minimum engagement of two hours in a single day, but I would have to defer back to - - -*
>
> *No, no, that's all right. I wasn't so much asking you for an interpretation of the agreement or the award?---Yes.*
>
> *I was just trying to get an understanding of is your practice - - -?---Yes.*
>
> *What is your practice in relation to rostering part-time employees, for example. If you had a split shift, for argument's sake, on a particular day - - -?---Yes.*
>
> *- - - or even a single continuous shift on a day, do you have any information about, well, what is the usual practice in relation to how long such an employee is engaged continuously? For example, with a part-timer - - -?---Yes.*
>
> *- - - is it the usual practice that they would work for a minimum period of time on each day? Continuously here is what I'm talking about?---Mm-hm.*
>
> *For argument's sake, if you had a split shift and they were working a period in the morning and a period in the afternoon, is there a usual minimum period that applies to both the morning and afternoon; because I think I've misunderstood your answer to Mr Robson and I just want to understand in a bit more detail how you go about that. I appreciate that you don't have the material in front of you and you'll need to confer with your rostering staff, and you can provide that material to Mr Pegg. Okay?---I would certainly like to, yes, have a look at the data on that rather than making any sort of assumptions.*
>
> *That's fine?---I would say that we apply - we try to apply in the rostering practice day-to-day some fair and reasonable sort of, you know, allocation of shifts and we try to avoid calling people in for shorter shifts if we can*.[3]

10. The additional witness statement of Steven Miller purports to provide additional data and analysis in relation to the use of broken shifts at Endeavour Foundation. However, it is difficult to comprehend and reconcile the data that has been provided for several reasons.

[3] Miller XXN, 17.10.19, PN2061-PN2070

11. First, the gravamen of the Commission's questions to Mr Miller concerned the minimum length of a shift, or the work performed by an employee. Mr Miller's statement has made no attempt to answer that question. Given the relevant passage of transcript is specifically cited in filing the statement, the Commission would not think Mr Miller or his representatives were not alive to the question being asked, or able to comprehend it. No attempt is made to explain why the relevant information has not been provided. That failure adds to the overall pattern of the employers declining to reveal the patterns of work they employ.

12. Second, Mr Miller has only provided data of the instances where there has been a "break" in shifts of over 1 hour in duration. Nothing in the Award defines a broken shift as one which is broken by a period of more than one hour. The adoption of that measure begs the question why. It suggests that there are "breaks" in shifts of less than one hour which are not regarded as "broken"; that is, that Endeavour has employees working discontinuously, that is, with work time interspersed with periods of "down time" of less than one hour, where such "gaps" are not considered to amount to a break in the shift. This practice was evident in respect of other employers[4]. If those breaks have not been factored into the data, the data that has been provided is likely to mislead the Commission about the real state of the organisation's practice.

AFEI 19 November 2019 Submission

Overtime

13. The Unions seek the following findings in relation to its claim to vary the overtime provisions for part-time and casual employees:

    a. employers in the home care and social and community services sectors rely on part-time employees regularly working additional hours above their contracted weekly or fortnightly hours.[5]

    b. employers gave evidence that high numbers of additional hours worked by employees did not give rise to a review of employees' guaranteed hours.[6]

    c. under current award provisions there is little incentive for employers to review employees' guaranteed hours.

    d. under current award provisions, full-time employees work up to 8 ordinary hours per shift, and can only work a 10 hour shift by agreement.[7] However, part-time and casual employees can be required to work 10 hour shifts without agreement, without payment of overtime.[8]

[4] Quinn CB 3053 [15], [20], Thames CB 2963 [13]
[5] Statement of Joyce Wang, [46]-[48], CB 207; Transcript, 18 October 2019, cross-examination of Joyce Wang PN 3572 – PN 3605; Transcript, 17 October 2019, cross-examination of Jeffery Wright, PN2652 – PN2658; Statement of Jeffery Wright, [35], CB474.
[6] Transcript, 18 October 2019, cross-examination of Joyce Wang, PN3605; Transcript, 17 October 2019, cross-examination of Jeffery Wright, PN2659 - PN2667.
[7] SCHCDS Award, clause 25.1
[8] SCHCDS Award, clause 28.1(b)(ii)-(iii)

e. for part-time and casual employees working broken shifts, current award provisions means they are rarely entitled to overtime when working over a 10 hour span, unless they work beyond the 12 hour span for a broken shift.[9]

14. The Unions contest the following proposed findings of AFEI in relation to the HSU's overtime claims:

Proposed Finding A-2 – There are employees who work part-time because it suits them

15. This proposed finding and the evidence on which this is purportedly based erroneously equates part-time employees indicating their availability and unavailability to their employer to employees having a preference for part-time work. In fact, the evidence as to the state of the industry shows a decline in the hours per week being worked by part-time employees, at the same time that many employees are seeking additional hours, as AFEI's proposed finding A-5 suggests.

16. Ms Sinclair's evidence that she works in a second, casual role, at a chemist and therefore is not available for shifts at certain times does not support the finding that employees work part-time because it 'suits them'. It simply reveals that she works a second job in addition to her part-time role.

17. Mr Wright's evidence that some care workers indicate they are not available in the middle of the day, between a morning and afternoon shift, similarly should not be taken as support for the finding that employees prefer part-time work. Mr Wright should not be presumed to know the motivations of employees for indicating such availability.

Proposed Finding A-3 - Part-time employees want to work additional hours

18. The Unions agree with this proposed finding. However, as the evidence of Dr Stanford indicated, such demand may be conditional on other factors, and the question of additional hours should not be considered in isolation from the terms and conditions associated with the performance of the hours:

> *So if the award was varied in a manner that caused employers to offer fewer hours of work to individual employees, would you accept then that that might undermine the attractiveness of the employment in the industry?---It depends on the nature of the change in the award and what else was in play there. There could be workers who would accept fewer hours of work but more predictability in the work or accept fewer hours of work but better compensation, so I can't possibly answer the question in the general form that you've put it[10].*

Proposed Finding A-5 - If the Award is varied as sought, this would have a detrimental impact on both the availability of part-time employment as a flexible yet permanent work option for employees, and on employer costs

19. ABI's witness evidence on the projected impact of the HSU's proposed variations was vague and lacked sufficient detail. Its witnesses could not substantiate how the figures provided for in their witness statements were arrived at. Ms Wang could not account for how the figure of 1863 hours provided in her witness statement was arrived at.[11] Mr Wright could not explain

[9] SCHCDS Award, clause 25.6(c)
[10] Stanford XXN, 17.10.19, PN 2256
[11] PN3596

how the figure of 14,000 hours he provided in his witness statement compared to the total hours worked overall, and how many or what proportion of employees were asked to work additional hours.[12]

Minimum Engagements

20. The Unions disagree with the following proposed findings of AFEI in relation to the HSU's minimum engagement claims:

    Proposed Finding B-3 - Employees in this sector typically work with the same clients on an ongoing basis

21. AFEI mistakenly conflates working with a client on an ongoing basis with attending to a client on multiple occasions in the same day. There was very scant evidence that clients require the same carer over multiple points in a single day. We refer to our response to ABI Proposed Finding [5].

    Proposed Finding B-5 - Existing arrangements for broken shifts in the Award are appropriate to the industry

22. This is a vague and unsubstantiated assertion. It should be rejected.

    Proposed Finding B – 6 The variation sought by the HSU would detrimentally impact on the provision of services in this sector, ultimately affecting service users

23. The evidence cited by AFEI does not support this assertion.

24. The statements of Mr Wright cited by AFEI are vague and the basis for them is unclear; they cannot not be relied on to support this proposed finding.

25. Moreover, in cross-examination Mr Wright gave evidence that Hammond Care tries to '*give runs to people*'[13] and that efforts are made to '*give a care worker a worthwhile shift pattern*'.[14] His evidence was that engagements of only two hours were rare, and that employees typically worked longer shifts.

    > *Travel to, work two hours, be paid for two hours, nothing else, and then that's the end of your day?---That would not be common. I can't say it doesn't happen, but efforts would be made to give a care worker a worthwhile shift pattern*.[15]

26. AFEI misrepresents the evidence of Mr Steiner. In the citation provided, Mr Steiner was asked in cross-examination about the importance of 'ongoing' and 'consistent' care over time, and the quotation ascribed to Mr Steiner was in reference to this, and not to the same carer attending to the client in multiple times in a day.

Travel Time

The Unions challenges to the findings proposed by AFEI are set out as follows. References are to paragraphs [G1] through [G5] of their Submission of 19 November 2019.

[12] PN2657 - 2658
[13] Transcript, 17 October 2019, PN 2616.
[14] Ibid, PN 2619.
[15] Ibid.

Where employees do travel a considerable distance, such travel is undertaken on an irregular basis (Paragraph [G2])

27. AFEI mischaracterises the cross-examination of Heather Waddell. Ms Waddell's evidence is that in the past she had travelled up to 250 kms regularly (See paragraphs [11] through [12] of her Statement), but she now worked with different clients which did not require such extensive travel. (PN1389-1414). There was no dispute that Ms Waddell had travelled extensively for work on a regular basis in the past. It cannot be relied upon to establish a general proposition that long distance travel is irregular. Mr Steiner gave evidence of travelling for considerable periods in the Hunter Valley to attend appointments.

Employees do not always use their breaks to travel from one client to another.

28. This proposed finding would not be embraced by the Commission. Where a worker (in home care or disability services) has a break in their shift, they will ordinarily undertake travel to the next appointment before the recommencement of their shift.

An employer has limited control over the time it takes for an employee to get from one client to another due to a number of factors including to traffic (Paragraph [G5])

29. It is correct that employers may not control traffic or other factors that may impact the time it takes to travel to any location. That is fundamental to the circumstance of any employer requiring an employee to undertake travel in relation to their work. The Unions contend that the travelling time between clients' residences would in most cases be predictable within a reasonable range. Employers are able to schedule and allocate workers to perform appointments across different locations, which task must necessarily involve some assessment of the travel time required between the locations. Where travel to and between particular locations is carried out regularly, the Commission would think employers would have a very good idea of those travel times.

SUBMISSIONS IN REPLY TO WRITTEN SUBMISSIONS AT PARAGRAPH [4] OF THE DECEMBER 2019 STATEMENT (5 December Directions (c))

ABI 19 November 2019 Submission

Variation to the Client Cancellation Provision – ABI Submission 3.1 – 3.13

30. ABI, by its Draft Determination dated 15 November 2019[16] seeks to extend the operation of the existing cancellation clause at clause 25.5(f) of the Award into disability services. The current clause applies only in respect of the cancellation of a home care service. ABI also seeks to extend the period during which employers may require an employee to work make-up time to compensate for a cancelled appointment beyond the current provision, in accordance with which make up time must be worked in the current of following fortnight.

Remote Response Work – ABI Submission 3.1 – 3.13

31. The Union's response to this part of the ABI's Submissions appears below in response to Question 18 and following.

[16] CB 5-6

HSU Claims for Minimum Engagement – ABI Submission 5.1 – 5.15

32. Currently, the Award provides no minimum engagement for permanent employees.

33. Casual minimum engagements appear at clause 10.4(c). Casual home care employees have the lowest minimum of one hour. Casual SACs workers, except disability services workers have a minimum engagement of three hours. Other casual workers have a minimum engagement of 2 hours.

34. The HSU seeks a minimum engagement of three hours for all employees under the Award[17].

35. The claim is advanced on the basis that the Award allows exploitative working patterns. Employers within the industry allocate workers to perform shifts as brief as 15 minutes and half an hour in length[18]. The remuneration from shifts of such brevity would not justify the time and cost required for the worker to attend the shift.

36. The Unions note that at 5.5 of its submissions ABI is not opposed to the introduction of minimum engagements for part-time employees provided they are consistent with minimum casual periods of engagement and attendances for staff meetings, training/professional development are subject to a minimum engagement of an hour.

37. As to the latter proviso, so far as ABI seeks to reserve a one hour minimum engagement for staff meetings and the like, ABI does not identify any other award with like provision. Given the rationale for minimum engagements is the avoidance of exploitation resulting from having the income generated by an attendance at work outweighed by the time and cost of attendance, there is no basis for exempting any particular work related activity from any minimum engagement provision.

38. So far as the substance of the claim is concerned, ABI contends, at 5.7 that short shifts are a very common feature in the SCHCDS industry.

39. The Unions do not accept that such shifts are a common feature of the *industry*. Rather, the evidence only went so far as to show that such shifts are prevalent in the working arrangements of home care and disability services workers, not the other categories of workers within the industry.

40. ABI appears to contend at 5.8 and following that the shortness of shifts is necessary or fundamental feature of the industry, and/or a product of the fact that clients require services of a short duration.

41. So far as the practice is said to be an inevitable consequence of the shortness of client services, the Commission would not accept it. Although the length of attendances on clients may be relatively short, the overall demand for services is great and increasing. With the introduction of the NDIS, an estimated $22 billion per year will ultimately be allocated to providing supports to some 475,000 clients (of which 300,000 are currently registered)[19]. There is strong growth in employment of about 11% per year[20], consistent with the Productivity Commission's projection that the disability care workforce will need to roughly

[17] CB2835
[18] Elrick CB2935 [19]; Thames CB2963 [12]; Quinn CB 2989 [20]; Ryan CB 198 [64]
[19] Stanford, CB 1451 [15]
[20] Stanford, CB 1452 [19]

double from 2014-2015 levels to meet the demand created by the NDIS[21]. That demand is likely to be compounded in many areas by the fact that turnover of workers in the industry is three times higher than elsewhere in the labour force[22]. Counter-intuitively in those circumstances, the average hours of work performed by workers has decreased since 2015, particularly (also counter-intuitively) in medium to large organisations[23].

42. The contention that short shifts are the inevitable result of short appointments ignores the choices made by employers about the length of the shifts that they offer, and the role played in those choices by the fact that the Award provides no minimum engagement for part-time employees. Although ABI contends that employers attempt to "bundle" services to create a shift, the Commission might think employers would try harder on that front if compelled to do so by a different Award provision. If employers are currently able, without any compulsion, to regularly bundle appointments to create 2 hour shifts[24] the Commission would be confident in establishing a minimum 3 hour engagement. Such a term would promote the efficient and productive performance of work consistent with s.134 (1) (d) of the FW Act, and would facilitate the retention of skilled workers in an industry presently struggling to do so.

43. The fact of current practice is no barrier to the Commission exercising its power in respect of the Award. There is no requirement under s.134 that fair and relevant minimum safety net terms and conditions reflect existing practice.

44. ABI's assertion at 5.15 that the imposition of a three hour minimum engagement will adversely impact consumers is made without any foundation.

45. Its claim that such a minimum would adversely impact the ability of the various schemes to deliver on the principles of consumer care is equally unsubstantiated.

46. The Unions' submit that a three hour minimum engagement for part-time workers will:

    a. provide workers with sufficient remuneration from a shift as to make the shift viable, when regard is had to the time and cost involved in preparing for and travelling to and from the shift;

    b. promote the efficient performance of work; and

    c. contribute to the attraction and retention of skilled workers into the industry.

Claims to Vary the Broken Shifts Provision – ABI Submission 5.1 – 5.15

47. The Unions responses to the ABI's proposed findings in respect of broken shifts are dealt with below in answer to Question 27 of the Background Paper.

48. The HSU relies on its submissions dated 18 November 2019 in support of its proposed amendments.

[21] Productivity Commission, CB 2138
[22] Stanford, CB 1452 [18(f)]
[23] *Australian Disability Workforce Report*, CB1851 -1852
[24] ABI Submissions at 5.13(a)

Travel Time Claims – ABI Submission – 14.1 – 14.14

49. ABI opposes the Union travel time claims and proposes that an allowance should be paid for time spent travelling.[25] The primary reasons advanced by ABI for the adoption of an allowance in place of payment for ordinary hours appear to be:

    a. Funding; and

    b. Difficulties in calculating travel time.[26]

50. The Commission would not be persuaded that those factors warrant the adoption of the ABI's proposal.

51. As to the question of funding, as found by the Commission in the Tranche 1 Decision, funding is a matter for the government, and should not be determinative in the setting of modern awards.[27]

52. In any event, any suggestion that funding is not available to disability services and home care providers is not correct.

