IN THE FAIR WORK COMMISSION
AT SYDNEY
Matter No.: AM2018/26

S 156 – Four yearly review of modern awards – Social, Community, Home Care and Disability Services Industry Award 2010

SUBMISSION OF THE UNIONS IN RESPONSE TO BACKGROUND PAPERS 2 AND 3 DATED 4 MARCH 2020

RESPONSES TO QUESTIONS IN BACKGROUND PAPER 2

Supplementary Question 1 (p3)

1. This question is directed to Ai Group.

Supplementary Question 2 (p4)

The UWU is invited to identify the paragraph of the September 2019 Decision in which the asserted finding is made.

2. Paragraph [160] of the September 2019 contains the finding.

> ***[160]*** *Section 134(1)(a) requires that we take into account 'relative living standards and the needs of the low paid'. A threshold of two-thirds of median full-time wages provides a suitable benchmark for identifying who is 'low paid', within the meaning of s.134(1)(a). 113 As mentioned earlier* ***a significant proportion of employees covered by the SCHADS Award may be regarded as 'low paid'*** *within the meaning of s 134(1)(a).*

3. The finding is demonstrably available to the Commission where:
    a. the benchmarks for "low paid employees" in [45] of the September decision were identified as $886.67 or $973.33 based on the approach taken by the Full Bench in the Penalty rates case;
    b. those figures were arrived at having regard to figures from 2018. The former figure has been reviewed recently and is now $920.00[1];
    c. the rates specified in the Award for Home Care employees are less than those amounts to the top of the Level 4 classification;

[1] https://www.fwc.gov.au/documents/wage-reviews/2019-20/statistical-reporting/statisticalreport.pdf

d. the rates specified in the Award for Social and Community Services employees at Level 1 are below the above amounts and the rates at Level 2 are barely above the latter amounts;
e. in New South Wales and the ACT, bargaining for agreements which cover home care employees has seldom resulted in significant variation to Award terms and conditions (save in respect of the requirement that part-time workers have a regular pattern of work)[2];
f. save for those in the public sector, the vast majority of disability support workers in Victoria are paid at award rates only and bargaining is not common[3];
g. in Tasmania, the large majority of employers pay disability workers at award rates only[4] and in home care bargaining has achieved gains of only around 2% on award rates[5];
h. part-time and less than full-time employment is the prevalent mode for disability services and home care workers;
i. by reason of the breaks in their shifts, employees in part-time roles are performing work across spans of hours that exceed their remunerated hours, in some cases, being available to perform work across a full-time, or nearly full-time span of hours[6];
j. underemployment, that is, a desire to work further hours, is a frequent feature of employment disability services and home care roles[7].

4. Although the rates applicable to some employees would exceed the "low paid threshhold" if the employee worked full time hours, the evidence does not indicate that such work is offered[8]. Given the evidence about the hours worked

[2] Friend [4] – [5], CB 2945
[3] Elrick [17], CB 2935
[4] Eddington [15], CB 2973
[5] Eddington [16], CB 2973
[6] For example, Ms Sinclair was available across more than a full time span of hours with Wesley Mission – CB4576
[7] Macdonald, CB 2916 - *The work aspect identified as a serious problem by all 10 workers was the way their working time was structured. Many frequently worked long days, 6 or even 7 days a week to try to earn an adequate income; yet many spoke of their difficulties earning enough to pay their bills.*
[8] For example, Deb Ryan at Community Care Options gave evidence of trialling full-time employment at but that trial failing – see CB 192 [24]; HSU-13, Ryan XXN, 18.10.19, PN2955ff

by home care and disability employees, the Commission would be satisfied that the vast bulk of them would, *in fact,* be earning less than the low-paid threshhold.

5. Section 134(1)(a) requires the Commission to consider, not just the low paid, but also *relative living standards.* Hence, it is relevant for the Commission to have regard to:
    a. workers being paid just above the "low paid" level;
    b. workers working full-time hours falling below the low paid level;
    c. workers for whom part-time work is all that is available to them, earning below the low-paid level, whether or not their earnings would exceed the low paid threshold if they worked full-time hours.

Supplementary Question 3 (p4)

The joint Unions are invited to respond to AFEI's submissions.

