BACKGROUND PAPER

Fair Work Act 2009
s.156 - 4 yearly review of modern awards

4 yearly review of modern awards—Award stage—Group 4—*Social, Community, Home Care and Disability Services Industry Award 2010*—substantive claims – Tranche 2

(AM2018/26) MELBOURNE, 6 JANUARY 2020

This is a background paper only and does not purport to be a comprehensive discussion of the issues involved. It does not represent the view of the Commission on any issue.

ABBREVIATIONS

ABI	Australian Business Industrial on behalf of the NSW Business chamber Ltd, Aged & Community Services Australia and Leading Age Services Australia Limited
AFEI	Australian Federation of Employers and Industries
Ai Group	Australian Industry Group
ASU	Australian Municipal, Administrative, Clerical and Services Union
CHSP	Commonwealth Home Support Program
HSU	Health Services Union of Australia
NDIS	National Disability Insurance Scheme
NDS	National Disability Services
SCHADS Award	Social, Community, Home Care and Disability Services Industry Award 2010
UV	United Voice
UWU	United Workers' Union
VHIA	Victorian Hospitals' Industrial Association

1. Background

1.1 The Tranche 1 claims

[1] A number of substantive claims have been made to vary the *Social, Community, Home Care and Disability Services Industry Award 2010* (the SCHADS Award) as part of the 4 yearly review of modern awards (the Review).

[2] On 12 April 2019 a summary document was published in relation to Tranche 1 outlining the relevant procedural history, the claims being pursued and a summary of the submissions received.

[3] The following claims were dealt with in Tranche 1:

United Workers Union (UWU) claims:

- S44A – deletion or variation to 24 hour care clause;
- S40 – consequential variation to the sleepover clause (arising from the deletion of the 24 hour care clause (S44A));
- S47 – variation to excursions clause;
- S51 – variation to overtime clause; and
- S57 – variation to public holidays clause;

Australian Services Union (ASU) claims:

- S6 – provision of a Community language skills allowance;

Health Services Union (HSU) claims:

- S19 – first aid certificate renewal;
- S43 – deleting the 24 hour care clause; and
- S48 – Saturday and Sunday work (casual employees receiving casual loading in addition to Saturday and Sunday rates).

[4] The Tranche 1 claims were heard on 15 – 17 April 2019.

[5] On 2 September 2019 the Full Bench issued a decision[1] (the *September 2019 Decision*) which dealt with the nature of the Review, the SCHADS Award, the SCHADS Sector and the National Disability Insurance Scheme (NDIS) and the Tranche 1 claims. In dealing with the Tranche 1 claims, the Full Bench decided to:

- vary the rates of pay of casual employees who work overtime and on weekends and public holidays (subject to the views expressed therein about transitional arrangements);
- reject the first aid certificate renewal claim;

[1] [2019] FWCFB 6067

- reject the UWU's claim to vary the public holiday clause;
- defer consideration of the ASU's claim for a community language skills allowance; and
- set out a process for addressing the lack of clarity and other deficiencies in the 24 hour care clause.

[6] On 18 October 2019 the Full Bench issued a decision[2] (the *October 2019 Decision*) resolving the transitional arrangements in respect of the decision to vary the rates of pay for casuals working overtime and working on weekends and public holidays. The Full Bench decided that the increases in overtime, weekend and public holiday rates for casuals will come into operation, in full, from 1 July 2020. A determination[3] was issued on 21 October 2019 giving effect to the *October 2019 Decision*.

[7] A Report was published by Commissioner Lee on 14 November 2019 arising out of conferences held in relation to the 24 hour care clause. The variation of the 24 hour care clause will be the subject of submissions in the Tranche 2 proceedings.

[8] A Background Document was published by Deputy President Clancy on 4 December 2019 in relation to the ASU's community language allowance claim and directions issued for the hearing of this claim in conjunction with the Tranche 2 claims.

1.2 The Tranche 2 claims

[9] The Tranche 2 claims being pressed are as follows:

ABI claims[4]:

- Variation to the client cancellation provision; and
- Remote response work.

ASU claims:

- Broken shift penalty rate;
- Paid travel time; and
- Recall to work overtime away from the workplace.

HSU claims:

- Broken shifts;
- Minimum engagements;
- Travel;
- Telephone allowance;
- Uniform/damaged clothing allowance;

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[2] [2019] FWCFB 7096

[3] PR713525

[4] In their submissions of 19 November 2019 ABI advised of only the above two claims being advanced by their clients. It is presumed that earlier claims are no longer being pursued.

- Recall to work;
- Cancellation;
- Sleepover; and
- Overtime for part-time and casual workers beyond rostered hours/8hours.

UWU claims:

- Broken shifts;
- Travel time;
- Variation to clothing and equipment allowance (uniforms);
- Variation to rosters clause; and
- Mobile phone allowance claim.

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

[10] Directions were issued on 13 May 2019[5] directing the parties to file submissions in reply in relation to the Tranche 2 substantive claims.

[11] On 26 September 2019 a Statement[6] was issued directing the parties to file a Court Book, which was filed on Friday 4 October 2019. The Court Book included draft determinations which were filed by:

- ABI on 2 April 2019;
- ASU on 7 November 2018 and 2 July 2019;
- HSU on 15 February 2019; and
- UWU on 3 October 2019.

[12] Following filing of the Court Book and the hearing of substantive claims, ABI filed an amended draft determination on 15 October 2019.

[13] The hearing of the evidence in respect of the Tranche 2 substantive claims took place in the period 14–18 October 2019. The following Transcripts of Proceedings have been published:

- Monday 14 October 2019;
- Tuesday 15 October 2019;
- Wednesday 16 October 2019;
- Thursday 17 October 2019; and
- Friday 18 October 2019.

[14] All exhibits tendered at the Tranche 2 Full Bench hearings are at **Attachment A**.

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[5] With various amendments up to and including 13 September 2019

[6] [2019] FWCFB 6685

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

[15] Directions were issued on 23 October 2019 requiring the parties to file submissions setting out the following:

(i) The claims they are pressing or opposing in the Tranche 2 proceedings.

(ii) The parts of the Court Book, the exhibits and transcript which are relevant to each claim.

(iii) Identifying the submissions filed (and which parts of those submissions) they rely on in relation to the claims being considered in the Tranche 2 proceedings.

(iv) Dealing with the evidence adduced during the proceedings on 15 – 18 October 2019, including by identifying the findings that they say should be made in light of the evidence and referring to the aspects of the evidence which is said to support those findings (by reference to particular paragraphs in exhibits and the Transcript).

(v) Responding to the amended claims filed by ABI on 15 October 2019.

(vi) Responding to the 'remote response' claim filed by the ASU on 19 September 2019 and any written submissions filed in support of it.

[16] The submissions filed in response to these Directions are as follows:

- UWU on 18 November 2019;
- Ai Group on 18 November 2019[7];
- HSU on 18 November 2019;
- ABI on 19 November 2019;
- NDS on 19 November 2019;
- AFEI on 19 November 2019 and in reply to ASU and ABI on 19 November 2019; and
- ASU on 20 November 2019.

[17] **Attachment B** sets out the list of submissions relied upon by each party in relation to the Tranche 2 proceedings, as indicated in their November submissions above.

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

[7] Attachment A to AiG submissions of 18 November 2019 identifies the claims advance by other parties that are opposed by AiG and the specific parts of the written submissions filed by AiG to date upon which it relies in respect of each claim.

[18] On 3 December 2019 the Full Bench issued a Statement[8] vacating the hearing scheduled for the Tranche 2 claims on 5 and 6 December 2019, noting that:

> 'Having considered the submissions filed we have formed the view that further written submissions are required. In particular we will be seeking final written submissions from each interested party addressing:
>
> - the findings sought by other parties;
> - whether they agree or contest those findings;
> - their reasons (by reference to the evidence) for agreeing or contesting those findings; and
> - any submissions in reply to the written submissions referred to at [4] above.
>
> Provision will also need to be made for submissions in reply.'[9]

[19] Revised Directions were issued on 5 December 2019 as follows:

> 'Interested parties are to file written submissions in respect of the following matters by **4:00 pm on Friday 7 February 2020**:
>
> (a) whether they agree with or contest the findings sought by other interested parties in the written submissions listed at paragraph [4] of the *December 2019 Statement*;
>
> (b) in respect of any submissions made in accordance with paragraph (a) above; the reasons for agreeing with or contesting the findings sought, by reference to the evidence;
>
> (c) any submissions in reply to the written submissions listed at paragraph [4] of the *December 2019 Statement*;
>
> (d) responses to the questions posed in the Background Paper; and
>
> (e) submissions in support of the parties preferred position on changes to the 24 hour clause as set out in the Report issued by Commissioner Lee on 14 November 2019 (Note: At [2019] FWCFB 6067, [104] we expressed the *provisional* view that a 24 hour clause be retained but that the existing clause does not provide a fair and relevant minimum safety net and required amendment).
>
> Interested parties are to file any submissions in reply by **4:00 pm on Monday 24 February 2020**.
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> Submissions are to be filed in Word format via email to amod@fwc.gov.au.
>
> The matter will be listed for hearing on **Wednesday 11 March 2020 at 9:30 am**.
>
> Interested parties are granted liberty to apply to vary these directions.'

[20] This Background Paper has been prepared to assist the parties in the preparation of the submissions referred to in the Revised Directions.

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[8] [2019] FWCFB 8177

[9] [2019] FWCFB 8177 AT [6]-[7]

2. General findings on the evidence

[20] A number of general findings were made in the *September 2019 Decision*[10]. The *September 2019 Decision* also made some observations about the relevance of the NDIS funding arrangements to the determination of the claims before the Full Bench.[11]

[21] The UWU notes the following 'relevant findings' from the *September 2019 Decision*:

- A significant number of employees covered by the Award are low paid.[12]
- Employees in the sector are predominantly female.[13]
- There is a high proportion of part time employment in the sectors covered by the Award.[14]
- Funding arrangements are not determinative, and the adequacy of funding (or lack thereof) is a matter for the government. The Commission observed in paragraph [138] that: "[*T]he Commission's statutory function is to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net. It is not the Commission's function to make any determination as to the adequacy (or otherwise) of the funding models operating in the sectors covered by the SCHADS Award. The level of funding provided and any consequent impact on service delivery is a product of the political process; not the arbitral task upon which we are engaged*."

[22] The ASU submits[15] that the following findings in the *September 2019 Decision* are relevant to the determination of the Tranche 2 claims:

1. In the 2 September Decision, the Full Bench referred to August 2016 Census data (at [25]) showing that:

   (a) there were around 168,000 employees in the social, community, home care and disability services ('SCHDS') industry;

   (b) 73 percent of SCHDS industry workers are female (compared to the all industry average of 50 percent);

   (c) SCHDS industry workers are significantly to older than the all industries average;

   (d) SCHDS industry workers are more likely to be part-time employees than the all industry average (50.3 percent compared to 34.2 percent);and

   (e) SCHDS industry workers work fewer hours than the all industries average.

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[10] See [2019] FWCFB 6067 at [48] – [75]

[11] See [2019] FWCFB 6067 [124] – [143]).

[12] Tranche 1 Decision, paragraphs [47] and [160]

[13] As above, paragraph [26]

[14] As above

[15] ASU submission 19 November 2019 at [7] – [8]

2. The Full Bench also found (at [47]) that some employees covered by the SCHCDS Award may be regarded as "low paid" within the meaning of s.134 (1) (a). The evidence before the Commission is that Social and Community Services ('SACS') Employees are paid according to the SACS Equal Remuneration Order ('ERO'). Although in a number of instances in the employers' evidence there were enterprise agreements governing the employment of the employees, these agreements do not provide for rates of pay in excess of the ERO. Employees covered by other classifications streams may be covered by enterprise agreements, but wages remain very close to the award minimum. The needs of the low paid must be taken into account by the Commission.

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)?

[23] We now turn to the general findings proposed by interested parties.

[24] ABI[16] proposes that the following general findings be made:

1. There have been significant regulatory changes in the disability services and home care sectors over recent years. These have included:

   (a) the introduction of the National Disability Insurance Scheme which has been progressively implemented throughout Australia from July 2013;[17]

   (b) the introduction of reforms in the home care sector since around 2012.[18]

2. A key feature of those regulatory changes was the transition from traditional 'block funding' models to individualised funding arrangements underpinned by the principle of 'consumer-directed care'.[19]

3. The principle of 'consumer-directed care' involves providing individual consumers with choice and control over what services are provided to them, when and where those services are provided, how those services are provided, and by whom those services are provided.[20]

4. These reforms have fundamentally changed the operating environment in the following ways:

   (a) service providers now have less certainty in relation to revenue;[21]

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[16] ABI submission 19 November 2019 at [2.5] – [2.27]

[17] *National Disability and Insurance Scheme Act 2013* (Cth); ABI submission of 5 April 2019 at [3.15]-[3.18]; See Ai Group submission of 8 April 2019, at [83]-[87]

[18] ABI submission of 5 April 2019 at [3.7]-[3.14]; See also the *Aged Care Legislation Amendment (Increasing Consumer Choice) Act 2016*

[19] Stanford Statement at [24] (Court Book p.1454); Coad Statement at [14]

[20] See section 3(1)(e) *National Disability and Insurance Scheme Act 2013* (Cth); Matthewson Statement at [48]; Coad Statement at [16]

[21] Wright Statement at [22] and [24]; Mason Statement at [37]; Stanford Statement at [8]

(b) service providers are experiencing greater volatility in demand for services[22], as consumers have a greater ability to terminate their service arrangements[23];

(c) there has been an increase in the number of service providers in the market;[24]

(d) service providers are exposed to greater competition for business;[25]

(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;

(f) there is a greater fragmentation of working patterns[26], as the employer is now less able to organise the work in a manner that is most efficient to it;[27]

(g) greater choice and control for consumers has led to greater rostering challenges by reason of:

(i) an increase in cancellations by clients;[28]

(ii) an increase in requests for changes to services by consumers;[29] and

(iii) an increase in requests for services to be delivered by particular support workers.[30]

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.[31]

6. The implementation of the NDIS is overseen by the National Disability Insurance Authority (the **NDIA**) which is an independent statutory agency. As part of its market stewardship role, the NDIA imposes price controls on some supports by limiting the prices that registered providers can charge for those supports and by specifying the circumstances in which registered providers can charge participants for supports.[32] These prices are contained in the NDIS PB Support Catalogue 2019-20.[33]

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[22] Stanford Statement at [8]: "Demand for specific services fluctuates constantly due to changes in the number of clients, their approved budgets, their specific choices of services, and other factors"

[23] Harvey Statement at Attachment A: ConnectAbility's Service Agreement allows participants to cancel with four weeks' notice

[24] State of the Disability Sector Report at p.20. (Court Book p.3385)

[25] Australian Disability Workforce Report at p 14. (Court Book p.3329); McDonald Statement at Court Book p. 2914

[26] Stanford Statement at [8]: "The individualised, market-based system which the NDIS uses to deliver services to participating clients is creating a profound fragmentation and instability in the nature of delivered services"

[27] Harvey Statement at [28]

[28] Ryan Statement at [41]

[29] Mason Statement at [34]

[30] Mason Statement at [42], Coad Statement at [26]

[31] Transcript at PN470-474 and PN520-PN524, Transcript at PN1554-1561

[32] Court Book at p.4321

[33] Exhibit ABI12

7. The prices and rules contained in the Price Guide are monitored by the NDIA's Pricing Reference Group.[34] The prices are typically updated on an annual basis by way of an Annual Price Review.[35] The Pricing Reference Group helps guide NDIS price regulation activities and decisions.[36]

8. The NDIA uses an Efficient Cost Model to:

   (a) estimate the costs to disability service providers of employing disability support workers to deliver supports through the NDIS;[37] and

   (b) inform its pricing decisions in respect of the supports delivered by disability support workers on which it imposes price limits.[38]

9. The Efficient Cost Model purports to estimate the costs of delivering a billable hour of support taking into account "all of the costs" associated with every billable hour.[39]

10. In relation to labour costs, the Efficient Cost Model uses the SCHCDS Award as "the foundation" of its assumptions and methodology.[40]

11. Notwithstanding the above, the Efficient Cost Model does not contain any specific provision for, or does not account for, a range of actual or contingent costs proscribed by the SCHCDS Award which are associated with delivering services. These missing cost items include[41]:

   (a) overtime;

   (b) redundancy pay;

   (c) paid compassionate leave;

   (d) paid community service leave (for jury service);

   (e) the supply of uniforms or payment of a uniform allowance;

   (f) all other allowances payable under the Award, including:

      (i) the laundry allowance;

      (ii) meal allowances;

      (iii) the first aid allowance;

      (iv) the motor vehicle kilometre reimbursement;

      (v) the telephone allowance;

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[34] Court Book at p.2858

[35] Court Book at p.2859

[36] Court Book at p.2859

[37] Court Book at p.494

[38] Court Book at p.493

[39] Court Book at p.494

[40] Court Book at p.494

[41] Court Book at p.489

(vi) the heat allowance;

(vii) the on-call allowance;

(viii) the additional week's annual leave for shift workers; and

(ix) rest breaks during overtime.

12. Additionally, the Efficient Cost Model contains other assumptions that have the effect of further underestimating the true costs of service providers in delivering services under the NDIS. For example:

(a) the Efficient Cost Model does not account for payroll tax;[42]

(b) the Efficient Cost Model does not account for over-Award payments under applicable enterprise agreements;[43]

(c) the Efficient Cost Model assumes that 80 percent of the disability support workforce is permanently employed (which witness Mark Farthing described this as "highly inaccurate"[44]), which results in the model underestimating the costs incurred by service providers where their workforce consists of casual employees at a rate of greater than 20 percent of the overall frontline workforce;[45]

(d) the Efficient Cost Model assumes 'utilisation rates' (paid time that is billable compared to overall paid time) of between 87.7% and 92%[46], which does not provide sufficient allowance for essential non-billable tasks such as administration, handover, training, team meetings, and other non-chargeable tasks[47]; and

(e) the Efficient Cost Model assumes that a support worker is employed in a particular classification for each type of support delivery, but in reality the employee delivering the support may actually be at a higher pay-point.[48]

13. The NDIA has been aggressive in its price regulation activities in trying to set the absolute minimal cost so as to control the cost to government of the NDIS as a whole.[49]

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.[50]

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[42] Court Book at p.496

[43] Court Book at p.494

[44] Transcript at PN897

[45] Court Book at p.497; Transcript at PN894-900 (15 October 2019)

[46] Court Book at p.498

[47] Court Book at p. 3156-3157.

[48] Court Book at p.494

[49] *4 yearly review of modern awards – Casual employment and Part-time employment* [2017] FWCFB 3541 at [630].

[50] See Ai Group submission of 8 April 2019, at p.59-65. See also MacDonald at Court Book p.2914

15. Employers in the disability services sector have been under significant financial strain since the introduction of the NDIS.[51] By way of example:

(a) there were considerable transitional issues with the rollout of the NDIA due to the size, speed and complexity of the reform;[52]

(b) the cost of transitioning to the NDIS and interacting with new systems and processes added to providers' cost bases and affected their financial position;[53]

(c) the pricing model has had a negative effect on the sector;[54]

(d) as at February 2018, while some providers had profitable operating models, many were struggling;[55]

(e) in 2018 providers reported concern that financial losses will lead to a market failure;[56] and

(f) providers held concerns in 2018 that they would not be able to continue providing services at the current prices.[57]

16. The home care sector is primarily funded by the Commonwealth Government. The Commonwealth Government controls the supply of services and packages, the levels of funding, the regulatory framework, the administrative infrastructure for payment of subsidies and consumer entry and navigation through the system.[58]

17. There are three main categories of service or packages in the home care sector. They are as follows:

*The Commonwealth Home Support Program (**CHSP**)*

(a) The CHSP commenced in 2015 and provides ongoing or short-term care and support services.[59] The CHSP provides funding to a considerably large number of aged persons, however there is no data retained in relation to the demand for the program.[60]

(b) The CHSP relies on grants for funding and, with the exception of recent additional funds being provided to existing providers to increase their

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[51] Stanford Statement at [24]

[52] Productivity Commission Position Paper 'National Disability Insurance Scheme (NDIS) Costs' (Court Book p.1976)

[53] McKinsey & Company 'Independent Pricing Review: National Disability Insurance Agency' Final Report (Court Book p.1748); See also Court Book at p. 3848-51

[54] Productivity Commission Study Paper 'National Disability Insurance Scheme (NDIS) Costs' (Court Book p.3759)

[55] McKinsey & Company 'Independent Pricing Review: National Disability Insurance Agency' Final Report (Court Book p.1729)

[56] Court Book at p.3395

[57] Court Book at p.3395: "Fifty-eight per cent of disability service providers agreed or agreed strongly that they were worried they wouldn't be able to provide NDIS services at their current prices"

[58] Mathewson Statement at [39]

[59] Mathewson Statement at [36]

[60] Mathewson Statement at [41]: "In 2017-18, CHSP provided support to a total of 847,534 aged persons"

services, at no time recently has there been an open round for funding, funding has not been available on an annual basis and there is no clarity as to when funding will be released.[61]

*Home Care Packages (**HCPs**)*

(a) HCPs were introduced in 2013 to replace a number of other programs. The introduction of HCPs also saw the introduction of consumer-directed care and individualised funding.[62]

(b) CDC has seen a shift in the way that care is provided to participants and the model encourages greater choice on the part of the consumer. Following further reform in 2017, HCPs are now directly allocated to the person requiring the support rather than to providers and with their funding the participant then selects the provider they prefer.[63]

Veteran Programs

(a) Veterans' Home Care (**VHC**) provide funding to certain eligible veterans who require assistance to continue to live independently. There is also a DVA Community Nursing Program to enhance the independence of veterans. While the programs hold similarities to the other home care programs, they are funded separately through Department of Veteran Affairs.[64]

18. Providers in the home care sector are under financial strain following the rollout of CDC. While some providers have been operating under CDC since 2010 when it was first piloted, other providers have only been operating under this approach for approximately 12 months.[65]

19. There has been a decline in the overall performance of home care providers, which is reported as being attributable to increased competition 'caused by the introduction of consumers being able to choose the provider from whom they receive their services'.[66]

20. Reports show that while revenue has been increasing in the sector, the revenue levels of HCP providers are so low that they border on being unsustainable (taking into account the money providers are required to spend in relation to technology, staff recruitment, retention and growth).[67]

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[61] Mathewson Statement at [43]-[44]

[62] Coad Statement at [14]

[63] Mathewson Statement at [48]; Coad Statement at [25]

[64] Mathewson Statement at [56]

[65] Mathewson Statement at [61]

[66] Seventh report on the Funding and Financing of the Aged Care Industry 2019, p.1 (Court Book p.260)

[67] StewartBrown – Aged Care Financial Performance Survey – Sector Report – December 2018 (Court Book p.572)

21. Many employers in the SCHCDS industry are not-for-profit organisations with a strong mission to support the community.[68] Accordingly, many service providers in the SCHCDS industry are not primarily motivated by profitability and other commercial considerations.[69]

22. Equally, many employees working in the SCHCDS industry are motivated by factors other than purely economic benefit. For example:

(a) Ms Stewart stated that she "loved working in home care", "loved the clients" and "felt that I made a difference in the lives of my clients";[70]

(b) Ms Sinclair stated that she changed careers from environmental engineering to home care as she "was looking for a career which was more fulfilling" and that "I like the idea of promoting person-centred care for older individuals in our community";[71]

(c) Ms Waddell gave evidence that she "gain[s] satisfaction from knowing that I have made a difference to peoples' lives…";[72]

(d) Mr Encabo stated "I have strong emotional attachments to my work and the people I support. I have been an advocate for people with a disability since I was caring for my first wife. My connection to this sector is deeply personal";[73] and

(e) Mr Lobert stated "Initially what I liked about the work was the people and making a difference in peoples' lives. Now I also like that you don't have to take the work home with you, and that working one on one, you're only responsible to the person you're working with".[74]

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

Q6. Question for ABI: How do these proposed general findings relate to the specific claims before the Full Bench?

[25] The NDS seeks the following general findings:[75]

1. The Award covers employees across a range of sectors including social and community services, crisis assistance, disability services, home care and family day care[76].

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[68] Wright Statement at [11]; Wang Statement at [13]-[15]; Ryan Statement at [16]; Harvey Statement at [9]; Shanahan Statement at [9]

[69] Ibid

[70] Further Stewart Statement at [17] (Court Book p.4711)

[71] Transcript at PN668

[72] Waddell Statement at [4]

[73] Encabo Statement at [37]

[74] Lobert Statement at [3]

[75] NDS submission 19 November 2019 paragraphs [8] – [18]

[76] FWC – Survey Analysis of the *Social, Community, Home Care and Disability Services Industry Award 2010* (June 2019)

2. All of the evidence listed in the above table attests that the disability sector has been undergoing significant change since the introduction of the National Disability Insurance Scheme which has been progressively rolled out across Australia between 2013 and 2020.

3. NDIS is a market based, individualised system[77] designed to give participants more choice and control over their daily lives[78].

4. The implementation of NDIS has led to an increased fragmentation of how work is performed. While some disability supports continue to be provided in settings such as group homes, and increasing amount of work is performed by individual workers in the homes of individual clients, or on an individual or small group basis in community settings[79].

5. Employers are under greater market pressure than before to accommodate the needs and preferences of clients and this has a flow on effect to how work needs to be organised[80].

6. The disability sector is characterised by a high level of part-time and casual employment[81].

7. The price that providers can charge participants for the delivery of services is currently capped by the National Disability Insurance Authority. The price has been developed using a "efficient cost model" which makes assumptions about labour costs[82].

8. The evidence in these proceedings is that the cost model is deficient in many respects and underestimates labour costs. The NDIA costing model has been criticised in recent years for underestimating true labour costs. Recent price changes have ameliorated this to some extent but there are still deficiencies in the model [83].

9. The result is that disability service providers are under increasing financial stress. For example, the NDS State of the Sector Report shows, that while the market is growing, a significant proportion of providers are making overall financial losses and experiencing deteriorating financial performance[84].

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[77] Stanford [8]; McDonald (Court Book p2914 para 2); Cortis (section 1.1); NDS submission 16 July 2019 [8]

[78] Moody [11-12]

[79] Miller [16-18]

[80] For example, Stanford PN 2249-2253

[81] NDS – Aust Disability Workforce Report; Stanford [16-18]; Moody [23-40]

[82] NDIA Efficient Cost Model for Disability Support Workers

[83] Cortis etal; Farthing PN 869-895; Moody [46-48]

[84] NDS State of the Sector Report (Court Book pp 3404-5); Endeavour Foundation Annual Report 2017-2018 (ASU3) at p44 shows falling surpluses between 2014-2018

10. The home care sector is experiencing changes similar to NDIS as a result of consumer directed care[85].

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.

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

Q8. Question for NDS: How do these proposed general findings relate to the specific claims before the Full Bench?

[26] AFEI relies on paragraphs 12 – 32 of its 23 July 2019 submissions, outlining the nature of the SCHADS Industry.

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

[27] Ai Group seeks the following general findings in the Tranche 2 proceedings:[86]

1. Employees providing disability services in clients' homes perform a range of duties including assisting clients with showering, personal hygiene, meal preparation, taking medication, cleaning, laundry, taking them to public places such as shops or a café, other community engagement activities and taking them to medical appointments.[87]
2. Employers face a peak in demand for their services at certain times of the day, such as in the morning and in the evening.[88]
3. Enterprise bargaining between employers and employees covered by the Award is not common.[89]
4. Where an enterprise agreement applies, it is uncommon for such an agreement to deliver terms and conditions that are significantly more beneficial to employees than those provided by the Award.[90] This is at least in part due to the operation of the pricing caps imposed by the NDIS.[91]

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[85] Mathewson [61-69]

[86] Ai Group submission 18 November 2019 at [6] – [21]

[87] See for example Page 1138 at paragraphs 13 – 15 (Statement of A. Encabo); Page 1172 at paragraphs 12 – 13 (Statement of R. Rathbone); Page 2952 at paragraphs 8 – 9 (Statement of P. Wilcock); Page 2956 at paragraph 4 (Statement of H. Waddell); Page 2961 at paragraphs 4 – 5 (Statement of T. Thames) and Page 2966 at paragraph 8 (Statement of B. Lobert).

[88] Page 4405 at paragraph 53 (Statement of D. Moody) and Page 4410 at paragraph 21 and page 4414 at paragraphs 36 – 37 (Statement of S. Miller).

[89] Page 2935 at paragraph 17 (Statement of W. Elrick) and Page 2972 at paragraph 15 (Statement of J. Eddington).

[90] Page 2929 at paragraph 9 (Statement of M. Farthing); Page 2935 at paragraph 17 (Statement of W. Elrick); Page 2945 at paragraph 5 (Statement of C. Friend) and Page 2972 at paragraphs 15 – 18 (Statement of J. Eddington).

[91] Page 2929 at paragraph 14 (Statement of M. Farthing).

5. Employees are commonly required to work routinely with a particular client or multiple such clients over a period of time.[92]

6. Such an arrangement benefits the employee (because the employee gains a better understanding of the clients' needs), the employer (because the employee is able to perform their work more efficiently) and the client (because the client develops a rapport with the employee).[93]

7. It is common for employees to be employed by and to be performing work for more than one employer covered by the Award.[94]

8. Some employees find personal satisfaction in undertaking work in the sectors covered by the Award.[95]

The Operation of the NDIS

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.[96]

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.[97]

11. The transition to the NDIS has been financially very challenging for some employers.[98]

12. The cost model underpinning the NDIS pricing arrangements does not make express provision for at least the following entitlements:

    (a) Redundancy pay prescribed by the NES;

    (b) Paid compassionate leave prescribed by the NES;

    (c) Community service leave for jury service prescribed by the NES;

    (d) The cost of providing uniforms pursuant to clause 20.2 of the Award;

    (e) The uniform allowance prescribed by clause 20.2 of the Award;

    (f) The laundry allowance prescribed by clause 20.2 of the Award;

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[92] Exhibit AIG1 (Staff roster of D. Fleming); Pages 1142 – 1165 (Attachment to statement of A. Encabo); Pages 1178 – 1185 (Attachment to statement of R. Rathbone) Transcript of proceedings on 15 October 2019 at PN469 and PN518; Transcript of proceedings on 16 October 2019 at PN1146, PN1553 – PN1554 and PN1563.

[93] Transcript of proceedings 15 October 2019 at PN470 – PN474 and PN520 – PN524; Transcript of proceedings 16 October 2019 at PN1555 – PN1561.

[94] Page 2916 (Statement of F. McDonald at FM-2).

[95] Page 1140 at paragraph 37 (Statement of A. Encabo); Page 2916 (Statement of F. McDonald at FM-2); Page 2956 at paragraph 3 (Statement of H. Waddell); Page 2965 at paragraph 3 (Statement of B. Lobert); Transcript of proceedings on 15 October 2019 at PN668 and Transcript of proceedings on 16 October 2019 at PN1366 – PN1367.

[96] Page 2962 at paragraphs 5 and 7 (Statement of T. Thames); Page 4482 at paragraph 19 (Statement of D. Fleming); Page 2958 at paragraph 23 (Statement of H. Waddell); Transcript of proceedings on 16 October 2019 at PN1453 – PN1455; Transcript of proceedings on 17 October 2019 at PN2048; Transcript of proceedings on 18 October 2019 at PN2885, PN3047 – PN3048 and PN3315 – 3316.

[97] Page 1447 at paragraph 8 and Transcript of proceedings on 17 October 2019 at PN2247.

[98] Page 1454 at paragraph 24, Page 1464 at paragraph 51 and Pages 1464 – 1465 at paragraph 53.

(g) The first aid allowance prescribed by clause 20.4 of the Award;

(h) The vehicle allowance prescribed by clause 20.5(a) of the Award;

(i) The telephone allowance prescribed by clause 20.6 of the Award;

(j) The heat allowance prescribed by clause 20.7 of the Award;

(k) The on call allowance prescribed by clause 20.9 of the Award;

(l) An additional week of annual leave for shiftworkers pursuant to clause 31.2 of the Award and the NES; and

(m) Overtime rates prescribed by the Award.[99]

(collectively, **Unaccounted Labour Costs**)

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.[100]

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.[101]

15. The cost model provides for a profit margin of 2%.[102]

16. The recently introduced Temporary Transfer Payment (**TTP**) will be paid to an employer in respect of a client's plan that is made from 1 July 2019 only if the client agrees to allow the employer to claim the TTP payment from the funding allocated to the client.[103]

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

Q11. Question for Ai Group: How do these proposed findings relate to the specific claims before the Full Bench?

[28] Ai Group also advances three general observations about the evidence:[104]

1. It appears that much of the evidence heard in these proceedings regarding the manner in which work is arranged for the purposes of providing disability services is uncontested. What is contested is whether, as a matter of merit, the Award should permit work to be arranged in those ways.

2. Vast portions of the unions' evidence should, in our submission, be given little weight on the basis that the evidence variously constitutes little more than opinion evidence without a proper basis from individual lay witnesses; speculative evidence

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[99] Transcript of proceedings on 15 October 2019 at PN870 – PN886.

[100] Transcript of proceedings on 15 October 2019 at PN891.

[101] Transcript of proceedings on 15 October 2019 at PN888.

[102] Transcript of proceedings on 15 October 2019 at N900.

[103] Transcript of proceedings on 15 October 2019 at PN917.

[104] Ai Group submission 18 November 2019 at [48] – [60]

and hearsay evidence which, in many cases, has been given without the source of the evidence having been identified, thereby compounding the prejudice to respondent parties. The specific elements of the evidence that we say should be given little weight and the bases for those submissions are set out at Attachment B to Ai Group's submission.

3. The third observation deals with the evidence of Dr Stanford.

4. Dr Stanford's evidence was based primarily on two research projects that he and others had undertaken.[105] One of those involved interviews with 19 disability support workers working in the Hunter region of New South Wales.[106] When asked during cross-examination, Dr Stanford confirmed that the interviewers did not in fact verify whether the interviewees were covered by the Award[107] and / or whether an enterprise agreement applied to them[108]. Therefore, the relevance of the interviews that were undertaken cannot be properly assessed. Dr Stanford also conceded that the results of the research could not be said to be representative of conditions in the industry more generally.[109]

Q12. Question for Ai Group: The interviewees were disability support workers, why wouldn't they be covered by the award?