53. Providers operating under the NDIS may claim up to 30 minutes at the relevant rate for time spent travelling participants in city areas and up to 60 minutes in regional areas.[28] Significantly, claiming those funds is not excluded where the attendance is a worker's first appointment of the day or the first appointment after a break in the shift.

54. Home care providers are also at liberty to charge for travel time. A fee for travel time can be charged under home care agreements, and service providers in home care also have the ability to set their own rates that 'cost in' the travel necessary to be undertaken by workers to carry out the in-home services.[29]

55. ABI also overstates the alleged difficulties of calculating travel time. Service providers need to have an idea of the time required to travel between the locations of their clients in order to allocate employees to carry out appointments. Several of ABI's own witnesses indicated that they already pay travel time,[30] indicating that in the era of Google Maps, the calculation of travel time is both possible and commonplace.

56. Under section 139 of the *Fair Work Act* 2009 a modern award may include allowances for the following:

    (i) expenses incurred in the course of employment;

    (ii) responsibilities or skills that are not taken into account in rates of pay;

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[25] ABI submission in reply dated 13 September 2019, Part 9.2, CB151.
[26] As above, Part 8.21, CB149 and Part 10.1, CB153.
[27] [2019] FWCFB 6067, paragraph [138].
[28] NDIS Price Guide 2019-20, page 12, CB 2807.
[29] Bundle of Home Care Price Guide materials (EX.UV9), see pg. 15, the provider can choose whether or not to charge for staff travel costs; also home care providers set their own prices for services, see Hammondcare pg. 34; NSW Home Support pg. 40; Connectability pg. 42; Baptistcare pg. 44; CASS Care pg. 45; and Community Care Options pg. 46
[30] Transcript (17/10/19), PN2612 [JEFFREY SIDNEY WRIGHT]; Transcript (18/10/19), PN2887-2890 [GRAHAM JOSEPH SHANAHAN], PN3050-3059 [DEBORAH GAYE RYAN], PN3210-3213 [WENDY MASON]; in addition Ms Wang indicates that CASS pays a travelling allowance which is calculated based on details logged in a mobile app (PN3505-3517, 3557-3558).

(iii) disabilities associated with the performance of particular tasks or work in particular conditions or locations;

57. Travel time does not fall under the categories described in section 139 (i) or (ii). It is not apparent how travel time could fit into the category described in section 139(iii). Travel time is not a disability associated with work in particular conditions or locations but is a core part of the performance of duties for employees who work in client residences or within the community. The most appropriate form of compensation for travel time is payment for the time worked. The Commission should find that an allowance paid to compensate employees for time worked would not be consistent with a 'fair and relevant minimum safety net terms and conditions'.

58. The Unions challenges to the findings proposed by ABI are set out as follows. References are to paragraphs [14.9] through [14.14] of ABI's Submission of 19 November 2019.

Time spent by employees travelling will naturally vary depending on which clients they support on any given day, and where they reside from time to time. (Paragraph [14.10])

59. The Unions agree that time spent travelling between locations may vary. However, the Unions urge caution with respect to this finding because it appears to lay the foundation for a submission that travel time should not be paid because it would be too difficult for an employer to administer. The Unions dispute that the travelling time between clients' residences is difficult to predict. Employers are able to schedule and allocate workers to perform appointments across different locations, which task must necessarily involve some assessment of the travel time required between the locations. Where travel to and between particular locations is carried out regularly, the Commission would think employers would have a very good idea of those travel times.

In the context of broken shifts, in many cases the duration of the break between portions of work does not correspond to the time taken to travel between the respective working location

60. We again urge caution with respect to this finding. The evidence does indicate that there are many employers who are structuring work so that the duration of the break between portions of work does not correspond to the time taken to travel between the respective working locations. However, employers operating under the NDIS and the home care sector have control over when work is required to be performed. It is possible to arrange client appointments in a largely sequential manner.

In breaks between work during a broken shift, employees often do not travel directly from client locations, and often undertake non-work-related activities

61. See above. Although employees may make some use of the broken time between engagements for their own purposes, a significant proportion of the down time may be either lost to the employee (by reason of having to undertake unpaid travel during that time, or because the time is insufficient to engage in other useful and meaningful activity), or of much less utility and value to the employee than time where the employee is not required to attend a further part of the shift later in the day (same as answer to Q28).

There are a range of factors that will affect how long it takes an employee to travel from one location to another on any given day (for example, traffic conditions).

62. With respect, this finding is trite, and should only be accepted with caution. It appears to lay the foundation for a submission that working time cannot be arranged in a manner that is efficient, productive and fair to both the employee and employer.

Some service providers adopt a range of practices to remunerate employees in respect of time spent travelling.

63. The Unions agree that practices currently vary. Again, we urge caution in accepting this finding. While practices vary between employers, there is substantial evidence that many employees perform a significant amount of work (travel) on unpaid time.

AIG Submission dated 18 November 2019

Travel Time

64. AiG opposes the Union claims. The basis for AiG's opposition is twofold, that funding arrangements do not take into account travel time, and that it is difficult to calculate travel time.[31] For the reasons outlined in our response to ABI neither of these reasons holds weight once examined.

AiG proposed findings

65. The Unions' challenges to the findings proposed by AIG are set out as follows. References are to paragraphs [22] to [35] of AiG's Submission of 19 November 2019.

Many employees are not paid for time spent travelling to and from clients. This includes travelling between clients and travelling to the first client / from the last client.

66. The Unions contend that time travelling to and from clients is time that should be paid as ordinary hours under the Award and non-payment of travel time is a contravention of the Award. However, we agree that non-payment of travel time occurs regularly in this industry and this is established by the evidence of both employee and employer witnesses.

The period of time taken by an employee to travel to a client's place of residence is in some instances as little as 5 minutes. (Paragraph [25])

67. The Unions urge caution with this submission because it appears to lay the foundation for a submission that travel time should not be paid because it is of an insignificant amount as a matter of ordinary and regular practice. Multiple witnesses gave evidence of travelling for significant lengths of time. Robert Steiner gave evidence that he can travel for up to an hour to attend clients in the Hunter Valley.[32] Even in circumstances in which the travel time is relatively short, it is still time worked and should be paid. Unpaid travel time accumulates. Deon Fleming, who indicated that sometimes she has short travel times, still accumulates a significant amount of unpaid travel time over a weekly basis.[33] Mr Quinn's evidence was that

[31] AiG submission in reply dated 16 September 2019, paragraphs [56]-[57], CB931-932, and paragraph [97], CB939.
[32] Steiner, CB 1223 [11].
[33] Fleming (EX.UV4), CB4568 [6].

his work locations were between 1 and 20 kilometres from his home and the travel to his first appointment of the day could vary between 5 minutes and 45 minutes[34].

The period of time taken to travel to a client's place of residence can vary from one occasion to the next and be difficult to predict for reasons including traffic. (Paragraph [30])

68. The Unions dispute that the travelling time between clients' residences is difficult to predict. Employers are able to schedule and allocate workers to perform appointments across different locations, which task must necessarily involve some assessment of the travel time required between the locations. Where travel to and between particular locations is carried out regularly, the Commission would think employers would have a very good idea of those travel times.

Some employers endeavour to prepare rosters in a way that maximises their employees' working time and / or minimises the time their employees spend travelling to and from their clients. (Paragraph [35])

69. The Unions note Dr Stanford's evidence that the incentive to allocate work in an efficient way that minimises unproductive time (travel and waiting) was an indirect incentive because the employee bears the cost of travel time and lost-time[35], and the evidence referred to above as to the working of broken shifts. While some employers may endeavour to prepare rosters in the manner described by AIG, (and the Unions note in this respect the AIG did not call a single witness to substantiate this proposition), it is evident that across the industry, there are a significant number of employees that are working, or have worked, patterns that do not minimise their unproductive time.[36]

During a break in a broken shift, employees often undertake non-work-related activities, including spending time at home.

70. Employees sometimes undertake non-work-related activities, and may sometimes spend time at home. Although employees may make some use of the broken time between engagements for their own purposes, a significant proportion of the down time is either lost to the employee (by reason of having to undertake unpaid travel during that time, or being insufficient to engage in other meaningful activity), or of much less utility and value to the employee than time where the employee is not required to attend a further part of the shift later in the day.

Some employers endeavour to prepare rosters in a way that maximises their employees' working time and / or minimises the time their employees spend travelling to and from their clients.

71. The Unions note Dr Stanford's evidence that the incentive to allocate work in an efficient way that minimises unproductive time (travel and waiting) was an indirect incentive because the employee bears the cost of travel time and lost-time[37], and the evidence referred to above as to the working of broken shifts. While some employers may endeavour to prepare rosters in the manner described by AIG, (and the Unions note in this respect the AIG did not call a single

[34] Quinn CB 3052 [10]
[35] Stanford XXN, PN2274.
[36] Stanford CB 1453ff, pp 21-25.
[37] Stanford XXN, PN2274.

witness to substantiate this proposition), it is evident that across the industry, there are a significant number of employees that are working, or have worked, patterns that do not minimise their unproductive time.[38]

Recall to work overtime away from the workplace

72. In its Submissions dated 18 November 2019, AIG made several arguments in reply to the ASU's recall to work overtime claim. The matters raised by AIG were largely dealt with by the ASU in paragraphs [90]-[102] of their Submission of 19 November. The Unions continue to rely on those submissions. The following submissions deal with matters not addressed in the ASU's submissions.

73. In its Supplementary Submission dated 2 October 2019 the HSU clarified its position in respect of this issue and expressed support for the principled approach taken by the ASU in its submission dated 23 September 2019. Each of the Unions now supports the ASU's draft determination.

<u>The ASU's claim does not concern 'remote response work'</u>

74. AIG describes the ASU's claim as dealing with 'remote response work'. They appear to have taken this term from a variation proposed by ABI. While the ASU and ABI claims deal with some similar matters, they are quite different.

75. The ASU's draft determination only concerns recall to work overtime. It does not interfere with any other term of the SCHDS Award.

76. In contrast, ABI's claim provides for a scheme whereby an employee could be required by their employer to work both ordinary hours and overtime away from their workplace. This is described as 'remote response work'. ABI's claim has the following features:

77. Firstly, Ordinary hours worked under ABI's draft determination:

    a. would not be arranged in the manner provided by clause 25.1(a);

    b. would not be rostered according to clause 25.5; and

    c. would not form part of a part-time employee's agreed regular pattern of work.

78. Secondly, there is no requirement for ordinary hours to be worked continuously, extending broken shifts to employees to whom the broken shift term (clause 25.6) does not currently apply.

79. Thirdly, the minimum engagements that apply to casual employees would not apply (except in the case of a casual home care employee required to perform remote response work under ABI clause 28.5).

80. Finally, employers would be permitted to require employees to work additional hours, contravening s 63 of the Fair Work Act 2009. This would also allow employers to require part-time employees to work additional hours without the employee's agreement as required by clause 10.3(e).

[38] Stanford CB 1453ff, pp 21-25.

81. Simply put, ABI's proposed variation would allow an employer to avoid the majority of the SCHDS Award's slim protections for hours of work. AIG appears not to understand the true scope of ABI's claim, which colours their response to the ASU's claim.

Technical submissions arising from AIG's misconception of ABI's claim

82. AIG's misconception of the scope of the ASU's claim appears to be the basis of several submissions advanced by AIG about the ASU's draft variation.

83. At paragraph [83], AIG misconstrues clauses 28.4(b) and 28.4(c) so that they would apply to an employee's ordinary hours of work. Clause 28 only regulates recall to work overtime. It does not concern an employee's ordinary hours of work, which remain regulated by the relevant terms of the SCHDS Award.

84. At paragraphs [90] and [91], AIG notes that no minimum engagement applies to the ordinary hours of full-time and part-time employees. The Unions do not dispute this. However, all employees recalled to work overtime are currently entitled to a minimum engagement of 2 hours of work. The ASU's proposed variation simply extends that entitlement (in modified form) to situations where an employee is recalled to work overtime, but not at a workplace. The ASU concedes that the reduced disutility of being recalled to work overtime, without being required to return to a physical workplace, but while rostered to be on call is less than if the employee was so recalled but not rostered on call. This is reflected in the reduced minimum engagement at clause 28.4(c).

85. At paragraph [118], AIG submits that clause 28.4(c) of the ASU's draft determination may capture any circumstance when an employee works away from the workplace, such as when an employee is permitted to work from home. Clause 28.4(c) could not be construed in such a away, it clearly only applies where an employee is recalled to work overtime.

Multiple requests made and concludes within one hour

86. At paragraph [112] and [113] of the AIG 19 November Submission, AIG notes that clause 28.4(b) provides for multiple requests to work within the same hour will not trigger separate minimum payments. They submit that this is inconsistent with the two hour minimum engagement in that clause. We agree. This is a typographical error and the clause should correctly read 'Multiple electronic requests made and concluded within the same two hours shall be compensated within the same one hour's overtime payment'.

Situations that attract payment

87. AIG criticises the ASU's draft determination. The Unions disputes that there is any lack of clarity associated with the description of the activities identified as attracting payment under the ASU's proposed clause. A two hour minimum payment at overtime rates should apply where an employee works remotely when they are not required to be on call. This aligns with the minimum payment for a recall to work overtime at the physical workplace. A one hour minimum payment when an employee works remotely when they are required to be on call. This aligns the minimum payment for remote work while on call with the minimum payment for work performed during a sleepover.

Record keeping

88. AIG submits that the ASU's proposal should include a mechanism for ensuring that time an employee spends working remotely is recorded and communicated to their employer. We dispute that any record keeping clause is necessary. Many employees covered by the Award perform work in situations where they cannot be directly supervised by their employers. These include employees required to be on call, home care workers and disability services employees when they perform work at their client's homes or in the community. There is no evidence before the Commission that employers have any significant issue with employees misrepresenting the hours that they work. Employers can simply adapt existing administrative procedures to the new term.

Rate of payment

89. At paragraph [129], AIG suggests that the ASU's proposed variation would 'require all remote response work to be paid at overtime rates'. This appears to derive from their misconception about the relationship between the ABI 'remote response' claim and the ASU's recall to work overtime claim. Time worked under the ASU draft determination would be paid at the 'appropriate overtime rate'. This reflects the current language of clause 28.4 of the SCHDS Award.

Minimum engagements for overtime away from the workplace

90. AIG contends the two hours minimum engagement proposed by the ASU is not justified. We have dealt with the merits of our claim at other places and will not reiterate them here.

91. However, we do respond to AIG's characterisation of the ASU's witness evidence about on call work.

92. AIG cite Ms Anderson's evidence at paragraph [23] of her statement that she occasionally checks her emails or responds to phone calls when she is not rostered to work on call as the basis for their submission regarding the minimum engagement for overtime when the employee is not rostered on calls.[39] Her evidence was that there was an expectation she would be available to respond to phone calls from management, but that this was overt. In cross-examination, she clarified that her employer did not require or request her to perform work outside of her ordinary hours unless she was rostered to be on call.[40]

93. AIG appears to believe that Ms Anderson would be entitled to the two hour minimum engagement in such a circumstance. However, the circumstances described above does would not amount to a request to work overtime under either clause 28.4(b) or clause 28.4(c). Presently, Ms Anderson can refuse to work outside of her ordinary hours, and if she does so she will be paid at her ordinary rate of pay. Under ABI's proposal, her employer would be able to require her to work (whether it was as ordinary hours or as overtime).