6. AFEI's contention (at [12(1)] of Background Paper 2) that there is no single accepted measure of two-third of median, ordinary time earnings is facile. The Fair Work Commission is obliged by s.134(1)(a) to have regard to *"relative living standards and the need of the low-paid"*. The fact that there is no *single* accepted measure of "low paid" does not mean that consideration may be disregarded.

7. AFEI's contention that *"only a portion of employees are covered by the Award are Award reliant"* suffers the same flaw. There is no basis for AFEI to make any positive submission that the "portion" is the greater or smaller part (and therefore warrants the use of the qualifier "only"), having introduced no evidence itself, and having failed to challenge in any way the evidence indicating the prevalence of payment at or about Award rates. AFEI has adduced no evidence to show that in fact employees covered by the Award are in receipt of wages above those rates, or significantly above those rates. All of the evidence indicates to the contrary.

8. AFEI's contention at [12(4)] of the Background Paper is made in circumstances where it called <u>no evidence</u> from employers as to the rates being paid to

employees, and no evidence as to the rate at which employees perform work which qualifies them for the payment of other penalties.

Supplementary Question 4 (p5)

Do the parties challenge the proposition that a significant proportion of employers covered by the SCHADS Award are part time employers?

9. Presuming that this question contains a typographical error and that "employers" should be "employees", the Unions agree with the proposition.

Supplementary Question 5 (p6)

10. This question calls for a response to a contention made in the Unions' Joint Submission.

RESPONSES TO QUESTIONS IN BACKGROUND PAPER 3

Question 1 (p7)

Are there any additions or corrections to Attachment 1? Parties are also asked to advise of the evidence which they rely upon for the community language allowance claim and the 24 hour clause matter respectively.

11. The ASU relies on the following evidence in respect of the Community Language Claim:

Evidence	**Date**	**Exh No.**	**Tcpt Reference**
Statement of Dr Ruchita	14 February 2019	ASU1	
Oral Evidence of Dr Ruchita	16 April 2019		PN526-PN588
Statement of Ms Nadia Saleh	14 February 2019	ASU2	
Oral Evidence of Ms Nadia Saleh	16 April 2019		PN592-PN644
Statement of Mr Lou Bacchiella	13 February 2019	ASU4	
Oral Evidence of Mr Lou Bacchiella	16 April 2019		PN709-PN792

Statement of Ms Natalie Lang	18 February 2019	ASU3	
Oral evidence of Ms Natalie Lang	16 April 2019		PN648-PN700

12. The UWU makes the following corrections to Attachment 1:

UWU travel time claim (pg 81-82 of Background Paper 3)

13. The UWU also relies on: Statement of James Stanford, dated 23 September 2019, EX ASU4, [26]-[30] (as stated in our submission on findings dated 18 November 2019, page 3).

UWU variations to rosters claims (pg 83 of Background Paper 3)

14. The evidence listed under the UWU variation to rosters claim is partially wrong. We only rely upon the following documents:
    a. UWU Draft determination, CB 4416, [4]
    b. Statement of Trish Stewart dated 17 January 2019, EX UV1 [9]-[12]
    c. Statement of Deon Fleming dated 16 January 2019, EX UV4 [13]-[17]
    d. Statement of Belinda Sinclair dated 16 January 2019, EX UV6 [22]-[26]
    e. Oral evidence of Belinda Sinclair PN599-616, 745.

15. The UWU does **not** rely upon EX ABI 12, the NDIA funding models or the Stewart Brown reports.

16. The HSU also relies on the following evidence in respect of the 24 hour clause:

Evidence	**Date**	**Exh No.**	**CB Reference**
Statement of James Eddington [51] – [54]	15 February 2019	HSU 30	2969
Statement of Will Elrick [28] – [29]	15 February 2019	HSU 3	2937
Statement of Rob Sheehy [10]	15 February 2019	HSU 26	2942

Question 2 (p10)

Are the findings proposed by ASU challenged (and if so, which findings are challenged and why)?

17. The HSU and UWU do not challenge the ASU's proposed findings.

Question 3 (p14)

Are the findings proposed by UWU challenged (and if so, which findings are challenged and why)?

18. The HSU and ASU do not challenge the UWU's proposed findings.

Question 4 (p18)

Are the findings proposed by HSU challenged (and if so, which findings are challenged and why)?

19. The ASU and UWU do not challenge the HSU's proposed findings.

Question 5 (p21)

Are the findings proposed by ABI challenged (and if so, which findings are challenged and why)?