5. The identity of the employees who were interviewed and their employers is not known. In response to objections raised by Ai Group to the relevant elements of Dr Stanford's evidence[110] on this basis, the ASU confirmed that the evidence is not relied upon to establish the truth of what was said by the 19 interviewees to the interviewers.[111]

6. Little if any weight should be given to those elements of the evidence to which we objected. Even if the transcripts of the interviews had been produced, the 19 employees were not called to give evidence in these proceedings and as a result, respondent parties did not have an opportunity to test the veracity or relevance of the information they provided during the course of the interviews relied upon.

7. The issue is also, however, relevant to the evidence of Dr Stanford more generally. He testified that his expert opinion was based *primarily* on the 19 interviews he had undertaken[112] (save for those parts of his evidence that related instead to a research project he undertook regarding the "intensifying skills and training requirements faced by the disability services workforce"[113]). In circumstances where the ASU does not assert the truthfulness of what the interviewees put during the interviews

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[105] Page 1445 at paragraph 3.

[106] Page 1445 at paragraph 4.

[107] Transcript of proceedings on 17 October 2019 at PN2231 – PN2234.

[108] Transcript of proceedings on 17 October 2019 at PN2235.

[109] Transcript of proceedings on 17 October 2019 at PN2242.

[110] Paragraph 9, sixth sentence; Paragraph 12, third sentence; Paragraph 26, third sentence; Paragraph 26, fourth sentence and subparagraphs (a) – (h); Paragraph 27; Paragraph 28, part of the final sentence (*These first-hand reports of dissatisfaction with conditions of work in the industry*); Paragraph 29, second sentence; Paragraph 30 and Paragraph 72.

[111] Transcript of proceedings on 17 October 2019 at PN2176 – PN2188.

[112] Page 1445 at paragraphs 3 – 4 and transcript of proceedings on 17 October 2019 at PN2223.

[113] Page 1446 at paragraph 5.

and its truthfulness has not, as a matter of fact, been established, the very basis for Dr Stanford's opinion is substantially undermined.

8. For completeness, we note that similar deficiencies also infect the articles attached at Attachments C – F of Dr Stanford's report[114] and on that basis they, too, should be afforded little weight.

9. *Finally*, in respect of travel time, Dr Stanford gave the following evidence: (our emphasis)

> 56. Finally, and perhaps most importantly, the Award presently does not specify minimum standards of practice regarding compensation for workers in work-related travel. … Allowing employers free-reign to organise work in such a fragmented, inefficient and unfair manner will only further degrade effective conditions and compensation in the sector, and clearly exacerbate the challenges of recruitment and retention.
>
> 57. … From the employer's perspective, there is little if any incentive to avoid scheduling work in small, discontinuous blocks (motivated, presumably, by the fragmented and unpredictable nature of demand from clients), nor to geographically plan the assignment of appointments to minimise travel. …[115]

10. Any assertion that employers have "free reign" to organise work ignores the various constraints imposed by the Award on an employer's discretion to roster employees' hours of work. It also ignores the client-focussed operation of the NDIS and, as Dr Stanford puts it in paragraph 57 of his report (extracted above), the "fragmented and unpredictable nature of demand from clients". These various limitations make self-evident that an employer does not have "free reign" over the manner in which they roster work.

Q13. Question for Ai Group: Was Dr Stanford cross examined in respect of this aspect of his evidence?

11. Respectfully, Dr Stanford's apparent refusal to accept under cross-examination that there are other pre-existing incentives for an employer to arrange work efficiently defies logic. It is in our submission self-evident that an arrangement of work that does not minimise unproductive time or, put another way, does not minimise the period of time during which an employee is not engaged in the provision of services for which an employer is able to charge their client (such as driving or waiting) undermines productivity and reduces the benefit enjoyed by the employer of the employee's labour. The desire to maximise productivity and thus maximise the extent to which chargeable services can be provided to clients (particularly where employers are facing challenging financial conditions, the demand for services under the NDIS is growing and the industry is allegedly facing a labour shortage) is a clear incentive to avoid unnecessarily scheduling work in "small, discontinuous blocks" and to "geographically plan the assignment of appointments to minimise travel"; subject of course to the overriding requirement to meet client needs.

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[114] Pages 1521 – 1610.

[115] Pages 1466 – 1467.

12. In our submission, Dr Stanford's opinion in this regard should not be afforded any weight. We also note that it is directly inconsistent with evidence in these proceedings provided by certain employers that they 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.[116]

Questions for all other parties:

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

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

[29] The general findings sought by the ASU are set out at [9] – [32] of its submission of 19 November 2019, and are summarised as follows:

1. The Commission would find that work in the disability services is becoming increasingly precarious. This change in the industry has significant adverse effects on employees in the sector, contributing to an extreme turnover rate.
2. Firstly, the rate of casual employment in disability services is increasing. The National Disability Services Australian Disability Workforce Report of July 2018 ('**NDS Report**') reporting that 46 percent of disability support workers are casuals. Dr Stanford's analysis of this data shows that new employment in the sector is being driven almost entirely by a growth in casual employment. The growth in casual employment in the sector was 26 percent per year, compared to just a 1.3 percent per year increase in permanent employment.[117]
3. Further, casualization is not the only challenged faced by workers in the industry. Dr Stanford stresses that precarious work practices are becoming increasingly common for all disability support workers. Average hours of work are low and highly variable. Some workers work very short hours, and many workers experience regular fluctuations in their hours of work. [118] There is an increase in part-time employment, irregular and discontinuous shift assignments, and the requirement to work in multiple locations. Work is regularly performed in private homes. Workers are also increasingly expected to provide transportation services, usually in their own vehicle.[119]
4. The Commission should also find that the increasingly unpredictable nature of the industry has clear adverse impacts on employees.

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[116] Transcript of proceedings on 17 October 2019 at PN2039, PN2057 – PN2059, PN2070, PN2616 and PN2619; Transcript of proceedings on 18 October 2019 at PN2879, PN2885, PN3141 – PN3142 and PN3534.

[117] Stanford, p 12.

[118] Stanford, p 11.

[119] Stanford, p 6.

5. In his original qualitative research, Dr Stanford recorded elevated levels of mental and physical stress being suffered by workers, which the workers attributed to the instability and precariousness of their work.[120] Dr Stanford reports:

> 'Multiple interviewees reported the great difficulties of managing very unstable and unpredictable shift and roster schedules, and balancing the demands of such unpredictable work with their other family and community responsibilities.[121]'

6. The Commission should also find that the findings from Dr Stanford's qualitative research reflect the general scientific consensus about the impact of irregular and unpredictable work.

7. Dr Muurlink, in his review of the literature, explains that unpredictable work presents challenges to health and wellbeing. There are structural challenges to health, where employees are less able to engage in positive health behaviours or access health services. There are also physical and psychological challenges to health, which include the adverse effects of change, reduced rhythmicity, or a diminished sense of control.[122] These adverse effects may be compounded by the conjunction of irregular work with a lack of job security and underemployment.[123]

8. Dr Muurlink also notes that control and change are the two key psychosocial dimensions of work, which have significant predictive power in determining a wide variety of health outcomes. Control is particularly relevant for staff in relatively junior positions within care settings, and for these staff, I recommend particular care is taken with interfering with the predictability of work, as it is likely to compound existing problems associated with uncontrollability in the workplace.[124]

<u>Labour and skills shortages in the SCHDS Industry</u>

9. The Commission would also be satisfied that disability support work is skilled work, but that the industry is struggling to attracted sufficient new staff

10. Dr Stanford explained in his expert report that a common misperception about work in disability services is that it is unskilled and that disability services workers do not need any special qualifications. However, the Productivity Commission found that 89 percent of employers in the disability and personal care field indicated that a certificate-level qualification was essential for the job.[125] He went on to say that:

> 'This stands in contrast to the view of clinicians, social workers, disability specialists and participants themselves: namely, that this work requires sophisticated communications skills, a high level of emotional intelligence, and (depending on the complex and varied needs of the participant) specialist knowledge (for example, in relation to particular medical conditions, dealing with challenging behaviour, or understanding the side-effects of medications). In addition to multiple and complex needs, people with disabilities may also need support in managing multiple and complex

[120] Stanford, p 14.

[121] Stanford, p 15.

[122] Muurlink, pp 4-5.

[123] Muurlink, p 9.

[124] Muurlink, p 17.

[125] Stanford, p19

interactions with government and non-government agencies in the course of addressing their housing, medical, and educational support needs[126].

11. The Commission would find on the evidence that disability services requires a large number of skilled, qualified and experienced staff, but is struggling to retain and existing staff and attract sufficient numbers of new employees with the requisite skills.

12. The rollout of the NDIS is anticipated to ultimately increase employment in the disability services by some 70,000 full-time equivalent positions, or a doubling of the workforce in the sector.[127]

13. Dr Stanford describes the severe difficulties in recruiting new staff to even maintain existing operations, let alone scale up to the dramatic degree implied by forecasts of fully rolled out NDIS operations.[128] Dr Stanford notes that this means the sector is not recruiting enough staff to meet its needs. The NDS database indicates that four-fifths of all agencies attempted to hire new staff during the March 2018 quarter. Of those, nearly one-third were unable to fill all the vacancies they advertised for, and unfilled positions accounted for 25 percent of all advertised positions. Some agencies advertise permanently for new recruits, with no limit on hiring – in essence hiring all the new staff they can find.[129] Many of these vacancies remain unfilled due to a lack of suitable candidates. In the March 2018 quarter, 43% of employers with unfilled vacancies cited an absence of suitable qualified candidates as the main reason for their unsuccessful recruitment effort, a sharp increase from the 29% of employers who answered a similar question the previous year.[130]

14. Turnover of employment is unusually high. Dr Stanford notes that over one-quarter of workers change jobs in the course of a year. That is approximately three times higher than the average turnover rate in the overall Australian labour force.[131]

15. The Commission should also find that the staffing shortage in the industry is caused, in part, by the low conditions of employment and intolerable working conditions common to disability services.

16. Dr Stanford's research shows that existing staff report dissatisfaction with conditions of work in the industry, and a growing risk of departure from the sector.[132] Many of the front-line workers interviewed by Dr Stanford and his colleagues were considering leaving the industry altogether in response to intolerable insecurity and deteriorating conditions.[133] Workers are leaving the sector because of the experiencing increased instability and precariousness in their

[126] Stanford, p 18.

[127] Stanford, p 7.

[128] Stanford, p 13.

[129] Stanford, p 29.

[130] Stanford, p 29.

[131] Stanford, p 11.

[132] Stanford, p 11.

[133] Stanford, p 7.

jobs, elevated levels of mental and physical stress, and irregular hours and incomes.[134]

17. Dr Stanford notes that skilled workers appear to be unwilling to join the sector due to the intolerable conditions of employment. Dr Stanford believes that it is impossible to imagine that the requisite number of qualified, skilled and motivated workers could be attracted to this industry, given the unappealing or even intolerable conditions and insecurities which they would face in their new jobs.[135] Some new workers joined the sector reluctantly.[136]

18. The shortage of skilled staff will have a significant impact on quality of care.

19. The shortage of skilled workers will have an impact on the quality of care provided to NDIS participants. As noted above, skilled workers are leaving the industry. New recruits to the industry have considerably less training and qualifications than the existing workforce.[137] The majority of new workers recruited to work in the sector do not possess any formal qualification in disability services work.[138] This challenge has been exacerbated by inadequate conditions of work in the sector: most workers are engaged in casual, part-time, and irregular positions; staff turnover is high; and there has been a consequent reduction in the availability of training, including in-house supervision and support.[139]

20. It is likely that the sector's recruitment and training difficulties will become more acute over time, as the demand from NDIS participants grows, as the sector becomes even more casualised, as disability service jobs become even more precarious, and as the existing cadre of more experienced and skilled workers continues to exit the industry.[140] Dr Stanford and his colleagues identified the instability of employment arrangements and the low wages as key barriers inhibiting current and prospective disability support workers from accumulating more formal training.[141] The industry needs to stabilise its workforce and reduce turnover. It can only do this if it makes working in the sector more appealing.[142]

21. In his oral evidence, Dr Stanford magisterially summarised the challenges faced by the disability services:

> 'In terms of the aggregate data the evidence is very clear that workers do not feel that the current conditions of work, the instability of hours that they face, and the compensation, the effective compensation which they receive, are adequate to maintain this as their career path. So the overall turnover rates in this sector are very high according to the NDS database. One in four workers in the sector changes their job in the course of a year and that's a turnover rate approximately three times as high as for the labour market as a whole. We also see evidence of the departure of senior workers. Our qualitative interviews highlighted that many longstanding employees in

[134] Stanford, p 14.

[135] Stanford, p 18.

[136] Stanford, p 14.

[137] Stanford, p 28.

[138] Stanford, p 28.

[139] Stanford, p 13.

[140] Stanford, p 27.

[141] Stanford, p 22.

[142] Stanford, p 22.

> the industry as the structure of service delivery changed under the NDIS found the turmoil and instability of their work intolerable and that was contributing to their departure from the career as well. The inability of the industry to attract, first of all, enough workers period but, secondly, workers with the skill level that most experts in the sector think is essential is also clear. We had the data that I mentioned from NDS on the number of vacant positions that can't be filled. We also have data from the NDS about the relatively low levels of formal qualifications of the workers who are attracted. So put all of that together, quantitative and qualitative indicators, we see an industry that needs to grow but isn't able to maintain its current workforce let alone attract in significant numbers the new workers with the skills that are going to be required to live up to the mandate that the NDIS undertook.[143]'

22. The weakness of the SCHDS Award in addressing these problems of instability and unpredictability in working arrangements is clearly facilitating the further fragmentation and destabilisation of work in the sector.[144]

23. However, employers in the sector are not adapting their work practices to address this problem. This is because there are few incentives for them to adopt more farsighted work practices. In Dr Stanford's 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.[145]'

24. As Dr Stanford goes on to say:

> 'Right now the pressure, if you like, or the incentive is indirect only from an employer that is enlightened enough to realise that a more satisfied employee is more likely to be a long-term and motivated employee.[146]'

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

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

[30] The HSU's submission of 18 November 2019 does not clearly set out the general findings sought. The following proposed general findings are derived from that submission:

1. Employees covered by the Award are generally paid at, or minimally above, award rates and enterprise bargaining does not deliver any significant wages increases to the employees in the industry.

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[143] Transcript 17 October 2019, PN 2285

[144] Stanford, p 25.

[145] Transcript 17 October 2019, PN2282.

[146] Transcript 17 October 2019, PN2275.

2. For disability and home care workers, the task of organising together and bargaining collectively is complicated by the fact that they have no "workplace" as such. Union organisers and officials cannot simply schedule meetings at the "workplace" as many of the workers are either at the client's home (or some other location to attend to the client), or in their cars between appointments7. That impediment may account, in part, for the low wage outcomes achieved even where bargaining occurs.

3. There is significant casualisation of (at least) disability workers, with the National Disability Services Australian Disability Workforce Report of July 2018 reporting that 46% of disability support workers are casual.

4. A further related feature of the workforce covered by the Award, observed by Dr Macdonald in her report9, and borne out by the employer evidence is the regular expectation of performing hours of work additional to the employee's scheduled or rostered hours, often at short notice.

5. The expectation of both disability and home care part-time employees is that they perform work additional to their contracted hours.

6. In his report, Dr Stanford noted that average hours of work are low and highly variable.[147] Dr Stanford described an increase in precarious work practices for disability support workers; not just casualisation, but also an increase in part-time employment, irregular and discontinuous shift assignments, the requirement to work in multiple locations (often in private residences), and the expectation that workers will provide transportation services.[148] As well as instability and precarity, Dr Stanford recorded elevated levels of mental and physical stress being suffered by workers.[149]

7. Dr Muurlink explains how the unpredictable nature of work (a reality for both casual and part-time workers under this Award) has clear implications for the ability of workers to maintain work-life balance20. Where work has a regular and predictable "beat", the worker may synchronise their health behaviours with work; for example, establish regular family meal times or exercise routines and schedule doctors' appointments or other self-care activities. Unpredictability of work presents challenges to health, both:

    (a) structural challenges (the reduced ability to engage in positive health behaviours or reduced access to services); and

    (b) physical and psychological challenges (the reduced sense of control, and reduced rhythmicity/increased change).

    The latter category of challenges, whilst less tangible, are no less significant. A worker's sense of control is one of the most critical psychological variables in

[147] Stanford, CB1452

[148] Stanford, CB1447

[149] Stanford, CB1455

determining health responses to stressors such as work conditions.[150] In a study of a large Hungarian dataset, a perceived absence of control at work was the second strongest work-related predictor of premature death from cardio-vascular disease and the most powerful predictor of female ischaemic heart disease mortality.[151] Dr Muurlink notes the same author reports a connection between sense of control and well-being.[152] Similar findings appeared in an Australian study of nurses,[153] a group of workers with obvious parallels to the workers covered by the Award.

8. There is also the potential for a compounding adverse impact when an absence of job security/underemployment is combined with irregular work.[154]

9. The above features represent a real problem for the attraction and retention of appropriately skilled workers to the industry.

10. The gendered nature of the work performed by many of the workers covered by the Award was the subject of comment in the Equal Remuneration Case [2011] FWAFB 2700. There, the Full Bench accepted (at [253) the following propositions about work performed under the Award:

    (a) much of the work in the industry is "caring" work;

    (b) the characterisation of work as caring work can disguise the level of skill and experience required and contribute, in a general sense, to a devaluing of the work;

    (c) the evidence of workers, managers and union officials suggests that the work, in the SACS industry, again in a general sense, is undervalued to some extent; and

    (d) because caring work in this context has a female characterisation, to the extent that work in the industry is undervalued because it is caring work, the undervaluation is gender-based.

11. The gendered nature of the work also has an impact at the level of work practices. Dr Macdonald concludes:

    'Non-payment of social care work is supported by the gendered legacy of care work as women's work (Hayes, 2017; Palmer and Eveline, 2012). With care work continuing to be mainly performed unpaid by women in the family, it is often regarded as performed for altruistic reasons and as unskilled and not deserving of decent pay. These norms have a powerful role in social care, influencing employer strategies and also workers' preparedness to perform unpaid work. Furthermore, much social care work is performed in not-for-profit agencies that have long traditions and strong norms of volunteering that contribute to pressures on workers (Baines et al., 2017).'[155]

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[150] Muurlink, CB1691

[151] Muurlink, CB1692

[152] Ibid

[153] Muurlink, CB1693

[154] Muurlink, CB1694

[155] Macdonald, CB2912-2913

12. Mark Farthing, the National Campaigns and Projects Officer of the Health Services Union has provided a further witness statement dated 16 September 2019 (Court Book: 2981) detailing (at [10]) the significant changes to funding under the NDIS as a consequence of the NDIA's publication of the 2019-2020 Price Guide, as follows:

    (a) general price increases and significant above-inflation increases for therapists and attendant care and community participation supports, with the price for attendant care and community participation supports delivered during the daytime on a weekday to a standard needs participant increasing from the previous financial year by 9.78% (or 18.01% when the TTP Payment is taken into account);

    (b) the introduction of a Temporary Transformation Payment (TTP), loading calculated at 7.5% of Level 1 (standard needs) prices, but applicable in respect of Level 2 and Level 3 supports as well (subject to satisfaction of conditions about price transparency;

    (c) a doubling of the remote and very remote loadings (from 20% and 25% to 40% and 50% respectively);

    (d) increases to the time that may be charged for travelling to participants;

    (e) clear provision for charging for some non face-to-face activities;

    (f) abolition of the limit on cancellations that may be charged in a year, and a new policy whereby a cancellation fee at 90% of the service may be charged in most cases where two days notice is not given.

13. The changes effected by the 2019-2020 Price Guide mean that many of the criticisms of the NDIS made in (or relying on) the 'UNSW Report' are either no longer apposite, or do not apply with the same force as previously.

14. Evidence from witnesses from the large aged care organisations illustrated the significant financial opportunities presented by the move to Consumer Directed Care in Aged Care. Based on the published reports available to date, HammondCare's financial position has improved dramatically in the period since the introduction of consumer directed care,[156] based in part on its diversified service offering and integrated range of services[157] (that is, offering aged care services in the home, and gaining an obvious competitive advantage in attracting custom for its residential care services). HammondCare's home care business increased by 13.8% in the 2017-2018 financial year.[158] In the period from 2015 to the 2018 financial year, it produced surpluses, increased its overall annual turnover significantly, and significantly expanded its total asset base.[159] It also established new offices throughout New South Wales and the ACT.[160]

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[156] Ex HSU9

[157] Wright XXN, 18.10.19, PN2671-2672

[158] Wright XXN, 18.10.19, PN2678

[159] Ex HSU9, Ex HSU10

[160] Wright XXN, 18.10.19, PN2542

15. The rollout of the NDIS is anticipated to ultimately increase employment in the disability sector by some 70,000 full-time equivalent positions, or a doubling of the workforce in the sector.[161] Given the prevalence of part-time work in the sector, this will mean workers well in excess of that number will require training to develop the skills necessary to provide the care.

16. Turnover in the industry is currently high, with over one quarter of workers changing jobs within the course of a year. That figure is three times that in the Australian labour force otherwise.[162]

17. The disjuncture between the skill levels required to perform the work, and the skill level of those retained, and between the demands of the work and the conditions under which it is performed, represents an obvious risk for attraction and retention of workers within the industry. Those risks are already being realised, with substantial numbers of new advertised positions remaining unfilled. The disjuncture also poses risks for the quality of care being provided to participants, with research across a range of disciplines showing quality of care depends on the stability, tenure, training and motivation of the workforce.

3. The claims

3.1 General

[31] Two matters arise from the claims and the submissions filed.

[32] First, there are three claims in respect of remote response/recall to work overtime, by ABI, the HSU and ASU, and two claims by ABI and the HSU in relation to client cancellation. It is convenient to deal with these claims collectively and they are addressed in sections 3.2 and 3.5 below.

[33] Second, some of the union claims appear to be the same or substantially the same or at least have a degree of commonality, namely:

- broken shift;
- telephone allowance; and
- clothing allowance.

[34] These claims are also grouped together, at sections 3.3, 3.4 and 3.6 below.

3.2 The Remote Response/Recall to Work claims

[35] Clause 28.4 of the SCHADS Award deals with 'Recall to work overtime' and states:

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[161] Stanford, CB1448

[162] Stanford, CB1452

28.4 Recall to work overtime

An employee recalled to work overtime after leaving the employer's or client's premises will be paid for a minimum of two hours' work at the appropriate rate for each time so recalled. If the work required is completed in less than two hours the employee will be released from duty.

[36] Clause 20.9, 'On Call allowance' states:

20.9 On call allowance

(a) An employee required by the employer to be on call (i.e. available for recall to duty) will be paid an allowance of 2.0% of the standard rate in respect to any 24 hour period or part thereof during the period from the time of finishing ordinary duty on Monday to the time of finishing ordinary duty on Friday.

(b) The allowance will be 3.96% of the standard rate in respect of any other 24 hour period or part thereof, or any public holiday or part thereof.

[37] The current on call allowances in the SCHADS Award are $19.78 (clause 20.9(a)) and $39.16 (clause 20.9(b)) respectively.

[38] One of the issues raised during the review is how the Award operates in circumstances where an employee, who is not 'at work' or otherwise rostered to work or performing work at a particular time, is contacted and required to undertake certain functions remotely without having to physically attend the employer's premises (such as providing information to the employer over the telephone). It is convenient to refer to such work as 'remote response work'.

[39] There now appear to be three proposals advanced in relation to this issue: by ABI, the HSU and the ASU.

[40] While there is a significant degree of overlap between the competing proposals, the key difference relates to the scheme of remuneration to be applied when employees perform remote response work.

3.2.1 ABI claim

[41] ABI filed an amended draft determination dealing with 'remote response' on 15 October 2019 proposing the deletion of clause 28.4 and the insertion of the following:

1. By deleting clause 20.9 and inserting in lieu thereof:

20.9 On call allowance

An employee required by the employer to be on call (i.e. available for recall to duty at the employer's or client's premises and/or for remote response duties) will be paid an allowance of:

(i) $19.78 for any 24 hour period or part thereof during the period from the time of finishing ordinary duty on Monday to the time of finishing ordinary duty on Friday; or

(ii) $39.16 in respect of any other 24 hour period or part thereof on a Saturday, Sunday, or public holiday.

2. By inserting at clause 3.1:

> **3.1** In this Award, unless the contrary intention appears:
>
> **Workplace** means a place where work is performed except for the employee's residence.

[42] The intent of ABI's proposal is said to be to provide a scheme of remuneration for situations where an employee is required, outside of their working hours, to provide advice or assistance remotely. ABI submits that this is not a novel claim or provision, and that similar types of provisions appear in:

(a) the Local Government Award 2010 (at clauses 24.4(d) and 24.6(d));

(b) the Local Government (State) Award 2014 (NSW) (at clause 19E);

(c) the Water Industry Award 2010 (at clauses 26.4(d) and 26.6(d));

(d) the Business Equipment Award 2010 (at clauses 30.6(d) and 30.7); and

(e) the Contract Call Centres Award 2010 (at clauses 26.4(d), 26.6(d) and 26.7).

[43] The relevant extracts from the above awards are set out at **Attachment C**.

[44] ABI contends that if the Commission was minded to insert such a provision into the SCHADS Award then the Commission's task is to determine what an appropriate monetary entitlement is for this type of work. This task is said to involve an assessment of the value of the work and the extent of disutility associated with the time at which the work is performed. In the Penalty Rates Decision[163], the Full Bench observed at [202]:

> 'A central consideration in this regard is whether a particular penalty rate provides employees with 'fair and relevant' compensation for the disutility associated with working at the particular time(s) to which the penalty attaches.'

[45] ABI submits that unlike being physically recalled to the workplace in the traditional sense (or being on call to be recalled to work), the level of disutility associated with employees performing remote response work is significantly less, as employees are not required to:

- stay in the vicinity of the workplace while on-call;
- keep themselves, their work clothes and transport in a state of readiness while on-call for a possible recall to work;
- spend time travelling to or from the workplace if recalled to work; or
- incur additional travelling expenses (such as public transport fares, petrol or road tolls) if recalled to work.

[46] ABI submits that an employee can be on-call remotely from anywhere; they do not need to remain static at a particular location, be in readiness to attend work or be in (or change into) work clothing to perform the work.

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[163] [2017] FWCFB 1001

[47] ABI submits that its proposal provides a fair and relevant minimum safety net payment regime for this type of remote work, which is proportionate to the lower level of disutility associated with remote work.

[48] In its submission of 19 November 2019, ABI invites the Commission to make the following findings in relation to this claim:

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.

2. Employees covered by the Award are requested or required, from time to time, to perform 'remote work' (i.e. work away from the workplace) at times outside of their rostered working hours.

3. Having arrangements in place for out of hours work is necessary, given the industry.[164]

4. Employers have different practices in place for ensuring that employees are available to receive calls or otherwise respond to emergencies or other inquiries issues that may arise.[165]

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.[166]

6. It is difficult for employers to monitor the time that employees spend performing remote response work.[167]

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

NDS response to ABI's claim

[49] NDS supports the revised ABI claim in relation to remote response, and the consequential amendments to the on call provisions and the recall to work overtime provisions.

[50] NDS relies on its submission of 2 July 2019 at [41] – [57] and support the ABI submission of 2 July 2019 and the amended draft determination filed on 15 October 2019. NDS also supports the submission of AFEI of 3 July 2019 at [13] and [14].

AFEI response to ABI's claim

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[164] Statement of Deb Ryan at [78]

[165] Some employers have dedicated 'on call teams', while others utilise the general workforce who may be oncall from time to time.

[166] Anderson Statement at [23]

[167] Transcript at PN1005-PN1007

[51] AFEI does not oppose the ABI claim, subject to clarification that the provisions only apply to 'response' duties, and does not apply to employees who are under a general instruction/requirement to undertake work from home, including routine overtime work (or simply to ensure projects are completed within deadlines), which is performed from home.

[52] AFEI would not oppose the ABI Draft Determination, with the following amendments (amends underlined below):

> '28.5 Remote response when not on call
>
> > (a) An employee who is not required to be on call and who is requested by the employer to perform work on a particular occasion for a particular unplanned incident ~~by the employer~~ where the work is a response via telephone or other electronic communication away from the workplace.
>
> 28.6 Remote response when on call
>
> > (a) This clause applies to an employee who is required to be on call and who is required by the employer to perform work on a particular occasion for a particular unplanned incident ~~by the employer~~ where the work is a response via telephone or other electronic communication away from the workplace.'

[53] Subject to the above, AFEI do not oppose to the remainder of the amendments sought to ABI's proposed Clause 28.5 and 28.6, in respect to payments made to the employee and record keeping requirements.

Q19. Question for ABI: What does ABI say in relation to the amendments sought by AFEI?

Ai Group response to ABI's claim

[54] Ai Group's response to ABI's claim is set out at [71] – [79] in its submission of 18 November 2019.

[55] Ai Group's overarching position in relation to each of the proposals relating to remote response work is as follows:

1. Ai Group is not calling for any variation to the Award directed at imposing new obligations on employers in relation to 'remote response' work.

2. Should the Full Bench nonetheless be minded to vary the Award to include an term relating to 'remote response' work, Ai Group submits that ABI's proposal ought to be preferred over that advanced by the HSU and ASU.

3. ABI's proposal strikes a more reasonable balance between the interests of employers and employees, as well as an appropriately conservative approach to the imposition of new obligations upon employers given the potential for such new provisions to have adverse consequences combined with the difficulty of robustly assessing such matters given the nature and paucity of evidentiary material relating to this issue advanced by the proponents of a change.

[56] Ai Group submits that ABI's proposal is intended to achieve the following outcomes:

(i) To clarify that the recall to work overtime provisions apply in circumstances where an employee is required to return to a workplace that is not their domestic residence in order to undertake overtime work.

(ii) To introduce a new mechanism for determining the remuneration of employees for work undertaken at their domestic residence, via telephone or other means of electronic communication, which provides for different entitlements depending upon whether the employee undertakes such work while 'on call' or while not 'on call'.

(iii) To clarify that an employee is required to be 'on call' for the purposes of clause 20.9 if they are required to be available for 'remote response duties'.

[57] Ai Group understands that the rationale for the lesser payment during the day is that employees will not suffer the same disutility when disturbed during the day when compared to a disturbance that occurs late at night. It is also anticipated that the greatest need to contact an employee outside of their normal working hours will likely be in the period not long after they have left work and, as such, this more conservative minimum payment will to some extent moderate the adverse financial impact of the proposal upon employers.

[58] Ai Group notes that 'remote response duties' does not appear to be defined in ABI's proposal, although its meaning can be gleaned implicitly from the terms of clauses 28.5 and 28.6. Ai Group understands 'remote response duties' to be work that is required to be done by the employee via a telephone or other electronic device away from the workplace.

Q20. Questions for ABI: Does ABI agree with AiGroup's characterisation of the intention of its proposal? ABI is invited to provide a definition of 'remote response duties'.

[59] Ai Group proposes two findings in respect of this issue:

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.[168]

2. Some work-related activities are undertaken by employees while they are not at the workplace in as little as a 'few minutes'.[169]

Q21. Question for AiGroup: What reliance is placed on the Government funding?

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

UWU response to ABI's claim

[60] The UWU relies on [49] and [52] of its reply submission of 13 September 2019:

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[168] Transcript 15 October 2019 at PN448-PN452 and PN547-PN549

[169] Transcript 15 October 2019 at PN992

"49. ABI and others have filed a draft determination to insert a clause addressing remote response duties. We do not oppose the insertion of a remote response clause, however we do not support the terms as proposed by ABI and others.

. . .

52. Remote response duties are performed outside of rostered hours, and should be paid at overtime rates. If remote response duties are not costed effectively, this could result in some employers requiring employees to work multiple instances of remote response across a long period of time, effectively disrupting any rest break the employee is entitled to between shifts."

3.2.2 HSU claim

[61] The HSU have proposed that clause 28.4 be varied to include a new sub-clause dealing with circumstances where an employee is required to perform work from home after leaving the employer's or client's premises. Under the HSU proposal, the employee would be entitled to a minimum of one hours' pay at overtime rates "for each time recalled".[170]

[62] HSU seeks to renumber the text appearing below the heading of clause 28.4 with '(a)' and insert the following as (b):

> (b) Where an employee is required to perform work from home after leaving the employer's or client's premises, including:
>
> (i) Responding to phone calls, message or emails;
>
> (ii) Providing advice ("phone fixes")
>
> (iii) Arranging call out/rosters of other employees; and
>
> (iv) Remotely monitoring and/or addressing issues by remote telephone and/or computer access;
>
> the employee will be paid for a minimum of one hours' work at the overtime rate for each time recalled.

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?

ABI response to the HSU claim

[63] ABI is opposed to both the HSU and ASU claims, and have advanced a separate proposal to introduce a remote response duties compensation regime.

Ai Group response to HSU claim

[64] Ai Group relies on its submission of 13 July 2019 at [427] – [478].

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[170] See [16] of Amended Draft Determination of HSU, filed 15 February 2019.

3.2.3 ASU claim

[65] The ASU relies on their submission dated 23 September 2019.

[66] The ASU submits that if the Commission is minded to make a term dealing with recall to work overtime remotely it should have the following features:

1. Remote work, like physical recall to the workplace, should be voluntary and paid at overtime rates.

2. There should be a clear incentive for remote work to only occur while an employee is required to be on call. This can be achieved by a structure of minimum payments.

3. 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.

4. 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.

5. Further, because this is a significant expansion of the current 'on call provision', cl 25.3 Roster days off should be varied to ensure that on call time counts as duty for the purposes of the clause. This is to ensure that the expansion of the scope of on call work does not reduce an employee's personal time.

[67] The ASU has proposed a draft determination[171] which it submits gives effect to these principles. The draft determination proposes to delete clause 28.4 and the insertion of a new clause, as follows:

> **28.4 Recalled to work overtime**
>
> (a) An employee who is recalled to work overtime after leaving the workplace and requested by their employer to attend a workplace in order to perform such overtime work will be paid for a minimum of two hours' work at the appropriate overtime rate for each time recalled. If the work required is completed in less than two hours the employee will be released from duty.
>
> (b) An employee who is not required to be on call and who is requested to perform work by the employer via telephone or other electronic communication away from the workplace will be paid at the appropriate overtime rate for a minimum of two hours work. Multiple electronic requests made and concluded within the same hour shall be compensated within the same one hour's overtime payment. Time worked beyond two hours will be rounded to the nearest 15 minutes.
>
> (c) An employee who is required to be on call and who is requested to perform work by the employer via telephone or other electronic communication away from the workplace will be paid at the appropriate overtime rate for a minimum of one hours work. Multiple electronic requests made and concluded within the same hour shall be compensated within the same one

[171] Court Book at pp 1124-1125

hour's overtime payment. Time worked beyond one hour will be rounded to the nearest 15 minutes.