94. AIG's submission that Ms Anderson's perception of the difficulty of being on call is based on her assumption that she cannot access the internet away from home.[41] This misrepresents Ms Anderson's evidence. During cross-examination by AIG, Ms Anderson clearly understood that she had wireless internet access through her work computer.[42] She agreed that she could

[39] AIG Submission, [140].
[40] Transcript of 15 October 2019, PN1000-PN1013.
[41] AIG Submission, [107].
[42] Transcript (15 October 2019), PN996, PN1019.

leave her home if she had access to internet, but noted she would need to be in telephone reception and have access to power.[43]

95. At the paragraph of her statement relied upon by AIG (paragraph [24]) Ms Anderson lists the equipment that she needs to do her work, this included 'phone, internet and computer access'. It is clear from the paragraph that she would need all three things to perform her duties, and must keep those items with her if she is on call. Moreover, she also explains that she must also 'be ready and able to respond to any requests for work', and so she cannot 'go anywhere or do anything else'. Ms Anderson was not cross-examined on this point. Indeed, Ms Anderson was only cross-examined on the equipment available to her away from the workplace.

96. Additionally, AIG asserts without basis that Ms Anderson works for the largest provider of disability services in Australia. It appears to form the basis that Ms Anderson's employment is unrepresentative of disability services, which would be rejected by the Commission. This finding is made without reference to any evidence of the size of Ms Anderson's employer or the characteristics of employers in the disability sector.

97. AIG makes a similar submission in reference to the evidence of Emily Flett, which the Commission would also reject. They do not disclose any factual basis to say that Ms Flett's employment is unrepresentative of the sector. Ms Flett was not cross-examined on this issue. She could have been asked if her work was representative of the social and community sector, but she was not. Indeed, Ms Flett was not cross-examined on any part of her evidence. The submission appears to have more to do with AIG's lack of knowledge about the SCHDS Industry, than anything arising from evidence before the Commission.

Evidence

98. AIG submits at paragraph the evidence relied upon by the ASU is insufficient to justify the making of the variation. The evidence relied upon by the ASU is set out at paragraph [89] of our submissions of 19 November. These include the witness statements of Deborah Anderson and Emily Flett, who describe patterns of work in the industry, and the expert reports of Dr Olav Muurlink and Dr Jim Stanford. The ASU maintains that this is a substantial body of evidence, sufficient to persuade the Commission of the findings sought by the ASU.

NDS Submission dated 19 November 2019

Travel Time

99. NDS has a similar position to ABI, in that NDS contends that an allowance would be an appropriate form of compensation for travel time between broken shifts.[44] The Unions dispute an allowance is appropriate compensation and we refer to our submission above, in response to ABI.

NDS Proposed Findings

100. The Unions challenges to the findings proposed by NDS are set out as follows. References are to paragraphs [40] and [41] of NDS Submission of 19 November 2019.

[43] Transcript (15 October 2019), PN996.
[44] NDS submission in reply dated 16 September 2019, paragraph 41, CB4398.

Practices appear to vary but there is evidence that some of the time needed for travel between clients is not paid time (paragraph [40])

101. The Unions accept that practices regarding travel time vary between employers. For a class of workers where travel is fundamental to each portion of the work, and where the requirement to travel may be extensive, the fact that travel time is not paid as a matter of course is a matter of concern.

Travel in the disability sector is often associated with the use of broken shift because in home supports are usually only needed for short periods at certain times of the day, such as meal times. For example, Robert Steiner gave evidence about the extent of travel in his job. (Paragraph [41])

102. NDS cites evidence of Mr Steiner to support the proposition that travel is often associated with 'home supports only needed for short periods'. Mr Steiner's evidence does not support a general finding that employees are performing work for short periods. NDS refers to Mr Steiner's cross-examination about his work on 2 January 2019. Mr Steiner was paid for a total of 5.5 hours work on that day, however, the work spanned between 6 a.m. and 7.15 p.m, and involved a break of nearly eight hours in the middle of the day.[45] He was not paid for time taken to travel to attend his first bloc of work at 6 a.m. and worked until 7.15 a.m[46] after which time, he was thereafter released from duty until 3.00 p.m. Prior to that point, he would have had to undertake further travel to the client's location.

Part of his evidence pointed to the importance of ensuring continuity of support for clients with psychosocial disability. The consequence was that where a client only needed intermittent supports during the day, it was often necessary for the same employee to travel back to provide that support in order to avoid the disruptive effect of different workers attending the client. (Paragraph [41])

103. The finding for which NDS contends should be treated with caution. It appears designed to lay the foundation for a contention, in support of the employers' position in respect of broken shifts, that clients require (as a matter of clinical imperative or priority and not just client preference) care by the same carer multiple times in a day, and that such requirement justifies the maintenance of broken shifts with no minimum engagement. The evidence before the Commission provides limited, if any, support for such a conclusion. Where Mr Steiner was cross-examined over "continuity of care", those questions were concerned with the provision of care over extended periods of time, and not directed to multiple attendances within a day.[47]

AFEI Reply Submission dated 17 September 2019

104. AFEI objects to the Unions' travel time claims, on the basis that the employer has no control over such travel, including: which travel route is taken and at what times, the means of travel, the time taken; and whether cost are incurred48. AFEI also objects on the basis that

[45] See Steiner [15-16] & PN 1552-1569
[46] Steiner CB 1224
[47] Transcript 16 October 2019, PN1552-PN1559.
[48] AFEI submission in reply dated 17 September 2019, paragraph [14], CB621

calculating travel time would be difficult and that the claim would result in increased cost and administrative burden, without an associated increase in productivity49.

105. The proposition that employers have no control over travel in this sector is disingenuous. The evidence clearly indicates that as a condition of employment, employees are required to have a current driver's license50. Further, employers schedule and allocate workers to perform appointments across different locations, a task that must necessarily involve some assessment of the travel time required between the locations. Where travel to and between particular locations is carried out regularly, the Commission would think employers would have a very good idea of those travel times.

106. AFEI has failed to bring any evidence of increased cost and administrative burden. It is fairly self-evident employers who do not currently pay for travel time would have some increased cost if they did. However, AFEI has not been able to provide any analysis of what the increased cost may be, and how it may be offset by providers claiming some amount for travel under funding arrangements, the reduced risk of being found to have contravened the Award (given that travel time is arguably already payable under the Award), and potential positive impacts on employee retention. In the absence of such analysis the Commission would not be persuaded that the travel time claim should be rejected on the basis of "increased costs".

[49] As above, paragraph [16], CB621

[50] Supplementary statement of Trish Stewart (EX. UV2), dated 1 April 2019, at [4], CB4661 and Annexure A to EX.UV1 CB4610, Supplementary statement of Deon Fleming (EX.UV4), at [8], CB4569, and Annexure A, CB4488

RESPONSES TO QUESTIONS IN THE BACKGROUND PAPER (5 December Directions (d))

Tranche 2 and Claims

Q1. Question for all parties: Is the list set out above an accurate list of the Tranche 2 claims that are being pressed?

107. The list of claims is accurate.

Q2. Question for all parties: Is Attachment A an accurate list of all exhibits tendered in the Tranche 2 proceedings?

108. Attachment A accurately lists all exhibits tendered in the Tranche 2 proceedings, save that Deon Fleming, the maker of the statements which are exhibits UV4 and UV5, is referred to as Deon Flemming.

Q3. Question for all parties: Is Attachment B an accurate list of all submissions and submissions in reply in relation to the claims being considered in the Tranche 2 proceedings.

109. Attachment B accurately lists all submissions and submissions in reply tendered in the Tranche 2 proceedings by the Unions.

110. In addition to those submissions, the UWU and HSU submitted a joint position on the 24 hour care clause on 13 November 2019.

General Findings On The Evidence – Background Paper [20ff] – Questions 4-17

Q4. Question for all parties: Are any of the findings made in the Tranche 1 September 2019 Decision challenged (and if so, which findings are challenged and why)?

111. The Unions don't seek to challenge the findings in the 1 September 2019 decision.

Q5. Question for all other parties: Are the findings proposed by ABI challenged (and if so, which findings are challenged and why)?

112. The Union's challenges to the findings proposed by ABI, are set out as follows. References to paragraph numbers in square brackets are to the paragraph numbers of the ABI findings (between [1] and [22]) which are set out at paragraph [24] of the Background Paper.

ABI Proposed Finding [4] - these reforms have fundamentally changed the operating environment…

113. ABI's proposed finding overstates the reality.

114. First, the Commission would distinguish between changes to the funding arrangements applicable within the sector, and changes to the nature and conditions of the work required to be performed within the sector. As to the latter, the evidence does not support a conclusion of fundamental change. Workers within the sector continue to provide the same or similar services, albeit the extent and scope of their work have expanded as a consequence of the increased funding within the sector.

115. So far as the finding concerns funding arrangements, ABI's contention requires tempering. The Commission would not think "block funding" arrangements were without their own vicissitudes and risks; changes in government policy and the need to seek, justify and account for continued funding being just two of those potential risks.

116. Further, the significant injection of funds into the sector consequential on the NDIS and Home Care reforms has created considerable opportunity for participants in the sector, notwithstanding the risk and variability associated with increased consumer choice. There was no evidence of operators falling by the wayside as a consequence of the changes; there was, however, evidence of some operators doing very well, having capitalised on the opportunities presented by the increased available funding.

ABI Proposed Finding [4(a)] - service providers now have less certainty in relation to revenue

117. It is noted that ABI does not urge any finding that employers have suffered any loss or reduction in revenue.

ABI Proposed Finding [4(b)] - consumers have a greater ability to terminate their service arrangements

118. The only footnote reference for this proposed finding was to a part in Scott Harvey's statement[51] referring to his organisation's pro forma service agreement which allows participants to cancel with 4 weeks' written notice. Whilst the changes in funding arrangements are designed to facilitate choice by clients, the extent to which that ability may be exercised will be contingent on a variety of factors. ABI called no evidence of the extent to which that capacity has manifested in any real adverse (and undeserved) impact upon employers.

ABI Proposed Finding [4(e)] - service providers have reduced levels of control in relation to the delivery of services, as individual consumers have more control over the manner in which services are provided to them

119. The Commission would not make such a finding. ABI's proposed finding overstates the evidence.

120. The first part of the proposed finding would be rejected. Nothing in the changes in disability and home care services has resulted in any service provider being compelled to provide services to any particular client, or to provide services at a time or in a manner dictated by the client. Service providers retain the ability to offer services to clients of their choice, and to determine the extent and timing of the services they offer. In that sense, service providers in fact have more control over their service than under block funding arrangements as they have the capacity to choose not to take on particular clients.

121. So far as the second part of the proposed finding contends that clients have, by reason of their market power, greater capacity to influence the delivery of services, the logic of that contention is accepted. However, the evidence before the Commission falls well short of demonstrating how, or the extent to which, that potential has been realised. There was no cogent evidence before the Commission showing that any service provider had been compelled by such influence to make significant changes their methods or times of operation, or to undertake work unwillingly.

ABI Proposed Finding [4(f)] - the employer is now less able to organise the work in a manner that is most efficient to it

[51] AB17

122. In support of this proposed finding, ABI references Mr Harvey's statement at paragraph 28[52], where he states: "The model of Rostering for customers has generally not changed but with the introduction of the NDIS it offered opportunities for customers to select supports outside of business hours and on weekends/public holidays. The scope of rostering increased significantly due to this. Currently ConnectAbility is investigating the continued viability of providing weekend/public holiday supports under the current pricing framework. There is potential that the weekend/public holiday model of service delivery will be withdrawn if new pricing framework to be delivered by the NDIA does not sustainably match the actual costs for services provided."

123. The reference falls well short of supporting the proposition for which it is cited. The evidence concerns only one employer, did not demonstrate any actual (as opposed to potential) impact on the manner of organisation, or cost of performing, the work. The evidence did not identify the efficient modes of work organisation that are not open to employers by reason of the changed funding arrangements. Rather, the evidence cited shows that the NDIS created an opportunity to work outside existing patterns, and that the ongoing viability of that new arrangement was being monitored. The latter circumstance is hardly surprising.

124. The Commission would not adopt the proposed finding.

ABI Proposed Finding [4(g)] - (g) greater choice and control for consumers has led to greater rostering challenges by reason of:

(i) an increase in cancellations by clients;

(ii) an increase in requests for changes to services by consumers; and

(iii) an increase in requests for services to be delivered by particular support workers

125. The finding urged by ABI overstates the evidential position, and it not logical.

126. As set out above, the Unions contest the ABI's use of the word "control" in characterising the nature of the influence in the hands of clients in their position as consumers of service providers.

127. So far as ABI contends there has been an increase in cancellations by clients, it relies only on the statement of Ms Ryan. That evidence provides scant, if any, support for a finding about the incidence of cancellations across the entire sector. To the extent there was any clear data before the Commission about the rate or incidence of cancellation, that was found in the Same Day Cancellation Log that Ms Ryan had prepared[53]. The Commission will recall that Ms Ryan accepted that the vast bulk of the cancellations for the period during which her organisation had retained a record were chargeable[54]. Given the capacity in many cases to charge for cancellations, it could hardly be safely inferred that rates of cancellations had increased as a consequence of the changes to funding arrangements. Indeed, it might be thought that cancellation charges might operative as a disincentive to cancellation for a client with a finite amount of dedicated funding.

[52] ibid
[53] HSU-15
[54] Ryan XXN, 18.10.19, PN 3020 - 3032

128. It is not clear how cancellations might be productive of rostering difficulties, that is, difficulties in drawing up, or having workers fill a roster. As a matter of logic it is apparent that there may be either loss of income or a waste of working time where cancellations occur.

129. Similarly, it is not clear how requests for changes to services, or requests for particular workers might cause problems at the point at which work patterns and allocations for the coming roster period are set down. Requests for a specific worker, or variations to timing of services are just two examples of the many variables (much like qualifications, availability, leave arrangements etc) of which account must be taken in drawing up a roster.

130. ABI has not demonstrated how the factors it points to make the tasks of setting rosters and managing the workforce that much more difficult than previously.

131. The Unions accept that the factors identified in the proposed finding are challenges. However, the extent to which they adversely impact employers, and particularly in relation to the task of rostering, has not been established.

ABI Proposed Finding [5] – It is also widely accepted that clients benefit from having continuity of care in the sense that care is provided by the same employee or group of employees.

132. The finding for which ABI contends is vague, and should be treated with some caution.

133. It is accepted by the Unions that many clients and their families desire services to be provided by the same employee or group of employees, and that the familiarity that engenders may make the performance of the work more efficient and possibly more pleasant for clients and their service providers.

134. However, there were limits to the evidence on this issue. There was no expert evidence of any demonstrable clinical benefit from having the same person providing the care and/or support work each time. As a matter of logic it must be the case that whether there are benefits in any case is likely to depend on a number of factors. Dr Stanford gives evidence that broken shifts exacerbate the personal and economic stress of disability work, contributing to the high rate of turnover in the industry.[55]

135. Further, where ABI cross-examined the Unions' witnesses about "continuity of care", those questions were predominantly concerned with the provision of care over extended periods of time, and not directed to multiple attendances within a day.[56]

136. The Unions urge some caution in respect of the contended finding as it appears designed to lay the foundation for a contention, in support of the ABI's position in respect of broken shifts,

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[55] Stanford, CB 1449[11] – 1450 [13], CB 1456 [27] – 1456 [30], CB 1471 [70] – 1472 [71].

[56] See, for example, cross-examination of Deon Fleming, PN518 - 524

Ms Flemming, are you often rostered to work with the same clients over an extended period?---Yes.
Do the clients derive any benefit from working with you, the same support worker, over an extended period?---Could you explain that again, please?
Do the clients get any benefit from consistently working with you rather than a series of people?---Yes, they do.
What would those benefits be?---They just get to know you over time.
Build rapport with you?---Yes, you do, yes.
Does working with the same client over a period of time help you to develop an understanding of their needs?---It does, yes.
Then you'd agree that that helps you perform your role more efficiently?---Yes, it does.

that clients require (as a matter of clinical imperative or priority and not just client preference) care by the same carer multiple times in a day, and that such requirement justifies the maintenance of broken shifts with no minimum engagement. The evidence before the Commission provides limited, if any, support for such a conclusion.