20. No challenge is made to the proposed findings appearing at the first dot point under [40].

21. As to the proposed finding at the second dot point, the Unions agree that time spent travelling between locations may vary. However, the Unions contend that as a general rule, such variance would ordinarily be within a limited range. Employers are able to schedule and allocate workers to perform appointments across different locations, which task necessarily involves some assessment of the travel time required between the locations. Where travel to and between particular locations is carried out regularly, the Commission would think employers would have a very good idea of those travel times.

22. The proposed finding at the third dot point appears to proceed on the assumption that the time work is to be performed on behalf of the employer is fixed by external forces over which the employer has no influence or control. The Unions contend that employers have the capacity to manage the scheduling of work, for example adopting the practice of "bundling" appointments, or as discussed by Mr Quinn, giving clients appointment windows, rather than set times.

23. At the fourth dot point, ABI contends that the Commission should find that employees ***often undertake non-work-related activities in breaks between work during a broken shift***.

24. That contention is said to be supported by the following exchange in cross examination:
You'd accept that where you've got breaks in between clients, you sometimes don't travel directly from client to client?---No, if I've got a big break, I don't, no. (Trish Stewart – at PN468).

25. Nothing in that answer provides support for the contended finding.

26. Immediately prior to the further passage cited, at PN1573-1574 (Steiner XXN), at PN1570-1571, there was an exchange that illuminates the point being made by the Unions about the disutility of broken shifts:
Am I right that when you have a significant gap in your day that you sometimes undertake non work related activities during that gap?---Yes.
Yes, and that sometimes you go to locations other than your client's premises during that gap?---Most of the time if it's not a very large gap, depending on where I'm going, I'll just wait, as there's no point in me going somewhere and then having to go right back.

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

28. The proposed finding at the 6th dot point is that services adopt a range of practices to remunerate employees in respect of time spent travelling. The Unions agree that practices currently vary. There is also substantial evidence that many employees perform a significant amount of travel unpaid.

29. The Unions note the concession by AiG that many employees are not paid for time spent travelling to and from clients, which includes travelling between clients and travelling to and from the first and last clients.

Question 6 (p22)

30. Question 6 is directed to ABI.

Question 7 (p22)

Question for all other parties: is the alternative variation proposed by ABI opposed (and if so, why)?

31. At Part 9 of their submissions in reply of 13 September 2019, ABI appears to concede that the SCHDS Award may not provide a fair and relevant safety net and proposes that travel time be paid through an allowance. They note that two pre-modern home care awards: the NSW *Miscellaneous Workers Home Care Industry (State) Award* (AN120341) and the *Community Services (Home Care) (ACT) Award 2002* (AP816351CRA) provide for payment of travel time by way of an allowance. These awards provide for an allowance of 3 percent of the employee's ordinary hourly rate for each kilometre travelled between clients.

32. The Unions oppose any variation in the form suggested by ABI's submission. The Unions have dealt with the ABI proposal in detail in their previous submissions. They continue to rely on paragraphs [14]-[27] of the ASU Submissions dated 2 October 2019, paragraphs [42] to [47] the HSU Submissions dated 2 October, paragraphs [6] to [12] of the UWU Submissions dated 4 October 2019, and paragraphs [49]-[66] of the Union's Final Submissions dated 10 February 2020.

33. However, in addition, the Unions submit that the Commission would not be persuaded to make a variation in the form proposed by ABI for the following reasons:

    a. Firstly, the ABI proposal would amount to a small and inadequate compensation to the employee travelling for work. When an employer directs an employee to undertake work at different locations, the employee is in service to the employer, and the time spent travelling between those locations should be treated as time worked. This principle is particularly important when an employee is an itinerant worker with no fixed place of work.

    b. Secondly, an allowance should deal with some additional duty, expense or disability: and allowance should not be paid for what are hours of work.

    c. Thirdly, if travel between clients were to be considered an allowance rather than time-worked, employees working long days with multiple clients would rarely be entitled to overtime, save for when working beyond the 12 hour span for a broken shift, notwithstanding that they devote many hours to the employer's business.

    d. Finally, the submission that the Union's travel time proposals are unworkable cannot be sustained. The evidence before the Commission is that employers in the home care sector and in disability services have regard to travel time when rostering employees. Employers have also adopted methods of recording work travel for the purposes of paying the travel allowance. The Unions acknowledge that some employers may change how they organise work if the Union's proposals are adopted. However, that is desirable, given the evidence about the destructive impact of current employer practices on the industry.