[68] In its submission of 19 November 2019 the ASU invites the Commission to make the following findings in relation to this claim:

1. Employees in the social and community sector are regularly recalled work overtime without returning to a workplace (i.e. their employer's premises or a client's home). This work is carried out by use of electronic means of communication (telephones, lap top computers, etcetera.)

2. These employees tend to be employed in higher classifications (managers and experienced practitioners) that are rostered on call to provide managerial duties or specialist expertise out of hours. Many of these employees work part-time hours.

3. The Award does not clearly regulate how this work should be structured or remunerated. Employers do not take a consistent approach to paying employees for this work. Some employees simply pay for the time worked; other employees pay an allowance, and others pay employees a minimum engagement.

4. The incursion of work into personal time, such as on call or ad hoc work from home, has significant negative impacts on an employee's health and well-being.[172]

5. The negative impact of out of hours work is diminished, but not minimised, if the employee is rostered to be on call. These impacts come in three forms: the need to remain alert and available to work, the interference with work-life balance and the negative impact on sleep.

6. In his review of the literature, Dr Muurlink explained that the unique negative impacts of on-call work appear to be related to the requirement to remain alert and available to being called to work, and not surprisingly, this requirement impacts on sleep.[173] On-call work requires the worker to subsume control over lifestyle choices to allow the ability to respond to work requirements, limiting behaviours to activities that would not interfere with their ability to work. This means that employees must often remain in their homes to be ready to respond to a request to work.

7. Deborah Anderson, a disability support worker, explained:

   'When I am on call, I cannot leave my home as I need to have phone, internet and computer access. I must also be ready and able to respond to any requests for work. I cannot go anywhere nor do anything else. This is particularly difficult on weekends when doing an on call shift from 9am until 9am. This causes high anxiety for me as I could be called out to any site to handle difficult incidences.'[174]

8. Dr Muurlink reports that on-call work has been linked with work-life imbalance, and the impact is particularly strong for women— and thus has particular relevance

[172] Muurlink, pp 4-6, 17

[173] Muurlink, p 11

[174] Anderson at [24]

to the care sector, where there is a significant continuing gender imbalance in favour of women. This is especially relevant to the SCHDS Award, given the gendered nature of the SCHDS Industry.

9. Further, being on-call has a negative impact on sleep. Dr Muurlink notes that those on-call were more likely to report sleep related problems. This is confirmed by laboratory evidence that being 'on call' appears to equate to being vigilant: the apprehension of being woken up impacts on quality of sleep. This includes significant increases in irritation and a reduction in mood and social activities, household activities, and low effort activities.[175]

10. Ms Flett, stated:

    'The following day after a night shift I can't do the things I like to do. I cannot exercise at a high level, my balance is affected, I cannot ride my motorbike or my pushbike. I also find it harder to engage with my partner, friends and family. I find that I don't have the energy to socialise, so I tend to withdraw a little bit and miss out.'[176]

11. Being recalled to work from home does not fully ameliorate the negative impacts of working being recalled to work. Dr Muurlink notes that that being on-call at home could be, if anything worse than being on-call at other locations, possibly because the presence of family interfered with the worker's ability to implement sleep patterns that would conform with on-call requirements.

12. Ms Flett explains that she finds working an on-call shift is 'different from working a shift when you are awake through the night'. She states that after a night on call 'you just feel like you are jetlagged as you have only slept in parts and will need to sleep again later in the day once morning duties are finalised and you go off shift'.[177] Further, Emily Flett has deliberately avoided living with her long term partner because of her working patterns. When she is on-call, they cannot share the same bed, because her working patterns would disrupt his sleep. Sharing a bed, and by inference a home, would be unfair to him because 'he would just be on call with me'[178].

13. The main reason why employees agree to work on call is to maximise their income. Both Ms Anderson and Ms Flett report that they are a paid a minimum engagement of two hours for each time they are contacted.[179] They both explain that if they were paid less than this, it may mean that they would choose not to work on call.[180] This is a significant concern for the disability service sector, which as Dr Stanford has noted, is having trouble retaining existing skilled and experienced staff.[181]

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[175] Muurlink, p 11-12

[176] Flett, at [22]

[177] Flett at [21]

[178] Flett at [23]

[179] Flett at [16], Anderson at [22]

[180] Flett at [24], Anderson at [25]-[27]

[181] Stanford Report, pp 11-12, 19

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

Ai Group response to ASU claim

[69] Ai Group relies on its submission of 18 November 2019 (at [80] – [153]).

AFEI response to ASU claim

[70] AFEI opposes the claim and relies on [129] – [133] of its 23 July 2019 submission in reply and [1.7] – [1.11] of its 19 November 2019 submission.

3.3 The Broken Shift claims

3.3.1 *General observations*

[71] Clause 25.6 of the SCHADS Award provides for certain types of work to be undertaken on a non-consecutive basis (ie as broken shifts).

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

[72] Clause 25.6 only applies to employees in the home care stream and employees in the social and community services stream when undertaking disability services work. Clause 25.6(b) currently provides for broken shifts to be paid at 'ordinary pay with penalty rates and shift allowances in accordance with clause 29 – Shiftwork, with shift allowances being determined by the finishing time of the broken shift' (emphasis added). The effect of this provision is that employees working broken shifts are shiftworkers for the purposes of the SCHADS Award and receive the applicable shift loading in respect of the broken shift.

[73] In its submission of 18 February 2019 the ASU contends that only 18 modern awards permit employers to engage employees on 'broken' or 'split shifts'. A summary of the broken shift provisions in other modern awards is set out at Annexure A to the ASU's 18 February 2019 submission. **Attachment D** to this Background Paper sets out these provisions.

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)?

[74] There are three union claims in respect of clause 25.6. Further, as the HSU observes in its supplementary reply submission of 3 October 2019 (at [38]), the issues of broken shifts, minimum engagements and travel provisions are inter-connected.

[75] The HSU proposal varies the existing clause in the following respects:

(i) limiting the clause to part-time and casual employees, thereby preventing full-time employees from being permitted to work broken shifts;

(ii) imposing a limit of one break per broken shift;

(iii) requiring that broken shifts only be worked where there is mutual agreement between the employer and individual employee;

(iv) requiring that each portion of a broken shift be subject to the proposed 3-hour minimum engagement;

(v) travel time between broken shifts be treated as time worked and be paid at the appropriate rate; and

(vi) the shift allowance be determined by either the starting time or the finishing time of the broken shift, whichever is the greater.

[76] The ASU seeks to vary clause 25.6 by introducing a 15 per cent loading to be paid when employees work a broken shift.

[77] The UWU seeks to vary clause 25.6 in two main respects:

- the imposition of a limit of two portions to a broken shift (or one break, as proposed by the HSU); and
- a variation to the way in which the existing loading is determined.

[78] ABI addresses the various union proposals in part 7 of its reply submissions of 12 July 2019. ABI contends that the union's (and in particular the ASU) are simply seeking to relitigate a matter which has been previously advanced and rejected.

[79] The broken shift provision in clause 25.6 was considered during the Transitional Review conducted under Item 6(1) of Schedule 5 of *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*. In the matter referred to by ABI, the ASU had sought to vary clause 25.6 of the SCHADS Award to remove the availability of broken shifts in the disability sector; or, in the alternative, the introduction of a broken shift allowance. Vice President Watson concluded that a case had not been made out to vary the existing arrangements:

> 'As with many other modem awards, this Award replaced a large number of other awards that applied in different states or parts of the social and community services sector. In creating a single award for the sector the AIRC had regard to the various provisions that applied under those previous instruments and applied the statutory tests applicable to the award modernisation exercise. The retention of arrangements for some became a change for others not covered by provisions of a particular type. It is understandable therefore that the change presents some difficulties. It is also understandable that a reversal of the situation would present difficulties for others. That is particularly so when one considers the blurring of home care and disability

services in practice. I do not consider that a case has been made out to modify the existing arrangements. The variations to the Award in 2012 also deal with the position of penalties for broken shifts. No case for a further change has been made out.'[182]

[80] In the Tranche 1 proceedings ABI and other employer organisations advanced a similar argument – also relying on Transitional Review decisions – in relation to the unions' claim that casual employees who work overtime are paid the casual loading *in addition to* overtime rates. The unions' claim was granted by the Full Bench in the Tranche 1 decision.[183] In reaching that determination the Full Bench decided[184] *not* to give significant weight to the Transitional Review decisions relied on by the various employer bodies, noting that the Transitional Review was more limited in scope than the Review and that the relevant legislation had changed, in that s.134(1)(da) was subsequently inserted into the Act.

Q26. Question for ABI: Given the view taken by the Full Bench in the Tranche 1 decision, does ABI press its contention that the unions are simply seeking to relitigate a matter which had previously been advanced and rejected?

[81] ABI accepts that the SCHADS Award requires amendment to ensure that employees are not exposed to practices which do not provide them with a fair and relevant safety net of terms and conditions; but do not accept that there is any need to materially alter the broken shifts provision.

[82] ABI submits that the issues identified by the unions can be rectified by:

(i) making some modest adjustment to the broken shifts provision;

(ii) addressing the concerns around travel time; and

(iii) introducing appropriate minimum-engagements for part time employees.

[83] As to the adjustments to the broken shifts provision ABI's clients do not oppose:

- the introduction of a requirement that broken shifts only be worked where there is mutual agreement between the employer and individual employee; and
- the existing payment under clause 25.6(b) being varied such that the applicable shift allowances be determined by either the starting time or the finishing time of the broken shift, whichever is the greater.[185]

[84] Business SA opposes the proposition that broken shifts only be worked by agreement and submits:

'preventing an employer from being able to direct an employee to work broken shift will significantly impair the ability to provide services to clients. It is recognised that, in homecare services the provision of care to a client over the course of the day is a regular requirement.'[186]

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[182] [2013] FWC 4141 at [29]

[183] [2019] FWCFB 6067 at [106] – [173]

[184] Ibid at [148] – [149]

[185] ABI submission 19 November 2019 at 6.6

[186] Business SA Submission 12 July 2019 at [46]

[85] ABI seeks the following findings in support of its position:

1. Broken shifts are an essential feature of the home care and disability services sectors.
2. There is a very high incidence of broken shifts in the home care and disability services sectors.[187]
3. There are clear peaks in demand for services at different times throughout the day. For example, in the home care sector, there are two clear peak times for the delivery of services: during the morning, and then in the evening. [188] There is also a less pronounced third peak time at around lunch time.[189]
4. It is very common for consumers in the home care and disability services sectors to request services of a short duration.[190]
5. Most broken shifts involve two portions of work and one break.[191] However, occasionally it is necessary for broken shifts to involve more than one break.[192]
6. Consumers in rural and remote areas require services more than once per day for short periods of time.[193]
7. Where broken shifts are worked, there is significant variation in the duration of the break period. Some broken shifts involve a break period of less than one hour, while other broken shifts involve a break period of 6-8 hours.
8. Employers engage in a range of practices in relation to remunerating employees when working a broken shift. By way of example:
   (a) Some employers provide a broken shift allowance;[194] and
   (b) Other employers only have employees work a broken shift by agreement.[195]
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.[196]

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

[86] Ai Group seeks the following findings in relation to the operation of broken shifts:

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[187] Sheehy Statement at [7]; Friend Statement at [49]; Eddington at [23]; Wang Statement at [65]-[67], Wright Statement at [44], Mason Statement at [67].

[188] Shanahan Statement at [37]; Ryan Statement at [67].

[189] Waddell Statement at [23]; Ryan Statement at [70].

[190] Wang Statement at [67]; Mason at [67]; Wright Statement at [44].

[191] Wright Statement at [45].

[192] Wright Statement at [45], Mason Statement at [72].

[193] Mason Statement at [57]-[59] and [72].

[194] Wright Statement at [46].

[195] Mason Statement at [69].

[196] See Court Book at p.489.

1. Broken shifts are commonly utilised by employers covered by the Award.[197]

2. Employees are commonly rostered to perform work for the same client on multiple occasions during the course of a day.[198]

3. The length of an engagement that forms part of a broken shift can vary from 15 minutes to 7 hours.[199]

4. Some full-time and part-time employees are required to work 30 minute engagements[200] and, in a smaller number of instances, 15 minute engagements[201].

5. The number of "breaks" in a broken shift can vary from 1 – 5.[202] For example:

   (a) In an article attached to the statement of Dr McDonald, which reported the results of qualitative research undertaken in respect of 10 disability support workers, the authors identified that over a period of 30 working days, "the 10 [disability support workers] worked between one and 5 separate shifts per day".[203] This amounts to up to 4 breaks per day.

   (b) Mr Friend gives evidence that the HSU's members have reported having "up to four or five breaks".[204]

   (c) Mr Quinn gave evidence that "a typical day of shifts" in his employment involved three breaks over the course of a day.[205]

   (d) Exhibit AIG1 (Ms Fleming's roster during the period of 4 May 2018 – 21 September 2018) demonstrates that Ms Fleming was from time to time required to perform a series of engagements during the course of a day with up to at least 4 breaks in between.

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[197] Page 2936 at paragraph 20 (Statement of W. Elrick); Page 2941 at paragraph 7 (Statement of R. Sheehy); Page 2949 at paragraph 49 (Statement of C. Friend); Page 2973 at paragraph 23 (Statement of J. Eddington); Page 4482 at paragraph 20 (Statement of D. Fleming); Page 4603 at paragraph 13 (Statement of T. Stewart) and Revised statement of R. Steiner at paragraphs 14 – 15.

[198] Pages 1178 – 1185 (Attachment to statement of R. Rathbone); Page 2942 at paragraph 8 (Statement of R. Sheehy); Exhibit AIG1 (Staff roster of D. Fleming); Transcript of proceedings on 16 October 2019 at PN1456 and PN1562 – PN1568.

[199] Page 3053 at paragraph 10 (Supplementary statement of S. Quinn); Page 4482 at paragraphs 19 and 21 (Statement of D. Fleming); Exhibit AIG1 (Staff roster of D. Fleming); Page 4603 at paragraph 12 (Statement of T. Stewart); Page 2949 at paragraph 47 (Statement of C. Friend); Revised statement of R. Steiner at paragraph 15; Pages 4613 – 4634 (Statement of T. Stewart at Annexure B) and Transcript of proceedings on 18 October 2019 at PN3047 – PN3048 and PN3052.

[200] Exhibit AIG1 (Staff roster of D. Fleming); Page 2917 (Statement of F. McDonald at FM-2); Page 2935 at paragraph 19 (Statement of W. Elrick); Page 2958 at paragraphs 21 – 22 (Statement of H. Waddell); Page 2962 at paragraph 12 (Statement of T. Thames); Page 2989 at paragraph 20 (Statement of S. Quinn); Pages 4613 – 4634 (Statement of T. Stewart at Annexure B) and Revised statement of R. Steiner at paragraph 15.

[201] Exhibit AIG1 (Staff roster of D. Fleming); Page 2973 at paragraph 22 (Statement of B. Lobert) and Pages 4613 – 4634 (Statement of T. Stewart at Annexure B).

[202] Pages 2916 - 2917 (Statement of F. McDonald at FM-2); Page 2963 at paragraph 23 (Statement of W. Elrick); Page 2942 at paragraph 7 (Statement of R. Sheehy); Page 2950 at paragraph 57 (Statement of C. Friend); Page 2990 at paragraph 29 (Statement of S. Quinn); Page 4604 at paragraph 15 (Statement of T. Stewart); Revised statement of R. Steiner at paragraph 15; and Attachment A and Transcript of proceedings on 18 October 2019 at PN3315.

[203] Pages 2916 - 2917 (Statement of F. McDonald at FM-2).

[204] Page 2950 at paragraph 27 (Statement of C. Friend).

[205] Page 2990 at paragraph 27 (Statement of S. Quinn).

(e) Ms Stewart describes a "typical day" for her as including five breaks between a series of engagements.[206]

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.[207]

7. Broken shifts provide some employees with the flexibility that they desire.[208]

8. Many employees are not paid for time spent travelling to and from clients.[209] This includes travelling between clients[210] and travelling to the first client / from the last client.[211]

9. 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.[212]

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.[213]

11. In some cases, employees travel directly from one client to the next.[214]

12. In other cases, employees do not travel directly from one client to the next.[215]

13. During a break in a broken shift, employees often undertake non-work-related activities, including spending time at home.[216]

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[206] Page 4604 at paragraph 15 (Statement of T. Stewart).

[207] Page 2991 at paragraph 40 (Statement of S. Quinn); Page 3055 at paragraph 34 (Supplementary statement of S. Quinn); Transcript of proceedings on 18 October at PN2881 and Transcript of proceedings on 18 October 2019 at PN3086.

[208] Page 2936 at paragraph 21 (Statement of W. Elrick) and Transcript of proceedings on 17 October 2019 at PN2623.

[209] Page 1172 at paragraph 17 (Statement of R. Rathbone); Page 1192 at paragraph 16 (Statement of T. Kinchin); Page 2916 (Statement of F. McDonald at FM-2); Page 2949 at paragraph 47 (Statement of C. Friend); Page 2957 at paragraph 13 (Statement of H Waddell); Page 2963 at paragraph 16 (Statement of T. Thames); Page 2967 at paragraph 15 (Statement of B. Lobert); Page 3053 at paragraph 10 (Supplementary Statement of S. Quinn); Page 4482 at paragraph 22 (Statement of D. Fleming); Page 4604 at paragraph 16 Statement of T. Stewart); Page 4661 at paragraph 6 (Supplementary Statement of T. Stewart); Pages 4720 – 4723 (Statement of J. Marks) and Revised statement of R. Steiner at paragraph 14.

[210] See for example page 2957 at paragraph 13 (Statement of H. Waddell).

[211] See for example page 2963 at paragraph 16 (Statement of T. Thames); Transcript of proceedings on 17 October 2019 at PN2609 – 2611 and Transcript of proceedings on 18 October 2019 at PN2890;

[212] Page 1174 at paragraph 34 (Statement of R. Rathbone); Page 3052 at paragraph 10(b) and page 3054 at paragraph 25 (Supplementary Statement of S. Quinn) and Transcript of proceedings on 18 October 2019 at PN2890.

[213] Page 3053 at paragraph 18 (Supplementary statement of S. Quinn); Page 4605 at paragraph 20 (Statement of T. Stewart); Transcript of proceedings on 15 October 2019 at PN459 – PN460 and Transcript of proceedings on 16 October 2019 at PN1573 – PN1574.

[214] Page 2990 at paragraph 28 (Statement of S. Quinn); Page 3052 at paragraph 10 (Supplementary statement of S. Quinn); Transcript of proceedings on 15 October 2019 at PN468; Transcript of proceedings on 16 October 2019 at PN1506 and PN1514 – PN1515 and Transcript of proceedings on 18 October 2019 at PN3536 – PN3540.

[215] Page 1140 at paragraph 34 (Statement of A. Encabo); Page 2963 at paragraph 15 (Statement of T. Thames); Page 2990 at paragraph 28 (Statement of S. Quinn); Page 3052 at paragraph 10 (Supplementary statement of S. Quinn); Page 3054 at paragraph 21 (Supplementary statement of S. Quinn); Page 3054 at paragraph 28 (Supplementary statement of S. Quinn); Transcript of proceedings on 15 October 2019 at PN461, PN468, PN525, PN527 and PN531; Transcript of proceedings on 16 October 2019 at PN1570 and PN1572; Transcript of proceedings on 18 October 2019 at PN3536 – PN3540.

[216] Page 1140 at paragraph 34 (Statement of A. Encabo); Page 2963 at paragraph 15 (Statement of T. Thames); Page 2990 at paragraph 29 (Statement of S. Quinn); Page 3052 at paragraph 10 (Supplementary statement of S. Quinn); Page 3054 at paragraph 21 (Supplementary statement of S. Quinn); Page 3054 at paragraphs 27 – 28 (Supplementary statement of S.

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.[217]

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

[87] NDS opposes the detail of most of the union claims relating to broken shift but accepts that an appropriate balance has to be struck between flexibility needed in order to deliver services in the context of tight pricing, and the need for employees to have some level of stability in their employment.

[88] NDS submits that employer witnesses provided evidence about the need for broken shift arrangements in certain types of services in the disability and home care sectors because the demand for services has peaks and troughs, especially around meal times.[218]

[89] NDS relies on the evidence of Jeffrey Wright and Wendy Mason of the significant need for the use of broken shift at their organisations, with the use of broken shifts being driven by the needs of clients.[219]

[90] NDS also submits that there was evidence of short engagements for individual clients, often as part of a broken shift, as well as short engagements for employees as portions of a broken shift[220]. However, NDS submits that caution needs to be exercised with the witness evidence as the term "shift" was sometimes used interchangeably to refer to the employee's total working hours, and the individual client appointment which might form part of a longer employee shift.[221] The employer witnesses also indicated that they seek to avoid short engagements within a broken shift, and aim to schedule consecutive appointments (or "runs").[222]

[91] NDS also refer to the oral evidence of Rob Steiner[223] which pointed to the need for supports being provided intermittently through the day at meal times. He also gave evidence that for some clients it is important that the same worker attend where possible for continuity of care. For his clients, using different workers at different times of the day would be potentially disruptive for the client. The result can be a need for a worker to attend the same client on at least three separate occasions during the working day, with two breaks between the attendances.

[92] The NDS contends that the evidence shows that the use of broken shift is driven by the needs of clients. NDS supports the NDIS objective that people with disability should be able to

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Quinn); Transcript of proceedings on 15 October 2019 at PN461, PN464, PN525 and PN527; Transcript of proceedings on 16 October 2019 at PN1570 and PN1572; Transcript of proceedings on 18 October 2019 at PN3537.

[217] Transcript of proceedings on 17 October 2019 at PN2039, PN2057 – PN2059, PN2070, PN2616 and PN2619; Transcript of proceedings on 18 October 2019 at PN2879, PN2885, PN3141 – PN3142 and PN3534.

[218] Miller [40-50] and PN 2042-2056; Shanahan [33-40]; Harvey [53-60]; Wright [44-46]; Mason [66-72]

[219] Wright [44-46]; Mason [66-72] & PN 3314-3315

[220] For example, Fleming [19-21]; Stewart [12]; Waddell [21-25]

[221] See for example, Miller PN 2033-2039; PN 2049-2053

[222] Miller PN 2035-2039; Harvey [57-58]; Mason [60-61]

[223] Steiner PN 1552-1569

exercise choice and control over how they live their lives and how supports are provided. NDS submits that the consequence of that objective is that broken shift will often be the only practicable way of meeting those needs.

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

[93] AFEI proposes[224] the following findings in relation to broken shifts:

1. Employees covered by the Award provide services which are unique to this sector; service are dictated by client needs.
2. Employees in this sector typically work with the same clients on an ongoing basis.
3. Each portion of work in a broken shift is typically less than three hours in length.
4. Existing arrangements for broken shifts in the Award are appropriate to the industry.
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.

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

3.3.2 *The HSU Broken Shift Claim*

[94] HSU seeks to delete the current clause 25.6 and replace it with the following:

25.6 Broken Shifts

(a) This clause only applies to:

(i) social and community services employees when undertaking disability services work; and

(ii) home care employees.

(b) For the purposes of this clause, broken shift means a shift worked by a casual or part-time employee that includes no more than one break (other than a meal break) and where the span of hours is not more than 12 hours.

(c) A broken shift may only be worked where there is mutual agreement between the employer and employee.

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

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[224] See generally AFEI's Submission of 19 November 2019 at [B.1] – [B.7]

(e) The minimum period of engagement specified in clause 10.6 shall apply to each period of work in a broken shift.

(f) In addition to the rates at 14.4(d) penalty rates and shift allowances in accordance with clause 20.2 – Shiftwork and clause 19 – Overtime apply.

(g) Shift allowances will be determined by the starting or finishing time of the broken shift, whichever allowance is higher. The allowance will apply across both parts of the shift.

(h) All work performed beyond the maximum span of 12 hours for a broken shift will be paid at 200% of the minimum hourly rate.

(i) An employee must receive a minimum break of 10 hours between broken shifts rostered on successive days.

[95] The HSU relies on its submissions of 15 February 2019 (at [34] – [39]) and 18 November 2019 (at [57] – [81]). It is unclear what specific findings are being sought by the HSU in respect of this issue.

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.

ABI response to HSU claim

[96] ABI notes that the basis of the HSU proposal to limit the application of the broken shits clause to part time and casual employees is not clear and that the HSU submissions do not address this issue. In its supplementary submissions in reply of 3 October 2019 (at [40] – [41]) the HSU accepts that it is appropriate in this industry for full-time workers to work broken shifts by agreement and accepts that its draft variation 'inadvertently excludes that possibility'. At [41] of that submission the HSU says:

'The HSU maintains, however, that part time disability and home care workers should have no more than one break to their shift.'

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?

[97] ABI opposes the proposal to impose a limit of one break per broken shift such that a broken shift cannot consist of more than two portions of work on the basis that:

- such a variation would reduce operational flexibility and prevent employers from having employees work a broken pattern of work across the course of a day to meet customer needs; and
- the variation would likely have the affect of reducing the number of hours that employers can offer to employees, thereby reducing their hours of work and take home pay.

[98] ABI opposes the proposal that a three hour minimum engagement be applied to each portion of a broken shift and submits that:

> 'In relation to the proposal that a three hour minimum engagement be applied to each portion of a broken shift, our clients oppose that variation. The minimum engagement applicable to a broken shift should be considered in the context of the recent findings in the *Casual and Part Time Employment Decision* and the previous authorities considered in that decision. For example, the notion of a "daily" minimum engagement had effectively developed to ensure employees received a sufficient level of remuneration to justify their attendance at work. On that logic, if the Commission has determined an appropriate minimum daily engagement, it is unclear why that period would apply twice if a broken shift is work. This is particularly so given that the broken shifts provision of the Award already provides for a shift loading.'[225]

NDS response to HSU claim

[99] NDS submits that the proposed requirement that broken shift only be worked by mutual agreement between the employee and employer is not necessary given the requirements of clause 10.3 in relation to part time employment, and the provisions of clause 25.5 in relation to rosters. However, NDS does not oppose this aspect of the claim.

[100] NDS submits that the claim for a minimum engagement to be applied to each period of work is unworkable in the context of NDIS because it does not reflect the reality of participant requirements. NDS is not opposed to considering a minimum engagement of 2 hours for part-time disability services employees, limited to work performed when delivering client services, as a way of providing some amelioration of the concerns raised by HSU.

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?

Business SA response to HSU claim

[101] Business SA opposes limiting broken shifts to one break only, submitting that:

> 'evidence has not been provided to limit the splitting of shifts to only two. It is common practice in the industry to have a person provide support over three distinct parts of the day in order to meet the clients needs. If shifts are limited to only two, this will reduce the continuity of service to clients in the industry, who request the same carer for all shifts. The care of a person is a very personal choice and the client will request or choose a carer who makes them comfortable. Restricting the number of parts of the broken shift to two will significantly impact the choices of the client. As well as be a cost impact of the business due to increased scheduling.'[226]

Q34. Question for Business SA: What is the evidentiary basis for the submission set out above?

Ai Group response to HSU claim

[102] Ai Group relies on its Reply Submission of 13 July 2019 at [202] – [320].

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[225] ABI submission 12 July 2019 at 7.29

[226] Ibid at [44]

3.3.3 *The ASU Broken Shift Claim*

[103] The ASU seek to delete clause 25.6 and insert in lieu thereof:

> **25.6 Broken shifts**
>
> This clause only applies to social and community services employees when undertaking disability services work and home care employees.
>
> (a) A **broken shift** means a shift worked by an employee that includes one or more breaks (other than a meal break) and where the span of hours is not more than 12 hours.
>
> (b) An employee who works a broken shift will receive:
>
> (i) Ordinary pay plus a loading of 15% of their ordinary rate of pay for each hour from the commencement of the shift to the conclusion of the shift inclusive of all breaks; and
>
> (ii) penalty rates and shift allowances in accordance with clause 29—Shiftwork, with shift allowances being determined by the finishing time of the broken shift.
>
> (c) All work performed beyond the maximum span of 12 hours for a broken shift will be paid at double time.
>
> (d) An employee must receive a minimum break of 10 hours between broken shifts rostered on successive days.

[104] The ASU contends that clause 25.6 does not provide a fair and relevant safety net of minimum terms and conditions:

> 'The clause offers an employer exceptional flexibility to roster a disability services or home care employee in broken engagements, without significant restriction or any compensation. Under clause 25.6:
>
> (a) ordinary hours do not need to be worked continuously;
>
> (b) there are no restrictions on the number of breaks in work;
>
> (c) there is no minimum engagement;
>
> (d) there is no requirement for the employee to agree to work broken shifts, so broken shifts may be rostered at the discretion of the employer;
>
> (e) shift allowances are determined by the finishing time of the broken shift; and
>
> (f) no allowance is paid to compensate for the disability associated with working a broken shift.'[227]

[105] In its submission of 2 October 2019 the ASU notes that ABI and NDS are not opposed to award variations to address the issues raised by the Unions.

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[227] ASU submission 18 February 2019 at [21]

[106] The ASU seeks the following findings in support of its claim:[228]

1. Disability sector employers routinely break the shifts of disability services employees;[229]

2. The award in its current form does not promote the efficient and productive performance of work;[230]

3. Long and irregular hours associated with working broken shifts interfere with employee work/life balance and negatively impact the employees health and well being.[231]

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

ABI response to ASU claim

[107] ABI notes that the ASU seek the introduction of a 15 percent loading to be paid when employees work a broken shift and that the loading is expressed to be payable not in respect of each hour worked during a broken shift, but in respect of the entire duration of the broken shift from commencement of the first portion of work to the cessation of the final portion of work (inclusive of breaks). Further, the loading is proposed to be payable in addition to the existing requirement that penalty rates and shift allowances in accordance with clause 29 be payable, with shift allowances being determined by the finishing time of the broken shift.

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

[108] ABI opposes the introduction of a 15 percent loading to be paid when employees work a broken shift:

> 'While our clients do not cavil with the contention that there is likely to be a degree of disutility associated with working a broken shift for some employees, it is not appropriate that a 15 percent loading be applied *in addition* to the existing penalty rates and shift allowances.
>
> Further, it is not fair or reasonable that the 15 percent loading be payable in respect of the entire duration of the broken shift from commencement of the first portion of work to the cessation of the final portion of work (inclusive of breaks and unpaid non-working time). This is plainly unreasonable.
>
> By way of illustration, a common working pattern is for employees to perform a 2-3 hour shift in the morning, and then have a large break from work until the afternoon or evening where a further period of work is performed. The gap between the two portions of the broken shift may in many cases be in the range of 6-8 hours, which provides an ample period of time for employees to engage in leisure activities, go home, rest, or in some cases perform work in

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[228] ASU submission 19 November 2019 at [35]

[229] Ibid at [35] – [44]

[230] Ibid at [45] – [64]

[231] Ibid at [65] – [74]

secondary employment. It is not fair or reasonable for an employer to be required to pay a 15 percent loading in respect of a 12 hour span, in circumstances where up to 8 hours of that period the employee was not at work.'[232]

[109] In respect of part-time employees, ABI submits that the alleged 'disutility' of working broken shifts needs to be assessed against the requirement at clause 10.3(c) that their pattern of work be agreed in writing on commencement of employment. In light of that existing protection, it is submitted that any disutility arising from a broken shift is largely mitigated by the employee having agreed on commencement of employment to the pattern of work and by having advanced notice of that fixed pattern of work.

[110] ABI also submits that there is no merit basis for casual employees to receive an additional loading for working broken shifts. Casual employees receive a casual loading which compensates for working irregular hours. Further, casual employees are under no obligation to accept shifts that they do not wish to take on.

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?

NDS response to ASU claim

[111] NDS opposes the claim, 'particularly in the context of the tight pricing arrangements that affect provision of disability services'.

[112] NDS also submits that the quantum of the loading is 'out of kilter' with the provisions of other awards that deal with broken shifts.

[113] NDS submits that the current clause regulating the length of a broken shift and provides for shift penalties and, further, the restrictions imposed by clause 10.3 (c) in the setting of hours in part time contracts provides significant protection for part-time employees in relation to the predictability of their hours of work, while casual employees receive a casual loading in compensation for irregular hours of work.

Business SA response to ASU claim

[114] Business SA opposes the claim for a 15% broken shift loading submitting that the claimed loading is 'significantly higher than any other industry'.[233]

Ai Group response to ASU claim

[115] Ai Group relies on its Reply Submissions of 13 July 2019 at [202] – [329].

3.3.4 *The UWU Broken Shift Claim*

[116] The UWU seeks to amend clause 25.6(a) as follows:

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[232] ABI submission 12 July 2019 at 7.34 – 7.36

[233] Business SA Submission 12 July 2019 at [42]

This clause only applies to social and community services employees when undertaking disability services work and home care employees.

> (a) For the purposes of this award a broken shift is a shift where an employee works in two separate periods of duty on any day within a maximum spread of twelve (12) hours and where the break between periods exceeds one hour.

[117] UWU seeks to delete clause 25.6(b) and insert the following:

> 25.6(b) Payment for a broken shift will be at ordinary pay with penalty rates and shift allowances in accordance with clause 29—Shiftwork, with shift allowances being determined by the starting or finishing time of the broken shift, whichever is the greatest.

[118] The UWU seeks the following findings in support of its claim:

1. Employees in home care and disability services are regularly rostered for broken shifts.[234] Some employees are rostered to have multiple breaks within a shift.[235]
2. Broken shifts are used as a device by some employers to avoid the payment of travel time, as such employers claim that time spent travelling by the employee in between broken shifts is travel undertaken after a '*break*' and unpaid.[236]
3. Multiple broken shifts reduce the earning capacity of low paid workers, as the worker has to be available for lengthy periods of time to receive a few hours of paid work.[237] This is time in which employees could undertake other paid work.[238]
4. The loss of potential earnings contributes to financial distress.[239]
5. Lengthy periods of time where the worker is engaged in the work of the employer but only paid for a few hours is a significant disutility for employees, as this is time that they could be spending with family and friends.[240] This time is not '*free time.*'
6. As noted, the Award permits broken shifts to be worked over a span of 12 hours.[241] The combination of broken shifts, employers' not paying travel time and lack of minimum engagements (for part-time employees) can result in a significant amount

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[234] Statement of Trish Stewart (EX. UV1), at [13]-[15]; Statement of Deon Fleming (EX. UV4), at [18]-[21].

[235] Statement of Trish Stewart (EX. UV1), at [15], see also Annexure B; Statement of Deon Fleming (EX. UV4), at [20], see also Annexure B (also in evidence in unredacted form as AiG1, *subject to a confidentiality order*).