ABI Proposed Finding [14] – The price regulation controls applied by the NDIA do not enable employers to recover the full employment costs incurred for the services provided to participants under the NDIS

137. The Unions reject this proposed finding. The proposition is based on the fact that certain contingent costs (i.e. costs that an employer would not necessarily incur) were not factored into the Efficient Cost Model. It does not follow from that fact that the full employment costs are not able to be recovered through the NDIS, particularly in circumstances where the hourly rate allowed under that model allowed overheads of 10.5% of direct costs[57]. In order to make its assertion good, the ABI would require evidence as to actual employment costs and actual NDIS monies recovered, so that any gap between those amounts was able to be discerned.

ABI Proposed Finding [18] – Providers in the home care sector are under financial strain following the rollout of CDC

138. This proposition is not supported by the evidence paragraph [61] in Mr Mathewson's Statement which is footnoted. Mr Mathewson's statement annexes (at "B") the Seventh Report on the Funding and Financing of the Aged Care Industry 2019. That report contains some discussion of both Home Care and Home Support and detail of financial performance across both areas for the 2017-2018 financial year[58]. What that report shows are considerable increases for that period in Commonwealth funding for the Commonwealth Home Support Program[59] and for the Home Care Packages Program, with 70% of home care package providers achieving a net profit in that year. The financial results were complicated: increased funding, decreases in EBITDA per client, but also a substantial increase in unspent funds.

139. The analysis in that report falls well short of supporting the proposed finding about financial strain, or of substantiating any connection, if one is suggested, between any such strain and the introduction of CDC.

ABI Proposed Finding [21] – Accordingly, many service providers in the SCHCDS industry are not primarily motivated by profitability and other commercial considerations

140. The Unions accept that many service providers in the SCHCDS industry are motivated by factors other than profit or commercial considerations, and many of them may be primarily motivated by those other factors. However, the evidence before the Commission falls short of establishing those motivations as facts.

ABI Proposed Finding [22] - Equally, many employees working in the SCHCDS industry are motivated by factors other than purely economic benefit

141. As a matter of common sense the Commission would expect employees in any industry to have a range of motivations, including a range of motivations affecting the work that they

[57] Farthing XXN, 15.10.19, PN 877
[58] At page 55ff of that report
[59] p 55

perform: their innate interests and skills, their physical and mental capacities, the work that is available to them, the level of remuneration available etc. The Commission would also accept as a fundamental proposition that almost all workers engage in employment for the purpose of making a living. The Unions doubt the capacity of the Commission to test or weigh in any evidentiary sense, the motivations of employees in the sector and do not agree that such motivations are relevant in valuing and determining the terms and conditions that should apply to the performance of work.

Q7. Question for all other parties: Are the findings proposed by NDS challenged (and if so, which findings are challenged and why)?

142. The Unions challenge the following finding proposed by NDS:

NDS Proposed Finding 11 - Most of the employer and union claims in tranche 2 of these proceedings, such as client cancellation, broken shift and minimum engagements, travel time, and phone allowances, deal with issues arising from the implementation of NDIS in disability services, and consumer directed care in home care

143. The Unions' claims for minimum engagements, improved broken shift provisions, travel time and other claims arise because of regulatory gaps in the Award that allow for underpayment or non-payment of workers for time that should properly be treated as time worked. Those regulatory gaps have become apparent since the Award modernisation process. Whilst the introduction of the NDIS and CDC models incentivises employers to exploit those gaps, those developments are not the cause of the deficiencies in the award.

Q9. Question for all parties: Are these aspects of AFEI's submission challenged (and if so, which findings are challenged and why)?

144. The Unions challenge the following of AFEI's proposed findings at paragraphs 12-32 of their 23 July 2019 submission.

AFEI Proposed Finding [12] – The Community Services sector is predominantly operated by not-for-profit organisations, many being charitable organisations, and most charitable organisations being small (revenue less than $250,000) to medium (revenue less than $1m) in size

145. The footnote reference cited does not support the proposition advanced. The footnote refers to the Australian Charities and Not-for-profits website and the definition of 'charity size'. It does not establish that most charities are "small" (as defined), or that most charitable operators within the industry are small.

AFEI Proposed Finding [20] – More recently, while private investment in welfare operations has increased, industry operators have been forced to increasingly rely on charitable donations by private citizens and companies

146. The link provided in support of this proposition is unavailable. The proposition is not substantiated by reference to any evidence, and no attempt is made to quantify the extent of any alleged increase in reliance on charitable donations. The Unions don't dispute that some operators in the industry receive charitable donations, but it is not clear that the rate of reliance on such donations is increasing. Given the increase in funding available as a consequence of NDIS funding, there appears some basis to query the support for that proposition.

AFEI Proposed Finding [21] - The NDIS is the first sector of the industry to provide clients the power to exercise choice and control by being able to purchase their supports directly from providers.

147. The accuracy and relevance of this proposed finding is questioned.

148. First, the consumer directed care model was first piloted in aged care in home care from 2010 (as the Full Bench discussed in the Tranche 1 decision [2019] FWCFB 6067 at [53]ff).

149. Second, the language of choice and control is not entirely apposite to a model where the funds expended on the provision of services are not available to the client as cash, may not be expended on other items at the client's discretion, and may only be expended on accredited providers for specific services. The "market" in which service providers and clients operate is a very particular one.

150. Third, the evidence adduced by the employers did not examine the relationship between clients and providers prior to changes to the funding models or establish any change in patterns of behaviour by customers as a consequence of those changes to funding models.

AFEI Proposed Finding [27] - Cost savings measures to account for increases in staff wage costs which are not fully funded may occur by reducing non-support worker staff, and limiting investment in staff development and training; or alternatively, reducing the amount of supply or service hours if the cost increases are related to the weekend, overtime or other higher staff cost activities.

151. The evidence before the Commission about employer practice did not demonstrate that such steps were being taken, or their prevalence.

AFEI Proposed Finding [32] - In the current state of the industry, unfunded increases in wage costs are likely to have negative effects on employment and services

152. This claim is speculative, imprecise and generalised. No evidential basis for it is disclosed.

Q10. Question for all other parties: Are the findings proposed by AIG challenged (and if so, which findings are challenged and why)?

153. The Unions challenge the following proposed findings of AIG, which are set out within [27] of the Background Paper.

Proposed Finding [1] - Employees providing disability services in clients' homes perform a range of duties...

154. The duties set out therein are an inclusive, but not exhaustive list.

Proposed Finding [6] - Such an arrangement benefits the employee…

155. The practice of an employee working routinely with a particular client may provide benefits for the employer and the client. The Unions do not embrace the characterisation of the practice as constituting a "benefit" of employment for an employee.

Proposed Finding [8] - Some employees find personal satisfaction in undertaking work in the sectors covered by the Award

156. The Unions accept this to be the case, however, the Commission would also note the extensive evidence, in particular, that of Dr Stanford, as to the deleterious effects of the precarity of work in the sector on employee well-being and retention in the industry.

Proposed Finding [9] - The hours of work of an employee engaged in the provision of disability services in a person's home are dictated by their employer's clients' needs and demands

157. The Unions disagree with this proposed finding and contend that the hours of work of an employee are determined by the employer. Client needs shape the overall demand for the employer's services, which in turn influences the hours that may be required of the workforce overall, and of particular employees. The finding as advanced ignores the intermediate factors and steps that affect the hours of work of any particular employee.

Proposed Finding [10] – Demand for specific services from an employer fluctuates constantly due to changes to the number of their clients, their budgets, their choices of services, seasonal factors, holidays and medical or clinical factors

158. The Unions accept that the factors enumerated in this proposed finding can and do cause fluctuations in demand for specific services. However, the evidence fell short of establishing that these factors cause constant fluctuation in demand in the case of every employer, or the degree of fluctuation in demand experienced by employers.

Proposed Finding [12] – Absence of cost provision in NDIS Pricing Arrangements

159. Whilst specific provision may not be made for the enumerated matters, it is noteworthy that the efficient cost model also factors within it a number of elements of cost which are contingent:

    a. it assumes all personal leave will be taken;

    b. it assumes employees will be entitled to be paid for an entire day on all public holidays in the year60.

Proposed Finding [13] - The component of the NDIS cost model attributed to 'overhead costs' is intended to cover labour costs associated with employees who are not delivering disability services (such as a CEO, managers, payroll staff and HR personnel); as well as capital expenditure

160. This finding is said to be supported by reference to the evidence given by Mr Farthing in cross-examination at PN 891 on 15 October 2019. The finding misstates the evidence of Mr Farthing, who said, of the overheads component of the cost model:

> *Whether it's the labour costs of direct support staff is another matter, but as I said the NDIA has never been prescriptive about what a provider can and cannot use their overhead component of the unit price for.*

Proposed Finding [14] - The cost model does not expressly factor the Unaccounted Labour Costs into the setting of the component of the cost model attributed to overhead costs.

[60] CB 489ff

161. This finding is said to be supported by reference to the evidence given by Mr Farthing in cross-examination at PN 888 on 15 October 2019. The finding misstates the evidence of Mr Farthing, who said, at that paragraph:

> *the NDIA has never been that prescriptive to providers about what the overhead can and cannot be used for.*

Q14. What do the other parties say in response to Ai Group's general observations regarding the evidence?

162. AIG's second observation that "(v)ast portions of the union' evidence should, in our submission be given little weight…" is without merit. The Commission heard from a number of home care and disability support workers, employed across several states in both urban and regional area, with a range of employers in the industry, including some of the major employers.

163. So far as AIG's general observations include an observation that Dr Stanford's opinion should not be afforded any weight, the Unions note this question is raised specifically in Question 15 and the Unions respond to that question below.

Q15. What do the other parties say about Ai Group's submission that Dr Stanford's opinion should not be afforded any weight

164. AIG's submission concerning the evidence of Dr Stanford should be rejected by the Commission. Dr Stanford's report provides a cogent analysis of the state of the disability sector workforce. Dr Stanford is eminently qualified by reason of his specialised study and qualifications to comment on labour market issues within the disability sector. No real attempt was made by AIG to challenge Dr Stanford's qualification as an expert in the area. There is no reason the Commission would not give Dr Stanford's evidence significant weight.

165. To the extent AIG criticises Dr Stanford's evidence because it relies on qualitative research projects conducted by Dr Stanford and his colleagues, that criticism would be rejected by the Commission. Qualitative research is an accepted and common method of social research. AIG did not cross-examine Dr Stanford regarding his research methods, neither in respect of the 19 respondent research project, nor in respect of the academic papers that were annexed to his report, which are the subject of AIG's criticism at [56] of its submissions. Dr Stanford's opinion was not based solely on that research project; he also drew upon another research project into the skills and training requirements of the disability services workforce, his exploration of the published literature in the field, statistical data and government policy documents. All of that enquiry was underlined by his extensive history of study, research and publication in the field of labour economics.

166. AIG's assertion that "Dr Stanford's apparent refusal to accept under cross-examination that there are other pre-existing incentives for an employer to arrange work efficiently…" misstates the evidence. Dr Stanford accepted the existence of such an incentive, but, characterised such incentive as an indirect one in circumstances where the employer was not bearing additional cost due to travel time and downtime[61]. AIG's submission proceeds on the basis that its assertion that there is such an incentive is self-evident, when in fact the existence of such incentive was put to Dr Stanford by the AIG as the product of an employer

[61] Stanford XXN, PN 2269ff

not having enough disability support workers[62]. No other basis for the existence of such an incentive was identified in the cross-examination of Dr Stanford. The nub of the exchange appeared at PN 2278-2279, as follows:

> *Yes. There's also an incentive for them to be able to structure the work in a way that lets the employee visit as many fee paying clients as possible in a day, isn't there? If they've got a shortage of workers?---Well, the shortage of workers per se is difficult to measure and interpret relative to how workers are utilised, so employers do face a challenge in recruiting new individuals to come and work for them, yet despite that we also see employers having a pattern of under-utilising the workers that they have in terms of the fragmentation of work, the very low average hours of work and the unreliability of the hours of work.*
>
> *That might be because they don't have any other option but to roster it that way in some circumstances. I'm sure you accept that?---But if they already experience an incentive to try to utilise the individuals as fully as possible, despite the absence of cost penalty to employers of fragmented work, then you would think they would be doing a better job of utilising those workers, and clearly they're not. The hours of work are very low in the sector. Many workers indicate that they would like to work more and the work has been very fragmented in the sector.*

167. AIG asserts it did not have an opportunity to test the veracity or relevance of the information provided during the course of the interviews undertaken by Dr Stanford. In fact, no attempt, was made to do so. AIG did not make any call for the production of Dr Stanford's working papers.

168. It is noteworthy that elsewhere in its submissions, AIG relies on Dr Stanford's observations about the industry in support of the findings it urges on the Commission. AIG cannot have it both ways on Dr Stanford.

AIG's final observation

169. AIG has been asked (at Q13) if Dr Stanford was cross-examined in respect of their submission that Dr Stanford's opinion that the Award gives 'free reign' for employers to organise work is unreasonable at paragraphs 56 of his report. We say that he was not cross-examined on his evidence in this regard, and AIG's submission is unsustainable.

170. At paragraphs 56 and 57 of his report, Dr Stanford is clearly referring to the industrial regulation of working hours in the SCHDS Award. His evidence was that the SCHDS Award does little to regulate how employers organise worker in the disability sector (whether by direct regulation or the imposition of additional costs). He does not, as AIG suggest, ignore the fact non-Award factors may influence or constrain an employer's decision-making. Dr Stanford's point is that the Award does not provide an incentive for employers to organise work efficiently or fairly of sufficient strength to override the other influences on their behaviour. The Unions rely on Dr Stanford's evidence in this regard to support our submission that the Award does not provide a fair and relevant safety net of terms and conditions in regards to the organisation of work.

171. Dr Stanford was cross-examined by AIG about the influence of award regulation on employer decision-making (Transcript PN2244 to PN2280). This largely consisted of AIG of asking Dr Stanford to agree with general propositions about the behaviour of hypothetical employers in

[62] Stanford XXN, PN 22873

unspecified circumstances.[63] Contrary to AIG's submission that Dr Stanford irrationally refused to accept that there are other pre-existing incentives for an employer to arrange work efficiently, Dr Stanford's evidence was there were multiple factors that influenced how employers organise work, leading to more or less optimal uses of labour depending on the circumstances.[64] In the case of the disability sector, the incentives asserted by AIG were weak. Dr Stanford noted that the incentive to allocate work in an efficient way that minimises unproductive time (travel and waiting) was an indirect incentive because the employee bears the cost of travel time.[65]

172. Dr Stanford also noted that even labour-shortages in the industry were sufficient to improve the organisation of work.[66] During re-examination, he went on to say that employee satisfaction was;

> *Something a smart employer would take into account, but that I don't believe that the impact of that incentive is as direct or as powerful as a more tangible financial or economic incentive which they would face, and in my experience in labour economics simply showing employers that they do get some benefits from a more satisfied workforce that feels it's been treated fairly, a workforce that's able to combine its work life with its family life is not always enough to elicit respect or do attention to those goals unless there's also some more tangible profit and loss related considerations that come into play. That's why we have labour regulations and benchmarks and norms because leaving it up to the voluntary wisdom and willingness of employers to do the right thing has not been reliable. (Transcript PN2284)*

173. AIG appears to accept Dr Stanford's evidence that work is generally not organised in an optimal manner in the disability sector. Instead, AIG's submission relies on a naïve assumption that employers always know what is good for them and will always make the most optimal decision that they can in the circumstances. They have led no evidence about economic decision-making to support this assertion. However, as Dr Stanford told the Commission during cross-examination, 'in my experience as a labour economist I've met lots of employers who haven't figured out yet that they're actually better off when their workers are better treated.'[67]

Q16. Question for other parties: Are the findings proposed by the ASU challenged (and if so, which findings are challenged and why)?

174. The other unions support the general findings contended for by the ASU. The conclusions of Dr Stanford and Dr Muurlink are supported by the evidence Dr MacDonald, and also that of the employee witnesses.

Q17. Question for the ASU: How do these proposed findings relate to the specific claims before the Full Bench?

175. The ASU's general findings relate directly to each claim made by the ASU in the Tranche 2 proceedings. They set out the factual findings that the ASU asks the Commission to make that are common to each of the ASU's claims. They support three submissions made by the ASU in support of its claims and in opposition to the employer claims.

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[63] Transcript, PN2247, PN2248, PN2251, PN2253, PN2259, PN2262, PN2266, PN2271.
[64] Transcript, PN2260, PN2265-PN2266, PN2271
[65] Transcript, PN2274.
[66] Transcript, PN2278.
[67] PN2274.

176. **Firstly, that work in the disability sector is increasingly 'precarious' (Paragraphs [9]-[16] of the ASU's November Submission).** That is work is characterised by casual work, high variability of hours of work, shorter hours of work, discontinuous hours of work, and unpredictable hours of work. Work with these characteristics is called 'precarious' because that is the social, psychological and physical state of those who work it. Simply, the SCHDS Award is not acting as a fair and relevant safety net of minimum terms and conditions for disability services workers. The ASU sets out the findings about work in the disability sector that is applicable to all its claims in the general findings, and deals with the evidence specific to individual claims later in the document. The ASU's claims are directed to the most egregious failings of the SCHDS Award, discontinuous work and unpaid working time. The ASU opposes the employer claims because they would remove the limited protections afforded to employees covered by the SCHDS Award.

177. **Secondly, that the low quality of work of in disability services means that employers are not able to retain skilled staff or attracted sufficient numbers of new staff (with the requisite skills) to meet demand (Paragraphs [17]-[25]).** Again, the precarious nature of work in disability services means that new recruits are not being trained to the standard of the experienced workers they are replacing. This has a significant impact on the quality of care afforded to people with a disability. The ASU's claims are directed towards fixing the recruitment and retention problems that beset the industry at a time of significant growth.

Remote Response Response/Recall To Work Claims - Background Paper [20ff] – Questions 18ff

178. The following address questions relating to remote response. In its Supplementary Submission dated 2 October 2019 the HSU clarified its position in respect of this issue and expressed support for the principled approach taken by the ASU in its submission dated 23 September 2019. Each of the Unions now supports the ASU's draft determination.

Q18. Question for all other parties: Are the findings proposed by ABI challenged (and if so, which findings are challenged and why)?

179. The Unions challenge the proposed findings [1], [5] and [6] of ABI, which are set out within [48] of the Background Paper.

Proposed Finding [1]- There is broad support from both employer and union parties for the introduction of a term in the Award dealing with 'remote response' work, or work performed by employees outside of their normal working hours and away from their working location.

180. The Unions support a clause clarifying the arrangements where an employee is recalled to work overtime. This includes where an employee is recalled to a workplace other than their employer's premises (i.e. a client's home) or where they are required to work overtime from their home. This can be distinguished from ABI's claim which would remunerate people for outside of their ordinary hours of work at ordinary rates of pay.

Proposed Finding [5] – Many inquiries that are fielded by employees when on-call or otherwise when not performing work do not require more than a few minutes of time.

181. The Unions reject this finding. This finding is said to be supported by the Witness Statement of Ms Anderson[68]. The urged finding misrepresents Ms Anderson's evidence. ABI has cherry-picked the single innocuous reference in a series of paragraphs detailing the significant demands on her outside of her rostered hours. Ms Anderson's evidence dealt with the requirements when she is on call at [17] – [22][69], including:

    a. Responding to emergencies;

    b. Providing advice to staff about their issues, including advising regarding medication

    c. Rostering;

    d. Having to make up to a dozen calls to find replacement staff in the event of illness;

    e. Covering the duties of absent workers herself;

    f. Ensuring incident reports and made and logging occurrences herself.

182. Ms Anderson averred to the limitation on her activities as a consequence of the requirement of availability when on-call, the prospect that she will be called in to deal with difficult incident requiring extended hours of her attendance, and the anxiety she suffers as a consequence[70].

183. Ms Anderson's evidence is complemented by that of Ms Emily Flett, who also reports sufficient work during on call shifts to feel exhaustion and significant stress.[71] The evidence of the Ms Anderson and Ms Flett is that they are paid an above-award 2 hour minimum engagement each time they perform out of hours work.[72] Ms Anderson was not cross-examined about the duration of inquiries, or any other work, performed while on call. Ms Flett was not cross-examined at all.

    Proposed Finding [6] - It is difficult for employers to monitor the time that employees spend performing remote response work.

184. The Unions do not accept that monitoring the time spent by employees performing remote work would be any more onerous than monitoring other work performed away from the client's premises (such as disability work performed in the community or a client's premises).

Q22. Question for all other parties: Are the findings proposed by the Ai Group challenged (and if so, which findings are challenged and why)?

185. The following AIG findings are challenged:

    Proposed Finding [1] - Some employees undertake work-related activities while they are not at the workplace in circumstances where they are not required by their employer to perform such work.

186. The Unions note that the ASU's draft determination would not cover this type of activity.

    Proposed Finding [2] - Some work-related activities are undertaken by employees while they are not at the workplace in as little as a 'few minutes'.

[68] Anderson: CB 1394
[69] CB1396
[70] Anderson, CB 1396 [24]
[71] Flett CB 1428 [11]-[13], CB 1429-30 [21]-[25].
[72] Anderson CB1396 [22]; Flett CB 1428, [16].

187. The unions reject this finding. It is imprecise, generalised and not supported by evidence. AIG cites Ms Anderson's answers during cross-examination (At PN1002 of Transcript) as the basis for this finding. This misrepresents Ms Anderson's evidence. Ms Anderson was asked under cross-examination if she checks her emails in her personal time, and Ms Anderson answered that she does so occasionally, but is not required to answer her phone or check her emails when she is not at work or on call.73 Ms Anderson's evidence does not support any conclusion that demands on employees out of hours are insignificant.

Q23. Question for the HSU: How does the proposed clause operate in the event that an employee responds to, say, three phone calls within the same one hour period?

188. The HSU does not press for the adoption of its draft clause. The HSU supports the ASU draft determination.

Q24. Question for all other parties: Are the findings proposed by the ASU challenged (and if so, which findings are challenged and why)?

189. The HSU and UWU support the findings contended for by the ASU.

Q25. Question for all parties: Is Attachment D an accurate summary of the modern award provisions that allow employers to engage employees on 'broken' or 'split' shifts (and if not accurate, which findings are challenged and why)?

190. Attachment D is an accurate summary of the provisions that allow employers to engage employees on broken shifts.

Broken Shift Claims - Background Paper [71ff] – Question 25ff

Q25. Question for all parties: Is Attachment D an accurate summary of the modern award provisions that allow employers to engage employees on 'broken' or 'split' shifts (and if not accurate, which findings are challenged and why)?

191. Attachment D is an accurate summary of the provisions that refer to or regulate (including to prohibit, expressly or impliedly)_employers engaging employees on broken shifts. It is important to observe that not all of those Awards permit the working of broken shifts.

192. The Unions do not accept as a matter of proper construction of Awards, that there broken shifts are expressly prohibited for a particular class of worker, they are necessarily permitted for another class of worker (for example, see the *Sugar Industry Award 2010)*. Whether or not an award permits the working of broken or split shifts will depend upon the overall construction and history of the award.

193. Further, although the *Building and Construction General On-site Award 2010* refers (at clause 34.1(d) to "broken shifts", it is not clear this refers to "broken shifts" as understood in the present matter, as the total hours of work in a day not being worked continuously, but broken by more than meal or rest breaks. In context, that phrase in the *Building and Construction General On-site Award* appears to refer to shifts of less than 7.6 hours in length over the course of a week.

[73] Transcript, PN1000-PN1013.

Q27. Question for other parties: Are the findings proposed by ABI challenged (and if so, which findings are challenged and why)?

194. In order to deal with the findings proposed by the ABI, it is important to observe that broken shifts, as conceived of in the context of other industries, such as in restaurants, hospitality and aged care, ordinarily involve only a single break of a defined minimum period. Such breaks ordinarily represent a genuine hiatus in the overall pattern of the work to be performed, for example, between meal service periods, and not simply the gaps between particular tasks which form a part of the work.

195. The evidence in the present matter shows that for home care and disability support workers, shifts are "broken" between client engagements, and may be broken more than once during the course of the day.

196. Accordingly, where "broken shifts" are discussed and debated, it is essential to understand what particular arrangements are envisaged.

197. The following ABI findings are challenged:

Proposed Finding [1] - Broken shifts are an essential feature of the home care and disability services sectors.

198. Broken shifts are a common feature of the home care and disability services industry. The Unions dispute they are an *essential* method of organising work in the industry.

Proposed Finding [4] - It is very common for consumers in the home care and disability services sectors to request services of a short duration.

199. The Unions urge caution regarding this finding. We note that a service is not necessarily identical with an employee's shift.

Proposed Finding [5] - Most broken shifts involve two portions of work and one break. However, occasionally it is necessary for broken shifts to involve more than one break.

200. The Unions dispute that the evidence shows that <u>most</u> broken shifts involve two portions of work and one break. Several employer witnesses accepted that it is desirable to organise work in that way, and gave evidence that they endeavoured to do so. However, the Award enables multiple breaks and the circumstances of the industry incentivise that practice, and the evidence shows numerous incidences of employers using multiple breaks. The Unions do not accept multiple breaks during the course of the day are either necessary or desirable. One striking feature of the evidence in the matter is the absence of detailed and reliable employer data showing the patterns of work of employees. Given that the breaking of shifts was a fundamental part of the union claims, in the absence of such evidence, the Commission could not be satisfied that current employer practice is consistent across the board with a fair minimum standard. The Unions rely on the Expert Report of Dr Stanford and his oral evidence at PN2260 to PN2278 regarding the organisation of work in the disability sector. The Unions also rely on Dr MacDonald: CB2916.5, 2916.9 – 2917.3; Thames: CB 2963 [13]; Quinn: CB 2990 [27] – [29], 2995ff; Quinn Supplementary: CB 3052, esp [10(e)&(f)] 3053[14] – 3055[29], 3057ff as to the practice.

Proposed Finding [6] - Consumers in rural and remote areas require services more than once per day for short periods of time.

201. The Unions agree that some consumers in rural and remote areas may be provided with services more than once per day for short periods, however, the employers failed to adduce clear data as to the incidence and length of such attendances, the numbers of clients with such needs, nor the patterns of work employed as a consequence of this alleged trend.

Proposed Finding [8(a)] – Some employers provide a broken shift allowance.

202. The Unions contend that where such allowance is paid, this is ordinarily limited to where the "break" is more than one hour. However, for other employees, "gaps" of a shorter period are not compensated.

203. ABI references the witness statement of Hammond Care CEO Jeffrey Wright as support for this proposed finding. Hammond Care provide a broken shift allowance for breaks in a shift, but only where breaks are 'in excess of 60 minutes'.[74]

204. The evidence of Mr Quinn was that he is only paid a split shift allowance where the break is longer than one hour, not including travel time. Otherwise, breaks in shifts are not paid. Mr Quinn refers to this time as 'dead time'.[75] Mr Quinn's evidence was that:

> *If the break is one hour, but including travel time, then the split shift allowance is not paid. For example, my roster on 12 July 2019 has a one hour break between my first and second clients. I would be paid the time it takes to travel between these clients, according to Google Maps, and the kilometre allowance, but no split shift allowance for that day.*[76]

205. Similarly, the evidence of Ms Thames was that:

> *Generally, breaks between clients longer than 10 minutes are called 'gaps' and are unpaid. Breaks an hour or longer are called broken shifts. We get an allowance of $10.74 for each broken shift.*[77]

Proposed Finding [9] - The introduction of a 15% 'broken shift loading' will impose an additional cost on businesses. Such an allowance is not accounted for in the existing funding arrangements, including under the NDIS.

206. Any new conditions are not accounted for in current funding arrangements.

Q28. Question for other parties: Are the findings proposed by Ai Group challenged (and if so, which findings are challenged and why)?

207. The following AIG findings are challenged:

Proposed Finding [6] - Client cancellations sometimes result in a broken shift where the employer is unable to provide the employee with other work during the cancelled shift.

208. The client cancellations do not apply to disability services. Consequently, a cancellation cannot cause a broken shift in the context of broken shifts.

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[74] *HammondCare Residential Care and HammondCare At Home Enterprise Agreement* 2018, clause 13.4.1, 19, Ex. ABI1.
[75] Quinn CB 3053 [15],
[76] Quinn CB 3053 [20]
[77] Thames CB 2963 [13]

Proposed Finding [10] - The period of time taken to travel to a client's place of residence can vary from one occasion to the next and be difficult to predict for reasons including traffic.

209. The Unions dispute that the travelling time between clients' residences is difficult to predict. Employers are able to schedule and allocate workers to perform appointments across different locations, which task must necessarily involve some assessment of the travel time required between the locations. Where travel to and between particular locations is carried out regularly, the Commission would think employers would have a very good idea of those travel times.

Proposed Finding [13] - During a break in a broken shift, employees often undertake non-work-related activities, including spending time at home.

210. Employees sometimes undertake non-work-related activities, and may sometimes spend time at home. Although employees may make some use of the broken time between engagements for their own purposes, a significant proportion of the down time is either lost to the employee (by reason of having to undertake unpaid travel during that time, or being insufficient to engage in other meaningful activity), or of much less utility and value to the employee than time where the employee is not required to attend a further part of the shift later in the day.

Proposed Finding [14] - Some employers endeavour to prepare rosters in a way that maximises their employees' working time and / or minimises the time their employees spend travelling to and from their clients.

211. The Unions note Dr Stanford's evidence that the incentive to allocate work in an efficient way that minimises unproductive time (travel and waiting) was an indirect incentive because the employee bears the cost of travel time and lost-time[78], and the evidence referred to above as to the working of broken shifts. While some employers may endeavour to prepare rosters in the manner described by AIG, (and the Unions note in this respect the AIG did not call a single witness to substantiate this proposition), it is evident that across the industry, there are a significant number of employees that are working, or have worked, patterns that do not minimise their unproductive time.[79]

Q29. Question for all other parties: Is NDS's characterisation of the evidence challenged (and if so, which aspects are challenged and why)?

212. The Unions note the concession by the NDS (at [87] of the Background Paper) of the legitimacy of the concern of employees for stability in their employment.

213. The Unions challenge NDS's contention (at [92] of the Background Paper) that the use of broken shifts is driven by the needs of clients. The use of broken shifts reflects decisions by employers about how work is arranged, and as discussed at length by both Dr Stanford and Dr MacDonald, the Award may provide an ineffective barrier to employers shifting the cost of dead-time and travel onto employees. At the very least, many employers do not appear to regard the Award as preventing such practice.

214. NDS submits that its position is driven by its support of the right of people with a disability to have choice and control over how their lives are lived and how supports are provided. The

[78] Stanford XXN, PN2274.
[79] Stanford CB 1453ff, pp 21-25.

Commission would be hesitant in treating NDS as being the voice of people with disability. It is an organisation which represents employers in the industry. The only organisation that represents people with a disability, People with A Disability Australia, has made a submission supporting the Union's claims and opposing the claims of employers.[80]

Q30. Question for other parties: Are the findings proposed by AFEI challenged (and if so, which findings are challenged and why)?