[236] Statement of Trish Stewart (EX. UV1), at [16] and Supplementary statement of Trish Stewart (EX. UV2), at [7]-[8]; Statement of Deon Fleming (EX. UV4), at [22]; see also Annexure B (also in evidence in unredacted form as AiG1, *subject to a confidentiality order*); Supplementary statement of Deon Fleming (EX.UV4), , at [6]; statement of Jared Marks (EX.UV8) at [23].

[237] Statement of Trish Stewart (EX. UV1), at [16]; Further statement of Trish Stewart (EX.UV3), at [7]-[8]; Statement of Deon Fleming (EX. UV4), at [23]-[24]; Statement of Robert Steiner (EX.ASU2), at [15]-[17].

[238] Statement of Trish Stewart (EX. UV1), at [17]-[18]; Ms Stewart left the home care sector and now has a new job in a residential aged care facility in which she is receives 8 hour shifts, see Further statement of Trish Stewart (EX.UV3), at [9]-[12]; Statement of Deon Fleming (EX. UV4), at [24].

[239] Further statement of Trish Stewart (EX.UV3), at [13]-[17].

[240] Statement of Trish Stewart (EX. UV1), at [19]; Statement of Deon Fleming (EX. UV4), at [24]; Statement of Fiona MacDonald (EX.HSU25), at Annexure FM2, pg.83; Statement of Robert Steiner (EX.ASU2), at [17]-[19].

[241] Clause 25.6(a).

of '*dead time*' for employees, which is time spent travelling without payment or time spent waiting in between broken shifts.[242] When this occurs, it is the employee who bears the cost of the idle time and the unpaid travel time.[243]

7. Multiple broken shifts are a disincentive for employees to stay in the sector.[244]

8. Continuous patterns of work are consistent with '*the efficient and productive performance of work*'[245] and are an appropriate alternative to multiple broken shifts.[246] Rostering patterns that include multiple broken shifts within a span of hours up to 12 hours are inconsistent with the consideration. Several employer witnesses indicated they attempt to provide continuous work broadly because such a pattern of work is efficient, consistent with the productive performance of work and preferred by the worker.[247]

9. Several employer witnesses indicated that it was their preferred practice to roster on the basis that there was only one break any shift (unexpected client cancellation being the main reason to depart from this practice).[248]

10. Care services such as cleaning, medication checks and personal care can be provided in a planned manner.[249] The nature of these services mean that they are largely performed in a routine manner, are low acuity and capable of being planned. The provider and the client must negotiate mutually acceptable times for the service to be provided in advance.[250] In addition, the evidence indicated that there were generally three peak periods of demand (aligned with breakfast, lunch and dinner).[251] The work in this sector can be organised to fit a pattern of continuous work, or if not, into a pattern of a broken shift with only one break.

11. The assertion that clients make demands that make the planning of consistent service delivery challenging is exaggerated.[252] Service providers have the ability to

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[242] Further statement of Trish Stewart (EX.UV3), at [6]; Statement of Deon Fleming (EX. UV4), at [22].

[243] Transcript (17/10/19) PN2274 [JAMES STANFORD].

[244] Further statement of Trish Stewart (EX.UV3), at [3]-[5]; Statement of Fiona MacDonald (EX.HSU25), at Annexure FM2, pg.87.

[245] S134(1)(d) of the modern awards objective.

[246] Ms Sinclair is uncommonly rostered for broken shifts (and mostly for team meetings in the office), otherwise she is generally rostered for a series of client engagements, see Statement of Belinda Sinclair (EX.UV6) at [12]-[13] and Annexure B, rosters from 17 December to 23 December 2018. This is in contrast to Ms Stewart and Ms Fleming, who are generally rostered for multiple broken shifts with consecutive client engagements broken by (unpaid) travel time or '*dead time'*, see EX.UV1, Annexure B, and EX.UV4, Annexure B.

[247] Statement of Jeffrey Wright (EX.ABI13) at [41]; Transcript (17/10/19), PN2619 [JEFFREY SIDNEY WRIGHT] ; Transcript (18/10/2019) PN3050 [DEBORAH GAYE RYAN]; Statement of Wendy Mason (EX.ABI8) at [71].

[248] Statement of Jeffrey Wright (EX.ABI13) at [45]; Transcript (18/10/2019) PN3086-3092 [DEBORAH GAYE RYAN]; Statement of Wendy Mason (EX.ABI8) at [72].

[249] Statement of Melissa Coad dated 12 October 2019 (EX.UV7) at [28].

[250] Statement of Melissa Coad (EX.UV7) at [29].

[251] Statement of Jeffrey Wright (EX.ABI13) at [41]; Statement of Graham Shanahan (EX.ABI15) at [37].

[252] Several employer witnesses made assertions in their witness statements to this effect but made concessions in cross examination. For example, Mr Wright in his statement (EX.ABI13), at [38], states that '*the provider has no control over their choice, but we need to accommodate it nonetheless*', however in cross examination Mr Wright agreed that HammondCare did not have a legal obligation to offer services to anyone who demands it at any time of day, and that HammondCare determines the range of services and the pricing that it applies to those services (see PN2543-2551). Similarly, Ms Mason states in her statement (EX.ABI8) at [55] that '*the company's home care activities are based on*

set out what services they will provide, including the times at which they will provide services, and the length of such services.[253]

12. Similarly, clients in aged care and disability services are capable of making choices within service constraints, and understanding of those constraints.[254] Services are provided pursuant to agreed terms and conditions. Service providers in home care routinely charge differential higher rates for services provided at unsocial hours. For home care, all providers that gave evidence charge differential and higher hourly rates for weekend, public holiday and evening work [255]

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

[119] In conclusion the UWU submits:

> 'In summary, there is evidence that justifies amending the Award to limit the amount of breaks within a shift to one. Multiple broken shifts reduce the earning capacity of employees, and are disruptive to the lives of employees. Roster patterns in which multiple broken shifts are used operate on the basis that employees will be available for long periods of time in order to obtain sometimes a few hours of work. Service providers are able to set out the terms on which they provide services and have the capacity to arrange work in a manner that restricts the breaks within a shift to one. There is also a clear preference for some providers to limit breaks in shift to one. The Award should incentivise rostering practices which maximise continuous patterns of work.
>
> In respect of the second component of our broken shifts claim, to ensure that an employee working a broken shift will receive the higher of the shift penalty at the start or finish of the shift, no employer evidence was presented on this matter.[256] The Commission can be satisfied that the proposed amendment is consistent with a '*fair and relevant*' minimum standard of conditions.'[257]

ABI response to UWU claim

[120] ABI opposes the proposal to impose a limit of one break per broken shift.

[121] ABI does not oppose a variation such that shift allowances are determined by either the starting time or the finishing time of the broken shift.

NDS response to UWU claim

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client demand and therefore rostering takes place around the preferred times of our clients' but acknowledged in cross examination that it is a negotiated process between the client and the care facilitator (see PN3230-3237).

[253] Statement of Scott Harvey (Ex.ABI17) at [56] –[59], Transcript (17/10/19), PN2547-2550 [JEFFREY SIDNEY WRIGHT].

[254] Statement of Melissa Coad (EX.UV7) at [30].

[255] See published pricing schedules in Exhibit UV9 '*homecare bundle*': Hammondcare p34; NSW Home Support p40; Connectability p42; Baptistcare p44; CASS Care p45; and Community Care Options p 46.

[256] We note several employer groups do not oppose this claim. See submission in reply of ABI and others re: outstanding union claims) paragraph 7.32 (CB 81), and submission in reply of NDS re: outstanding union claims, paragraph 38 (CB4387).

[257] UWU submission 18 November 2019 at [44] – [45]

[122] NDS submits that the proposal to restrict broken shift to just 2 parts is an unnecessary restriction that would impact on the ability of participants to schedule supports for when they actually need them throughout the day. The operational need is to be able to cover a variety of different individual patterns of supports through the day, and this might reasonably require a worker to work a broken shift with more than one break.

[123] NDS submits that the concentration of supports around a few hours at each end of the day means broken shift arrangements are often the only way to offer some workers enough hours for a living wage, especially if the worker is engaged on a casual basis. It is likely that the restriction sought by the UWU would also affect the ability of part-time and casual employees to obtain additional hours where they seek them.

[124] NDS accepts that in relation to shift penalties that apply, the current award provision results in an employee working broken shift not receiving a shift penalty in some circumstances where such a shift penalty would apply to a continuous shift. This is the case for work that commences before 6am Monday to Friday (clause 29.2 (b) of the award). NDS accepts that the example provided by the UWU of a broken shift commencing at 5am but receiving no shift penalty is a valid example of this scenario.

[125] NDS does not oppose the UWU proposal to provide that any shift penalty be determined by the starting or finishing time of the broken shift, whichever is highest.

Ai Group response to UWU claim

[126] Ai Group relies on its submission at pages 725 – 728 and 737 – 751 of the Court Book.

3.4 The Clothing and Equipment Claims

[127] Clause 20.2 of the SCHADS Award deals with clothing and equipment, as follows:

> **20.2 Clothing and equipment**
>
> (a) Employees required by the employer to wear uniforms will be supplied with an adequate number of uniforms appropriate to the occupation free of cost to employees. Such items are to remain the property of the employer and be laundered and maintained by the employer free of cost to the employee.
>
> (b) Instead of the provision of such uniforms, the employer may, by agreement with the employee, pay such employee a uniform allowance at the rate of $1.23 per shift or part thereof on duty or $6.24 per week, whichever is the lesser amount. Where such employee's uniforms are not laundered by or at the expense of the employer, the employee will be paid a laundry allowance of $0.32 per shift or part thereof on duty or $1.49 per week, whichever is the lesser amount.
>
> (c) The uniform allowance, but not the laundry allowance, will be paid during all absences on paid leave, except absences on long service leave and absence on personal/carer's leave beyond 21 days. Where, prior to the taking of leave, an employee was paid a uniform allowance other than at the weekly rate, the rate to be paid during absence on leave will be the average of the allowance paid during the four weeks immediately preceding the taking of leave.

(d) Where an employer requires an employee to wear rubber gloves, special clothing or where safety equipment is required for the work performed by an employee, the employer must reimburse the employee for the cost of purchasing such special clothing or safety equipment, except where such clothing or equipment is provided by the employer.

[128] There are two claims relating to clothing and uniforms.

[129] The HSU propose the introduction of a new "damaged clothing allowance" which would require employers to compensate employees for any damage to, or soiling of, any clothing or other personal effects (excluding hosiery) which are damaged in the course of the employee's employment (to the amount of the "reasonable replacement value").

[130] The UWU propose a variation whereby employers would be required to provide employees with enough uniforms to allow them to launder their work uniforms no more than once per week.

3.4.1 *The HSU Claim*

[131] HSU seeks to insert a new provision at clause 20.3 as follows:

20.3 Damaged clothing allowance

(i) Where an employee, in the course of their employment suffers any damage to or soiling of clothing or other personal effects (excluding hosiery), upon provision of proof of the damage, employees shall be compensated at the reasonable replacement value of the damaged or soiled item of clothing.

(ii) This clause will not apply where the damage or soiling is caused by the negligence of the employee.

[132] Under the proposed clause, employers would be required to compensate employees, to the amount of the "reasonable replacement value", for any damage to, or soiling of, any clothing or other personal effects (excluding hosiery) which are damaged in the course of the employee's employment (save where the damage or soiling is caused by the employee's negligence).

[133] The HSU advances the following submission in support of its claim: (footnotes omitted)

> 61. Clause 20.2 of the Award provides for payment of an allowance for uniforms and their laundering. The reality of work in the industry, particularly for home carers and disability support workers, is that employees are not provided with uniforms, but wear their own clothes to work, which are at risk of being soiled or damaged in the course of their duties.
>
> 62. The award should include a damaged clothing allowance, which takes into account that employees' clothing will frequently become damaged, soiled or worn given the nature of the work they do. Where such damage occurs, upon provision of proof of the damage, employees should be compensated at the reasonable replacement value of the damaged or soiled item of clothing.[258]

[134] The grounds advanced by the HSU in support of its claim appear to be:

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[258] HSU submission dated 15 February 2019 at paragraphs 61 – 62.

- an assertion that many employees, particularly support workers in home care and disability services, wear their own clothes to work and are not provided with a uniform;[259]

- a submission that employees' clothes are at risk of being soiled or damaged in the course of their duties;[260] and

- an assertion that employees' clothes "will frequently become damaged, soiled or worn" given the nature of the work they do.[261]

[135] The HSU contends that the employees who are the subject of the present proceedings are obliged by their roles to take their clients as they find them, and to provide care and assistance to them, by reason of their incapacity to carry out those tasks themselves. The HSU seeks a finding, relying on the evidence of Wilcock, Waddell and Sheehy that the care work performed by employees in the industry is likely to cause damage to their clothing.

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

[136] The HSU contends that a fair and relevant condition for such workers is to compensate them for damage to clothing suffered as a consequence of their performance of such roles.

ABI response to the HSU claim

[137] ABI opposes the claim noting that the SCHADS Award already contains an allowance at clause 20.2 for uniforms and their laundering.

[138] ABI's primary concern with the HSU's proposed variation is that the Award already provides an allowance for employees who are not issued with a uniform.

[139] ABI submits that if an employer does not provide the employee with a uniform (as is the case with the two witnesses that provide evidence in support of the HSU claim), the employee is entitled to receive a uniform allowance. This 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. The alternative is that the employer provides a uniform, and if it is damaged, the employer replaces the uniform.

[140] ABI submits that there are also drafting and practical issues with the proposed clause, given what it submits is the lack of precision around how the replacement value of clothing is to be calculated and the phrase "suffers any damage". For example, it is not clear how an employer should determine what the "reasonable replacement value" is, and whether the employer would be required to replace a secondhand piece of clothing with a new piece of clothing.

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[259] HSU submission at [61]

[260] Ibid

[261] Ibid at [62]

[141] ABI submits that there is limited evidence before the Commission in respect of the proposed variation but that the evidence suggests that it is common for support workers in the disability services sector to not wear uniforms when undertaking work. The benefits of such an approach include that it helps to break down barriers between support workers and clients and avoids unwanted attention when in public.[262]

[142] ABI submits that the evidence is somewhat mixed in relation to practices in the home care sector. For example:

(a) Mr Elrick states that "Uniforms are common in the home care services which undertake a cleaning heavy practice"; and

(b) The witnesses employed by Wesley Mission are provided with uniforms;

whereas

(c) Mr Sheehy states that some employers in the home care industry do not provide any uniforms; and

(d) the witnesses employed by Hammond Care are not provided with uniforms.

[143] ABI also submits that the evidence as to the frequency with which employees' clothing or uniforms become damaged is limited and vague. For example:

(a) Mr Elrick makes a generic assertion, unsupported by any specific evidence, that clients will "often damage clothing to the point they need replacing";

(b) Mr Elrick also outlines a couple of ways in which an employee's clothing may get damaged. However, these appear to be more in the vein of hypothetical scenarios or hearsay rather than testimony of real events that actually occurred;

(c) Ms Wilcock gave evidence that she is required to use cleaning products which can "ruin our clothes", however she then states that Hammond Care "does provide us with protective clothing and gloves"; and

(d) Ms Waddell gave evidence that her clothes "get damaged and worn out very quickly" , however she does not provide any specific examples of that occurring, information about what items of clothing have been damaged, when the last time this occurred, etc.

[144] ABI notes that the above evidence is limited to two employees working for the same single employer.

[145] ABI contends that, although limited, the evidence suggests that employers provide various forms of personal protective equipment for use by employees such as "protective clothing", "gloves", "single use aprons" and "goggles".

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)?

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[262] Elrick statement Exhibit HSU3 at para 38

Ai Group response to the Claim

[146] Ai Group opposes the claim and submits that the case advanced by the HSU falls well short of providing a proper basis for granting the claim.

[147] Ai Group notes that there is no probative evidence or material that might justify the proposition that the proposed clause is necessary to ensure that the SCHADS Award achieves the modern awards objective. AiGroup submits that the HSU seeks to rely on the following evidence:

(a) The evidence of Pamela Wilcock (a community care worker) that her role involves cleaning duties in a client's home, which can include using cleaning agents that "can" damage clothing however her employer providers protective clothing and gloves.[263] She also states that her role also includes cleaning bodily fluids and urine.[264]

(b) The evidence of Heather Waddell (a community care worker) that clothing can be spoiled by bodily fluids cleaning agents.[265] She also gives evidence that her employer provide single use aprons and goggles for employees to use, however she chooses not to because to do so would require her to travel to her employer's office, which "is usually in the opposite direction of [her] clients".[266]

[148] Further Ai Group contends that the HSU's claim is unfair to employers in various ways:

(i) The proposed clause would appear to apply even where an employee such as Ms Waddell elects not to use equipment, clothing or protective effects provided by an employer for the very purpose of ensuring that an employee's clothing and personal effects are protected from damage and/or soiling.

(ii) The proposed clause requires reimbursement "at the reasonable replacement value". The provision appears intended to entitle an employee to replace the value of clothing or personal effects that they have elected to wear during the course of their employment, irrespective of their value and even though they may not be essential for the purposes of enabling the employee to undertake their work (e.g. designer brand glasses).

(iii) The scope of the clause is broad; it applies wherever there is any damage or soiling, even if the extent of the damage or soiling does not necessitate or warrant the replacement of the clothing or other item (for example, because it can be cleaned or replaced).

(iv) The proposed clause does not require an employee to provide proof of the "reasonable replacement value" or absolve an employer from their liability to reimburse an employee where such proof is not forthcoming.

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[263] Statement of Pamela Wilcock dated 15 February 2019 at paragraph 13.

[264] Statement of Pamela Wilcock dated 15 February 2019 at paragraph 14

[265] Statement of Heather Waddell dated 15 February 2019 at paragraph 33.

[266] Statement of Heather Waddell dated 15 February 2019 at paragraph 34.

[149] Ai Group notes that the HSU's submissions do not address s.138 or the s.134(1) considerations. Ai Group makes the following observations about the s.134 considerations:

- Section 134(1)(a): there is no evidence dealing with the impact of the claim on the relative living standards and needs of the low paid. In the circumstances, we consider that s.134(1)(a) does not advance the union's case. The Commission cannot properly conclude that the relative living standards and needs of the low paid will be enhanced or improved if the claim is granted.

- Section 134(1)(b): the grant of the claim may have an adverse impact on the need to encourage collective bargaining.

- Section 134(1)(c): there is no evidence that might enable the Commission to conclude that the grant of the claim will improve social inclusion through increased workforce participation; this consideration does not advance the union's case.

- Section 134(1)(f): the grant of the claim will increase employment costs and the regulatory burden imposed on employers and therefore would have an adverse impact on business. Such an impact is compounded in the case of NDIS-funded services, because the funding does not contemplate the proposed entitlement.

- Section 134(1)(g): the need to ensure a stable system tells against the grant of the claim. Further, the proposed clause is not simple and easy to understand. The meaning of "reasonable replacement value" – a central element of the proposed clause – is unclear.

[150] Ai Group submits that the consideration in s 134(1)(d), (da), (e) and (h) are neutral or not relevant.

[151] Ai Group seeks the following finding in respect of this claim:

1. Some employers provide protective clothing and gloves for employees to wear while working.[267]

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)?

Business SA response to the HSU claim

[152] Business SA acknowledges that:

- not all workplaces provide uniforms, or the uniform provided will be a company shirt and not pants and there is a requirement for employees to wear some of their own clothing; and

[267] Page 2952 at paragraph 13 (Statement of P. Wilcock); Page 2960 at paragraph 34 (Statement of H. Waddell) and Transcript of proceedings on 18 October 2019 at PN3608.

- employees covered by the SCHADS Award may undertake work that results in the soiling or damage of clothing, such as using harsh cleaning chemicals or from bodily fluids.

[153] Business SA submits that:

> 'It is not unusual for employees to wear their own clothes to work and general wear and tear of such clothing should not be the liability of the employer. Employees are expected to take all reasonable care necessary to protect their clothing.'[268]

[154] As to the wording of any proposed clause Business SA submits that the standard wording for award terms dealing with the reimbursement of clothing is that used in the Manufacturing Award. Clause 32.2(d) of that award states:

> '**(d) Damage to clothing, spectacles, hearing aids and tools**
>
> **(i)** Compensation must be made by an employer to an employee to the extent of the damage sustained where, in the course of work, clothing, spectacles, hearing aids or tools of trade are damaged or destroyed by fire or molten metal or through the use of corrosive substances. The employer's liability in respect of tools is limited to the tools of trade which are ordinarily required for the performance of the employee's duties. Compensation is not payable if an employee is entitled to workers compensation in respect of the damage.
>
> **(ii)** Where an employee as a result of performing any duty required by the employer, and as a result of negligence of the employer, suffers any damage to or soiling of clothing or other personal equipment, including spectacles and hearing aids, the employer is liable for the replacement, repair or cleaning of such clothing or personal equipment including spectacles and hearing aids.'

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?

AFEI response to the claim

[155] AFEI opposes the claim and submits that the HSU has not established that the variation is necessary to achieve the modern awards objective. AFEI contends that the proposed variation would result in 'uncertainty and inappropriate additional cost to employers and that the issue is more appropriately addressed at the enterprise level through bargaining'.[269]

[156] AFEI makes the following points in opposing the claim:

(ii) In some circumstances an employee could receive compensation where no loss has arisen.

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[268] Business SA submission 12 July 2019 at para 9

[269] AFEI submission of 23 July 2019 at [154]; see generally ibid at [149] – [153]

(iii) The proposal does not require that the employee actually purchases the clothing which has been damaged or soiled, or even that the employee owned the clothing. Hence, the employee could seek payment to cover a cost they have not incurred.

(iv) The proposal allows an employee to claim an uncapped amount of compensation for the replacement of clothing or personal affects.

(v) The proposal does not require the employee to provide evidence that the damage occurred during the course of employment and did not involve negligence by the employee.

NDS response to the Claim

[157] NDS opposes the claim but do not appear to have advanced any submissions in support of its position.

3.4.2 *The UWU Claim*

[158] As noted above, currently the SCHADS Award requires that an employer provide 'an adequate number of uniforms appropriate to the occupation' of the employee, where the employer requires the employee to wear a uniform. The award does not presently prescribe what an 'adequate number of uniforms' will be; what is 'adequate' will depend on the circumstances.

[159] The UWU seeks to insert a new clause 20.3(b) as follows:

> '(b) An adequate number of uniforms should allow an employee to work their agreed hours of work in a clean uniform without having to launder work uniforms more than once a week.'

[160] Under the proposed clause, employers would be required to provide employees with enough uniforms to allow employees to go the full week without needing to launder their work uniforms more than once per week.

[161] The UWU claim rests on the following propositions:

(i) At present the decision as to what constitutes an 'adequate' number of uniform is made by the employer and employees are often not provided with 'a genuinely adequate number of uniforms'.

(ii) Many of the employees covered by the SCHADS Award carry out work which can easily result in uniforms becoming stained and dirty quickly.

(iii) Where employees are not provided with 'a genuinely adequate number of uniforms' the burden of ensuring they have a clean uniform for work falls on individual employees and can result in employees having to wash their uniform multiple times a week.

[162] The UWU submits:

> 'Employees covered by the Award should be provided with enough uniforms to ensure that they are able to attend work in a clean uniform, without having to wash their uniforms more than once a week.

The evidence indicates that there are employees in this sector who are not provided with an adequate number of uniforms.'[270]

[163] The UWU contends that the variation proposed is 'in line with' the modern awards objective, specifically:

- s.134(1)(a): the variation would assist the low paid to meet their needs; employees covered by the SCHADS Award can generally be considered 'low paid' and many work part-time;

- s.134(1)(c): participation in the workforce is 'facilitated by the dignity in having a clean uniform.

[164] The UWU seeks the following findings in support of its claim:

1. Employees in this sector may be required by their employer to wear a uniform.[271]

2. Employees may not be provided with an adequate number of uniform items.[272]

3. Where an employee is not provided with an adequate number of uniforms the employee may have to wash their uniforms multiple times a week.[273]

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

ABI response to the claim

[165] ABI opposes the claim on the basis that a sufficient case has not been made out for the proposed variation.

[166] ABI does not accept the contention advanced by the UWU that "the decision as to what constitutes an 'adequate' amount of uniforms is often made solely by the employer".[274] ABI submits that the Award terms are clear, and the obligation requires an objective assessment as to the adequacy of the number of uniforms to be provided, having regard to the particular circumstances. If there is any dispute about the number of uniforms provided by a particular employer, the matter can be resolved through the application of the dispute resolution procedure provided for in the Award including, if necessary, the involvement of the Commission.

[167] ABI submits that the evidence as to the number of uniforms provided by employers is limited. For example:

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[270] United Voice Submission 4 February 2019 at [54] – [55]

[271] Sinclair, Exhibit UV6 at [18]

[272] Ibid at [19]

[273] Ibid

[274] United Voice submission at [50]

(a) Mr Sheehy states that "Other employers will provide only one t-shirt a year", however the identity of these employers is not disclosed, and no further detail is provided; and

(b) Ms Sinclair gave evidence that she was initially provided with only two shirts upon commencement of employment, however was then given an additional shirt and then a further three additional shirts after requesting additional uniforms from her employer (such that she then had a total of six shirts).

[168] ABI contends that there is no evidence that would support a finding that the current terms of the Award are not operating satisfactorily and nor is there evidence of any disputes having been initiated in relation to the provision or non-provision of uniforms.

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)?

Business SA

[169] Business SA opposes the claim and submits that 'the provision of additional uniforms to ensure an employee only washes clothing once a week is a cost on employers that is unnecessary and prohibitive', [275] and submits:

> 'While washing clothing more than once a week may be seen as an inconvenience the Union has not provided sufficient evidence to show that by requiring an employee to wash more than once a week results in the modern award objectives are not met. Ms Sinclair's statement does not provide evidence that participation in the workplace is facilitated by having a clean uniform or that providing additional uniform will improve the relative living standards and needs of the low paid.'[276]

Ai Group response to the claim

[170] Ai Group opposes the claim and submits that the factual propositions relied upon by the UWU are not made out by its evidentiary case, specifically:

(a) The only witness evidence called by the UWU in support of its claim is that of Belinda Sinclair.[277] Ms Sinclair gives evidence that she was provided with two uniforms upon the commencement of her employment; however, after raising the issue with her employer, she was provided with an additional three uniforms.[278]The evidence does not establish that employees are "often" not provided with an adequate number of uniforms, as asserted by United Voice.

(b) The union's evidence does not deal with, let alone establish, that "many" employees covered by the SCHADS Award carry out work which can easily result in uniforms becoming stained or dirty quickly.

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[275] Business SA submission 12 July 2019 at para 18

[276] Ibid at para 17

[277] Statement of Belinda Sinclair dated 16 January 2019.

[278] Statement of Belinda Sinclair dated 16 January 2019 at paragraphs 18 – 21

(c) It is clear from the terms of the SCHADS Award that the "burden" of ensuring that employees have clean uniforms does not fall squarely on employees. Clause 20.2(a) of the Award contemplates that an employer covered by the Award will maintain and launder an employee's uniform, without cost to the employee. It is only where this does not occur that the employee is responsible for laundering their own uniform and they are entitled to the allowance prescribed by the current clause 20.2(b). The UWU's evidence does not establish the extent to which employees in fact launder their own uniforms because their employers do not do so.

(d) There is no evidence before the Commission that establishes that laundering uniforms "several times a week can be onerous". The assertion proceeds on the assumption that employees covered by the Award launder their uniforms "several times a week"; a proposition that has not been made out. Further, the union's case does not appear to take into account:

- the extent to which employees do their laundry more than once a week in the ordinary course and therefore, laundering their uniforms during the week does not create any additional burden or inconvenience.; and

- the extent to which the working hours and/or personal circumstances of employees in the industry facilitates their ability to undertake any necessary laundry more than once a week; for example, because they do not work full-time.

[171] Ai Group submit that there is no evidence or material before the Commission that might justify the proposition that the clause proposed is necessary to ensure that the SCHADS Award achieves the modern awards objective, as such, there is no justification for creating an Award-derived obligation on an employer for providing uniforms by refence to the benchmark proposed by the UWU (i.e. that employees not be required to launder their uniforms more than once a week).

[172] Ai Group also contends that the variation proposed is 'out of step with the modern awards system'. It is submitted that to the extent that awards deal with the issue of uniforms, overwhelmingly they do not prescribe the number of uniforms to be provided to employees. Further, other awards in the health and aged care sectors take a similar approach to that currently adopted in the SCHADS Award.[279] Ai Group submits that the number of uniforms to be provided is appropriately left to be determined by reference to the relevant circumstances; including the nature of the work undertaken by the employee. To the extent that an employee considers that they have not been provided with an adequate number of uniforms, the dispute settlement procedure in the SCHADS Award provides a readily accessible avenue to deal with such issues. Ai Group notes that despite the availability of this mechanism, the UWU has not pointed to any disputes that have arisen in relation to the question of the adequacy of the number of uniforms provided by employers covered by the Award. Ai Group contends that the evidence

[279] See for example clause 15.2 of the *Aged Care Award 2010*, clause 18.3 of the *Health Professionals and Support Services Award 2010*, clause 16.2 of the *Nurses Award 2010* and clause 15.3 of the *Aboriginal Community Controlled Health Services Award 2010*.

demonstrates that employers and employees are able to discuss and resolve the matter within the workplace.

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?

[173] As to the modern awards objective, Ai Group contends that the proposed clause is unfair to employers and advances the following submissions in relation to the s.134 considerations:

- *Section 134(1)(a)* – there is no evidence dealing with the impact of the claim on the relative living standards and needs of the low paid. Contrary to the UWU submission, s.134(1)(a) does not advance the union's case; the Commission cannot properly conclude that the relative living standards and needs of the low paid will be enhanced or improved if the claim is granted.

- *Section 134(1)(b)* – the grant of the claim may have an adverse impact on the need to encourage collective bargaining. The union's pursuit of the claim demonstrates that the issue is one of importance to the union and by extension, it is one that may motivate it to engage in collective bargaining. Any such motivation would necessarily be extinguished by the grant of the claim. A further improvement to the minimum floor and the imposition of additional employment costs may disincentivise employers from engaging in collective bargaining.

- *Section 134(1)(c)* – there is no evidence that might enable the Commission to conclude that the grant of the claim will improve social inclusion through increased workforce participation. Section 134(1)(c) does not advance the union's case. This is a neutral consideration in this matter.

- *Section 134(1)(f)* – the grant of the claim would increase employment costs. The claim, if granted, would therefore have an adverse impact on business. Further, significant portions of the industry covered by the SCHADS Award are dependent on NDIS funding to cover their employment costs. The NDIS does not provide funding for the additional employment costs contemplated by the proposed clause. The impact on business is compounded in these circumstances.

- *Section 134(1)(g)* – the proposed clause is not simple and easy to understand. The interaction between the proposed clause 20.2(b) and an employer's obligation to launder and maintain the uniforms at clause 20.2(a) is not clear. The need to ensure a stable system tells against the grant of the claim; particularly given that the claim lacks any proper foundation.

[174] Ai Group submits that the considerations in s.134(1)(d), (da), (e) and (h) are neutral or not relevant.

[175] Ai Group seeks the following finding in respect of this claim:

1. Employee concerns about inadequate uniforms are on occasion dealt with and resolved at the enterprise-level.[280]

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

AFEI response to the UWU claim

[176] AFEI opposes the claim and submits that the UWU has not made out a case that the variation is necessary to achieve the modern awards objective.

[177] AFEI submits that the evidence of Ms Sinclair, relied on by the UWU, is an example of an employer providing uniforms free of charge on request and does not support the UWU's claim.

3.5 The Client Cancellation Claims

3.5.1 *General observations*

[178] Clause 25.2(f) of the SCHADS Award deals with client cancellation, as follows:

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

[179] Clause 25.5(f) permits employers to change an employee's roster where a rostered 'home care service' is cancelled or changed by a client. It also provides that where a roster is changed, an employer is not obliged to make a payment to the employee where the requisite notice was given to the employee (being by 5pm on the day prior to the rostered shift in question). The clause entitles employers to direct employees to make-up time equivalent to the cancelled time in that fortnight or during the subsequent fortnight.

[180] Ai Group contends that clause 25.5(f) operates as follows:

(i) The clause applies only to home care services.

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[280] Page 4572 at paragraph 19 – 20 (Statement of B. Sinclair).

(ii) Where a client cancels or changes a rostered home care service, it requires an employer to provide an employee with notice of a change to their roster by 5pm the day before the service.

(iii) Where notice is provided in accordance with paragraph (b) above, the employee is not entitled to any payment. Accordingly, if a client cancelled their service and an employer notified the relevant employee before 5pm on the day prior that they are no longer required to work, the employee would not be entitled to any payment.

(iv) Where notice is not provided in accordance with paragraph (b), the employee is entitled to payment for their minimum specified hours.

(v) An employer has an Award-derived right to direct an employee to perform make-up time where a client cancels or changes a rostered home care service. Further:

- the employer may direct the employee to work make-up time only during the same or the following fortnightly period; and
- the time may be made up working with other clients or in other areas of the employer's business, if the employee has the skills and competence to perform the work.

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)?

[181] There are 2 claims that seek to vary clause 25.5(f), by ABI and the HSU.

3.5.2 *ABI client cancellation claim*

[182] The ABI cancellation claim seeks to delete clause 25.5(f) and insert the following:

(f) Client cancellation

(i) This clause applies where a client cancels or changes a scheduled home care or disability service which a full-time or part-time employee was rostered to provide.

(ii) Where a service is cancelled by a client under clause 25.5(f)(i), the employer may either:

A. direct the employee to perform other work during those hours in which they were rostered; or

B. cancel the rostered shift.

(iii) Where clause 25.5(f)(ii)(A) applies, the employee will be paid the amount payable had the employee performed the cancelled service or the amount payable in respect of the work actually performed, whichever is the greater.

(iv) Where clause 25.5(f)(ii)(B) applies, the employer must either:

A. pay the employee the amount they would have received had the shift not been cancelled; or

B. subject to clause 25.5(f)(v), provide the employee with make up time in accordance with clause 25.5(f)(vi).

(v) The make up time arrangement cannot be utilised where the employee was notified of the cancelled shift after arriving at the relevant place of work to perform the shift. In these cases, clause 25.5(f)(iv)(A) applies.

(vi) The make up time arrangement cannot be utilised where the employer is permitted to charge the client in respect of the cancelled service. In these cases, clause 25.5(f)(iv)(A) applies.