215. The following AFEI findings are challenged:

Proposed Finding [1] - Employees covered by the Award provide services which are unique to this sector; services are dictated by client needs.

216. As discussed above, the Unions disagree with this proposed finding and contend that the hours of work of an employee are determined by the employer. Client needs shape the overall demand for the employer's services, which in turn influences the hours that may be required of the workforce overall, and of particular employees. The finding as advanced ignores the intermediate factors and steps that affect the hours of work of any particular employee.

217. Additionally, the work performed by employers covered by the SCHDS Award is also performed by employees of local, state and federal governments who are covered by other industrial instruments and work under other arrangements.

Proposed Finding [2] - Employees in this sector typically work with the same clients on an ongoing basis.

218. The Unions accept that some employees covered by the SCHDS Award work with the same clients on an ongoing basis, however, the evidence does not go so far as to demonstrate that this is the invariable practice, or that in those cases the same worker provides all services to the one client.

Proposed Finding [3] – Each portion of work in a broken shift is typically less than three hours of length

219. This proposed finding should be treated with caution. In many cases the portions of work in a broken shift are much less than three hours.

Proposed Finding [4] - Existing arrangements for broken shifts in the Award are appropriate to the industry.

220. This finding is generalised, imprecise and without a disclosed evidentiary basis. The Unions have dealt with this issue extensively elsewhere and do not repeat those submissions here.

Proposed Finding [5] - The variation sought by the HSU would detrimentally impact on the provision of services in this sector, ultimately service users and could result in an employee being liable to pay an employee for hours during which no productive work is being performed.

221. This finding is generalised, imprecise, without a disclosed evidentiary basis. It is contrary to the expert evidence before the Commission which shows the opposite trend; that is,

[80] Submission of People with a Disability Australia, 11 September 2019.

employees not being remunerated for periods during which they are travelling or in a state of readiness to perform work for their employer.

Q31. Question for the HSU: The HSU is asked to clearly set out the findings it seeks in respect of broken shifts and the evidence in support of those findings.

222. The HSU contends that the Commission should make the following findings in respect of the working of broken shifts:

a. The individualisation and marketisation of social care in the United Kingdom resulted in the adoption of arrangements where workers are paid only for contact time and not for travel time, and short periods of paid time are interspersed with fragmented, variable and unpredictable periods of non-work time. As a consequence social care workers there at greater risk than other workers of not receiving the National Minimum Wage[81];

b. Both the NDIS and the consumer directed care model in in aged care in the home involve the same individualisation and marketisation of those services, meaning that there are similar incentives to adopt like arrangements;

c. The evidence shows the agencies providing disability services in Australia attempt to shift the uncertainty and risk associated with fluctuations in demand and revenue, associated with the changes to funding arrangements, onto their employees, through the imposition of increasingly insecure and unstable employment relationships, rostering practices, and compensation. A clear consequence of this structural shift in the nature of work in the sector has been a marked increase in precarious work practices in various forms, including: casualisation, increased part-time employment, irregular and discontinuous shift assignments, requirements that disability workers work in multiple locations (often in the course of a single day, and often working inside clients' private residences), and the expectation that disability workers provide private or informal transportation services in the course of their work (including transporting clients, in some cases without compensation)[82].

d. The scheduling of discontinuous or split shifts is an increasingly common practice in the disability sector. That practice undermines the quality and sustainability of work in the sector as workers are expected to divide their working days between multiple even-shorter shifts. This has the result of reducing their effective hourly wage over the course of the working day[83], with workers accruing paid time significantly less than the overall hours devoted to the performance the work, travelling to and from clients, waiting between client appointments and being in a state of readiness to perform the work[84].

e. Disability support workers may work between one and 5 separate "shifts" in the course of any day with "shifts" as short as 30 minutes long[85], or even as brief as 15 minutes in some cases[86].

[81] MacDonald CB2911-2912
[82] Stanford CB1447 [8]
[83] Stanford, CB1449 [11], 1456[29]
[84] Quinn CB2991 [43]; Fleming CB 4482 [23]; Sinclair CB 4603 [13] – [16]
[85] MacDonald CB 2916; see also Quinn CB 3054
[86] Fleming CB 4482 [21]

f. Employers in home care have the same capacity and incentive to arrange work in that manner as employers in disability services.

g. The SCHCDS Award facilitates and incentivises the breaking of the shifts of social and community services employees because it:

   i. expressly contemplates, and thereby, permits disability services workers and home care workers to be required to work broken shifts[87];

   ii. expressly contemplates and thereby permits that the shifts of such workers may be broken more than once and imposes no limit on the number of such breaks during the course of any shift[88];

   iii. prescribes no minimum period of total hours of work for a shift to be broken, or any minimum period of work before a shift may be broken, or broken again[89];

   iv. contains no minimum engagement for any shift worked by a part-time employee, or casual disability services worker[90];

   v. contains no penalty, loading or allowance associated with the break of any shift.

h. The capacity of employers to require employees to work broken shifts facilitates the fragmentation and disruption of normal work schedules and complicates the challenges facing disability workers in maintaining healthy work-life balance[91];

i. Time between portions of broken shifts typically occurs at sub-optimal locations and times of the day, preventing workers from experiencing full "value" for their leisure time[92]. For some workers, breaks between shifts are spent waiting in their cars for the next appointment[93], or driving home only to have to turn around and drive back out to a later appointment[94]. Although employees may make some use of the break between engagements for their own purposes, a significant proportion of the down time is either lost to the employee due to the need to travel, or of less utility and value to the employee than time

Q32. Question for the HSU: In accordance with its supplementary reply submissions of 3 October 2019 should the words be deleted from its draft variation determination? As to the HSU's submission at [41] of its supplementary reply submission of 3 October 2019, does that mean that full time and casual employees are to be treated differently to part time employees?

223. It is not clear which words are the subject of the first sentence of this question. Assuming they are the words "a casual or part-time employee" in clause 25.6(b) of the HSU's Draft Determination at CB 2836 [3], the answer is "Yes". If that assumption is incorrect, the HSU would wish to address this issue in oral submissions.

[87] Clause 25.6
[88] Clause 25.6(a)
[89] Clause 25.6
[90] The minima appear at clause 10.4(c).
[91] Stanford CB 1465 [54(c)]
[92] Stanford CB 1466 [54(c)]; Thames CB 2963 [15]
[93] Waddell CB 2957 [11] – [12]; Thames CB 2963 [15];
[94] Waddell CB 2957 [11] – [12]; Quinn CB 3053ff [20] – [29]

Q33. Question for other parties: What is said in response to the NDS proposition that consideration be given to a minimum engagement of 2 hours for part time employees?

224. The HSU contends that a 3 hour minimum engagement represents a fair and relevant minimum standard for workers under the award.

225. Given the current standard of a minimum 3 hour engagement that applies to casual SACS workers (other than disability services employees), by virtue of clause 10.4(c)(i), the Unions can see little basis for a provision any less than that standard for part-time workers.

226. If an unlimited capacity to work broken shifts remains in the Award (with a concomitant approach of treating travel to and from each part of the engagement as travel to be undertaken in the employee's own time) then a 2 hour minimum engagement is unlikely to prevent the risk foreshadowed in the *Part-time and Casuals Case,* that work arrangements will be exploitative, being realised. The Commission should only contemplate a 2 hour minimum engagement in the event that minimum applies to any period of engagement within a broken shift.

Q35. Question for all other parties: Are there findings proposed by the ASU challenged (and if so, why)?

227. The other Unions do not challenged the findings proposed by the ASU.

Q36. Question for the ASU: Does the ASU agree with ABI's characterisation of its claim? (and if it disagrees, why)?

228. The ASU disagrees with ABI's characterisation of the claim. Contrary to ABI submission, the loading is paid on hours worked during a broken shift.

Q37. Question for the ASU: Does the ASU accept that the casual loading compensates casual employees for working irregular hours? If so, why should casual employees receive the proposed 15% loading?

229. The 125 percent casual loading does not include a component for irregular hours of work. Clause 10.4(e) of the Award provides that the casual loading is paid instead of the '*leave entitlements accrued by the full-time employees*'. It does not include any component in lieu of overtime, penalty rates, award payments or other matters. The ASU's position is consistent with the reasoning of the Full Bench in the *September Decision*.[95]

230. Moreover, the case history of the 125 per cent casual loading suggests that the current loading does not include compensation for irregular hours of work. The 125 percent loading was set across all modern awards (barring the business equipment award) by the AIRC during the award modernisation process. Like many of the decisions made during that time, the AIRC did not disclose its reasoning. When the issue of the loading was pressed by employer parties, the AIRC simply stated, '*we consider that the reasoning in that case Re Metals, Engineering and Associated Industries Award, 1998 – Part 1* [('Metals Casual Decision')] *is generally sound and that the 125 per cent loading is sufficiently common to qualify as a minimum standard*'.[96]

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[95] [2019] FWCFB 6067, [152]-[158].

[96] *Award Modernisation Decision* [2008] AIRCFB 1000 at [47]-[49].

231. In the *Metals Casual Decision,* the Commission set the 125 percent casual loading. The Commission compared the entitlements of permanent full-time employee. The loading for paid annual leave, leave loading, sick leave, long service leave, and termination benefits amount to a loading of roughly 120 percent. The Commission also found that there should be a component of the loading to compensate for '*itinerancy and lost time*'. They calculated the difference between the average hours of a full-time employee (38 hours) with those of a casual employee (36.1). This resulted in a component of 5 percent to compensate for.[97] However, this component only compensated for the shorter working hours of casual employees in the metals industry. It did not compensate for the disutility associated with working irregular hours, such as shift penalties, weekend rates, public holiday rates or overtime. In any case, the casual loading in the SCHDS Award only compensates of leave entitlements, it does not compensate for itinerancy or lost time.

Q38. Question for other parties: Are the findings proposed by the UWU challenged (and if so, which findings are challenged and why)?

232. The Unions do not challenge the findings proposed by the UWU, and support the UWU's contentions.

Clothing and Equipment Allowance Claims - Background Paper [127ff] – Question 39ff

Q39. Question for all other parties: Do you challenge the findings sought by the HSU (and if so, which findings are challenged and why)?

233. The ASU and UWU support the HSU findings.

234. The Unions submit that whilst many employees are required to wear their own clothes to work, and in disability services there is a trend to require employees to wear casual clothes, there remains a proportion of employees, particularly in home care, required to wear uniforms to work. The terms of the Award should provide appropriately for each circumstance.

Q40. Question for all other parties: Is ABI's characterisation of the evidence in respect of this claim, and the findings sought by ABI in respect of that evidence, challenged by any other party (and if so, which characterisation of the evidence or findings are challenged and why)?

235. The Unions do not agree with ABI's submission in paragraph [139] that under the current SCHCDS Award provisions, an employee is entitled to receive a uniform allowance even if they are not required to wear a uniform to work, and that '[t]his uniform allowance can be used to purchase clothes to wear to work, and, if those clothes become damaged in the course of their employment, to replace them'. It seems clear from clause 20.2(b) of the Award that the uniform allowance is only applicable to employees who are required to wear uniforms.

236. The Unions do not agree with ABI's characterisation of the William Elrick's evidence in paragraph [143] (a) and (b). Mr Elrick's evidence was not 'hypothetical' but based on his seven years' experience in disability support and social and community services roles set out in his witness statement, as well as his experience as a union organiser in the SACS sector. [98]

[97] Print T4991, [184]-[192].
[98] Statement of William Elrick, [1]-[9], CB2933 - 2944

237. The Unions do not agree with ABI's characterisation of the evidence of Ms Wilcock and Ms Waddell in paragraph [143] - [146].

238. In paragraph [145] ABI points to the fact that some protective clothing is available to employees at Hammond Care. However at paragraph [34] of her statement, Ms Waddell's states:

> *Hammond Care does provide single use aprons and goggles that we can use, for example when dealing with bodily fluids. These are kept at head office and we'd need to drive to head office before our shift to pick them up if we are rostered to them. I don't do this because the head office is usually in the opposite direction of my clients, and it doesn't work out economically to make that trip.*[99]

239. Additionally, in cross-examination, Jeffrey Wright, the CEO of Hammond Care, confirmed that Hammond Care home care employees were required to travel from home directly to their first client, and not to report into the Hammond Care's premises first.

> *And just in terms of the mechanics of doing the job, is it the case that home care workers are required to report in to HammondCare's premises every day, and then they move out to do their jobs from there?---No. That wouldn't be practical.*
>
> *They are required to go directly to the client's home?---First client.* [100]

240. ABI's characterisation of the evidence, therefore, is inaccurate. In the case of Hammond Care employees, such personal protective equipment is not practically available to employees, as employees have to pick these up in their own time, and cover the costs of travel themselves, if they wish to use such equipment.

Q41. Questions for all other parties: Is the finding proposed by Ai Group challenged (and if so, which evidence or findings are challenged and why)?

241. The Unions refer to the response to Q40 and reiterate that such protective clothing is not practically available to employees at Hammond Care, as they are required to travel directly to their first client, and not to the office where such equipment is kept.

Q42. Question for all other parties: Is there merit in inserting a clause in similar terms (with appropriate amendment, e.g. to remove the reference to 'molten metal') into the SCHADS Award and if so, why?

242. The Unions would not oppose a clause similar to that in the Manufacturing Award being inserted into the SCHCDS Award, subject to this qualification: the clause establishes liability in (d)(ii) where the damage is suffered as a consequence of *negligence* of the employer. In the Unions' submission, negligence should not be the touchstone for reimbursement for damaged clothing or equipment. The fact that such loss is suffered in the course of the employment should be sufficient to ground an entitlement to reimbursement.

Q43. Question for all other parties: Are the findings proposed by the UWU challenged (and if so, which findings are challenged and why)?

243. The Unions do not challenge the findings proposed by the UWU.

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[99] Statement of Heather Waddell, [34], CB 2960
[100] Transcript 17 October 2019, PN2580-PN2581

Q44. Question for all other parties: Is ABI's characterisation of the evidence in respect of this claim, and the findings sought by ABI in respect of that evidence, challenged by any other party party (and if so, which characterisation of the evidence or findings is challenged and why)?

244. The Unions' response to ABI's characterisation of the evidence is as follows:

Finding (paragraph reference)	Response	Comment
[165]	Disagree	The unions contend that a sufficient case has been made for the claim. We refer to paragraphs [58] to [61] of the UWU submission on factual findings dated 18 November 2019.
[166]	Disagree, in part	We do not see ABI's statement that the Award requires an '*objective assessment*' as inconsistent with UWU's submission that the decision as to what constitutes an '*adequate*' amount of uniforms is often made solely by the employer. That disputes regarding the clause could be dealt with via the dispute resolution procedure in the Award does not negate the need for a definition of the term '*adequate*' within the clause.
[167]	Disagree	The unions contend that there is sufficient evidence before the Commission is sufficient to justify the variation to the Award.

Q45. Question for the UWU: Is the union aware of any instance where the adequacy of the number of uniforms provided to an employee has been the subject of a dispute under the dispute mechanism in the award?

245. The UWU is not aware of instances.

Q46. Question for all other parties: Is the finding proposed by Ai Group challenged by any other party (and if so, why)?

246. No, we do not challenge the finding that employee concerns about inadequate uniforms are on occasion dealt with and resolved at the enterprise level. However, we contend that defining the term 'adequate' in the manner proposed by the UWU would ensure that employees were provided an adequate number of uniforms from the commencement of employment.

Client Cancellation – Background Paper [178]FF – Question 47FF

Q47. Question for other parties: Does any party take issue with Ai Group's contention as to how clause 25.2(f) operates (and if so, why)?

247. As to [180(iv)], the Unions submit that there is evidence before the Commission that some employers take the approach that they are required to make a payment of one hour, and not the employee's minimum specified hours. The Unions contend such approach is contrary to the clause.