(vii) Where the employer elects to provide make up time:

A. the make up time must be rostered in accordance with clause 25.5(a);

B. the make up time must be rostered to be performed within 3 months of the date of the cancelled shift;

C. the employer must consult with the employee in accordance with clause 8A regarding when the make up time is to be worked prior to rostering the make up time; and

D. the make up shift can include work with other clients or in other areas of the employer's business provided the employee has the skill and competence to perform the work.

[183] ABI propose that the scope of the current client cancellation clause be expanded to capture the provision of disability services in the community (for example, care services provided in the community to people with a disability).

[184] The phrase 'home care service' is not defined in the Award. The phrase is only found once in the Award, at clause 25.5(f). ABI submits that, the phrase 'home care service' is most likely intended to mirror the scope of the 'home care sector', which is one of four defined sectors which the Award is expressed to cover.

[185] The term 'home care sector' is defined at clause 3.1 to mean the 'provision of personal care, domestic assistance or home maintenance to an aged person or a person with a disability in a private residence' [emphasis added].

[186] ABI contends that it is clear from that definition that the home care sector encompasses the provision of services to persons with a disability.

[187] ABI submits that the current client cancellation clause already applies to a significant part of the disability services sector, as it applies to services provided to people with a disability in their home and there is no reason for distinguishing between supports provided to persons with a disability in their home and services provided in the community. Other than the location, there are clear similarities between care services provided by support workers in the home and care services provided in the community, including that:

(i) community-based services are just as susceptible to client cancellation as in-home care services;

(ii) community-based services are subject to the same cancellation rules under the NDIS as attendant care in the home; and

(iii) the nature of the work is the same or very similar.

[188] ABI contends that there is no good reason why the SCHADS Award should provide a regime for dealing with client cancellations of rostered 'home care' services, but not provide

any such regime for client cancellations of attendant care services in the community for people with a disability.

[189] ABI submits that there is a clear disconnect between the terms of the Award and the funding arrangements under the NDIS when it comes to client cancellations and that this disconnect is having a materially adverse impact on the viability of businesses operating in this sector.

[190] NDIS service providers are bound by a price cap. They are also bound to comply with rules relating to client cancellations. While the intention behind the NDIS cancellation rules is to attempt to strike a balance between the interests of service providers and participants, ABI contends that the reality is that the cancellation rules place service providers in a very difficult position. Unless there is an ability to cancel the rostered shift (without being required to pay the employee), or redeploy the rostered employee to other available work, service providers will incur costs regardless of the scheduled service having been cancelled, yet will not derive any revenue.

[191] ABI acknowledges the desire of many employees in having job security, stability in income, and reasonably predictable hours of work but submits that, those interests need to be balanced against the interests of employers in being responsive to client needs.

[192] ABI submits that where it is not feasible to redeploy a permanent employee to other work in the event of a client cancellation event, the employer should have the ability to cancel the employee's rostered shift and offer them make-up time at a later date. ABI submits that this type of regime is not new in the home care sector, including in situations where the in-home service is provided to a person with a disability but ABI submits that it should be extended to the broader disability sector where supports are provided in the community.

[193] ABI submits that, as a general proposition, the evidence adduced during the proceedings reinforces the fact that client cancellation events are a real issue for service providers in both the disability services and home care sectors. ABI's proposed findings that are relevant to this claim are as follows:

> 1. Client cancellation events occur frequently in both the disability and home care sectors, for example:
>
> (a) Mr Shanahan gave evidence that Coffs Coast Health & Community Care Pty Ltd experience client cancellations on a 'regular basis';[59]
>
> (b) Mr Harvey gave evidence that ConnectAbility experiences client cancellation events on a 'daily basis';[60]
>
> (c) Ms Ryan gave evidence that Community Care Options experiences client cancellations on 'at least a daily basis';[61]

[59] Shanahan Statement at [20].

[60] Harvey Statement at [32].

[61] Ryan Statement at [46].

(d) Ms Wang gave evidence that CASS Care Limited experiences client cancellations on a 'regular basis';[62] and

(e) Mr Wright gave evidence that Hammond Care experiences client cancellations on a 'frequent basis'.[63]

2. In terms of the incidence of client cancellation events, the evidence was as follows:

(a) Ms Wang gave evidence that 'approximately 40 visits are cancelled per week' at CASS and, in the month of May 2019, 3.83% of visits were cancelled (180 of 4,700 total scheduled visits);[64]

(b) Mr Wright gave evidence that during May 2019 there were 2,708 cancellations out of 47,704 scheduled services which equates to 5.68% of services cancelled for the month;[65]

(c) Ms Mason gave evidence that BaptistCare experiences 'a high proportion of client cancellations on a very regular basis' and that in the month of May 2019 5,140 of 35,083 services were cancelled, which equates to 14.65% of scheduled services;[66] and

(d) Mr Harvey gave evidence that ConnectAbility experienced 1,134 cancellations during the financial year ending 30 June 2018.

3. Clients cancel scheduled services for a range of reasons including ill health or injury, an unscheduled medical appointment, hospitalisation, transfer into permanent residential care, death, family visits, complex behavioural issues, social appointments, the client refuses to have the replacement worker if their usual worker is absent that day, the client is not home at the time of the scheduled service, holidays, poor weather, and festival celebrations.[67]

4. As to the timing of client cancellations, the balance of the evidence tends to suggest that most client cancellations occur in the 24 hours prior to the commencement of the scheduled service, for example:

(a) Mr Shanahan gave evidence that clients typically give notice of a cancellation on the day when a client goes into hospital, permanent care, or when they pass away;[68]

(b) Mr Harvey gave evidence that 75% of cancellations occurring at ConnectAbility during the financial year ending 30 June 2018 were made within 24 hours or not provided at all;[69]

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[62] Wang Statement at [35].

[63] Wright Statement at [25].

[64] Wang Statement at [35].

[65] Wright Statement at [25]-[26].

[66] Mason Statement at [40]-[41].

[67] Shanahan Statement at [22]; Harvey Statement at [37]; Ryan Statement at [48]; Wang Statement at [37]; Wright Statement at [27]; Mason Statement at [42].

[68] Shanahan Statement at [24]

[69] Harvey Statement at [36].

(c) Ms Ryan gave evidence that for the time period 1 April 2019 to 30 June 2019 Community Care Options had clients cancel their services on the same day on 205 separate occasions;[70]

(d) Ms Wang gave evidence that:

(i) In home ageing services, while more notice is typical, cancellations for unexpected reasons are usually less than 24 hours; and
(ii) In disability services most cancellation notice is overnight and less than 24 hours;[71] and

(e) Mr Wright gave evidence that for Hammond Care 'the vast majority of client cancellations are within 0 to 6 hours of the scheduled commencement time of the service'.[72]

5. The frequency of cancellation events causes significant rostering challenges for businesses. While employers endeavour to redeploy employees to other productive work where cancellation events occur, it is not always possible to do so for a range of reasons.[73]

6. Funding schemes have different terms in respect of cancellations.[74] 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.[75]

7. Employers encounter difficulties in finding alternative work for employees at the time of their rostered shift when a scheduled client service is cancelled by the client.[76]

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

HSU response to ABI claim

[194] The HSU submits that there is no warrant, financial or otherwise, for extending the existing cancellation arrangements to disability workers, noting that the capacity of employers

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[70] Ryan Statement at [47].

[71] Wang Statement at [39]-[40].

[72] Wright Statement at [29].

[73] Shanahan Statement at [23]; Harvey Statement at [39]-[43]; Wright Statement at [38].

[74] Shanahan Statement at [21]. We also intend to rely on an anticipated Joint Paper to be prepared by the parties outlining the relevant cancellation rules applicable to the different services in the home care sector, which has not yet been filed by the parties.

[75] Shanahan Statement at [27].

[76] Harvey Statement at [39]-[42]; Ryan Statement at [50].

to charge for cancelled services under the NDIS has 'improved dramatically' as a consequence of changes to the 2019-2020 Price Guide.[281]

UWU response to ABI claim

[195] The UWU submits that an industrial standard that allows employers to receive payment for a service which is not provided and for which the worker is not paid for is incompatible with a fair and relevant safety-net of terms and conditions.

[196] The UWU contends that clause 25.5(f) results in low paid employees suffering financial detriment and should be deleted. The UWU also submits that the evidence does not support an extension of the clause 25.5(f) to disability services; rather the evidence justifies the removal of clause 25.5(f) altogether, as there is evidence that client cancellations in home care are often chargeable.

[197] The UWU submits that 'in disability services, due to changes made in July 2019 in the NDIS Price Guide 2019-20, an unlimited amount of client cancellations are now claimable'.[282]

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

[198] The UWU contends that the evidence justifies the removal of a provision enabling an employer to withhold payment for home care workers where a client has cancelled and, to that extent supports ABI's draft determination with respect to client cancellation, as their proposed clause removes the capacity for an employer to withhold payment to home care workers for client cancellations.

[199] The UWU proposes the following findings in respect of the issue of client cancellations:

1. It is common for employer's to cancel rostered shifts of part time employees (without payment) under the provisions of the current clause 25.5(f).[283]

2. Where an employee has a rostered shift cancelled without payment by their employer, the employee will lose out on income that the employee expected for the week, and this can result in financial uncertainty and detriment.[284]

3. Changes to NDIS policy that came into effect in July 2019 enable providers to claim back a greater amount with respect to client cancellations.[285]

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[281] HSU Submission of 18 November 2019 at [152].

[282] Citing the NDIS Price Guide 2019-2020, CB 2796, pg.12-13

[283] Statement of Trish Stewart (Exhibit UV1), at [10]; Statement of Fleming (Exhibit. UV4), at [13]-[16].

[284] Statement of Trish Stewart (Exhibit. UV1), at [10]; Statement of Fleming (Exhibit. UV4), at [13]-[16]; Transcript (15/10/19), PN745 [Sinclair].

[285] Further statement of Mark Farthing dated 16 September 2019 (Exhibit.HSU2) at [6]-[10], [23]-[32]; Transcript (18/10/19), PN3118-3127 [Harvey].

4. Home care providers are able to set out the terms and conditions upon which they will provide services to a client, including terms about cancellation of services.[286]

5. Home care providers can charge a client for a cancelled service provided this is in accordance with the service agreement in place between the provider and the client.[287]

6. Home care providers may *chose* not to charge a client for a cancellation for reasons that may include demonstrating sensitivity to the client and retaining/gaining client business.[288]

7. Employer witness evidence regarding the loss of clients if clients were charged for the cancellation of a service should be given very little weight as such statements are speculative.[289]

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

8. Depending on the timing of a cancelled service, a service provider may be able to both recover money from the client, and cancel the shift of the employee without payment of wages.[290]

9. The evidence shows that providers in home care may *chose* not charge a client for a cancellation for business reasons. The UWU submits that the provider's decision in this respect should not result in an employee losing out on payment for a rostered shift.

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[286] Transcript (17/10/19), PN2421-2424 [Mathewson]; Transcript (18/10/19), PN3020-3029, 3075-3080 [DEBORAH GAYE RYAN]; Community Care Options Home Care Agreement Template (Exhibit HSU16); PN3237-3249 [Mason]; Baptist Care Commonwealth Home Support Programme (CHSP) pro-forma Service Agreement (EX.HSU19); Baptist Care Home Care Agreement (Exhibit.HSU20).

[287] Transcript (18/10/19), PN2891-2897 [Shanahan], PN3020-3029, 3075-3080 [Ryan]; Cross examination of Ryan: Same Day Cancellation Log – subject to confidentiality order (Exhibit.HSU15); Community Care Options Home Care Agreement Template (Exhibit.HSU16)**;** PN3237-3249 [Mason]; Baptist Care Commonwealth Home Support Programme (CHSP) pro-forma Service Agreement (Exhibit.HSU19); Baptist Care Home Care Agreement (Exhibit.HSU20). Note: Mr Wright provided evidence that cancellation fees cannot be charged under the CHSP however later admitted that this understanding was based on what he had heard from "*operations people who are in that space within the organisation*" (see transcript (17/10/19) PN2645-2651, and PN2702-2706). His evidence on this issue should not be preferred, as it is hearsay evidence that directly contradicts other evidence in this matter including that of Mr Shanahan (PN2894), Ms Mason (PN3239) and the terms of the Baptist Care Commonwealth Home Support Programme (CHSP) pro-forma Service Agreement (Exhibit HSU19). Similarly, Ms Wang provided evidence that if a client cancelled the service, CASS would not be able to recover income as the clients held the funding, but this evidence is also hearsay, and should not be preferred as she admitted funding arrangements were not her responsibility, and her evidence was based on "*what I have heard from*" work colleagues (PN3611-PN3616).

[288] Transcript (18/10/19), PN2891-2897 [Shanahan], PN3273-3274 [Mason].

[289] Statement of Shanahan (Exhibit ABI5), dated 28 June 2019, at [28].

[290] Transcript (18/10/19), PN3031-32 [Ryan]; Cross examination of Ryan: Same Day Cancellation Log – subject to confidentiality order (Exhibit HSU15); also, this is the logical conclusion from considering the interaction of cancellations clauses within service agreements (see Baptist Care Commonwealth Home Support Programme (CHSP) pro-forma Service Agreement (Exhibit.HSU19); Baptist Care Home Care Agreement (Exhibit.HSU20)) with the terms of clause 25.5(f) of the Award.

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

ASU response to ABI claim

[200] The ASU responds to ABI's claim at [25] – [43] of its submission of 16 September 2019.

[201] The ASU submits that there is no probative evidence that identifies any need for a client cancellation term in the disability services sector and that the employer witness evidence that they will lose clients if they charge for cancellation of a service is speculative and should be given little weight:

> 'No employer has been able to quantify the cost of client cancellations to their business. Any witness evidence about the cost of client cancellation is purely speculative and should be given no weight. The employer witness evidence demonstrates that employers in the disability services are better placed to manage the risk of cancellation and absorb the unquantified costs of cancellation than their employees.'[291]

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

[202] The ASU submits that funding arrangements for the NDIS allow employers to recover the majority of the cost of cancelled shifts and that from the evidence provided by the employers, 'the majority of cancellations occur at very short notice. For all other services, employers may charge 90% of the cost of the service unless 5 clear business days' notice is given. Providers may claim an unlimited number of cancellations.'[292]

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)?

[203] The ASU submits that ABI's proposed variation would 'further reduce the control that employees have over their working hours, and thus make the already intolerable working conditions in the sector worse'.[293]

NDS response to ABI claim

[204] NDS supports ABI's proposed variation to the client cancellation provisions and submits that the variation would be consistent with the modern awards objective and in particular the promotion of flexible modern work practices and the efficient and productive performance of work (s.134(1)(d)).

[205] NDS submits that the proposed variation does three things:

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[291] ASU Submission of 19 November 2019 at [117]

[292] Ibid at [120]

[293] Ibid at [121]

(i) it removes the option withholding payment from a worker in the event of a cancellation;

(ii) it extends the operation of the clause to disability support work; and

(iii) it provides more flexibility around the timetabling of make up time.

[206] NDS notes that ABI's proposal 'removes the ability of the employer to withhold payment to an employee in the event of a client cancellation where notice has been provided by 5pm the previous day' and proposes 'a more flexible approach to make up time' in order to deal with the operational difficulties arising from client cancellations:[294]

> 'NDS supports this approach as the current provision for home care employees would appear onerous, while at the same time, employers face genuine operational difficulties in relation to client cancellations'.[295]

Q54. Question for NDS: NDS is asked to clarify the submission that the current provision 'would appear onerous'; onerous for whom and why?

Q55. Question for ABI: Does ABI agree with NDS' characterisation of its proposal?

[207] NDS notes that the NDIS Price Guide for 2019-2020 has modified the funding arrangements in the event of client cancellation:

> 'Specifically, providers can claim 90% of the charge for the cancelled appointment where the client provides up to 2 days' notice, and there is no cap on the number of times this can be done. The Guide states[296]:
>
> > Where a provider has a short notice cancellation (or no show) they are able to recover 90% of the fee associated with the activity, subject to the terms of the service agreement with the participant.
> >
> > A cancellation is a short notice cancellation (or no show) if the participant has given
> >
> > - less than 2 clear business days' notice for a support that is less than 8 hours continuous duration and worth less than $1000; and
> > - less than 5 clear business days' notice for any other support.
> >
> > There is no limit on the number of short notice cancellations (or no shows) that a provider can claim in respect of a participant.
> >
> > However, providers have a duty of care to their participants and if a participant has an unusual number of cancellations then the provider should seek to understand why they are occurring.
> >
> > The NDIA will monitor claims for cancellations and may contact providers who have a participant with an unusual number of cancellations.

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[294] NDS Submission of 2 July 2019 at [20] – [21]

[295] Ibid at [22

[296] NDIS Price Guide 2019-2020, (1 July 2019), pages 12-13

> The changes for 2019-2020 mean that the financial impact on the employer of a cancellation made with 2 days' notice is slightly reduced compared to previous years, because the previous cap of payment for a maximum of 8 occasions per year has been removed.'[297]

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)?

[208] NDS submits that despite the modification to the funding arrangements, client cancellation remains a problem:

> 'Nevertheless, client cancellation remains a problem. An employer still needs to be able to reallocate work in the event of a cancellation, if other work is available. An example where this is important for reasons of efficiency and productivity, is if the worker can be redeployed to backfill for another worker on unplanned personal leave.
>
> Notwithstanding the changes to the arrangements for cancellations under the NDIS Price Guide, the employer still has a problem in relation to cancellations made with more than 2 days' notice but less than 7 days. If no other work is available to be allocated to the worker, then the worker is paid without having to perform work, and the employer is unable to charge the customer for this. Furthermore, clause 25.5 (d) limits the ability of an employer to change a roster with less than 7 days' notice to situations of illness or emergency.
>
> The current clause 25.5(f) deals with this situation for home care workers by providing the option using make up time by the end of the following fortnightly period.
>
> The proposed new clause 25.5(f) extends this option to disability support workers, but also extends the time available for the employer to find suitable work to 3 months.
>
> NDS submits that an extended period is needed to enable suitable work to be found for the working of make-up time because of the difficulty of matching appropriate workers to individual clients.
>
> Client choice and control in the operation of the NDIS is also a factor in the need for an extended period to organise make up time, because the individual client has enhanced negotiating power with providers in relation to the timetabling of supports, as well as the identity of the worker as previously mentioned. The provider cannot unilaterally schedule work for their own administrative convenience without reference to the client.'[298] (Footnotes omitted)

Ai Group response to ABI claim

[209] Ai Group submits that the regime for dealing with client cancellations proposed by ABI would operate as follows:

1. The clause would apply to home care and disability services.
2. The clause would apply in the event of any cancellation to a service by a client, regardless of whether an employee is provided with notice of the cancellation (and, by extension, regardless of the period of notice provided to the employee).
3. In the event of a client cancellation, the clause would provide an employer with two options:

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[297] Ibid at [30] – [31]

[298] Ibid at [32] – [37]

Option 1: The employer would have the right to direct the employee to perform other work during the hours that they were rostered to work; in which case the employer would be required to pay the employee the amount they would have been paid had the employee performed the cancelled service or the amount payable for the work actually performed; whatever is greater.

Option 2: The employer would be permitted to cancel the shift; in which case, the employer would be required to:

(i) pay the employee the amount they would have received had they performed the cancelled service; or

(ii) provide the employee with make-up time. Such make up time must be rostered to be performed within 3 months of the date of the cancelled shift. The employer must consult with the employee about when the make-up time will be performed.

[210] Ai Group also notes that clause 25.5(f)(ii), which is the operative provision, is expressed to apply only where a service is cancelled by a client. Read literally, neither it nor the rest of the clause appear to apply where a client changes a service; as such the proposed clause appears to limit the scope of the flexibility currently afforded under the Award.

Q57. Question for ABI: Does ABI agree with Ai Group's submission as to how ABI's proposed clause would operate (and if not, why not)?

[211] Ai Group submits that ABI's proposal for dealing with client cancellations 'is not consistent with the need to afford flexible modern work practices and will have an adverse impact on many employers' (referring to ss 134(1)(d) and (f)).[299] Ai Group submits that it supports greater flexibility being afforded in respect of client cancellations to the provision of disability services but contends that:

> 'Any scheme dealing with client cancellation should retain an ability to cancel an employee's shift without payment where a client cancels or changes their service request.'[300]

[212] Ai Group submits that the disconnect between the current award client cancellation provisions and the NDIS funding arrangements, is 'potentially less problematic than was previously the case in light of the revised NDIS rules concerning client cancellations'. However, Ai Group contends that ABI's proposal will 'exacerbate or further any existing disconnect between the two in some respects'.[301] Ai Group provides the following example in support of this contention.

> 'If a client cancels a home care service that is less than 8 hours in duration and $1000 in price with 72 hours' notice and the employer immediately notifies the employee that their corresponding shift is cancelled:
>
> (a) Under the NDIS, the cancellation is not a "short notice" cancellation. The employer therefore cannot recover any amount under the NDIS funding arrangements.

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[299] Ai Group Submission of 26 September 2019 at [44]

[300] Ibid at [44] – [45]

[301] Ibid at [33]

(b) Under the current Award clause: the employer is not required to pay the employee or to afford the employee make-up time. The employee's shift can be cancelled.

(c) Under ABI's proposal: the employer no longer has the ability to cancel the employee's shift without payment to the employee. The employer must either:

(i) direct the employee to perform other work at the same time and pay the employee in accordance with clause 25.5(f)(iii); or

(ii) cancel the shift and pay the employee the amount they would have received had they performed the cancelled service; or

(iii) provide the employee with make-up time.

Q58. Question for ABI: ABI is asked to respond to the above example and to Ai Group's submission that ABI's proposal will 'exacerbate or further any existing disconnect between the two in same respects'.

[213] Ai Group submits that in 2 respects the ABI proposal is 'more onerous, more costly and more inflexible' than the existing client cancellation scheme:

1. It operates in the event of any client cancellation, even where ample notice of the cancellation is provided by the client to the employer and, in turn, by the employer to the employee.

   Even where an employee has, for instance, four weeks of notice of a cancellation, the clause will require the employer to either pay them or to afford them make-up time.

   Ai Group submits:

   'There is … no foundation for proceeding on the basis that the purpose or rationale underpinning the requirement to pay an employee in the context of a short notice change under the current clause is also relevant in the context of an employee having weeks of notice. Rather, the proposition that an employee should be compensated in the same way for a roster change with multiple weeks of notice as they should for a change made after 5pm on the preceding day, self-evidently has little force'.

2. The proposed clause will in many instances increase employment costs and the regulatory burden. The clause will require an employer, in the context of any client cancellation to either pay the employee for the shift or to find other work for the employee to perform (either at the same time or later, in the form of make-up time). The proposed clause creates an employer obligation to provide make-up time (unless payment is made to the employee).

[214] No specific findings are proposed by Ai Group in respect of the issue of client cancellations.

AFEI response to ABI claim

[215] AFEI supports the introduction of paragraph 25.5(f)(i) and (ii) of ABI's proposed variation but opposes the removal of the words 'in such circumstances no payment will be made to the employee', in clause 25.5(f)(i).

Q59 Question for AFEI: In its submission of 3 July 2019 AFEI states (at [12]) that it 'reserves its position in respect to the proposed introduction of clauses 25.5(f)(iii)-(vi) in the ABI draft

determination'. AFEI is asked to expand on this submission in light of ABI's amended draft determination filed on 15 October 2019.

[216] At [E.1] – [E.4] of its submission of 19 November 2019 AFEI proposes the following findings in respect of the issue of client cancellations:

1. Client cancellations are usually on late notice.
2. Cancellation fees are not always charged to the client.
3. Employers do not benefit from a cancelled service.

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

3.5.3 *ABI Submission in Reply*

(i) Response to the HSU Submission

[217] ABI accepts the HSU submission that the updated cancellation rules in the NDIS Price Guide 2019-20 has improved the position of employers when it comes to clients cancelling scheduled services that are provided under the NDIS but submits that this development does not nullify the merit of the claim. ABI contends that there is still a material disconnect between the Award requirements around changing rosters or cancelling shifts and an employer's ability to charge clients for cancelling scheduled services.

[218] ABI does not accept the HSU submission that the revised cancellation rules provide 'a generous mechanism for service providers to recoup the cost of service cancellations' and submits that in the vast majority of cases, the rules do not allow employers to charge clients anything at all provided the client gives more than 2 clear business days' notice of the cancellation of a service.

[219] ABI contends that this 'disconnect' creates a situation where the employer receives no revenue, and yet has an employee who has been rostered to provide the now-cancelled service. Unless the employer is able to usefully deploy the employ to other productive work at that exact time slot, they face a potential situation of incurring labour costs without deriving any revenue.

[220] Where a disability services client cancels a scheduled service with less than 7 days' notice, the Award does not permit an employer to unilaterally change the employee's roster to accommodate the fact that their work is no longer required or available by reason of the client cancellation. Under the NDIS rules, where the client cancels a shift more than 2 clear days before, but less than 7 days before the service is scheduled to be delivered, the employer is prohibited from charging the client.[3]

[221] ABI submits that in those circumstances, the only ways the employer can avoid incurring a loss for the cancelled service are:

[3] In most cases.

(a) where they can redeploy the employee to other work at that precise time, which will be difficult in most cases given that other employees would most likely have already been rostered to perform that work; or

(b) where clauses 25.5(d)(ii) or (iii) apply, which will be rare; or

(c) where the employee agrees to vary their hours (e.g. under clause 10.3(e)).

[222] ABI submits that its proposed make-up time scheme addresses this disconnect between the NDIS rules and the Award and its proposal also involves materially improving the entitlements for employees in the home care stream.

(ii) Response to the UWU submission

[223] ABI submits that the position adopted by the UWU to ABI's claim requires scrutiny.

[224] On the one hand, the UWU correctly acknowledge that the proposed clause is 'an improvement on the current client cancellation clause' for home care workers, and that it has 'a beneficial effect in that it would provide employees with a more stable and secure income'.
[225] The UWU then indicate their *support* for the thrust of our clients' proposed variation *in respect of home care workers*, subject to a few additional elements. However, on the other hand, the UWU then *oppose* ABI's proposed variation in respect of disability services workers and assert that it will not result in the Award meeting the modern awards objective.

[226] So you have the UWU conditionally supporting the proposed client cancellation / make-up pay clause in respect of home care workers while at the same time opposing it for disability services workers.

[227] ABI contends that such a position is illogical:

> '[2.18] The United Voice's conditional support for our proposed clause in respect of home care employees undermines their opposition to it applying to disability services employees.
>
> [2.19] While the United Voice refer to the different regulatory regimes for the different streams of work, the reality is that there is no less merit of a client cancellation / make-up time arrangement in the disability services stream as it is in the home care stream.'

[228] At paragraph [38] of their submission, the United Voice identify a drafting error in our Draft Determination. ABI confirms that the reference to clause 25.5(f)(iv)(B) in clause 25.5(f)(v) should instead be 25.5(f)(iv)(A).

(iii) Response to the ASU submission

[229] At paragraph [34] of the ASU reply submission, they state that our clients' proposed clause would permit an employer to 'double-dip' where the employer is can charge a participant for a cancelled service.

[230] ABI submits that this was not the intention of the proposal. The proposed clause is intended to cover the circumstances where an employer cannot charge a participant but would still be liable to pay the employee in respect of the cancelled shift.

> 'Our clients are not opposed to a variation to our proposal to explicitly state that the employer may only require an employee to work make-up time where the employer is permitted to charge the client a cancellation fee.'[302]

[231] In response to paragraph [35] of the ASU submission, ABI disputes the proposition that the new NDIS rules allow provider sot charge a 90% cancellation fee 'in most circumstances'. There is a significant window where a provider is not able to charge a cancellation fee and yet the employer is unable to vary the employee's roster or cancel the shift.

[232] In response to paragraphs [36] - [43] of the ASU reply submission, we accept that we most likely erroneously construed the scope of the existing client cancellation clause. We do not press those parts of our submission of 2 July 2019 which asserted otherwise.

[233] However, ABI maintains that it is necessary to extend the existing client cancellation clause in the Award beyond the home care sector and to the disability services sector. It is necessary to address this disconnect between the NDIS rules and the Award.

[234] Finally, while the ASU make a general assertion at [29] that clause 25.5(f) in its current state 'does not meet the modern awards objective', they do not proffer any changes to it or provide any suggestions for improving the existing regime. They simply oppose our clients' claim. Again, the credibility of that position deserves scrutiny.

(iv) Response to the Ai Group submission

[235] ABI submits that it was not its intention for the proposed client cancellation to prevent an employer utilising clause 25.5(d)(i) of the Award to change an employee's roster in response to a cancellation that is notified more than 7 days in advance of the scheduled service. The proposed clause is intended to operate in conjunction with, and not to the exclusion of, clause 25.5(d)(ii). ABI accepts that the proposed drafting does not make that clear and requires a minor amendment to clarify that issue.

[236] ABI submits that the proposed client cancellation clause is intended to deal with circumstances where services are cancelled by clients less than 7 days before the rostered shift is due to take place. It seeks to provide a fair and workable mechanism to deal with those situations without the employer or employee being unfairly disadvantaged.

[237] ABI notes that Ai Group submit that ABI's claim is less flexible for employers than the existing clause in respect of client cancellations in the home care stream of the Award. Further, they contend that ABI's claim is less beneficial for employers than the HSU claim in respect of home care services. ABI accepts that both of those propositions are correct and submits:

> 'However, the primary aim of our clients' claim is to extend a client cancellation / make-up pay regime to the disability services stream, and in doing so, we have proposed to materially improve the existing Award regime as it stands for home care employees.
>
> We submit that the proposed variation strikes the right balance and meets the modern awards objective.'[303]

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[302] ABI Submission of 12 October 2019 at 2.22

[303] ABI Submission of 12 October 2019 at 2.31 – 2.32

Q61. Question for ABI: ABI is asked to file an amended draft variation determination addressing the drafting issues raised in its reply submission.

3.5.4 *The HSU client cancellation claim*

[238] The HSU's primary position is that clause 25.5(f) be deleted; in the alternative the HSU propose the following amendments:

> **(f) Client cancellation**
>
> (i) Where a client cancels or changes the rostered home care service, an employee will be provided with notice of a change in roster ~~by 5.00 pm the day prior~~ at least 48 hours in advance and in such circumstances no payment will be made to the employee. If a full-time or part-time employee does not receive such notice, the employee will be entitled to receive payment for their ~~minimum specified hours~~ rostered hours for that visit on that day.
>
> (ii) The employer may direct the employee to make-up time equivalent to the cancelled time, in that or the subsequent fortnightly period. This time may be made up working with other clients or in other areas of the employer's business providing the employee has the skill and competence to perform the work.

[239] The HSU contends that the brevity of the notice required in the current clause (by 5.00 pm the day prior) has the capacity to be disruptive for employees seeking to arrange other responsibilities around work commitments. The HSU refers to the evidence of Ms Waddell for whom the capacity for such change meant that she found herself on one occasion, with a change which required her to attend an appointment 50 kilometres away, without sufficient fuel in her car to undertake the trip.[304]

[240] The HSU contends that the capacity to cancel set hours of work on such terms undermines significantly the entitlement of part-time workers to regular and guaranteed days and hours of work.

[241] The HSU's principal position is that there should be no client cancellation clause in the SCHADS Award:

> 'the Commission would not be satisfied, on the evidence before it, that cancellation of a home care appointment at short notice would leave the employer without a source of funding to meet employee wages. First, wages are modest. Second, it is far from the case that employers in the home care industry are suffering through any financial hardship. Third, on the evidence before the Commission, it would not be satisfied that organisations providing home care services are not able to make arrangements whereby they charge when clients cancel scheduled services.
>
> …
>
> In summary, the existing cancellation clause in the Award operates to shift the financial risk (which on the evidence above is minimal) of variable client demand onto the employee, and to

[304] Waddell [15] – [16], CB 2958

> require the employee to forego wages to build up the employer's goodwill. The clause is not a fair and relevant minimum condition.'[305]

[242] In the alternative the HSU submits that, the clause should be amended to ensure that employees receive payment for all of their rostered hours if they are not given at least 48 hours' notice of cancellation.

ABI response to HSU claim

[243] ABI opposes the HSU claim and submits that as most cancellations or changes to rostered home care services are made in the 24 hours prior to the scheduled service:

> 'the HSU variation would effectively nullify the utility of this clause for employers, which is more important than ever in the context of the consumer – directed care reforms that have recently been implemented.'[306]

Ai Group response to HSU claim

Q62. Question for Ai Group: What is Ai Group's response to the HSU's claim?

NDS response to HSU claim

[244] NDS supports ABI's proposed variation and opposes the HSU claim on the basis that 'it does not provide for any flexibility for dealing with client cancellation in the disability sector'.[307]

AFEI response to HSU claim

[245] AFEI submits that the Commission should prefer the variation proposed by ABI to that proposed by the HSU.

3.6 The Mobile phone allowance claims

[246] Clause 20.6 of the SCHADS Award currently states:

> **20.6 Telephone allowance**
>
> Where the employer requires an employee to install and/or maintain a telephone for the purpose of being on call, the employer will refund the installation costs and the subsequent rental charges on production of receipted accounts.

[247] There are 2 union claims to vary clause 20.6, by the UWU and HSU.

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[305] HSU submission at [138] and [143]

[306] ABI Submission of 12 July 2019 at [12.4]

[307] NDS Submission of 16 July 2019 at [64]

3.6.1 *The UWU mobile phone allowance claim*

[248] The UWU initially proposed that clause 20.6 be varied as set out below (emphasis added):

> 'Where the employer requires an employee to install and/or maintain a telephone or mobile phone for the purpose of being on call, for the performance of work duties or to access work related information the employer will refund the installation costs and the subsequent rental charges on production of receipted accounted.'

[249] ABI and others raised concerns about the drafting of the UWU's claim and concerns that employers will be required to reimburse all personal use by the employee.[308] Business SA and AFEI raise similar concerns, although Business SA acknowledged that employees are, at times, required to use personal mobile phones in the course of their employment.[309]

[250] To address some of drafting concerns raised by the employer parties the UWU filed a revised draft determination with its Further Submissions in Reply dated 3 October 2019. The revised draft determination provides an employer with several options in respect to reimbursing an employee for the cost of a mobile phone. The employer can provide a mobile phone or, alternatively, the employer can reimburse costs associated with use of the employee's own mobile phone. The reimbursement is of '*reasonable*' costs incurred in the course of employment.

[251] The UWU submits that the revised draft variation does not require an employer to purchase a phone for an employee to continue to use if the employment *ends*. An employer can purchase a phone, provide it to the employee to use during the period of their employment and then require the return of the phone once the employment of that employee is terminated. This method may be attractive to employers as they are able to determine the type of device purchased and any service arrangement entered into. The employer is also able to ensure that the device purchased is one that can properly display any apps the employer requires the employee to use in the course of duties.

[252] The UWU's revised draft variation determination seeks to delete clause 20.6 and insert the following:

> **20.6 Telephone allowance**
>
> (a) Where the employer requires an employee to install and/or maintain a telephone for the purpose of being on call, the employer will refund the installation costs and the subsequent rental charges on production of receipted accounts.
>
> (b) Where the employer requires an employee to use a mobile phone for the purpose of being on call, for the performance of work duties or to access work related information, the employer will either:

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[308] Submission in reply of ABI and others re: outstanding union claims, paragraphs 9.25 to 9.27.

[309] Submission in reply of Business SA re: outstanding union claims dated 12 July 2019, paragraphs 24 and 25 -27, submission in reply of AFEI in reply re: outstanding union claims, paragraph 144.

(i) provide a mobile phone fit for purpose and cover the cost of any subsequent charges; or

(ii) provide a mobile phone and reimburse subsequent costs on the production of receipts, or

(iii) reimburse the employee for the cost of the phone and its use according to clause (c).

(c) Where the employer requires the employee to use the employee's own mobile phone in the course of employment:

(i) where the mobile telephone is provided under a mobile phone plan from a telecommunications provider, the employer and employee must agree in writing on the amount of reasonable reimbursement payable by the employer to the employee for the use of the employee's mobile phone in the course of employment provided that such reimbursement must not be less than 50% of the cost of the employee's monthly mobile phone plan, up to a maximum monthly phone plan of $100; or

(ii) where the mobile phone is a pre-paid mobile phone, the employer and employee must agree in writing on the amount of reasonable reimbursement payable by the employer to the employee for the use of the employee's pre-paid mobile phone.

(d) If requested, the employee must provide the employer with a copy of the mobile phone plan associated with the mobile telephone to be used by the employee in the course of employment.

(e) If the employee enters into a new mobile phone plan or arrangement with a telecommunications provider entitling the employee to a different allowance under this subclause, the new allowance will become payable from the first full pay period after the date the employee provides the employer with a true copy of the new mobile phone plan.

[253] The UWU's submissions in support of its claim are set out at [81]-[110] of its submission of 4 February 2019. In essence, the UWU submits that the current telephone allowance is 'anachronistic' and 'does not reflect the current ubiquity of mobile 'smart' phone use and their status as work tools'.[310] In addition to the witness evidence the following points are advanced:

1. The Australian Communications and Media Authority released data on 30 November 2018 indicating that 5.78 million Australians, about 31% of the population, have no fixed landline at home.[311]

[310] United Voice Submission of 4 February 2019 at [101]

[311] Ibid at [92]

2. Digital disruption was the subject of a 2016 Research Report by the Productivity Commission which explicitly drew a link between the greater use of technology and improved productivity and workplace participation.[312]

[254] The UWU also submits that granting its claim will assist the low paid to better meet their needs:

> 'Much of the work covered by the Award can be classified as low paid and the cost of purchasing and maintaining a mobile phone because the employer demands its employees use this technology is a significant imposition and a cost which the employer should properly make some contribution towards.'[313]

[255] The UWU goes on to submit:

> 'The allowance as proposed would also provide certainty to employers that any direction to possess and use a mobile phone as a tool of work is a lawful and reasonable direction. It is unarguable that any work direction to use a personal mobile phone without some reimbursement provision for expenses is not 'reasonable'.'[314]

[256] The UWU also contends that 'such an allowance can be characterised apt to *promote flexible modern work practices and the efficient and productive performance of work*', and greater workforce participation (ss 134(1)(d) and (c)'.[315]

[257] In short, the UWU submits:

> 'In light of the expense of purchasing and maintaining a mobile phone and its status as a tool of trade; it is appropriate that a reimbursement allowance as proposed is part of the safety net of this modern award.'[316]

[258] The UWU seeks the following findings in support of its claim:

1. Employees in home care and disability services are required to have access to, and to utilise, a mobile phone in the course of their duties.[317]
2. Employees are expected by their employers to have access to, and utilise a mobile phone, to:

    (a) take directions from their employer;[318]

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[312] Ibid at [93]-[94]

[313] Ibid at [109]

[314] ibid

[315] Ibid at [110]

[316] Ibid at [108]

[317] Statement of Trish Stewart (EX. UV1), at [20]-[22]; Statement of Deon Fleming (EX. UV4), at [28]-[29]; Transcript (16/10/19), PN2584 [JEFFREY SIDNEY WRIGHT]; Transcript (18/10/19), PN2867-2870 [GRAHAM JOSEPH SHANAHAN], PN3554-3559 [JOYCE WANG].

[318] Transcript (16/10/19), PN2584 [JEFFREY SIDNEY WRIGHT]; Transcript (18/10/19), PN2867-2870 [GRAHAM JOSEPH SHANAHAN].

(b) access work-related apps to maintain records on clients, confirm attendance and input other work-related data;[319]

(c) update their employer of issues with clients;[320]

(d) access and read client care plans;[321]

(e) call clients who may not answer the door to their home;[322]

(f) undertake medication checks with clients;[323]

(g) advise clients when running late;[324]

(h) be advised of roster changes via call or text;[325]

(i) check emails relating to roster changes or work related communications;[326]and

(j) report workplace hazard/incidents.[327]

3. There are different approaches to the attribution of the cost of mobile phones usage by employers in the home care and disability sector:

(a) there are employers that will provide employees with a mobile phone to use for work purposes and pay for associated costs;[328] and

(b) there are employers that do not provide employees with a mobile phone to use, but require employees to use their own mobile phones for work purposes.[329] In this case, the Award does not clearly mandate that employees are reimbursed for the cost of the mobile phone, or for costs of work-related charges

4. In circumstances in which the employer did not provide a mobile phone, or reimburse for associated costs, the evidence indicates that:

(a) not all employees in this industry have a smartphone, and not all employees have a phone with the capabilities to access the relevant apps as required by their employer;[330]

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[319] Statement of William Gordon Elrick dated 14 February 2019 (EX.HSU3), at [31] - [33];Transcript (16/10/19), PN2587-88 [JEFFREY SIDNEY WRIGHT]; Transcript (18/10/19), PN2865 [GRAHAM JOSEPH SHANAHAN], PN3554-3559 [JOYCE WANG].

[320] Transcript (18/10/19), PN2872 [GRAHAM JOSEPH SHANAHAN].

[321] Statement of Trish Stewart (EX. UV1), at [22].

[322] Statement of Belinda Sinclair (EX. UV6), at [15].

[323] Statement of Trish Stewart (EX. UV1), at [20]; Statement of Deon Fleming (EX. UV4), at [29].

[324] Statement of Trish Stewart (EX. UV1), at [20]; Statement of Deon Fleming (EX. UV4), at [27]; Statement of Belinda Sinclair (EX. UV6), at [15].

[325] Statement of Belinda Sinclair (EX. UV6), at [16].

[326] Statement of Deon Fleming (EX. UV4), at [27]; Statement of Belinda Sinclair (EX. UV6), at [17]; Transcript (15/10/19), PN539 [DEON LEIGH FLEMING]; Transcript (16/10/19), PN2586 [JEFFREY SIDNEY WRIGHT]; Transcript (18/10/19), PN2870 [GRAHAM JOSEPH SHANAHAN].

[327] Statement of Belinda Sinclair (EX. UV6), at [15].

[328] Transcript (16/10/19), PN2584-2588 [JEFFREY SIDNEY WRIGHT].

[329] Statement of Trish Stewart (EX. UV1), at [21]; Statement of Deon Fleming (EX. UV4), at [30]; Statement of Belinda Sinclair (EX. UV6), at [16].

[330] Statement of Deon Fleming (EX. UV4), at [27]; Statement of William Gordon Elrick (EX. HSU3), at [31]; Transcript (15/10/19), PN1075-1080 [WILLIAM GORDON ELRICK].

(b) employees are in effect directed by their employer to upgrade to a smartphone, or upgrade their smartphone, in order to be able to access apps required by the employer;[331]

(c) employees may have to pay for a higher level plan than they otherwise would; and[332]

(d) the work-related cost of an appropriate mobile phone can be a significant portion of the overall cost, and in some cases, equally as significant as the costs of personal use.[333]

5. No employer evidence was presented that suggested that a mobile phone allowance would be costly or prohibitive.

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

[259] In conclusion, the UWU submits that there is evidence indicating the variation of the SCHADS Award to insert a mobile phone allowance in terms of its claim is necessary. A mobile phone for workers under the SCHADS Award providing services in the community is said to be a vital '*tool of trade'* and required, in effect, at the direction of employers.[334]

3.6.2 *The HSU mobile phone allowance claim*

[260] The HSU advances a claim in (broadly) similar terms to that of the UWU. It seeks to delete the current clause 20.6 and replace it with:

> **20.7 Telephone allowance**
>
> Where the employer requires an employee to use a mobile phone for any work related purpose, the employer will either:
>
> (a) Provide a mobile phone fit for purpose and cover the cost of any subsequent charges; or
>
> (b) Refund the cost of purchase and subsequent usage charges on production of receipts.

[261] The stated purpose of the variation is to effectively modernise the provision which is currently expressed to apply only to situations where an employee is required to install and/or maintain a landline telephone for the purpose of being on call.

[262] The HSU propose to extend both the operation of the provision and the quantum of the entitlement. In respect of the operation of the provision, the HSU propose that the entitlement apply:

(a) where an employee is required to use a mobile phone rather than a landline telephone; and

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[331] Statement of Deon Fleming (EX. UV4), at [27].

[332] Statement of Trish Stewart (EX. UV1), at [21];Transcript (15/10/19), PN453-455 [TRISH STEWART].

[333] Transcript (15/10/19), PN440-445 [TRISH STEWART]; PN533-538 [DEON LEIGH FLEMING].

[334] UWU submission 18 November 2019 at [57]

(b) where the employee is required to use the phone for "any work related purpose" rather than only where employees are required to be "on-call".

[263] The HSU also seeks to alter the substance of the entitlement and propose that where the clause is triggered, employees be entitled to either:

(a) the provision of a mobile phone that is fit for purpose and reimbursement of the cost of "any subsequent charges"; or

(b) be refunded for the "cost of purchase" and "subsequent usage charges" on production of receipts.

[264] The grounds advanced by the HSU in support of the variation include that:

(i) that the current telephone allowance clause is "outdated" because it refers to a landline telephone and does not deal with mobile phones;[335]

(ii) that the vast bulk of employees now have mobile phones which are available to them during the course of their work;[336]

(iii) that employers "frequently require or expect" care workers to be contactable by mobile phone when performing their duties;[337]

(iv) that employees who are required to use their phones for work purposes should receive a telephone allowance "that reflects the cost of maintaining and using such mobile phone";[338] and

(v) that employees required to use a smart phone should be reimbursed for the cost of purchasing one "if such purchase is necessary".[339]

[265] In its submission of 18 November 2019 the HSU relies on the findings sought by the UWU. The additional findings sought by the HSU are not clearly articulated but the following proposed findings may be extracted from [117] – [136] of the HSU's 18 November 2019 submission:

1. A smart phone is an essential 'tool of the trade'. Employees require a telephone in order to contact and be contactable by their employer and in order to contact and be contactable by clients. Employees also need to access email, perform internet searches or use their employer's telephone applications for the purpose of record keeping etc.[340]

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[335] HSU Submission at [59]

[336] Ibid

[337] HSU Submission at [60]

[338] HSU Submission at [60]

[339] HSU Submission at [60]

[340] HSU Submission 18 November 2019 at[117] – [124]; relying on the evidence of Wright, Transcript 18 October 219 at [2584] – [2588]; Shanahan, Transcript 18 October 2019 at [2865] – [2870]; Elrick Exhibit HSU3 at [30] – 33]; Sheehy, Exhibit HSU26 at [11] – [13]; Waddell, Exhibit HSU4 at [31] – [32]; Lobert, Exhibit HSU27 at [18] – [30]; Quinn, Exhibit HSU29 at [23] – [35]

2. The likelihood of employers communicating with employees via internet based application or requiring them to sue such applications in the course of their work is only likely to increase in the coming years.[341]

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] In sum, the HSU submits:

> 'On the evidence before the Commission there is a real risk that the cost of maintaining contactability and connectivity for work purposes, like the cost of travel, and the cost f idle time, will be absorbed by employees to the advantage of the employer and rendered invisible. Fairness dictates that the employer meet those costs, or a fair proportion of those costs.[342]

3.6.3 *Employer responses to the Union claims*

ABI response

[267] ABI opposes the claims and submits that the Unions have failed to adduce relevant evidence in support of the claims, in particular there is no evidence of:

- the proportion of employees in the industry who are required to use mobile phones in the course of their employment;
- the proportion of work related mobile phone usage versus non-work related use by employees;
- any award covered employer requiring prospective employees, as a condition of employment, to own a mobile phone;
- any award covered employer directing or otherwise requiring existing employees to purchase a mobile phone

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

[268] ABI identifies a range of issues with the drafting of the unions' proposed variations (at [9.17] – [9.27] of ABI's 12 July Submission in Reply). Some of these submissions are directed at the UWU's initial claim and have been overtaken by events. Of continued relevance is the observation that the submissions advanced in support of the claims appear to be advanced in respect of 'care workers'[343] but the application of both proposed clauses is not so confined and are expressed to apply to all employees covered by the SCHADS Award. This would extend to managerial staff and other senior employees who do not work as carers or support workers.

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

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[341] HSU's 18 November 2019 Submission at [125]

[342] Ibid at [126]

[343] Citing HSU submission at [60] and UV submission at [83]

allowance be restricted to the class of employees which have been the subject of evidence in the proceeding? How should that class be defined?

[269] As to the HSU's claim, ABI raises the following issues with the drafting of the proposed claim:

> 1. The HSU clause requires an employer to either 'provide' a mobile phone, or refund the 'cost of purchase' of a mobile phone, where one is required to be used for specified purposes. But there is not exemption where an employee already owns a mobile phone. There is nothing to prevent an employee who already owns a mobile phone from purchasing a new one, simply to obtain reimbursement for it.
>
> 2. There is nothing to prevent an employee seeking reimbursement of the purchase costs of a mobile phone that was purchased years before the employer required the employee to use it for work purposes, provide the employee can produce 'receipted accounts'. This would result in the employer bearing the costs of a depreciated asset and subsidising the employee's personal use of the device.
>
> 3. There is no limitation on the costs which are required to be borne by the employer. There is no reference to refunding 'reasonable' purchase costs or 'reasonable' charges. Nor is there any link between the proposed entitlement and the type of device an employer requires an employee to use. An employer may only require a basic mobile device but there is nothing to prevent an employee purchasing (and obtaining reimbursement for) a smart phone. There is not mechanism in the clause for the employer to have any control or oversight at all over the type of device or service arrangement that employees might purchase or enter into.
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> 4. The HSU clause doe not require an employer to reimburse or refund an employee for only the work-related costs associated with the use of a mobile phone. It requires the employer to cover all costs, both up-front costs and subsequent charges.

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

[270] As to the implications of granting the Unions' claims, ABI submits they would have a considerable adverse impact on employment costs and would impose an unreasonable cost on employers. The cost to be borne by employers will be disproportionate to any benefits an employer would derive, given they will be subsidising an employee's personal use. Further, ABI submits:

> 'It is difficult to understand how an employer can reasonably be expected to reimburse an employee for the up-front and ongoing costs of their mobile phone in circumstances where the employee already owned a mobile phone prior to commencing work with the employer, and primarily uses it for personal use.
>
> …
>
> The vast majority of costs borne by employees through the purchase, use and maintenance of their mobile phone will almost certainly be related to their personal use of the device (rather than work-related use). We would expect that for most employees, their workrelated usage

would be only a small proportion of their overall usage, and as such the workrelated costs would be a small proportion of the overall costs.'[344]

[271] ABI also notes that the claims fail to recognise that where an employee incurs a work-related expense the applicable income tax legislation entitles the employee to claim a tax deduction, which has the effect of reducing the employee's taxable income (and thereby reducing the amount of income tax required to be paid).

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?

[272] In sum, ABI submits the claims should be rejected:

'Our clients are opposed to the Unions' claims for the reasons outlined above. A merit basis for the claim has not been made out. No mischief or problem has been properly identified which would warrant the intervention of the Commission. The claim will pass an unreasonable cost onto employers, which is in no way equivalent to the usage of mobile phones for work-purposes. The claim would effectively require employers to subsidy employees' personal usage of a personal device, for which employers have no way of controlling or maintaining. This is plainly unreasonable, and is inconsistent with the notion of creating a fair and relevant minimum safety net of terms and conditions. The proposed Award term will result in the Award not meeting the modern awards objective. The proposed term offends section 138 of the FW Act.'[345]

[273] ABI proposes that the following findings be made relating to these claims:

1. Rates of mobile phone and smart phone ownership in Australia are very high. Recent data suggests that:

   (a) approximately 83 per cent, or 15.97 million Australian adults, own a smart phone;[346] and

   (b) approximately 96 per cent, or 18.57 million Australian adults, own a mobile phone.[347]

2. Given the very high rates of mobile phone ownership in Australia, it would be highly unusual for someone working in the SCHCDS industry to not already own a mobile phone.[348]

3. The evidence adduced during the proceedings was mixed as to whether employees are required to use their personal mobile phones during work. For example:

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[344] Abi Submission of 12 July 2019 at 9.31 and 9.34

[345] ABI submission of 12 July 2019 at 9.36

[346] ABI Reply Submission of 12 July 2019 at [9.13], referring to Australian Communications and Media Authority, Communications Report 2017-2018, p. 33. (30 November 2018).

[347] Ibid

[348] See *4 yearly review of modern awards – Award stage – Group 4 – Aged Care Award 2010 – Substantive claims* [2019] FWCFB 5078 at [51]. There is no reason to believe that there would be any material difference between mobile phone ownership rates of employees in the aged care sector and employees in the SCHCDS industry.

(a) Mr Elrick stated that "Generally speaking, most workers will only use their personal phone for the purposes of being contacted for shifts, and not during work";[349] [emphasis added]

(b) However, Ms Wilcock, Ms Waddell and Mr Lobert all stated that they are required to use either the company-issued mobile phone (in the case of Ms Wilcock and Ms Waddell) or their personal mobile phone (in the case of Mr Lobert) in the course of their duties.[350]

4. The evidence adduced during the proceedings was also mixed as to whether or not employers provide employees with mobile phones. For example:

(a) Mr Sheehy gave evidence that "many of the aged care employers are now providing phones to employees;[351]

(b) that proposition was supported by Ms Wilcock, Ms Waddell and Ms Thames, all of whom stated that their employer provides them with a phone (which Ms Wilcock described as being "common these days");[352]

(c) there was also evidence of employers providing employees with a 'tablet computer' and not a mobile phone;[353]

(d) however, Mr Lobert stated that none of his three employers provide their employees with a mobile phone. Ms Sinclair and Ms Stewart are also not provided with a mobile phone by her employer;[354] and

(e) Mr Elrick gave evidence of a "growing trend" of employers in the industry requiring employees to use their personal mobile phones.[355]

5. Employees use their personal mobile phones for both personal purposes and for work purposes, and it is unclear what proportion is used for personal purposes and what proportion is used for work.[356]

6. There was limited evidence in relation to the extent of usage by employees of mobile phones for work purposes. The totality of evidence before the Commission in relation to the extent of mobile phone usage by employees is as follows:

(a) Mr Fleming gave evidence that he uses his phone for work related reasons "regularly" and stated that he "would make approximately 10 calls per week on the mobile";[357]

(b) Ms Sinclair gave evidence that she would "normally make two to eight calls each working week";[358] and

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[349] Elrick Statement at [30].

[350] Wilcock Statement at [19]; Waddell Statement at [31]; Lobert Statement at [20].

[351] Sheehy Statement at [13].

[352] Wilcock Statement at [19]; Waddell Statement at [31]; Thames Statement at [22].

[353] See Fleming Statement at [25].

[354] Lobert Statement at [18]; Sinclair Statement at [16]; Stewart Statement at [21].

[355] Elrick Statement at [31].

[356] Transcript at PN440-PN452; Transcript at PN534-PN540.

[357] Fleming Statement at [29].

[358] Sinclair Statement at [15].

(c) Ms Stewart gave evidence that she normally makes two to three calls per working day.[359]

7. In light of the above, it cannot be concluded that employees' usage of personal mobile phones while working is substantial.

8. It is open to conclude that the proportion of work-related usage of personal mobile phones by employees is modest.

9. Lastly, employees' costs in respect of their mobile phone ownership and/or usage appears to vary considerably. By way of example:

   (a) Mr Fleming's mobile phone bill is approximately $65 per month;[360] while

   (b) Ms Stewart's mobile phone bill is approximately $170 per month.[361]

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

Ai Group response to the claims:

[274] The proposed clause would apply wherever an employer requires an employee to use a mobile phone for any work related purpose. It would require the employer to provide the employee with a mobile phone and cover the cost of any usage charges (whether incurred for work purposes of otherwise) or reimburse the employee for the same.

[275] Ai Group opposes the variations proposed and submits that the material before the Commission does not establish that the claims proposed by the unions are necessary to ensure that the SCHADS Award achieves the modern awards objective.

[276] Ai Group contends that the HSU's claim is unfair to employers, for 4 reasons:

1. The grant of the HSU's claim would see employers liable for "any subsequent charges" or "usage charges" incurred by an employee. It is plainly unfair that an employer be required to pay for costs incurred by an employee for usage unrelated to work. The proposed clause does not create an Award-derived limitation on the purpose for which the mobile phone may be used, nor does it absolve employers from the liability for paying for such expenses.

2. The HSU's proposed subclause (b) would entitle an employee to the reimbursement of expenses incurred through acquiring a phone and usage, even where those costs are excessive or unnecessary. For example, the clause would entitle an employee to reimbursement even if the employee selected a phone plan with inclusions that are not necessary for the purposes of fulfilling the employee's duties.

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[359] Stewart Statement at [20].

[360] Fleming Statement at [27].

[361] Stewart Statement at [21].

3. The proposed clause would afford employees a windfall gain where they are employed by more than one employer covered by the Award; a situation which, on the unions' material, is apparently not uncommon.

4. The clause does not account for circumstances in which an employee already possesses a mobile phone which is adequate for the purposes of an employee's duties. The clause applies to any employee who is required to use a mobile phone and essentially delivers to them an entitlement to an additional mobile phone and/or reimbursement for the purchase and usage of such a mobile phone, even if they already have one.

[277] As to the evidentiary case in support of claims, Ai Group submits that the unions have not presented any material that establishes the proportion of employees covered by the Award who are required by their employer to use a mobile phone for the purposes of their employment and of those, the percentage who do or do not own a mobile phone that is fit for purpose. Of the evidence called by the unions, only one of the witnesses claims that they did not own a smartphone as required by their employer.[362]

[278] Ai Group submits that the evidence before the Commission suggests that most employees either own a mobile phone[363] or that they are provided with a device by their employer.[364]

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

[279] Further, Ai Group relies on a report published by Deloitte in 2018[365], which sets out the results of a survey of a nationally representative sample of over 2,000 Australian consumers aged 18–75, found that 89% of those surveyed owned a smartphone. Another 11% owned a standard mobile phone.[366] The survey results appear to suggest that the entire survey population owned a mobile phone of some description.

[280] Ai Group contends that, in this context, the unions' proposed variations are plainly unjustifiable and unfair.

[281] Ai Group submits that considerations of fairness of themselves provide a basis for dismissing the HSU and the UWU claims.

[282] Ai Group also contends that the variations proposed by the unions are 'out of step' with the way in which the modern awards system typically deals with the matter of telephones, including mobile telephones. The vast majority of awards do not make any provision for telephones. Of those that do, most appear to contemplate only landline telephones, as per the

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[362] Statement of Deon Fleming dated 16 January 2019 at paragraph 27.

[363] Statement of Belinda Sinclair at 16 January 2019 at paragraphs 15 – 17, statement of Trish Stewart dated 17 January 2019 at paragraphs 20 – 22, statement of William Elrick dated 15 February 2019 at paragraph 30 and statement of Bernie Lobert dated 15 February 2019 at paragraph 20.

[364] Statement of Robert Sheehy dated 15 February 2019 at paragraphs 12 – 13, statement of Pamela Wilcock dated 15 February 2019 at paragraph 19, statement of Heather Waddell dated 15 February 2019 at paragraph 31 and statement of Thelma Thames dated 15 February 2019 at paragraph 22.

[365] Deloitte, *Behaviour Unlimited, Mobile Consumer Survey 2018, The Australian cut* (2018).

[366] Deloitte, *Behaviour Unlimited, Mobile Consumer Survey 2018, The Australian cut* (2018) at page 6.

current clause 20.6 of the Award.[367] Other award provisions either deal expressly with mobile phones or are drafted such that they appear to apply, implicitly, to mobile phone usage. In each case, they include various important parameters that do not appear in the union's proposals.

[283] For example:

(a) The *Commercial Sales Award 2010*,[368] *Contract Call Centres Award 2010*,[369] and *Telecommunications Services Award 2010*[370] entitle an employee to reimbursement for the reasonable cost of purchasing a phone *only where the employee does not already have a telephone*.

(b) The aforementioned awards entitle an employee to reimbursement for the *reasonable cost* of purchasing a mobile phone; not to *all* costs incurred by purchasing a mobile phone.

(c) The *Real Estate Industry Award 2010* requires the payment of only *reasonable reimbursement*, as agreed between the employee and employer.[371]

(d) The *Stevedoring Industry Award 2010* provides for the payment of a set weekly allowance, as prescribed by the award.[372]

[284] Ai Group submits that the approach proposed by the HSU and the UWU is inconsistent with that adopted in the aforementioned awards and lack any of the limitations found in the relevant provisions.

[285] Ai Group makes the following observations about the s.134 considerations:

(a) Section 134(1)(a): there is no evidence dealing with the impact of the claims on the relative living standards and needs of the low paid. In the circumstances and hence s.134(1)(a) does not advance the unions' case. The Commission cannot properly conclude that the relative living standards and needs of the low paid will be enhanced or improved if the claims are granted.

(b) Section 134(1)(b): granting the claims may have an adverse impact on the need to encourage collective bargaining.

(c) Section 134(1)(c): there is no evidence that might enable the Commission to conclude that the grant of the claims will improve social inclusion through increased workforce participation.

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[367] See for example clause 19.6 of the *Air Pilots Award 2010*, clause C.1.10 of the *Aircraft Cabin Crew Award 2010*, clause 18.5 of the *Broadcasting and Recorded Entertainment Award 2010*, clause 18.11 of the *Health Professionals and Support Services Award 2010*, clause 16.5 of the *Medical Practitioners Award 2010*, clause 31.2 of the *Plumbing and Fire Sprinklers Award 2010* and clause 15.2 of the *Rail Industry Award 2010*.

[368] Clause 16.1(a).

[369] Clause 20.3(a).

[370] Clause 17.1(c)(i).

[371] Clause 18.6.

[372] Clause 14.5.

(d) Section 134(1)(d): the imposition of additional employment costs and the accompanying regulatory burden will not promote flexible modern work practices and the efficient and productive performance of work to the extent that it deters employers from using mobile technology. This issue is said to be particularly important in light of the observations made in the McKinsey Report about the importance of employers under the NDIS funding arrangements implementing and leveraging technological systems and solutions.[373] In particular:

> While there is no single model of care that will work for all providers and participants, and acknowledging the substantial investment providers have already made in transforming their organisations, the significant variation in cost to serve across the market indicates there are opportunities to innovate and lessons to be learned from operating models that are working well in standard intensity attendant care. Providers will generally need to achieve corporate overheads of 10-15% and improve workforce utilisation rates to above 90% to make a profit while complying with SCHADS award obligations. To do this, most existing providers will be required to adjust their operating models, driving efficiencies and innovation through technology and other operational improvements.[374]

(e) Section 134(1)(f): it is axiomatic that the grant of the claim will increase employment costs. The effect on business resulting from these employment costs would be exacerbated by the broad application of the clause and the absence of any limitation on an employer's liability to pay costs arising from an employee's usage.

The proposed clauses would also increase the regulatory burden imposed on employers in order to deal with and process requests for reimbursement made by their employees and/or providing employees with all-expenses-paid mobile phones.

The claim, if granted, would therefore have an adverse impact on business. Such an impact is compounded in the case of NDIS-funded services, because the funding does not contemplate the proposed entitlement.

(f) Section 134(1)(g): the need to ensure a stable system tells against the grant of the claim. Further, the clause proposed by the UWU is not simple and easy to understand.

[286] Ai Group submits that the consideration at s.134(1)(da), (e) and (h) are either neutral or not relevant to the claims.

[287] In essence, Ai Group submits that a proper foundation of the provisions proposed by the Unions has not been made out and the claims should not be granted. Ai Group also submits that the issue of mobile phones is more appropriately dealt with at the enterprise level where employees are in fact required to use mobile phones; having regard to the purpose for which

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[373] See for example, McKinsey Report at pages 20, 27 and 28.

[374] McKinsey Report at page 71.

they are required to use mobile phones and the extent to which the employer's employees already own appropriate mobile phones.

[288] Ai Group seeks two findings in support of its position:

1. Some employers provide their employees with mobile phones.[375]

2. Mobile phones owned by employees and utilised for work purposes are also utilised by those employees for personal purposes including personal phone calls, text messages and internet usage.[376]

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

NDS response to the claims:

[289] The NDS opposes the claims but does not appear to have advanced any submissions in support of its position. In its submission of 19 November 2019 NDS propose two findings relevant to these claims:

1. Disability support workers who are required to work in client homes and in the community are commonly required to own a mobile phone.[377]

2. Disability support workers use their mobile phones for a combination of work and personal purposes, and may be on plans with unlimited data included.378

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

AFEI response to the claim:

[290] AFEI opposes the claims. AFEI notes that the current clause is limited in its scope:

- it only applies where an employee is required to install/maintain a phone for being on call; and

- it does not require an employer to cover the cost of purchase of a phone.

[291] AFEI submits that the breadth of the proposed extensions to the current provision is significant and requires a merit argument supported by probative evidence. AFEI submits that the unions have not established the merit of their proposed variations.

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[375] Statement of Robert Sheehy dated 15 February 2019 at paragraphs 12 – 13, statement of Pamela Wilcock dated 15 February 2019 at paragraph 19, statement of Heather Waddell dated 15 February 2019 at paragraph 31 and statement of Thelma Thames dated 15 February 2019 at paragraph 22 and transcript of 17 October 2019 at PN2585

[376] Transcript of 15 October 2019 at PN445 to PN447 and PN534 and PN537.

[377] Sheehy at [11]-[13]; Exhibit HSU26; Wilcock at [19] – [20], Exhibit HSU27; Waddell at [31] –[32], Exhibit HSU4; and Transcript at [1386] – [1414]; Thames at [22], Exhibit HSU28; Fleming at [25] – [30], Exhibit UV4 and UV5; and Transcript at [533] –[540]; and Stewart at [20] – [22], Exhibit UV1, UV2 and UV3; and Transcript at [445] – [456].

[378] For example, Stewart Transcript at [445] – [456] and Fleming Transcript at [533] – [540]

[292] AFEI makes a number of points in respect of the UWU's initial variation determination, which have been overtaken by events. As to the HSU's proposed variation, AFEI submits:

- the HSU claim would allow an employee to seek reimbursement for the cost of their personal mobile phone even in circumstances where:
  - the employer assumes no property rights in respect of the mobile phone (despite the fact that they have paid for it); and
  - work related usage may not result in any additional expense to the employee.
- the HSU proposes that the allowance apply to the use of a mobile phone 'for any work related purpose', but provide no definition or scope of the expression 'work related purposes' and it could extend to an employee calling in because they are sick.

[293] As to the UWU submission which relies on statements by witnesses that rosters are provided to them via their mobile phone, AFEI submits:

> 'Communication between an employer and an employee abut the hours in which they will be rostered for work does not involve the performance of work, but are rather steps taken by an employee to ensure they are ready, willing and able to work. Imposing such costs on employers is not fair nor relevant, and is also thus inconsistent with the modern awards objective.'[379]

[294] AFEI seeks the following findings:

1. Employees in this sector already own a mobile phone and already use them for work purposes at no additional cost to the employee

   Supported by the evidence of Ms Stewart and Ms Fleming.[380] Ms Stewart has, as part of her phone plan, unlimited standard calls and SMS messages and up to 10 gigabytes usage without additional charges.[381] Ms Fleming has, as part of her phone plan, unlimited standard national calls and texts with 20 gigabytes of data and she doesn't get separately charged for any data used for accessing her roster.[382]

2. There are difficulties with disaggregating between work and personal use of the mobile phone

   Supported by the evidence of Ms Anderson concerning including monitoring issues such as how long and or how often an employee spends using a mobile phone or device for work purposes,[383] what happens in instances where phone usage was not authorised nor required by the employer[384] and how to differentiate between personal and work use of the phone.[385]

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[379] AFEI Submissions in Reply of 23 July 2019 at [145](b).

[380] Stewart Statement at [21].

[381] PN448; PN452.

[382] PN547-PN549.

[383] PN1005.

[384] PN1011 – PN1013.

[385] PN441.

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

Business SA response to claims

[295] Business SA acknowledges that employees are, at times, requested to use personal mobile phones in the course of their employment but submits that 'it is not appropriate for an employer to pay for a mobile phone, which may only be used for a small amount of work, for the employee to keep'.[386]

[296] Business SA notes that mobile phone plans vary significantly; some plans are available from $15 per month with all calls and text messages covered and 3 gigs of data; and a significant number of phone plans do not require additional payment for calls.

[297] Business SA submits:

> 'An employer should only be required to pay for a suitable plan or a mobile phone allowance, rather than subsidise an employee's personal phone usage …
>
> Most plans include all phone calls and text messaging costs and any reimbursement should be a reasonable amount and not subsidise either poor phone plan choice or an employees personal usage.'[387]

[298] While Business SA did not propose a variation to the phone allowance clause it drew the Commission's attention to the mobile phone allowance clause in the *Real Estate Industry Award 2010* and submits that that clause 'contemplates and better reflects the nature of using a personal mobile phone for work purposes'.[388] Clause 18.6 of the *Real Estate Industry Award 2010* provides:

> **18.6 Mobile Phone Allowance**
>
> (a) Where the employer requires the employee to use the employee's own mobile phone in the course of employment and:
>
> (i) the mobile telephone is provided under a mobile phone plan from a telecommunications provider, the employer and employee must agree in writing on the amount of reasonable reimbursement payable by the employer to the employee for the use of the employee's mobile phone in the course of employment provided that such reimbursement must not be less than 50% of the cost of the employee's monthly mobile phone plan, up to a maximum monthly phone plan of $100; or
>
> (ii) the mobile phone is a pre-paid mobile phone, the employer and employee must agree in writing on the amount of reasonable reimbursement payable by the employer to the employee for the use of the employee's pre-paid mobile phone.
>
> (b) Without limiting an agreed method of payment for reimbursement, an employee's salary in excess of the minimum weekly wage may be inclusive of reimbursement providing the reimbursement component of the salary is identified in the agreement.