248. This approach is reflected in the evidence of Mr Shanahan who stated

> *When a client cancels a scheduled service, the Company tries to place the employee who was supposed to work that shift, with another client. For example, if another employee is sick, the employee who has had their client cancel would be moved to cover the sick employee's shift. If the Company cannot find alternative work, the Company sends the employee home and pays them for one hour.*[101]

249. It was also reflected in the evidence of Ms Ryan, who stated

> *For example if the client had a three hour service scheduled, but cancelled the night before, we would charge the client for one hour and pay the employee for one hour's work.*[102]

250. Ms Wang gave evidence that

> *If the client's cancellation is after 5.00pm, a late cancellation fee of one hour will be charged to the client, and the rostered support worker will receive a one hour shift payment regardless the original length of the shift.*[103]

Q48. Question for all other parties: Are the findings proposed by ABI challenged (and if so which findings are challenged and why)?

251. The following ABI findings are challenged:

Finding [2] - Client cancellation events occur frequently in both the disability and home care sectors

252. The Unions submit client cancellations occur in both disability and home care sectors. However, their incidence depends on the business practices of the home care and disability provider. The employers referred to in this finding were not able to quantify the incidence of client cancellations or explain the financial impact of client cancellations with any precision.

Finding [6] - Funding schemes have different terms in respect of cancellations. Employers are in some cases prohibited from charging cancellation fees. For example, where disability services are provided under the NDIS, service providers must comply with the cancellation rules in the NDIS Price Guide 2019-20. Some service providers have adopted cancellation policies and practices whereby they do not always charge cancellation fees (or charge lower cancellation fees than permitted to) even though they are permitted to under the applicable regulatory system. For example, Mr Shanahan gave evidence that Coffs Coast Health & Community Care Pty Ltd has a policy whereby they only charge clients for one hour of a cancelled service regardless of the scheduled duration of the service.

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[101] Statement of Graham Shanahan, [23], CB 158
[102] Statement of Deborah Ryan, [49], CB 196
[103] Statement of Joyce Wang, [38], CB 206

253. The Unions urge caution with respect to this finding. Both in home care and in disability services employers have significant capacity to charge where scheduled services are cancelled. The latest NDIS rules give employers considerable latitude to charge. There was no evidence before the Commission that employers in the disability sector have adopted cancellations policies that do not reflect NDIA funding arrangements.

Q49. Question for other parties: Do you agree with the above statement (and, if not, why not)?

254. The other Unions agree with the UWU's statement, understanding that it is subject to the claim for cancellation being one made in accordance with the guidelines (that is, that the cancellation has been made inside the timeframes there specified

Q50. Question for UWU: Were the relevant employer witnesses cross-examined in respect of this aspect of their evidence?

255. The relevant witness was Mr Shanahan. He wasn't directly cross-examined on this question, because the opinion he expressed in this regard was speculative, and that was already apparent from the manner in which he expressed himself.

Q51. Question for other parties: Are the findings proposed by the UWU challenged (and if so, which findings are challenged why)?

256. The other Unions do not challenge the UWU's proposed findings.

Q52. Question for the ASU: Were the relevant employer witnesses cross-examined in respect of this aspect of their evidence?

257. Yes. The relevant transcript is found here:

Employer Witness	Transcript Reference
Scott Harvey	PN3134-PN3140
Deb Ryan	PN3014-PN3032, including Exhibit #HSU15
Wendy Mason	PN3281-3289
Joyce Wang	PN 3463-3479
Steven Millller	PN2028-PN2032

Q53. Question for all other parties: Do you agree with the ASU's submission as to the effect of the NDIS client cancellation arrangements (and, if not, why not)?

258. The Unions agree with ASU's submission.

Q56. Question for all other parties: Is the NDS' characterisation of the modified funding arrangements in the event of client cancellation accurate (and if not, why not)?

259. Yes, it is accurate. However, the Unions doubt the submission that that financial impact of client cancellations is '*slightly reduced*'. The modified funding arrangements have changed the definition of 'short-notice cancellation' from a cancellation after 3 pm the day before the scheduled service to two clear business days before the scheduled service. Cancellation rules have also changed in favour of service providers, increasing the number of times a provider

could recover funding in respect of a short-notice cancellation from a cap of 8-12 times per year, to now be uncapped. Although the rate at which funds may be recovered are 90% of the charge, given the two changes above, the Commission would find that the rules regarding cancellations have been modified *significantly in favour of service providers*.

260. NDS has not led any evidence of the overall financial impact of client cancellations on employers. The findings sought by other employers suggest that the majority of the cancellations occur in the 24 hours prior to service (see ABI Finding 4, AFEI Finding 1); in other words in the majority of cases, 90% of the funds will be recoverable.

Q60. Question for all other parties: Are the findings proposed by AFEI challenged (and if so, which findings are challenged and why)?

261. The following AFEI findings are challenged:

Proposed Finding [1] - Client cancellations are usually on late notice.

262. Most cancellations occur in the 24 hours immediately prior to service.

Proposed Finding [2] – Cancellation fees are not always charged to the client

263. AFEI has led no evidence of the incidence of such practices in the Home Care Sector. There is no evidence before the Commission that disability services do not charge for cancellations.

Proposed Finding [3] - Employers do not benefit from a cancelled service.

264. Currently, there are situations where employers may receive funding from a cancellation but have no obligation to pay an employee for the cancelled shift, such as if the employee scheduled to perform the shift is casual. If an employer receives funding for a cancelled shift and does not need to pay the employee the portion of that funding that goes to wage costs, it benefits from a cancellation. The evidence did not reveal the extent to which employers exercised their right to charge for cancelled services in those circumstances.

Mobile Phone Allowance Claims – Background Paper [246]Ff – Question 63ff

Q63. Question for other parties: Are the findings proposed by the UWU challenged (and if so, which findings are challenged and why)?

265. The HSU and ASU support the findings proposed by the UWU.

Q64. Question for all other parties: Do you challenge the findings sought by the HSU (and if so, which findings are challenged and why)?

266. The ASU and UWU support the findings proposed by the HSU.

Q65. Question for UWU and HSU: Do you take issue with the above submission (and if so, point to the relevant evidence)?

267. ABI submitted that the Unions have failed to adduce relevant evidence in support of the claims. ABI's submissions should not be accepted. It would not be feasible for Unions to ascertain 'the proportion of employees in the industry who are required to use mobile phones in the course of their employment'. That level of specificity poses too high an evidentiary bar for any party to meet, particularly in an industry where, as Dr Stanford observed, the precise numbers of workers are not known. ABI's submission flies in the face of the reality of the ubiquitous use of mobile telephones and smart phones in the Australian community, and as a method of communication between employers and employees.

268. ABI's submission that the Unions had not adduced evidence of 'the proportion of work related mobile phone usage versus non-work related use by employees' again poses an unrealistic evidentiary bar.

269. Both the HSU and UWU have adduced ample evidence from rank and file workers and union organisers and industrial officers that home care workers and disability support workers in particular are required to use smart phones in the course of their employment, as their roles are not based in the employer's offices but in private homes. In many cases employees only contact with their employer is via their telephone.

270. This evidence was corroborated by ABI's own witnesses, such as Mr Shanahan's evidence in cross-examination, which confirmed that home care workers are required to electronically report in to the premises every day, and need to be contactable via their mobile phones.[104] Mr Shanahan's evidence was that employees of his company, Coffs Coast Health & Community Care Pty Ltd, are covered by the SCHCDS Award. ABI therefore has adduced its own evidence of 'any award covered employer requiring prospective employees, as a condition of employment, to own a mobile phone'.

271. ABI is also incorrect to state that the Unions have not provided evidence of an 'award covered employer directing or otherwise requiring existing employees to purchase a mobile phone'. Paragraph [32] of the witness statement of William Elrick sets out evidence of a disability support provider, PALS requiring employees to upgrade their phones to smart phones.[105] PALS is an award covered employer. Ms Fleming, an award covered employee, gave evidence that she was previously provided with a work tablet, but when this was taken off the home care workers, she had to upgrade from a flip style phone to a smart phone, otherwise she would not have been able to access her work roster or emails.[106]

272. Further, in addition to disability support workers based in private homes, Mr Elrick's evidence was that disability support workers in group homes may also be required to use their personal mobile phones to carry out research and communications.[107]

Q66. Questions for all parties: The evidence led by the unions in support of these claims is confined to particular categories of employees. If the Commission was minded to vary the SCHADS Award to provide a mobile phone allowance then should the application of that allowance be restricted to the class of employees which have been the subject of evidence in the proceeding? How should that class be defined?

273. The mobile phone allowance should apply to any employees covered by the Award who are required to use a mobile phone for the performance of work duties. This would include (but not be limited to) home care and disability support workers, and employees who perform on call duties.

Q67. Question for HSU: What does the HSU say in response to the issues raised by ABI?

[104] Transcript 18 October 2019, PN2865 – PN2872.
[105] Statement of William Elrick [32], CB 2938.
[106] Fleming CB 4483 [25]-[28].
[107] HSU Submissions, 18 November 2019, [118]; Witness Statement of William Elrick, [30]-[33] (CB 2937).

274. The HSU withdraws the mobile phone claim in the draft determination replicated at paragraph [260] and adopts the UWU claim as set out in paragraph [252].

Q68. Question for the UWU and HSU: If a smart phone is to be characterised as a 'tool of trade' are the costs associated with work-related use tax deductible?

275. The Australian Tax Office (ATO) permits employees who use their own phones for work to claim a certain amount as a tax deduction.[108] That some phone related costs can be claimed as a tax deduction does not negate the need for a mobile phone allowance in the Award. A tax deduction for a low paid worker will be in the lower tax brackets, meaning that a small portion only of the work related expense will ultimately be recouped. Even to the extent the cost can be recouped through a tax deduction, the employee will remain out of pocket for the expense for 12 months or more until they submit their tax return. It is not apparent to the Unions why employees and taxpayers should subsidise employers expenses in this manner. The Union's proposed claim would result in the employee being paid a mobile phone allowance on a weekly or fortnightly basis, in line with their wages.[109]

276. Of course, not all employees covered by the Award will be eligible for tax deductions. The tax free threshold is currently $18,200.[110] Given the low wages and the high incidence of part time work in this sector, it is likely that there are a proportion of employees who do not earn more than the tax free threshold and therefore, do not pay income tax. For example, a home care employee at level 2 (hourly rate $22.24) working 10 hours per week will earn less than $18,200 per year.[111] Tax deductions do not assist with the issue of work-related mobile costs for these employees.

277. It is common for Awards to provide reimbursement or an allowance for work-related expenses that could also be claimed as a tax deduction. Many awards contain allowances or reimbursements for vehicle expenses and clothing, laundry and dry-cleaning expenses. These items are also tax-deductible (when not reimbursed or paid for by the employer).[112]

Q69. Question for all other parties: Are the findings proposed by ABI challenged (and if so, which findings are challenged and why)?

Findings in [273]	Response	Comment
1	Agree	
2	Agree, in part	We agree most but not all employees in the SCHDS sector would own a mobile phone.[113] Some employees may own a

[108] https://www.ato.gov.au/Individuals/Income-and-deductions/Deductions-you-can-claim/Other-work-related-deductions/Claiming-mobile-phone,-internet-and-home-phone-expenses/
[109] Clause 24, payment of wages.
[110] https://www.ato.gov.au/individuals/working/working-as-an-employee/claiming-the-tax-free-threshold/
[111] Assuming the employee's hours of work does not attract penalty rates. This calculation does not take into account penalty rates or overtime.
[112] https://www.ato.gov.au/Individuals/Income-and-deductions/Deductions-you-can-claim/
[113] Statement of William Gordon Elrick (EX. HSU3), at [31]; Transcript (15/10/19), PN1075-1080 [WILLIAM GORDON ELRICK].

		mobile phone, but it may not be of the model or type that can access the employer's required apps.[114]
3	Agree, in part	To the extent to which 'mixed' is intended to refer to some employers requiring employees to use their own phones, and others providing phones, we do not oppose this statement. But if 'mixed' is intended to infer that the evidence was ambiguous or uncertain, we disagree.
4	Agree, in part	As above.
5	Agree, in part	We agree that employees use their personal mobile phones for both personal and work related purposes. The proportion used for personal purposes and work purposes will vary depending on the specific nature of the employee's role, the employer's expectations about usage (some employers may expect employees to 'log in' at each client location and input detailed client care records, others may use a different system) and the extent to which a particular employee uses their own phone for personal needs. Ms Stewart and Ms Fleming, for example, both indicated in cross examination that work related usage of their phones was significant.[115] The UWU and HSU mobile phone allowance provides that an employer and an employee will agree to a reasonable reimbursement amount, taking into account the circumstances (see subclause (c) of the draft determination).
6	Disagree	ABI have failed to take into account that numerous employer witnesses also acknowledged the need for

[114] Statement of Deon Fleming (EX. UV4), at [27].
[115] PN442-443, PN538-539.

		employees to have mobile phones for work purposes, for example: Jeffrey Wright, PN2584-2587 Graham Shanahan, PN2865-2872 Joyce Wang, PN3554-3563 We disagree the evidence was limited. The UWU submission on findings dated 18 November at paragraphs [52] to [57] and the HSU submission on findings dated 18 November at paragraphs [114] to [126] covers the evidence comprehensively.
7	Disagree	We refer again to the UWU and HSU submissions on findings. For home care and disability services employees, having access to, and being available by mobile, is critical.
8	Disagree	As noted above, Ms Stewart and Ms Fleming, both indicated in cross examination that work related usage of their phones was significant.[116] Even for employees who only have a modest work-related phone costs, employers should not be permitted by the Award to require employees to pay for work-related costs without reimbursement.
9	Agree	We agree that mobile phone costs may vary between employees.

Q70. Question for the unions: What do you say in response to the above submission?

Paragraph reference	Response	Comment
[274]	Disagree	The proposed clause provides the employer with the option to provide a mobile phone or, where the employer

[116] PN442-443, PN538-539.

		expects an employee to use their own phone in the course of employment, to reimburse a reasonable amount.
[275]	Disagree	The variation is necessary to ensure mobile phone costs are not shifted onto employees. We refer to the UWU submission on findings dated 18 November 2019 at paragraphs [52] to [57] and the HSU submission on findings dated 18 November at paragraphs [114] to [126].
[276]	N/A	No longer relevant.
[277]	Disagree	We refer to our response to question 65.
[278]	Agree	We agree with this statement. However, we disagree with the inference that there is no need for a mobile phone allowance because most employees own mobile phones. We refer to the UWU submission in reply, which is quoted in paragraph [300] of the Background paper.

Q71. Question for other parties and HSU: Are the findings proposed by Ai Group challenged (and if so, which findings are challenged and why)?

278. Findings (1) and (2) in paragraph [288] are not challenged.

Q72. Question for other parties: Are the findings proposed by NDS challenged (and if so, which findings are challenged and why)?

279. Findings (1) and (2) in paragraph [289] are not challenged.

Q73. Questions for other parties: Are the findings proposed by AFEI challenged (and if so, which findings are challenged and why)?

Findings in paragraph [294]	Response	Comment
1	Disagree	Both Ms Stewart and Ms Fleming gave evidence that they have incurred additional costs as a result of having to use their phones for work.

		Ms Stewart gave evidence that: "my phone bill costs approximately $170 per month. If I was not required to make as many work calls, I could consider dropping to a cheaper mobile phone plan."[117] Ms Fleming gave evidence that she had to upgrade from a flip phone to a smart phone at a cost of $65 per month to ensure she could "access the internet to check my roster and my work emails…. If I did not buy a smart phone, then I would not have been able to access my work roster or work emails."[118]
2	Disagree	AFEI's contention is not supported by the evidence of Ms Anderson or Ms Stewart that AFEI refers to. At PN1005, Ms Anderson responds to a question regarding checking emails in her personal time, and whether her employer has 'any way to monitor how long you spend monitoring your emails on your phone, does it?' Ms Anderson indicates that in response that: 'Not that I'm aware of. I don't know. I wouldn't be able to clarify that.' This exchange is not relevant to the mobile phone allowance claim. Ms Anderson is provided with a mobile phone for work purposes (see PN992). At PN1011-1013, Ms Anderson is questioned about responding to emails during personal time, and whether she is allowed to not check her emails, or switch off her phone, during times at which she is not rostered to work. Again, this exchange is not relevant to the mobile phone allowance claim. Ms Anderson's employer already provides her with a company mobile phone for work purposes and she would receive no further entitlement for mobile phone costs under the UWU and HSU's mobile phone allowance

[117] Stewart CB4605 [21].
[118] Fleming CB 4483 [27].

		claim, as her costs are already covered. At PN441, Ms Stewart is asked if she also uses her personal phone for personal purposes unconnected to her work. She responds: 'Yes, I do. I've always said I use the personal phone. But we didn't only ring clients, but we used to have to ring the office as well.' The Unions understanding is that it is not in dispute that employees who are required to use their personal phone for work also use their personal phone for non-work purposes. PN441 does not assist AFEI in establishing anything further than that.

The Sleepover Claim – Background Paper [301]Ff – Question 74ff

Q74. Question for the HSU: what does the HSU say in response to the findings sought by ABI?

Proposed Finding [1] - There is insufficient evidence to conclude that the current clause 25.7(c) is not operating satisfactorily.

280. The Unions disagree. It is clear on the face of the clause that there are not sufficient protections to ensure employees have access to the basic requirements for a night's sleep during a sleepover shift. The HSU provided evidence that supports our claim.

Proposed Finding [2] Further, when one considers the specific items that the HSU seek to have expressly included in clause 25.7(c)…there is no evidence….

281. There are no requirements in the clause for an employer to provide a separate room or any other of these facilities in the clause. The question for the Commission is not whether there is evidence of widespread failure to afford those items, it is whether a term making such provision establishes an appropriate fair minimum standard for the performance of the work.

282. The HSU adduced evidence in the witness statement of William Elrick about the deficiencies in sleepover provisions for disability support workers. In reference to ABI's submission summarised at [309] in the Background Paper regarding the evidence of Mr Elrick, we note that Mr Elrick attended the Commission for cross-examination, but ABI chose not to cross-examine Elrick on his evidence.

Q.76 Question for the HSU: What is the source of the power to vary the award in the manner sought?

283. The source of power for the HSU's proposed changes is s 139(1)(c) which provides, relevantly:

(1) A modern award may include terms about any of the following matters:

(c) arrangements for when work is performed, including hours of work, rostering, notice periods, rest breaks and variations to working hours;

284. The sleepover clause in the current award sits at sub-clause 25.7 and is under the heading of clause 25 – Ordinary hours of work and rostering.

285. Section 139(1)(c) does not provide an exhaustive list of what is included under 'arrangements for when work is performed'.

Q.77 Question for all other parties: Are the findings proposed by Ai Group challenged (and if so, which findings are challenged and why)?

286. It appears Q.77 is a repeat of Q.71. We refer to our response to Q.71.

The Variation To The Rosters Clause Claim – Background Paper [318]Ff – Question 79ff

Q79. Question for the UWU: As to the consequence for an employer who does not provide the requisite 7 days notice, is it not simply a breach of the award and amenable to an order for contravention of a civil remedy provision (see ss 45 and 539)? What is the argument in support of what is said to be the 'logical interpretation' that overtime is payable in such circumstances?

287. The UWU withdraws its statement that overtime is payable in such circumstances and agrees that the consequence of such conduct would be a breach of the award.

Q80. Question for all other parties: Are any of the findings proposed by the UWU challenged (and if so, which findings are challenged and why)?

288. The Unions support the findings urged by the UWU.

Q81. Question to all other parties: Are the findings proposed by ABI challenged (and if so, which findings are challenged and why)?

Findings in [328]	Response	Comment
(a)	Disagree, in part	While the Unions acknowledge that consumer-directed care has created change within the sector, the Unions contend that ABI has: over-emphasised the rostering challenges faced by service providers and; downplayed the control that service providers have in deciding which services to provide, and the terms and conditions on which those services will be provided to clients.[119]
(b)	Agree, in part	The Unions agree that there has been an increase in working hours variability since the introduction of consumer-directed care, but do not agree that this is a natural or inevitable consequence of the introduction of consumer directed care. The increase in working hours variability is a result of how employers in the industry have chosen to organise their workforce, and of the high level of flexibility available for employers under the current Award (for

[119] See paragraphs [41] to [43] of the UWU Submission on factual findings dated 18 November 2019.

		example, with respect to broken shifts and client cancellation). Employers operating under the NDIS and the home care sector continue to have control over when work is required to be performed.[120]
(c)	Agree, in part	The Unions agree that it is not uncommon for employers seek to depart from the requirements of clause 10.3(c) in enterprise bargaining (though we do not agree it is necessarily the most common bargaining request).
(d)	Agree	
(e)	Agree, in part	The Unions agree that changes are generally made for operational reasons. However, whilst some of these operational changes will result from genuinely unexpected circumstances, operational reasons for changes can also be the result of poor roster planning by the service provider and the service provider offering clients an unsustainable degree of flexibility that relies upon late changes to staff rosters. Ensuring that overtime is paid for late roster changes will act as a financial incentive for employers to roster effectively.
(f)	Disagree, in part	The Unions agree that rostering in the sector requires consideration of a number of factors, as does rostering in many sectors, but do not consider this justifies frequent and late changes to employee rosters.

Q82. Question for the UWU: What does the UWU say in response to the above submission?

289. The submission in paragraph [330] is inaccurate. Overtime payments would not apply in scenario (i) and (ii) as the employees have agreed with the changes. Further, as the UWU is not seeking to vary clause 25.5(d)(ii), the proposed variation would not apply in the listed circumstances where the reason for the roster alteration was to enable the service of the organisation to carry on where another employee was absent from duty on account of illness, or in an emergency.

Q83. Question for other parties: Are the findings proposed by Ai Group challenged (and if so, which findings are challenged and why)?

290. Findings (1) and (2) in paragraph [343] are not challenged. The relatively common occurrence of these matters indicate that these are matters that should be taken into account by a service provider in planning rosters and in setting out policies on service provision. Ensuring that overtime is paid for late roster changes will act as a financial incentive for employers to roster effectively, and to adopt a model of service provision that does not rely on regular late changes to employee rosters.

[120] See paragraphs [11] to [20] of the UWU Submission on the NDIS dated 17 May 2019 (CB 4460).

24 HOUR CARE CLAUSE – (5 DECEMBER DIRECTIONS (E))

291. The Unions note that in the Decision of 2 September 2019 ([2019] FWCFB 6067) the Full Bench found that the 24 hour clause did not provide a fair and relevant minimum safety net (at [104]).Given that the Full Bench stated that it was the Commission's *provisional* view that clause 25.8 be retained the Unions submit, for the same reasons as were advanced in their submissions in Tranche 1, that the Commission should consider phasing the clause out of the Award over the course of 3 years. That will allow sufficient time for that cohort of employers who utilize the clause to make alternative arrangements, such as by engaging in enterprise bargaining for appropriate terms and conditions to cover such work patterns.

292. If the clause is to remain in the Award (whether or not on a temporary basis), the Unions propose amendments to the clause in accordance with the clause attached and marked "**A**". The features of that clause are discussed in further detail below.

Unpaid hours of work

293. The most significant deficiency of clause 25.8 is that it enables an employer to require an employee to be at work for 24 hours without payment for that whole period of work.

294. In the submission of the Unions, the whole time an employee is at a client's home and available for duty is work, whether they are actively providing care under the terms of the care plan, or available in place to provide that care. The circumstances of an employee working a 24 hour shift compare unfavourably with a worker on call as the worker's freedom of movement is limited for the entire period of the 24 hour shift.

295. A provision in a modern award that enables an employer to require an employee to be present at a workplace, but does not provide payment for all such hours of work, cannot be considered a 'fair and relevant' minimum safety net, as it effectively requires the employee to work a period of time without remuneration. Clause 25.8 of the Award effectively provides that an employee is paid 12.4 ordinary hours pay for 24 hours work. This is a significant deficiency in the current clause, and it is particularly egregious when considering that home care workers are largely low paid.

296. If the Commission retains clause 25.8, provision must be made for payment for all hours of work within the 24 hour period. The union proposed clause addresses this by providing for:

    a. 16 hours of payment at 155% of the employee's appropriate rate of pay - (h)(i));

    b. a sleepover allowance for the 8 hour sleep break portion of the shift - (f); and

    c. ensuring all hours of work in the shift are treated as such for all purposes - (j)

297. This ensures that the employee will be compensated for all hours of work.

298. The payment in sub clause (h)(i) of the union proposed clause at the rate of 155% is to compensate for the disutility of being present at work for a 24 hour period, a period that is unusually long and can fairly be considered 'unsocial'.

Care work

299. The union proposed clause contains a definition of care work at subclause (b). A definition is necessary as the current clause provides a limit of 8 hours 'care'. However, the proximity of

the worker makes it likely they will be requested to perform tasks outside the scope of the plan. The definition assists to clarify the scope of duties the worker is obliged to perform.

Sleep break

300. The current clause provides that an employee 'will normally' have the opportunity to sleep. This is ambiguous, and raises the question of the circumstances in which an employee will not have the opportunity to sleep, and the compensation for such disturbance. This provision is inferior to the sleepover provisions in the current Award clause 25.7 (which provide for an overtime payment where an employee is woken up at sub clause 25.7(e)).

301. An employee working a 24 hour shift should be afforded the opportunity to sleep, and there should be a penalty if an employee is woken up. Sub clauses (d) to (g) of the union proposed clause provide for more appropriate sleep arrangements and conditions than ABI's proposed clause.

302. The union proposed clause at sub clause (d) provides that the employee will be provided with basic amenities when working a 24 hour care shift including:

(i) a separate and securely lockable room with a peephole or similar in the door, a bed and a telephone and internet connection in the room;

(ii) a bed, bedside lamp and clean linen;

(iii) access to food preparation facilities;

(iv) access to appropriate temperature control; and

(v) free board and lodging.

303. Sub clause (e) of the union proposed clause provides an appropriate structure for the sleep break portion of the shift, by ensuring that the sleep break will occur during regular sleeping hours.

304. Sub clause (f) provides payment for the sleep over portion of the shift and is consistent with how sleepover shifts are paid in the Award.

305. Sub clause (g)(i) provides that there will a penalty of double time in circumstances where the employee is woken up during the sleep break.

Additional care work

306. The union proposed clause at sub clause (g) (ii) provides that where an employee is required to perform more than 8 hours of care, the employee will be paid double time (which is in lieu of the 155% penalty otherwise applicable).

307. The overtime rate for part time and casual employees in clause 28.1(b)(ii) is time and a half for the first two hours and then double time thereafter, after ten hours of work per day.[121]

[121] For part time and casual employees in clause 28.1(b)(i), except on Sundays and public holidays. Different provisions apply to full time employees in clause 28.1(a).

Meal breaks

308. The union proposed clause provides at sub clause (h)(ii) that employees will receive three meal allowances to compensate for the fact that they are not necessarily able to leave the client premises and have actual meal breaks.

Breaks between shifts

309. The union proposed clause (at sub clause (k)) contains a provision by which an employee can elect to have a break of not less than 10 hours between the end of one 24 hour care shift and the start of another period of work. This sub clause is important in ensuring that employees are able to have appropriate breaks in between periods of work.

Refusal to work more than 8 hours

310. One issue raised by the Full Bench in the 2 September 2019 decision was how an employee is able to refuse to work more than 8 hours during a 24 hour care shift.[122] The union clause provides for penalties to compensate where a worker is required to perform more than 8 hours care, and clarifies that an employee may not be unreasonably required to perform more than 8 hours of care.

Accrual of hours

311. The current clause is silent as to accrual of leave entitlements in respect of the shift. The unions have attempted to address this deficiency in ABI's clause with sub clause (j), which states that 'For each 24 hour care shift, the employee will be treated for all purposes as having performed 24 ordinary hours of work.'

AUSTRALIAN SERVICES UNION

HEALTH SERVICES UNION

UNITED WORKERS UNION

10 FEBRUARY 2020

[122] [2019] FWCFB 6067, [103].

ATTACHMENT A – HSU & UWU DRAFT 24 HOUR CLAUSE

<<FileNo>> <<PrintNo>>

FAIR WORK COMMISSION

DRAFT DETERMINATION

Fair Work Act 2009

Part 2-3, Div 4 – 4 Yearly reviews of modern awards

Social, Community, Home Care and Disability Services Industry Award 2010

(ODN AM2014/285) MA000100

Health and Welfare

<<PLACE, MONTH, YEAR>>

Review of modern awards to be conducted.

A. Further to the Full Bench decision issued by the Fair Work Commission on DD MM YYYY, the above award is varied

[1] By deleting clause 25.8 – 24 hour care and inserting the following:

This clause only applies to home care employees.

(a) A **24 hour care** shift requires an employee to be available for duty in a client's home for a 24 hour period. During this period, the employee is required to provide the client with the services specified in the care plan. The employee is required to provide a total of no more than eight hours of care during this period, and may not be required to perform duties outside the scope of the care plan or be unreasonably required to provide more than eight hours of care.

(b) For the purposes of this clause, "care" shall mean the performance of any task that assists a client with daily living.

(c) An employer may only require an employee to work a 24 hour care shift by agreement.

(d) During a 24 hour care shift, the employee will be afforded the opportunity to sleep for a continuous period of eight hours (the "sleep break") during a 24 hour care shift and will be provided with:

(i) a separate and securely lockable room with a peephole or similar in the door, a bed and a telephone and internet connection in the room; and

(ii) a bed, bedside lamp and clean linen;

(iii) access to food preparation facilities; and

(iv) access to appropriate temperature control and

(v) free board and lodging.

(e) The sleep break shall not commence earlier than 10pm and shall not finish later than 7am.

(f) An employee required to work a 24 hour care shift will be paid the sleepover allowance prescribed by clause 25.7.

(g) In the event that:

(i) the sleep break is interrupted by the client for any reason, whether to deliver services specified in the care plan or not; or

(ii) the employee is otherwise required to provide more than eight hours of care;

the employee shall be paid double time for the period of such interruption or the provision of such care, with a minimum payment of one hour, provided that nothing in this clause shall be regarded as obliging an employee to perform duties outside the scope of the care plan or provide more than eight hours of care where such requirement is unreasonable.

(h) In addition to the above, for each 24 hour period, the employee will be paid:

(i) 16 hours at 155% of their appropriate rate and;

(ii) three meal allowance payments prescribed by clause 20.3.

(i) An employee who regularly works 24 hour care shifts during the yearly period in respect of which their annual leave accrues will be deemed to be a shiftworker for the purpose of entitlement to annual leave pursuant to the NES.

(j) For each 24 hour care shift, the employee will be treated for all purposes as having performed 24 ordinary hours of work.

(k) An employee will be allowed, at their election, a break of not less than 10 hours between the end of one 24 hour care shift and the start of another period of work.

[2] By deleting clause 31 .2 –Quantum of leave and replacing it with the following:

For the purpose of the NES, a shiftworker is:

(l) an employee who works for more than four ordinary hours on 10 or more weekends during the yearly period in respect of which their annual leave accrues; or

(m) an employee who regularly works 24 hour care shifts in accordance with clause 25.8 (for the purposes of this sub clause, an employee will regularly work 24 hour care shifts if the employee works four or more 24 hour care shifts during the yearly period in respect of which their annual leave accrues)

and is entitled to an additional week's annual leave on the same terms and conditions

B. This determination will come into operation from DD MM YYYY.