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[386] Business SA Submission of 12 July 2019 at [24] –[25]

[387] Ibid at [26] – [27]

[388] Ibid at [29]

(c) The mobile phone allowance under cause 18.6(a) is payable during the entire period of employment, except when the employee is on any period of leave either paid or unpaid.

(d) If requested, the employee must provide the employer with a copy of the mobile phone plan associated with the mobile telephone to be used by the employee in the course of employment.

(e) If the employee enters into a new mobile phone plan or arrangement with a telecommunications provider entitling the employee to a different allowance under this sub-clause, the new allowance will become payable from the first full pay period after the date the employee provides the employer with a true copy of the new mobile phone plan.

3.6.4 *UWU submission in reply*

[299] ABI and others argue that it is difficult to understand how an employer can reasonably be expected to reimburse an employee for mobile phone costs where an employee primarily uses it for personal use.[389] In response, the UWU submits that it is difficult to understand how an employer can reasonably expect an employee to use their own mobile phone in the course of their employment without providing any reimbursement for that expenditure. Further, it submits that the notion that an employee '*primarily*' uses the mobile phone for personal use is misleading. An employee may or may not use their mobile phone primarily for personal use, but the key issue is whether the employee is *required* to use their mobile phone for work purposes and how the employee should be reimbursed for that work-related use.

[300] AiG have noted a Deloitte report from 2018, in which a survey of 2,000 Australian consumers found that 89% of those surveyed own a smart phone.[390] The UWU acknowledges that most employees will own a phone but submits that this does not negate the need for a mobile phone allowance. There are costs associated with using a mobile phone for work, whether that is direct charges for work-related use, having to pay for a higher plan to ensure work-related use is covered, or increased wear and tear on the device. For example, United Voice witness Ms Stewart gives 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*.'[391] The UWU submits that it cannot be considered '*fair*' for the cost of work-related mobile phone use to be shifted onto employees and it is appropriate that there be an Award clause that provides for compensation for work-related mobile phone usage.

3.7 The Sleepover claim - *HSU*

[301] Clause 25.7(c) currently deals with the facilities to be afforded to an employee performing a sleepover shift:

(c) The span for a sleepover will be a continuous period of eight hours. Employees will be provided with a separate room with a bed, use of appropriate facilities (including staff facilities where these exist) and free board and lodging for each night when the employee sleeps over.

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[389] Submission of ABI and others re: outstanding union claims, paragraph 9.31.

[390] Submission in reply of AiG re: outstanding union claims, paragraph 548.

[391] Witness statement of Trish Stewart signed 17 January 2019, paragraph 21.

[302] The HSU submits that clause 25.7(c) is vague and should be amended to ensure that appropriate facilities are provided when employees are required to perform a sleepover shift. The HSU seeks to replace clause 25.7(c) with the following:

> '(c) The span for a sleepover will be a continuous period of eight hours. Employees will be provided with:
>
> (i) a separate and securely lockable room with a peephole or similar in the door, a bed and a telephone connection in the room; and
> (ii) suitable sleeping requirements such as a lamp and clean linen;
> (iii) use of appropriate facilities (including staff facilities where these exist), and
> (iv) free board and lodging for each night when the employee sleeps over.'

[303] Items (i) and (ii) above represent variations to the current award provision.

[304] In support of its claim the HSU relies on what is submits is the unchallenged evidence of William Elrick (Exhibit HSU 3) about how the current provision can operate in practice:

> 'The sleepover arrangements in many workplaces aren't conducive to a good sleep. For a period while I was undertaking sleepovers where bed was located in the office. The head of the bed was coming out of the cupboard that had the doors removed, the office had hums from the computer and fax, along with a bright light from the handset of the house phone. I have had reports from other members who have had to sleepover with the sleepover door open, having to deal with uncomfortable beds, and various other issues that result in poor sleep.[392]

[305] The HSU submits that the circumstances described by Mr Elrick 'involve a risk to personal security and safety and are unlikely to provide an environment for proper rest and repose'.[393]

[306] NDS opposes the HSU's sleepover claims[394] but makes no submission in support of its position.

ABI response to the HSU claim

[307] ABI opposes the claim and relies on Part 13 of its reply submission of 12 July 2019 and its submission of 19 November 2019, in summary:

- the basis for the variation is unclear - the HSU have failed to articulate why it is that they consider the current clause to be deficient;
- the current award refers to providing employees with 'use of appropriate facilities' – which is a sensible formulation as it is sufficiently flexible to apply to a broad range of circumstances. What is 'appropriate' will vary depending on the circumstances of a particular situation. Given that the SCHADS Award is an industry wide minimum safety net instrument covering employers operating in a diverse range of sectors and

[392] Exhibit HSU3 at [27]; CB 2937

[393] HSU submission 18 November 2019 at [1517]

[394] NDS submission 19 November 2019

catering to a broad customer base, it is not appropriate to prescribe in any greater detail the specific items to be provided to every employee performing sleepover shifts; and

- there is very little evidence before the Commission that would provide an evidentiary basis for granting the claim. The only two employee witnesses gave evidence that they work sleepovers.[395] Further, that evidence is quite general in nature. Neither of those two witnesses gave any specific evidence about the facilities provided to them when working sleepover shifts. Notably, nor did they raise any concern about the adequacy of those facilities. The only exception to this is Mr Elrick,, who is a union official.

[308] As to Mr Elrick's evidence ABI notes that it includes:

- a generalised assertion that "the sleepover arrangements in many workplaces aren't conducive to a good sleep";[396] and

- a reference to a previous experience whereby he undertook sleepovers at a site where the bed was located in the office.[397]

[309] ABI submits that it is not clear which employer Mr Elrick's experience related to, or when it was said to have occurred, or whether he complained or otherwise raised concerns with his employer at the time, and/or how the situation was resolved (if he did raise it).

[310] ABI seeks the following findings in relation to this claim:

1. There is insufficient evidence to conclude that the current clause 25.7(c) is not operating satisfactorily.

2. Further, when one considers the specific items that the HSU seek to have expressly included in clause 25.7(c):

   (a) There is no evidence before the Commission of employers not providing employees with a 'separate' room to sleep in when undertaking a sleepover;

   (b) There is no evidence before the Commission of employers not providing employees with a 'clean linen';

   (c) There is no evidence about whether it is customary for employers to provide employees with a 'securely lockable room';

   (d) There is no evidence about whether it is customary for employers to provide employees with a room 'with a peephole or similar in the door';

   (e) There is no evidence about whether it is customary for employers to provide employees with a 'lamp'; and

   (f) There is no evidence of any disputes having occurred in relation to the provision or non-provision of any of the abovementioned facilities or items.

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[395] See Encabo Statement at [27]; Steiner at [14]

[396] Elrick Statement at [27]

[397] Elrick Statement at [27]

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

[311] ABI submits that it cannot be said that the variation is self evident and, therefore, in the absence of any probative evidence substantiating the issues the HSU seek to address, the claim should be dismissed.

Ai Group response to HSU claim

[312] Ai Group opposes the claim for the following reasons.

(i) The HSU has failed to mount a case warranting the variation proposed. No meaningful reasoning for the variation is advanced. The HSU does not assert that the variation is necessary to achieve the modern awards objective and does not refer to any of the relevant s.134 considerations.

(ii) The evidentiary material advanced by the union does not establish that the kind of amenities specified in clause 25.7(c) are actually warranted in the context of all circumstances in which a sleepover occurs.

(iii) The claim seeks, at least in part, to inappropriately deal with safety issues through an 'extremely simplistic mechanism'. Employer obligations relating to the management of the safety of their employees at work is comprehensively dealt with under specialised laws dealing with workplace health and safety obligations for employers. It is not desirable or necessary, in the sense contemplated by s.138, for the award system to regulate such matters in a piecemeal manner.

(iv) Compliance with the proposed variation to clause 25.7(c) would be problematic from a practical perspective. The provision assumes a level of control over particular premises that does not accord with the practical realities of the industry. An employer will not always own the premises at which a sleepover occurs. For example, the premises may be an individual client's residence, or it may be a rented facility. In such circumstances an employer will not always have the capacity or legal right to make the kind of physical modifications proposed.

(v) The reference to "*suitable sleeping requirements such as a lamp and clean linen*" is imprecise. The provision does not provide for an exhaustive list of items or conditions that might be said to constitute suitable sleeping requirements or any indication as to the basis upon which the requirements might be regarded as "suitable". The inclusion of such wording would be fertile ground for disputation and inconsistent with the need to ensure a simple and easy to understand modern award system.[398]

Q75. Question for Ai Group: What does Ai Group say about the current provisions, which speaks of 'appropriate facilities'?

[398] Section 134(1)(g) of the Act.

(vi) To the extent that the proposed variation seeks to impose new and potentially expensive obligations upon employers, it is axiomatic that a consideration of s.134(1)(f) (the likely impact of any exercise of modern award powers on business) would weigh against granting the claim.

(vii) The inclusion of terms establishing these new obligations is beyond power. Ai Group cannot identify any provision of the Act that would permit a modern award to include provisions of the nature proposed.

Q76. Question for the HSU: What is the source of the power to vary the award in the manner sought?

[313] Ai Group proposes two findings in respect of these claims:

1. Some employers provide their employees with mobile phones.[399]

2. Mobile phones owned by employees and utilised for work purposes are also utilised by those employees for personal purposes including personal phone calls, text messages and internet usage.[400]

Q77. Question for all other parties: Are the findings proposed by Ai Group challenged (and if so, which findings are challenged and why)?

AFEI response to HSU claim

[314] AFEI opposes the claim, submitting that it is without merit and that the HSU has not explained any aspect of its argument for including such a degree of prescription concerning facilities to be provided to employees who work sleepover shifts.

[315] To the extent that the HSU's concerns may be motivated by work health and safety concerns AFEI submits that employers are already obliged to ensure, as far as reasonably practicable, the health and safety of its workers. Further, if these obligations are not met there are avenues for reporting concerns to work health and safety regulators.

[316] AFEI also observes that during the Award Simplification process the AIRC removed non allowable matters from awards 'such as provisions' relating to amenities considered to be overly prescriptive'.[401] To illustrate this point AFEI refer to the removal of the following provision from the Hospitality Award:

> 'An employer shall provide a separate dressing room each for male and female employees, adequately lighted and ventilated with suitable floor coverings and floor space to be sufficiently roomy to accommodate all employees likely to use it at the one time; a table and adequate seating accommodation for staff to partake of meals, and lounge or settee and steel or vermin-proof lockers; adjacent thereto wash basins and showers with hot and cold water and toilets for staff use.'

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[399] Sheehy at [12]-[13], Exhibit HSU26; Wilcock at [19], Exhibit HSU27; Waddell at [31], Exhibit HSU4; Thames at [22], Exhibit HSU28; and Transcript of 17 October 2019 at [2585]

[400] Transcript of 15 October 2019 at [445]-[447] and [534]-[537]

[401] AFEI submission in reply 23 July 2019 at para 163.

[317] AFEI advances the following submission in relation to the removal of the above provision from the Hospitality Award:

> 'The approach taken by the AIRC reflects that the determination of which specific amenities should be provided for employees is more appropriately addressed at the workplace level rather than in Award prescription. This allows more individualised consideration of the circumstances in identifying amenity needs, such as the nature of the client's profile, the location at which the sleepover will be performed, the employee's level of training and skill, and other amenities already provided to the employee.'[402]

Q78. Question for AFEI: What was the basis stated by the AIRC for the removal of the provision referred to by the AFEI?

3.8 The Variation to the rosters clause claim - *UWU*

[318] Clause 25.5(d) deals with changes to rosters:

> **25.5(d) Change in roster**
>
> **(i)** Seven days' notice will be given of a change in a roster.
>
> **(ii)** However, a roster may be altered at any time to enable the service of the organisation to be carried on where another employee is absent from duty on account of illness, or in an emergency.
>
> **(iii)** This clause will not apply where the only change to the roster of a part-time employee is the mutually agreed addition of extra hours to be worked such that the part-time employee still has four rostered days off in that fortnight or eight rostered days off in a 28 day roster cycle, as the case may be.

[319] The UWU seek a variation to clause 25.5(d)(i) to provide that full-time and part-time employees will be entitled to the payment of overtime for roster changes where seven days' notice is not provided. In particular, the UWU seeks to amend clause 25.5(d)(i) as follows:

> (i) Seven days' notice will be given of a change in a roster. Full time and part time employees will be entitled to the payment of overtime for roster changes where seven days' notice is not provided.

[320] The UWU contends that roster changes without adequate notice can be disruptive and can have a significant impact on the ability of employees to attend to their family and caring responsibilities. It is submitted that the proposed variation will remove any ambiguity about what occurs when 7 days' notice is not provided. In relation to the latter point the UWU submits:

> 'The Award does not explicitly identify what the consequences is for the employer for failing to provide seven days' notice of a roster change in a situation where the exceptions in clause 25.5(d)(ii) and (iii) do not apply.
>
> The logical interpretation is that any roster changes where seven days' notice has not been provided must be paid as overtime. This is also the stand industrially generally.

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[402] Ibid at para 164.

However, many employers in the sector do not heed this, and regularly make changes to employee rosters without the required notice and without the payment of overtime.'[403]

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?

[321] The UWU submits that the evidence of Trish Stewart[404], Deon Fleming[405] and Belinda Sinclair[406] are relevant to this claim and seek the following findings:

1. Employees may have their rosters changed regularly, sometimes with little or no notice.[407]
2. Roster changes can be disruptive, and create difficulties for employees :
   (a) in planning budgets;[408] and
   (b) undertaking outside of work activities.[409]
3. Employees regularly agree to roster changes because there is under-employment in the sector and they require additional income.[410]
4. It is uncommon for employees to disagree to roster changes, and where such disagreement occurs, it is for a good reason.[411]
5. No evidence was presented by the employer witnesses that suggested that employees were regularly disagreeing or refusing roster changes without good reason. There was no evidence that employers had issues with excessive overtime payments.

[322] In summary the UWU contends that:

'On the above evidence, the Commission can be satisfied that inserting a provision providing for the payment of overtime where late roster changes are not agreed to by an employee would have limited cost impact on employers, but would provide a reasonable means of compensation

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[403] UV Submissions 4 February 2019 at [67] – [69]

[404] Exhibit UV1

[405] Exhibit UV4

[406] Exhibit UV6

[407] Statement of Trish Stewart (EX. UV1), at [10]-[11]; Statement of Deon Fleming (EX. UV4), at [15]; Statement of Belinda Sinclair (EX. UV6), at [22]-[25]; Transcript (15/10/19), PN605 [BELINDA JANE SINCLAIR].

[408] Statement of Trish Stewart (EX. UV1), at [10]; Statement of Deon Fleming (EX. UV4), at [16]; Statement of Belinda Sinclair (EX. UV6), at [25].

[409] Statement of Belinda Sinclair (EX. UV6), at [25].

[410] Statement of Trish Stewart (EX. UV1), at [11]; Statement of Deon Fleming (EX. UV4), at [17]; Statement of Belinda Sinclair (EX. UV6), at [26];Transcript (15/10/19), PN604-605 [BELINDA JANE SINCLAIR].

[411] Statement of Trish Stewart (EX. UV1), at [11]; Statement of Deon Fleming (EX. UV4), at [17]; Transcript (15/10/19), PN604-608 [BELINDA JANE SINCLAIR].

employees when such changes do occur and assist in the development of good rostering practices.'[412]

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)?

ABI response to UWU claim

[323] ABI opposes the claim.

[324] ABI submits that where employers seek to change an employee's roster it is for a legitimate operational reason and generally in order to meet the client needs.

[325] Contrary to the UWU submissions, ABI submits that the SCHADS Award currently does *not* provide 'a significant level of flexibility in rostering' and submits that the right to change a roster on 7 days notice is limited in two ways:

(i) the employer must consult with the employee regarding the proposed change in accordance with clause 8A prior to implementing the roster change under clause 25.5(d)(ii); and

(ii) where the employer wishes to change the roster of a part-time employee, clause 10.3(c) operate so as to prevent the employer from utilising the right under clause 25.5(d)(i) unless the employee agrees in writing to the change.

[326] ABI does not cavil with the limitation in (i), but submits that the limitation in (ii) materially diminishes the right under clause 25.5(d) to change a part time employee's roster.

[327] ABI submits that if the claim is granted it will increase the extent of casualisation in the sectors covered by the SCHADS Award:

> 'Ultimately, if the Award is varied to make it even more difficult for employers to utilise part-time employees in the current dynamic operating environment (for example, by imposing overtime payment obligations where a part-time employee's roster is changed), employers will transition towards a workforce composition with a greater proportion of casual employees.'[413]

[328] ABI proposes the following findings relevant to this claim:

(a) There appears to be general agreement between the parties about the rostering challenges facing service providers in the disability services and home care sectors as a consequence of the introduction of consumer-directed care.

(b) Since the introduction of consumer-directed care, there has been an increase in working hours variability.

(c) A very common (if not the most common) item that is sought by employers in enterprise bargaining is a departure from the requirements of clause 10.3(c) of the Award.

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[412] UWU submission 18 November 2019 at [51]

[413] ABI Reply Submission 12 July 2019 at 14.8

(d) It is common for employees' rosters to change regularly. It is also common for roster changes to occur with less than 7 days' notice.

(e) Changes to employees' rosters are made for operational reasons and generally in order to meet the needs of the vulnerable customers to which the organisation is providing care services.

(f) There is considerable complexity associated with rostering frontline support work staff. Rostering staff and matching staff with clients requires a consideration of a number of factors including client preferences, continuity of care, employee gender, client location, travel time, staff skills, personality issues, car size, etc.

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

,
AFEI response to this claim:

[329] AFEI opposes the claim.

[330] As the UWU do not propose to vary clause 25.(d)(ii), (iii), or (f), AFEI submits that there would appear to be only four circumstances in which the proposed variation would have application, these being:

(i) Where a full-time employee's roster has been changed with less than 7 days' notice by agreement to include hours that are different, but not additional to their original rostered hours;

(ii) Where a part-time employee's roster has been changed with less than 7 days' notice by agreement, to include hours that are different, but not additional to their original rostered hours;

(iii) Where a full-time or part-time employee's roster has been changed with less than 7 days' notice to include hours that are different, but not additional to their original rostered hours, without the employee's agreement; and

(iv) Where a part-time or full-time employee's hours have been changed with less than 7 days' notice to include hours that are additional to their original rostered hours without the employee's agreement.

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

[331] In respect to the first two circumstances, AFEI submits that it would be highly inappropriate that the Award impose an overtime rate for variation to rostered hours where the change has been made by mutual agreement between the employer and the employee.

[332] In respect to the third circumstance, the UWU states 'the Award does not explicitly identify what the consequence is for the employer for failing to provide seven days' notice of a roster change in a situation where the exceptions in clause 25.5(d)(ii) and (iii) do not apply'. AFEI submits that there is no requirement that an Award specify the consequences for non-compliance with a particular term and that, therefore, there is no imperative in the Act to impose a penalty provision in the Award to address non-compliance. The implications of non-

compliance with Award terms is sufficiently addressed in Chapter 4 of the Act. AFEI notes that the Act provides:

> (a) rights and protections to employees so that issues of non-compliance with Award terms can be raised without adverse action taken against them;
>
> (b) union rights of entry for investigation of non-compliance;
>
> (c) Fair Work Ombudsman powers of investigation of non-compliance;
>
> (d) standing of employees, and unions to seek legal redress for non-compliance with an Award; and
>
> (e) powers of the Fair Work Ombudsman for compliance enforcement.

[333] AFEI submits that the evidence adduced by the UWU does not address the extent to which any of the avenues already available under the Act to address non-compliance have been exhausted unsuccessfully, prior to seeking variation to the Award to impose further regulation. AFEI submits that the additional regulation in such circumstances is inappropriate, particularly taking into account the modern awards objective at s134(f) to take into account the impact of the regulatory burden.

[334] In respect to the first three circumstances, if a roster change with less than 7 days' notice attracted overtime rates of pay. AFEI submits this would result in uncertainty ascertaining which hours are overtime and which are ordinary hours which would also have implications for identifying which hours attract superannuation and leave accruals, and could result in uncertainty in determining whether a person had been provided with their full weekly/fortnightly ordinary hours pursuant to any contractual arrangements.

[335] In respect to the last circumstance, AFEI submits that an employer may require an employee to work reasonable additional hours in accordance with s62 of the Act. The Act already directly addresses the adverse consequences associated with working additional hours by providing a right to refuse to work unreasonable hours. The criteria for determining whether additional hours are reasonable or unreasonable are set out in s62(3) and include the employees personal circumstances,[414] whether the employee is entitled to receive overtime payments,[415] the needs of the workplace or enterprise in which the employee is employed,[416] the nature of the employee's role,[417] and the usual patterns of work in the industry in which the employee works.[418]

[336] In support of the proposed variation, the UWU rely on the evidence of Ms Sinclair. AFEI submits that the roster changes referred to in Ms Sinclair's statement at [23] appear to largely involve the working of additional hours. Ms Sinclair claims that '[I] am concerned that if I complain or don't accept additional hours, I will be rostered less.'. This is, however, at odds with her statement that she 'need[s] the hours'.[419]

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[414] s.62(3)(b)

[415] s.62(3)(d)

[416] s.62(3)(c)

[417] s.62(3)(h)

[418] s.62(3)(g)

[419] Statement of Belinda Sinclair at [26]

[337] AFEI submits that the claim is not supported by probative evidence, and does not provide a basis for the Commission to conclude that the proposed variation is necessary in order for the SCHADS Award to achieve the Modern Awards Objective. AFEI contends that the proposed variation would, however, result in unnecessarily high regulatory restraints and costs associated with achieving mutually suitable working arrangements with employees, as well as uncertainty for employers and employees in determining entitlements. The proposed variation should therefore be rejected.

Ai Group's response to UWU claims

[338] Ai Group's 'overarching' response to the case advanced by the UWU is that the variation is not necessary having regard to the following considerations:

- it is not necessary (in the s.138 sense) or appropriate to provide for the payment of overtime penalties by reference to circumstances which constitute a breach of an award clause;
- the award already appropriately and comprehensively regulates the manner in which overtime should be paid;
- the proposal would introduce inconsistencies between award terms and give rise to various problems, including uncertainty as to whether rostering provisions can be breached if a relevant payment is made; and
- the evidentiary case advanced does not establish the various factual assertions relied on in support of the claim.

[339] Ai Group also submits that there are existing limitations on the ability to vary a roster on less than 7 days notice in respect of part-time employees and, more generally, under clause 10.3.

[340] Further, Ai Group submits that the wording of the proposed variation is 'problematic' in two respects:

(i) an employee being "entitled to the payment of overtime for roster changes" is inherently ambiguous. If an employee is entitled to the "payment of overtime", it is unclear whether those hours are actually overtime, or ordinary hours subject to a penalty equivalent to overtime. Whichever it is, it has significant implications; for example:

(a) In respect to the accrual of various kinds of paid leave, such as annual leave;

(b) Whether the payment is considered ordinary time earnings for superannuation purposes;

(c) It may have implications on how provisions of the National Employment Standards, such as those in s.62 of the FW Act would apply.

(ii) it is unclear how the UWU's proposed clause 25.5(d)(i) would interact with the exceptions found at clauses 25.5(d)(ii) and (iii) (which are not sought to be varied). On one construction, even though clauses 25.5(d)(ii) and (iii) are currently considered 'exceptions', they would no longer operate as exceptions under the

proposed clause. While the roster may be changed in those circumstances, it does not necessarily follow that overtime would not still be payable. Rather than provide clarity, (as United Voice submits their clause is intended to achieve), the variation will likely cause confusion and the incorrect application of the Award.

[341] Ai Group also contends that the evidence adduced by the UWU does not justify the variation sought, in particular:

- Ms Sinclair's evidence illustrates that it is *not* the case that rosters are changed 'on a whim', but rather as a last resort.
- Mr Fleming's evidence is consistent with the terms of clauses 25.5(d)(ii) and 25.5(f) and provides no support for the proposed variation.
- Ms Stewart's evidence is that her roster can change frequently due to a colleague being absent due to illness or alternatively because she is offered, and accepts, additional shifts. These roster changes are contemplated and permitted by the current clause 25.5(d) and the evidence provides no support for the variation sought.

[342] As to the s.134 considerations, Ai Group submits that the claim is not consistent with the need for a simple and easy to understand award system (s.134(1)(g)) given.

[343] As to s.134(1)(da)(ii), Ai Group submits that this provision does not constitute a legislative imperative to provide additional remuneration and to the extent that the award heavily regulates the manner in which hours must be rostered, this weights against the need for additional remuneration.

Ai Group seeks the following findings in relation to this claim:

1. Changes to employees' rosters are commonly caused by client cancellations[420]
2. Changes to employees' rosters are commonly caused by the absence of other employees of the employer.[421]

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

NDS response to UWU claims

[344] NDS opposes the claim and contends it is unnecessary as a failure to provide the requisite notice is a breach of the award an the employer can be prosecuted and fines imposed as a result. NDS also refers to the protection afforded to part-time employees by the requirements of clause 10.3(c), while full-time employees have the protections of the ordinary hours provisions of clauses 25.1 – 25.4.

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[420] Court Book Page 2953 at paragraph 11 (Statement of P. Wilcock); Page 2962 at paragraph 11 (Statement of T. Thames); Page 4481 at paragraph 15 (Statement of D. Fleming); Page 4481 at paragraph 16 (Statement of D. Fleming); Page 4603 at paragraph 10 (Statement of T. Stewart) and Page 2947 at paragraph 30 (Statement of C. Friend)

[421] Court Book Page 4481 at paragraph 15 (Statement of D. Fleming); Page 4482 at paragraph 17 (Statement of D. Fleming) and Page 4573 at paragraph 22 (Statement of B. Sinclair)

UWU in reply

[345] In its Further Submission in Reply dated 3 October 2019 the UWU responds to the proposition advanced by ABI and others that there are already limitations on roster variations in clauses 8A and 10.3(c).

[346] The UWU submits that the limitation in clause 8A only applies in specific circumstances, namely 'if an employer proposes to change the regular roster or ordinary hours of work of an employee, other than an employee whose working hours are irregular, sporadic or unpredictable'. The UWU acknowledges that clause 10.3(c) and (e) are intended to have a protective effect and would apply in many cases consistent with clause 25.5(d)(iii) but submits:

> 'However, this clause does not provide sufficient protection and it is necessary to ensure that where an employer seeks to change a roster without 7 days notice, overtime should apply.'[422]

[347] The UWU also replies to the submission advanced by Ai Group and NDS that any change in roster without 7 days notice is not permitted by the award (save for the exceptions in clause 25.5(d)(ii) and (iii)) and would constitute a breach of the award. In reply, the UWU says:

> 'Roster changes without proper notice do occur in this sector, and that for an employee subject to these late roster changes, there is value in having a clause within the Award that provides for payment of overtime. It is appropriate that the employee has an entitlement to overtime rather than a right to allege a breach of the Award.'[423]

END-

[422] UV Further Submissions in Reply 3 October 2019 at [31]

[423] Ibid at [32]

Attachment A

List of exhibits – Tranche 2

15 – 18 October 2019

EXHIBIT NO.	DATE TENDERED	TENDERED BY	DESCRIPTION	TRANSCRIPT REFERENCE
United Workers Union				
UV1	15 Oct 2019	UWU	Statement of Trish Stewart	PN433
UV2	15 Oct 2019	UWU	Supplementary statement of Trish Stewart	PN433
UV3	15 Oct 2019	UWU	Further Statement of Trish Stewart	PN433
UV4	15 Oct 2019	UWU	Statement of Deon Flemming dated 16 January 2019	PN498
UV5	15 Oct 2019	UWU	Statement of Deon Flemming dated 28 March 2019	PN498
UV6	15 Oct 2019	UWU	Statement of Belinda Sinclair dated 16 January 2019	PN592
UV7	17 Oct 2019	UWU	Statement of Melissa Coad dated 16 September 2019	PN1930
UV8	17 Oct 2019	UWU	Statement of Jared Marks dated 3 October 2019	PN1933
UV9	18 Oct 2019	UWU	Bundle of Home Care Price Guide materials: - Documents from the Commonwealth Government's *myagedcare.gov.au* website - Provider witness price guides displayed on *myagedcare* - Provider witness general price information displayed on *myagedcare*	PN3421

EXHIBIT NO.	DATE TENDERED	TENDERED BY	DESCRIPTION	TRANSCRIPT REFERENCE
Ai Group				
AIG1	15 Oct 2019	AIG	Rosters – **subject to confidentiality order**	PN515

EXHIBIT NO.	DATE TENDERED	TENDERED BY	DESCRIPTION	TRANSCRIPT REFERENCE
Health Services Union				
HSU1	15 Oct 2019	HSU	Statement of Mark Farthing dated 15 February 2019	PN822
HSU2	15 Oct 2019	HSU	Further Statement of Mark Farthing dated 16 September 2019	PN826
HSU3	15 Oct 2019	HSU	Statement of William Elrick dated 15 February 2019	PN1068
HSU4	16 Oct 2019	HSU	Statement of Heather Waddell dated 15 February 2019	PN1362
HSU5	16 Oct 2019	HSU	Statement of Christopher Friend dated 15 February 2019	PN1500
HSU6	16 Oct 2019	HSU	Parts of Christopher Friend's statement not read	PN1844
HSU7	17 Oct 2019	HSU	Schedule of Fees For Home Care Services At Hammondcare	PN2570
HSU8	17 Oct 2019	HSU	Contract of Employment for Hammondcare Home Care At Home Employees	PN2591
HSU9	17 Oct 2019	HSU	Extract from Annual Financial Report 2017-2018 Report Of Hammondcare	PN2682
HSU10	17 Oct 2019	HSU	Extracts from the HammondCare Consolidated Financial Report for the year ended 30 June 2015	PN2701
HSU11	18 Oct 2019	HSU	HSS Part time contract	PN2864

HSU12	18 Oct 2019	HSU	NSW HSS Fees	PN2925
HSU13	18 Oct 2019	HSU	Cross examination of Deb Ryan: Full time staff trial	PN2980
HSU14	18 Oct 2019	HSU	Cross examination of Deb Ryan: CCO Schedule of rates	PN3012
HSU15	18 Oct 2019	HSU	Cross examination of Deb Ryan: Same Day Cancellation Log – **subject to confidentiality order**	PN3040
HSU16	18 Oct 2019	HSU	Community Care Options Home Care Agreement Template *(the instruction sheet is only the first page)*	PN3079
HSU17	18 Oct 2019	HSU	Cross examination of Wendy Mason: Pro forma contract template	PN3194
HSU18	18 Oct 2019	HSU	Baptist Care Agreement NSW & ACT Aged Care Enterprise Agreement 2017	PN3219
HSU19	18 Oct 2019	HSU	Baptist Care Commonwealth Home Support Programme (CHSP) pro-forma Service Agreement	PN3225
HSU20	18 Oct 2019	HSU	Baptist Care Home Care Agreement	PN3248
HSU21	18 Oct 2019	HSU	Baptist Care at Home Price Guide 2019	PN3291
HSU22	18 Oct 2019	HSU	Baptist Care Annual Financial Report	PN3301
HSU23	18 Oct 2019	HSU	CASS Financial Report 30 June 2018	PN3455
HSU24	18 Oct 2019	HSU	CASS Directors Repot	
HSU25	18 Oct 2019	HSU	Statement of Fiona Macdonald dated 15 February 2019	
HSU26	18 Oct 2019	HSU	Statement of Robert Sheehy dated 15 February 2019	

HSU27	18 Oct 2019	HSU	Statement of Pamela Wilcock dated 15 February 2019	
HSU28	18 Oct 2019	HSU	Statement of Thelma Thames dated 15 February 2019	
HSU27	18 Oct 2019	HSU	Statement of Bernie Lobert dated 15 February 2019	
HSU28	18 Oct 2019	HSU	Statement of James Eddington dated 15 February 2019	
HSU29	18 Oct 2019	HSU	Statement of Scott Quinn dated 16 December 2015	
HSU30	18 Oct 2019	HSU	Supplementary Statement of Scott Quin dated 3 October 2019	

EXHIBIT NO.	DATE TENDERED	TENDERED BY	DESCRIPTION	TRANSCRIPT REFERENCE
Australian Services Union				
ASU1	15 Oct 2019	ASU	Statement of Deborah Anderson dated 2 September 2019	PN980
ASU2	16 Oct 2019	ASU	Statement of Robert Steiner dated 15 Oct	PN1549
ASU3	17 Oct 2019	ASU	Endeavour Annual Report 2017-18	PN2026
ASU4	17 Oct 2019	ASU	Statement of Dr James Stanford	PN2220
ASU5	18 Oct 2019	ASU	Schedule of employer objections to statements of Emily Flett and Augustino Encabo	PN3380
ASU6	18 Oct 2019	ASU	Statement of Judith Wright dated 12 September 2019	
ASU7	18 Oct 2019	ASU	Statement of Tracy Kinchin dated 24 June 2019	
ASU8	18 Oct 2019	ASU	Statement of Emily Flett dated 22 September 2019	

ASU9	18 Oct 2019	ASU	Statement of Richard Rathbone dated 13 February 2019	
ASU10	18 Oct 2019	ASU	Statement of Augustino Encabo dated 13 February 2019	

EXHIBIT NO.	DATE TENDERED	TENDERED BY	DESCRIPTION	TRANSCRIPT REFERENCE
ABI & NSWBC				
ABI1	16 Oct 2019	ABI	Hammondcare Residential Care and Hammondcare at Home enterprise agreement 2018	PN1378
ABI2	17 Oct 2019	ABI	Witness Statement of Darren Mathewson	PN2313
ABI3	17 Oct 2019	ABI	Witness Statement of Jeffrey Wright	PN2528
ABI4	18 Oct 2019	ABI	Parts of statements not read	PN2782
ABI5	18 Oct 2019	ABI	Statement of Graham Shanahan - to be read in conjunction with ABI4	PN2842
ABI6	18 Oct 2019	ABI	Statement of Deb Ryan – to be read in conjunction with ABI4	PN2952
ABI7	18 Oct 2019	ABI	Statement of Scott Harvey – to be read in conjunction with ABI4	PN3115
ABI8	18 Oct 2019	ABI	Statement of Wendy Mason – to be read in conjunction with ABI4	PN3176
ABI9	18 Oct 2019	ABI	Statement of Joyce wang – to be read in conjunction with ABI4	PN3392
ABI10	18 Oct 2019	ABI	Fair Work Commission Transcript of 15 July 2016 (AM2014/196 and AM2014/197) - Cross-Examination of Olav Muurlink (PN6328-PN6468)	PN3388

ABI11	18 Oct 2019	ABI	Fair Work Commission Transcript of 15 March 2016 (AM2014/196 and AM2014/197) - Cross-Examination of Scott Quinn (PN1543-PN1738)	PN3389
ABI12	18 Oct 2019	ABI	The NDIS Support Catalogue - October 2019-20	PN3390
ABI13	18 Oct 2019	ABI	The NDIA Efficient Cost Model Spreadsheet (entire spreadsheet)	PN3391

EXHIBIT NO.	DATE TENDERED	TENDERED BY	DESCRIPTION	TRANSCRIPT REFERENCE
National Disability Services				
NDS1	17 Oct 2019	NDS	Witness statement of David Moody dated 12 July 2019	
NDS2	17 Oct 2019	NDS	Statement of Steven Miller dated 28 June 2019	PN1988
NDS3	~~18~~ 17 Oct 2019	NDS	Parts of David Moody's statement not read	PN1914

Attachment B

List of submissions relied upon in relation to Tranche 2 proceedings

	Party	Submission	Date
Australian Business Industrial and others			
	ABI	Submissions	2 July 2019
	ABI	Submissions	12 July 2019
	ABI	Submission in reply	13 September 2019
	ABI	Submission in reply	12 October 2019
	ABI	Closing submissions	19 November 2019
Australian Federation of Employers and Industry			
	AFEI	Submissions	3 July 2019
	AFEI	Submissions in reply	23 July2019
	AFEI	Submissions	17 September 2019
	AFEI	Submissions	19 November 2019
The Australian Industry Group			
	Ai Group	Further submission	2 May 2019
	Ai Group	Submission	3 July 2019
	Ai Group	Reply submission	13 July 2019
	Ai Group	Reply submission	16 September 2019
	Ai Group	Reply submission – Employer claims	26 September 2019
	Ai Group	Submission	18 November 2019
Australian Municipal, Administrative, Clerical and Services Union			
	ASU	Submission	18 February 2019
	ASU	Submission	2 July 2019
	ASU	Submission in reply	16 September 2019
	ASU	Submission	23 September 2019
	ASU	Submission in reply	2 October 2019
	ASU	Submission	19 November 2019
Business SA			
	BSA	Submissions in reply	12 July 2019
Health Services Union of Australia			
	HSU	Submissions	15 February 2019
	HSU	Submission in reply	16 September 2019
	HSU	Supplementary submission in reply	2 October 2019
	HSU	Supplementary submission in reply	3 October 2019

	HSU	Submissions	18 November 2019
National Disability Services			
	NDS	Submission	2 July 2019
	NDS	Submission	16 July 2019
	NDS	Submission	16 September 2019
	NDS	Submission	19 November 2019
United Workers' Union			
	UWU	Submission	15 February 2019
	UWU	Supplementary submission	1 April 2019
	UWU	Submission on NDIS	17 May 2019
	UWU	Submission in reply	13 September 2019
	UWU	Further submission in reply	3 October 2019
	UWU	Submission on findings sought	18 November 2019

Attachment C

Relevant extracts from the following awards

Local Government Industry Award 2010

Clause 24.4(d)

(d) **On call, call-back and remote response**

Notwithstanding clauses 24.4(a) to (c), this clause will not apply where an employee works for less than three hours on call, call-back or remote response on any one day in accordance with clauses 24.5 or 24.6.

Clause 24.6(d)

(d) Remote response

An employee who is in receipt of an on call allowance and available to immediately:

(iv) respond to phone calls or messages;

(v) provide advice ('phone fixes');

(vi) arrange call out/rosters of other employees; and

(vii) remotely monitor and/or address issues by remote telephone and/or computer access,

will be paid the applicable overtime rate for the time actually taken in dealing with each particular matter.

Local Government (State) Award 2014 (NSW)

Clause 19E

E. REMOTE RESPONSE

(i) An employee who is in receipt of an on call allowance and available to immediately:

(a) respond to phone calls or messages;

(b) provide advice ('phone fixes');

(c) arrange call out/rosters of other employees; and

(d) remotely monitor and/or address issues by remote telephone and/or computer access, will be paid the applicable overtime rate for the time actually taken in dealing with each particular matter, except where the employee is recalled to work (Note: subclause 19C(vi) applies where an on-call employee is recalled to work).

(ii) An employee remotely responding will be required to maintain and provide to the employer a time sheet of the length of time taken in dealing with each matter remotely

for each day commencing from the first remote response. The total overtime paid to an employee for all time remotely responding in any day commencing from the first response will be rounded up to the nearest 15 minutes.

(iii) The employer may, by agreement, make an average payment equivalent to an agreed period of time per week where the employee is regularly required to remotely respond as defined in subclause (i) of this clause.

Water Industry Award 2010

Clause 26.4(d)

(d) Notwithstanding the above, clause 26.4 will not apply where an employee works for less than three hours on call, call-back or remote response on any one day in accordance with clauses 26.5 or 26.6.

Clause 26.6(d)

(d) **Remote response**

An employee who is in receipt of an on call allowance and available to immediately:

(i) respond to phone calls or messages;

(ii) provide advice ('phone fixes');

(iii) arrange call out/rosters of other employees; and

(iv) remotely monitor and/or address issues by remote telephone and/or computer access,

will be paid the applicable overtime rate for the time actually taken in dealing with each particular matter.

Business Equipment Award 2010

Clause 30.6(d)

(d) The provisions of this clause will not apply to call-backs or in circumstances where an employee provides technical service or technical support over the telephone or via remote access arrangements.

Clause 30.7

30.7 Technical service/support

(a) An employee required to work overtime providing technical service or technical support over the telephone or via remote access arrangements will be paid for each occasion that such work is carried out:

(i) for a minimum of half an hour at the appropriate overtime rate where such work commences between 5.00 am and 10.00 pm; or

(ii) for a minimum of one hour at the appropriate overtime rate where such work commences after 10.00 pm and before 5.00 am except where the overtime is continuous (subject to a meal break) with the commencement or completion of ordinary hours.

(b) Provided that, the employee will not be required to work the full half an hour or one hour as the case may be if the work which the employer requires to be performed is completed within a shorter period.

(c) Notwithstanding the above, where an employee is required to carry out further overtime work within the half an hour or one hour guarantee period, the half an hour or one hour minimum for the first work period will be cancelled and the employee will be paid up to the commencement of the second or subsequent work period.

(d) Overtime worked in circumstances specified in this subclause will not be regarded as overtime for the purposes of clauses 30.4 and 30.5.

Contract Call Centres Award 2010

Clause 26.4(d)

(d) The provisions of this clause will not apply to call-backs or in circumstances where an employee provides service or support over the telephone or via remote access arrangements where the time worked is less than three hours during the call-back or each call-back. Provided that where the total number of hours worked on more than one call-back is four hours or more then the provisions of clauses 26.4(b) and (c) will apply.

Clause 26.6(d)

(d) The provisions of this clause will not apply in circumstances where an employee provides service or support over the telephone or via remote access arrangements.

Clause 26.7

26.7 Remote service/support

(a) An employee required to work overtime providing service or support over the telephone or via remote access arrangements must be paid for each occasion that such work is carried out:

(i) for a minimum of half an hour at the appropriate overtime rate where such work commences between 5.00 am and up to 10.00 pm;

(ii) for a minimum of one hour at the appropriate overtime rate where such work commences after 10.00 pm and up to midnight; or

(iii) for a minimum of one and a half hours at the appropriate overtime rate where such work commences after midnight and before 5.00 am;

except where the overtime is continuous (subject to a meal break) with the commencement or completion of ordinary hours.

(b) Provided that, the employee will not be required to work the full half an hour or one hour or one and a half hours if the work which the employer requires to be performed is completed within a shorter period.

(c) Notwithstanding the above, where an employee has completed the job and finished work and is required to perform further work within the half hour, one hour or one and a half hours, the balance of the minimum period for that job will be cancelled and the employee will only be paid up to the commencement of the next work period. The employee will then be entitled to be paid for a minimum of half hour, one hour or one and a half hours as the case may be for the next work period.

(d) Overtime worked in circumstances specified in this clause will not be regarded as overtime for the purposes of clause 26.4 where the time worked is less than three hours during the work period or each work period. Provided that where the total number of hours worked on more than work period is four hours or more then the provisions of clauses 26.4(b) and (c) will apply.

(e) Overtime worked in circumstances specified in this clause will not be regarded as overtime for the purposes of clause 26.5.

Attachment D

Summary of broken shift provisions in other modern awards – extract from ASU submission			
	Award	**General position**	**Notes**
1.	*Aged Care Award 2010*	**22.8 Broken shifts** With respect to broken shifts: (a) Broken shift for the purposes of this clause means a shift worked by a casual or permanent part-time employee that includes breaks (other than a meal break) totalling not more than four hours and where the span of hours is not more than 12 hours (b) A broken shift may be worked where there is mutual agreement between the employer and employee to work the broken shift. (c) Payment for a broken shift will be at ordinary pay with penalty rates and shift allowances in accordance with clauses 25—Overtime penalty rates and 26— Shiftwork, with shift allowances being determined by the commencing time of the broken shift. (d) All work performed beyond the maximum span of 12 hours for a broken shift will be paid at double time. (e) An employee must receive a minimum break of 10 hours between broken shifts rostered on successive days.	• Only where agreed • Only for part time and casual workers • Overtime and penalties may be payable: o not *because* its a broken shift, only because of the hours that might be worked as part of it; and, separately o if the span of hours over the broken shift is more than 12 • If there are broken shifts 2 days in a row, there must be 10 hours between the end of one and the start of the next
2.	*Security Services Industry Award 2010*	**15.1 Allowance rates** … **(a) Wage related allowances** Allowance Payable % of standard rate Broken shift per broken shift 1.62 **15.6 Broken shift allowance** A broken shift allowance is payable to an employee who is required to work a rostered shift in two periods of duty (excluding crib breaks).	• Can only be broken in two • Must be at least 3 working hours on *each* side of the break • An allowance is payable • $14.11 per broken shift

Summary of broken shift provisions in other modern awards – extract from ASU submission			
	Award	**General position**	**Notes**
		21.7 Broken shifts Employees may be rostered to work ordinary hours in up to two periods of duty, exclusive of crib breaks, per day, with a minimum payment of three hours for each period of duty.	
3.	*Educational Services (Schools) General Staff Award 2010*	**22.5 Breaks between periods of duty** (a) An employee will be entitled to a minimum break of 10 consecutive hours between the end of one period of duty and the beginning of the next. This applies in relation to both ordinary hours and where overtime is worked. (b) Where an employer requires an employee to continue or resume work without having a 10-hour break off duty, the employee is entitled to be absent from duty without loss of pay until a 10-hour break has been taken, or be paid at 200% of the ordinary rate of pay until released from duty. (c) The entitlements in clauses 22.5(a) and (b) do not apply to: (i) a boarding supervision services employee, where the periods of duty are concurrent with a sleepover; (ii) an employee who is provided with accommodation on the employer's premises or in the vicinity of the employer's premises at no cost to the employee; (iii) an employee who is attending a school camp or excursion; or (iv) an employee working a broken shift. **25.1 Ordinary hours for shiftwork** The ordinary hours for shiftwork will: (a) be worked continuously each shift (except for broken shifts and meal breaks); (b) not exceed 10 hours, inclusive of a meal break in any single shift; and (c) be rostered in accordance with clause 25.4. **25.3 Broken shifts**	• Can only be broken in two • Employees (other than casuals) entitled to minimum pay of 2 hours on *each* side of the break • 15% penalty rate payable (but not for casuals) • Overtime is payable if the span of hours over the broken shift is more than 12

Summary of broken shift provisions in other modern awards – extract from ASU submission			
	Award	**General position**	**Notes**
		(a) An employee may be rostered to work ordinary hours in a broken shift, that is a rostered shift in two periods of duty, exclusive of breaks, per day, with a minimum payment (other than for a casual) of two hours for each period of duty. (b) An employee, other than a casual, required to work a broken shift will be paid at the ordinary time rate plus a penalty of 15% of the ordinary time rate. (c) The maximum spread between the start of the first period of duty and cease of the second period of duty for a broken shift is 12 hours. Any hours in excess of this 12 hour spread will be paid for as overtime. (d) The provisions of clause 25.3(c) do not apply to a boarding supervision services employee who is provided with reasonable accommodation including living quarters, fuel and light, and available to the employee for their exclusive use for 52 weeks of the year, at no cost to the employee	
4.	*Cleaning Services Award 2010*	**17.1 Broken shift allowance** An employee who works a broken shift will be paid an allowance of 0.458% of the standard rate per day up to a maximum of 2.29% of the standard rate per week. For the purposes of this award a broken shift is a shift where an employee works in two separate periods of duty on any day within a maximum spread of thirteen 13 hours and where the break between periods exceeds one hour. **26.2 Non-shift workers** Non–shift workers are entitled to an unpaid meal break of not less than 30 minutes, and not more than one hour. An employee will not be required to work for more than four and one half hours without a meal break, except in cases of emergency, when the time may be extended to five hours. All day workers and broken shift workers are entitled to a 10 minute paid morning tea break and a 10 minute paid afternoon tea break.	• Can only be broken in two • Break between periods of work must be at least an hour • (subject to the above) Spread of hours must be no more than 13 • allowance is payable • entitled to paid morning and afternoon tea breaks • $3.62 per day, up to a maximum of $18.12 per week (broken shift)

Summary of broken shift provisions in other modern awards – extract from ASU submission			
	Award	**General position**	**Notes**
5.	*Fitness Industry Award 2010*	**12. Part-time employment** **12.1** A part-time employee is an employee who: (a) works less than the full-time hours of 38 hours per week; (b) has reasonably predictable hours of work; and (c) receives, on a pro rata basis, equivalent pay and conditions to those of full-time employees who do the same kind of work. **12.2** At the time of engagement the employer and the part-time employee will agree in writing on a regular pattern of work, specifying at least the hours worked each	• Can only be broken in two • Total length must be at least three hours (e.g. 1.5 at the start and 1.5 at the end) • Span of hours must be 12 or less • An allowance is payable • $13.91 per day (broken shift)

		day, which days of the week the employee will work and the actual starting and finishing times each day. **12.3** Any agreed variation to the hours of work will be recorded in writing. **12.4** An employer is required to roster a part-time employee for a minimum of three consecutive hours on a shift or a minimum of three hours, exclusive of meal breaks, on a broken shift. **12.5** An employee who does not meet the definition of a part-time employee and who is not a full-time employee will be paid as a casual employee in accordance with clause 13—Casual employment. **12.6** All time worked in excess of the hours as agreed under clause 12.2 or varied under clause 12.3 will be overtime and paid for at the rates prescribed in clause 26—Overtime and penalty rates. **12.7** A part-time employee employed under the provisions of this clause must be paid for ordinary hours worked at the rate of 1/38th of the weekly rate prescribed in clause 17—Minimum wages for the work performed. **18.4 Broken shift allowance** An employee working a rostered broken shift must be paid per day 1.7% of the standard rate extra and for excess fares $1.94 extra. **24. Ordinary hours of work and rostering** **24.1** The ordinary hours of work for a full-time employee must not exceed an average of 38 hours per week over a period of four weeks. Such hours may be worked over any five days of the week, between the hours of: (a) 5.00 am and 11.00 pm, Monday to Friday; and (b) 6.00 am and 9.00 pm, Saturday and Sunday. **24.2** The ordinary hours of work for a full-time or part-time employee must not exceed 10 hours on any one day. **24.3** An employee may be rostered to work a broken shift on any day provided that: (a) the shift is not broken into more than two parts; (b) the total length of the shift is not less than three hours, exclusive of meal breaks; and	

Summary of broken shift provisions in other modern awards – extract from ASU submission			
	Award	**General position**	**Notes**
		(c) the span of hours from the start of the first part of the shift to the end of the second part of the shift is not more than 12 hours. **24.4** An employee must be notified by their employer of their rostered hours. At least seven days' notice must be given by an employer to an employee of any change in their rostered hours, except in the case of an emergency.	
6.	*Social, Community, Home Care and Disability Services Industry Award 2010*	**25.6 Broken shifts** This clause only applies to social and community services employees when undertaking disability services work and home care employees. (a) A broken shift means a shift worked by an employee that includes one or more breaks (other than a meal break) and where the span of hours is not more than 12 hours. (b) Payment for a broken shift will be at ordinary pay with penalty rates and shift allowances in accordance with clause 29—Shiftwork, with shift allowances being determined by the finishing time of the broken shift. (c) All work performed beyond the maximum span of 12 hours for a broken shift will be paid at double time. (d) An employee must receive a minimum break of 10 hours between broken shifts rostered on successive days.	• Only applicable to some categories of workers covered by the award, and only when some are performing particular kinds of work • Unlimited number of breaks in the shift (e.g. can be more than 2 working periods) • Span of hours must be not more than 12, if it is then payable at double time • Other penalties & overtime might be available, not *because* it is broken shift but because of when the hours are worked. • 10 hours break between broken shifts on successive days
7.	*Children's Services Award 2010*	**15.1 Broken shift allowance** Where an employee works two separate shifts in a day, they will be paid an allowance of 1.91% of the standard rate per day for each day on which a broken shift is worked.	• Allowance is payable "where an employee works two separate shifts in a day" • Note the concept of working two separate shifts in a day is at odds with the description of ordinary hours given in clause 53.1 • $15.99 per day for each day on which a broken shift is worked

Summary of broken shift provisions in other modern awards – extract from ASU submission			
	Award	**General position**	**Notes**
8.	*Aboriginal Community Controlled Health Services Award 2010*	**24.1 Overtime rates** **24.2** The following overtime rates will be paid for all work done: (a) in excess of the number of hours fixed as a day's, a week's or a fortnight's work as the case may be—time and a half for the first two hours and double time thereafter; (b) outside the span of hours in clause 21.1—time and a half for the first two hours and double time thereafter; (c) outside a spread of nine hours from the time of commencing work by an employee rostered to work broken shifts—time and a half; and (d) outside a spread of 12 hours from the time of commencing work by an employee rostered to work broken shifts—double time.	• Time and half if the period extends beyond 9 hours • Double time if the period extends beyond 12 hours
9.	*Passenger Vehicle Transportation Award 2010*	**3.1** In this award, unless the contrary intention appears: … broken shift means a shift with a spread of hours permitted under the relevant State or Territory driving hours legislation and with an unpaid break of greater than 60 minutes between the two portions of work **10.5 Casual employment** (a) A casual employee is an employee engaged as such and paid by the hour. (b) An employer must wherever practicable notify a casual employee if their services are not required the next working day. (c) A casual employee while working ordinary hours must be paid on an hourly basis 1/38th of the appropriate weekly wage rate prescribed by the award, plus 25% of ordinary time earnings for the work performed. (d) A casual employee is to be paid a minimum payment of three hours pay for each shift. (e) A casual employee solely engaged for the purpose of transportation of school children to and from school may be rostered to perform one engagement or two separate engagements per day, with a minimum payment of two hours for each separate engagement.	• Only two portions of work permitted • Unpaid break of more than 60 minutes is part of definition. • Definition interacts with spreads of hours permitted in State & Territory legislation. • Waiting time allowance for some employees • Appears that only casuals transporting schoolkids gets minimum engagement payment (2 hours) either side

Summary of broken shift provisions in other modern awards – extract from ASU submission			
	Award	**General position**	**Notes**
		21.4 All known rostered duty, which may include broken shifts and days off, must be displayed at least seven days prior to the commencement of such duty. Changes to the roster, including alterations to days off, must be displayed at least 24 hours in advance and the employee must be notified. Any changes for which less than 24 hours' notice has been given must be agreed to by the employee. **21.5** An employee who is engaged as a coach driver or a bus driver on a single day charter may have a rostered shift divided into two working periods with no requirement to return to the depot during a rostered shift. Such an employee will be paid waiting time at the rate of 50% of the ordinary rate of pay plus any applicable penalty or loading, provided that the waiting time so paid for will not be taken into account in the computation of hours for overtime purposes.	
10.	*Registered and Licensed Clubs Award 2010*	**18.3 Allowance for disabilities associated with the performance of particular tasks or work in particular conditions or locations—broken periods of work** An employee (other than casual) who is required to work any of their ordinary hours on any day in more than one period of employment, other than for meal breaks as prescribed in accordance with the provisions of clause 24—Meal breaks, will be paid an allowance of 0.4% of the standard weekly rate per day, for such broken work period worked.	• Allowance payable (but nor for casual employees, or some managerial employees on salaries) • $3.45 per day (broken shift)
11.	*Hospitality Industry (General) Award 2010*	**21.3 Allowance for disabilities associated with the performance of particular tasks or work in particular conditions or locations** **(a) Broken periods of work** Employees other than casuals who have a broken work day must receive an additional allowance as follows: • where the time between periods of work is two hours and up to three hours— an allowance per day equal to 0.33% of the standard weekly rate; or • where the time between periods of work is more than three hours— an allowance per day equal to 0.5% of the standard weekly rate.	• Allowance payable, depending on the length of the break between shifts • Casuals not entitled to the allowance • Spread of hours can be no greater than 12 (but these restrictions don't apply to casual employees) or else overtime is payable.

Summary of broken shift provisions in other modern awards – extract from ASU submission			
	Award	**General position**	**Notes**
		33.2 Entitlement to overtime rates (a) A full-time employee is paid at overtime rates for any work done outside of the hours set out in clause 29—Ordinary hours of work. (b) A part-time employee is paid at overtime rates in the circumstances specified in clause 12.8. **29.2 Part-time employees** A part-time employee's rostered hours of work under clause 12.5 must meet the following conditions: (a) A minimum of three hours and a maximum of 11 and a half hours may be worked on any one day. The daily minimum and maximum hours are exclusive of meal break intervals. (b) An employee cannot be rostered to work for more than 10 hours per day on more than three consecutive days without a break of at least 48 hours immediately following. (c) No more than eight days of more than 10 hours may be worked in a four week period. (d) Where broken shifts are worked the spread of hours can be no greater than 12 hours per day. **12. Part-time employment** … **12.8** All time worked in excess of: (a) 38 hours per week or, where the employee works in accordance with a roster, an average of 38 hours per week over the roster cycle; or (b) the maximum hours limitations specified in clause 29.2; or (c) the employee's rostered hours; will be overtime and paid for at the rates prescribed in clause 33.3—Overtime rates.	• $2.85 per day where the time between periods of work is two hours and up to three hours (broken period) • $4.31 per day where the time between periods of work is more than three hours (broken period)

Summary of broken shift provisions in other modern awards – extract from ASU submission			
	Award	**General position**	**Notes**
		29. Ordinary hours of work (Full-time and part-time employees) **29.1 Full-time employees** **(a)** The average of 38 hours per week is to be worked in one of the following ways: ▪ a 19 day month, of eight hours per day; ▪ four days of eight hours and one day of six hours; ▪ four days of nine and a half hours per day; five days of seven hours and 36 minutes per day; ▪ 152 hours each four week period with a minimum of eight days off each four week period; ▪ 160 hours each four week period with a minimum of eight days off each four week period plus a rostered day off; ▪ any combination of the above. **(b)** The arrangement for working the average of 38 hours per week is to be agreed between the employer and the employee from the alternatives in clause 29.1(a) and must meet the following conditions: (i) A minimum of six hours and a maximum of 11 and a half hours may be worked on any one day. The daily minimum and maximum hours are exclusive of meal break intervals. (ii) An employee cannot be rostered to work for more than 10 hours per day on more than three consecutive days without a break of at least 48 hours immediately following. (iii) No more than eight days of more than 10 hours may be worked in a four week period. (iv) Where broken shifts are worked the spread of hours can be no greater than 12 hours per day.	
12.	*Mining Industry Award 2010*	**14.3 Allowances for disabilities associated with the performance of particular tasks or work in particular conditions or locations** …	• Clause 43(ii) provides an allowance for some employees. • Note that shiftworkers must work "consecutive" hours, the word

Summary of broken shift provisions in other modern awards – extract from ASU submission			
	Award	**General position**	**Notes**
		(c) Drilling, prospecting and exploration allowances The following allowances apply only to employees who are required to perform drilling, prospecting and exploration duties. … (i) Employees who are classified as cooks and cooks assistants will be paid an all purpose allowance of 1.07% of the standard rate per week, whilst they are required by their employer to work broken shifts. **18. Ordinary hours of work** **18.1** A full-time employee's ordinary hours of work will be an average of 38 hours per week. The ordinary hours of part-time and casual employees will be in accordance with clause 10—Types of employment. **18.2 Employees other than shiftworkers** (a) Subject to clause 18.2(c) employees, other than shiftworkers, may be required to work up to 10 ordinary hours per day, between the hours of 6.00 am and 6.00 pm, Monday to Sunday. (b) An employer may agree with a majority of affected employees to alter the spread of hours in clause 18.2(a) and/or to increase the ordinary hours per day to a maximum of 12. (c) Where employees were required to work 12 hour shifts under roster and working hours arrangements which were in place before 1 January 2010 those arrangements may continue to operate in respect to both existing employees and new employees.	absent in the provision relating to non-shiftworkers. • $9.23 per week (broken shift)

Summary of broken shift provisions in other modern awards – extract from ASU submission			
	Award	**General position**	**Notes**
		18.3 Shiftworkers (a) Subject to clause 18.3(c) shiftworkers may be required to work a shift of up to 10 consecutive ordinary hours (including meal breaks). Shiftwork may be worked on any or all days of the week. (b) An employer may agree with a majority of affected employees to alter the spread of hours in clause 18.3(a) and/or to increase the ordinary hours per day to a maximum of 12. (c) Where employees were required to work 12 hour shifts under roster and working hours arrangements which were in place before 1 January 2010 those arrangements may continue to operate in respect to both existing employees and new employees.	
13.	*Restaurant Industry Award 2010*	**24.2 Split shift allowance** Full-time and part-time employees who have a broken work day will receive an additional allowance of 0.5% of the weekly standard rate for each separate work period of two hours or more. **31.4 Spread of hours** Where broken shifts are worked the spread of hours can be no greater than 12 hours per day. **31.5 Minimum break between shift** The roster for all employees other than casuals will provide for a minimum 10 hour break between the finish of ordinary hours on one day and the commencement of ordinary hours on the following day. In the case of changeover of rosters, eight hours will be substituted for 10 hours. **31. Hours of work** **31.1** The hours of work of a full-time employee are an average of 38 per week over a period of no more than four weeks. **31.2** The arrangement of ordinary hours must meet the following conditions:	• No restriction on how many breaks in the work day • Unclear whether for full timers there is an outright prohibition on the spread of a broken shift being over 12 hours, or whether this attracts overtime (interplay between 60 & 65(a)). • Overtime might come from rest period prescriptions (but this happens whether or not there is a broken shift). • $4.31 for each separate work period of two hours or more (split shift)

Summary of broken shift provisions in other modern awards – extract from ASU submission			
	Award	**General position**	**Notes**
		… (d) an employee must be given a minimum break of 10 hours between the finish of ordinary hours of work on one day and the commencement of ordinary hours of work on the next day. In the case of a changeover of rosters the minimum break must be eight hours; **33. Overtime** **33.1 Requirement to pay overtime rates** (a) Full-time employees shall be paid at overtime rates for any work done outside of the spread of hours or rostered hours set out in clause 31—Hours of work. (b) Part-time employees shall be paid at overtime rates in the circumstances specified in clause 12.8. (c) Casual employees shall be paid at overtime rates in the circumstances specified in clause 13.5. **12. Part-time employment** **12.8** All time worked in excess of: (a) 38 hours per week or, where the employee works in accordance with a roster, an average of 38 hours per week over the roster cycle; or (b) the maximum hours limitations specified in clause 31.2; or (c) the employee's rostered hours; will be overtime and paid for at the rates prescribed in clause 33.2—Overtime rates	
14.	*Animal Care and Veterinary Services Award 2010*	**16.2 Other than veterinary surgeons** **…** **(a) Broken shift allowance** Where an employee is required to carry out their ordinary hours of duty in more than one shift, the employee will be paid 1.60% of the standard rate, per shift so worked. This is to be paid only once per 24 hour period.	• Allowance contemplates shifts being broken into more than two, with allowance payable for all but the first shift. • Hours of work clause for dayworkers says that hours must be

Summary of broken shift provisions in other modern awards – extract from ASU submission			
	Award	**General position**	**Notes**
		22.2 Span of hours—day work (a) The ordinary hours of work will be between 6.00 am and 9.00 pm Monday to Sunday. (b) The ordinary hours of work are to be worked continuously, except for meal breaks, at the discretion of the employer. The spread of hours may be altered by agreement between the employer and the individual employee.	worked continuously. Shiftwork clause is silent on the issue. • Predecessor NSW NAPSA had a separate category of workers called "broken shift workers". • $13.80 (broken shift)
15.	*Higher Education Industry-General Staff-Award 2010*	**21. Ordinary hours and spread of ordinary hours** Ordinary hours may be worked in a manner agreed over a four week cycle. **Category of staff employees** **Ordinary hours** **Spread of hours (non shiftworkers)** … Catering and retail staff 38 6.00 am – 7.30 pm Monday – Sunday Security staff 38 6.00 am – 6.00 pm Monday – Sunday **Schedule C—Allowances** … The following additional allowances apply to certain trades and services staff only as specified in the following table, subject to the terms in the table: **Allowance** **Staff Category** … Broken shift Catering and retail staff; and security staff **Rate** … 0.28% of SR per day to a maximum of 1.38% of SR per week **Application** …	• Allowance is payable to the only categories of workers (outside of shiftwork who are permitted to be rostered for ordinary hours on weekends. • $2.42 per day to a maximum of $11.95 per week (broken shift)

Summary of broken shift provisions in other modern awards – extract from ASU submission			
	Award	**General position**	**Notes**
		When an employee is required to work shift in two periods of duty	
16.	*Building and Construction General On-site Award 2010*	**34. Shiftwork** **34.1 General building and construction and metal and engineering construction sectors** (a) **Definitions** For the purposes of this clause: **afternoon shift** means a shift commencing at or after 1.00 pm and before 3.00 pm **night shift** means a shift commencing at or after 3.00 pm and before 11.00 pm **morning shift** means a shift commencing at or after 4.30 am and before 6.00 am **early afternoon shift** means a shift commencing on or after 11.00 am and before 1.00 pm. (b) When an employee is employed continuously (inclusive of public holidays) for five shifts Monday to Friday, the following rates will apply: (i) afternoon and night shift— ordinary time hourly rate plus 50%; (ii) morning and early afternoon shifts— ordinary time hourly rate plus 25%. (c) Where a job finishes after proceeding on shiftwork for more than five consecutive days or the employer terminates the employee's services during the week, the employee must be paid at the rate specified in clause 34.1(b) for the time actually worked. (d) In the case of broken shifts (i.e. less than 38 ordinary hours worked over five consecutive shifts Monday to Friday) the rates prescribed will be time and a half for the first two hours and double time thereafter.	• Penalty rates are payable for some shiftworkers in some sub-sectors, but seems to deal with situations where insufficient work is provided.
17.	*Sugar Industry Award 2010*	**29. Ordinary hours of work and rostering—other than shiftworkers** **…** **29.3 Other than field sector** …	• Appears prohibited for non-shiftworkers • Attracts overtime for shiftworkers, but not permitted at all for

Summary of broken shift provisions in other modern awards – extract from ASU submission			
	Award	**General position**	**Notes**
		(c) Altering spread of hours The ordinary hours of work are to be worked continuously, except for meal breaks, at the discretion of the employer. The spread of hours may be altered by up to one hour at either end of the spread by agreement between an employer and the majority of employees concerned or, in appropriate circumstances, between the employer and an individual employee. **32.8 Nominal crushing season—shiftwork** (a) The ordinary working hours in the nominal crushing season must not exceed 40 in any one week or eight in any one day, which may be worked in accordance with a roster system as mutually agreed upon between the employer and the majority of employees directly affected, or as approved by the Fair Work Commission. Provided that with agreement between the employer and the majority of employees directly affected, shifts of more or less than eight hours may be worked. The working of broken shifts or six hour shifts in mills is prohibited. (b) In mills where locomotive drivers, their assistants and weighbridge clerks are working two shifts, such shifts may be worked between 6.00 am and 2.00 pm and between 2.00 pm and 10.00 pm or such other roster as mutually agreed **32.9 Nominal slack season—shiftwork** The ordinary working hours for shiftworkers in the nominal slack season must not exceed 40 in any one week or eight in any one day, provided that with agreement between the employer and the majority of employees directly affected, shifts of more or less than eight hours may be worked. (a) For employees other than seasonals and also other than those deemed to be seasonals, the ordinary working hours must be worked in accordance with an agreed roster which will provide for nine ordinary working days or 72	shiftwork during the "crushing season".

Summary of broken shift provisions in other modern awards – extract from ASU submission			
	Award	**General position**	**Notes**
		ordinary working hours per fortnight. One day of such two week cycle must be an unpaid rostered day off. (b) For seasonal employees the ordinary working hours must be worked in accordance with an agreed roster which will provide for 19 working days or 152 ordinary working hours per four week cycle. One day of such four week cycle must be an unpaid rostered day off. (c) The agreed rosters provided for must provide for a rostered day off on a Monday, or if agreed between the employer and employees at a particular mill, on a Friday. (d) If a rostered day off falls on a public holiday, the rostered day off must be taken on the next ordinary working day. (e) Rostered days off may, by agreement between the employer and the majority of employees directly affected, be accrued up to a maximum of six rostered days off, which must be taken within 12 calendar months of the date on which the first rostered day off was accrued, at a time or times agreed between the employer and the employees directly affected. (f) Employees terminated prior to taking any banked rostered day(s) off must receive one fifth of average weekly pay over the previous six months multiplied by the number of banked substitute days.	
18.	*Medical Practitioners Award 2010*	**25.3 Shift length—Doctors in training** (a) No shift will be less than eight hours in length on a week day or less than four hours in length on Saturday, Sunday or a public holiday. (b) No broken or split shifts will be worked. (c) All time worked in excess of 10 hours in any one shift will be paid as overtime.	• Prohibited in relation to doctors in training. • Otherwise silent