Question 8 (p24)

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

34. The proposed finding at [48(2)] that the period of time taken by an employee to travel to a client's place of residence is in some instance as little as 5 minutes,

whilst strictly correct, is of little import, in the absence of evidence to show how frequently employees are required to travel only that distance (evidence in the possession of employers). Multiple witnesses gave evidence of travelling for significant lengths of time. Robert Steiner gave evidence that he can travel for up to an hour to attend clients in the Hunter Valley.[9] Even in circumstances in which the travel time is relatively short, it is still time worked and should be paid. Unpaid travel time accumulates. Deon Fleming, who indicated that sometimes she has short travel times, still accumulates a significant amount of unpaid travel time over a weekly basis.[10] Mr Quinn's evidence was that his work locations were between 1 and 20 kilometres from his home and the travel to his first appointment of the day could vary between 5 minutes and 45 minutes[11].

35. As to the proposed finding at [48(3)] that *"(t)he 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",* the Unions contend that the Commission would find that although it may be difficult to predict exactly the period of time necessary to travel from one location to the next, employers are capable of predicting such periods sufficiently reliably in order to schedule appointments.

36. As to the proposed finding at 48[6] that *"during a break in a broken shift, employees often undertake non-work related activities, including spending time at home",* it is instructive to consider the actual evidence cited (in footnote 84 at p23 of the Background Paper) in support of the proposition:

    a. Augustino Encabo described his patterns of work thus (at CB1140 [34]):

    > *The breaks between shifts are also a problem. Often, there is not enough time to go home from work and then get to the next workplace. Other times it's just not cost effective to go home because of the cost of fuel. If I can't go home, I will I would head to the library to read for a bit. This is not what I really want to do with my time; it's just all I can do in the time available. If I am able to go home, I am usually only there for about an*

[9] Steiner, CB 1223 [11].
[10] Fleming (EX.UV4), CB4568 [6].
[11] Quinn CB 3052 [10]

hour after travelling between clients. It's not really enough time to do anything useful or have a real rest.

b. Thelma Thames said (at CB2963 [15]):

When I have a gap or broken shift, I usually sit and wait in my car for my next client. Sometimes, if I have the time and I'm close to home, I will go home in this break. But often I will be waiting for an hour in my car for the next client, sometimes longer."

c. Whilst Scott Quinn gave evidence that he would normally have 2 to 3 occasions when he returns home during the course of the working day (at CB 2990 [29]), he also described the breaks in these terms:

During breaks like these, if the kids are home, I might muck around with them. I am working on renovations on my home, which I can sometimes do on my breaks, but 25 minutes isn't long enough to start a task. Often I will just sit down and do nothing. (at CB 3054 [21])

The time between 1pm and 3pm is a split shift. Berriedale from home is about 5 to 6 kilometres and a 10 minute drive from home. There's never anything I need to do out in Berriedale so I just go back home during that time. I am paid the $7.50 split shift allowance for this time, but no more, even though practically there is nothing else for me to do but to drive home and drive back in that time. (at CB3054 [27])

d. Trish Stewart's responses when cross-examined on these issues were as follows (15.10.19. PN461ff):

Now, I understand from your evidence that you sometimes have large gaps in between your time with clients on any given day. During those breaks, do you try to make the most of your time by sometimes undertaking activities not related to your work?---Sometimes.

Yes, for example, do you sometimes visit your grandchildren during those gaps?---Pardon, sorry?

Do you sometimes visit your grandchildren during those gaps?---No, they're usually at school or day care.

But do you sometimes return home?---Yes, sometimes.

And sometimes you go to town, do you?---Well, I work in town, but I live out of town.

Yes, and do you visit clients out of town?---Sometimes.

Do you sometimes return to town after visiting those clients and before visiting another client?---Yes, if I'm meant to.

e. Mr Steiner's answers were the following:

Am I right that when you have a significant gap in your day that you sometimes undertake non work related activities during that gap?---Yes. Yes, and that sometimes you go to locations other than your client's premises during that gap?---Most of the time if it's not a very large gap, depending on where I'm going, I'll just wait, as there's no point in me going somewhere and then having to go right back.

37. Ms Wang's evidence (18.10.19 at PN3537) when questioned about breaks of three or four hours was *the workers usually do their own things.* The Commission would give little weight to Ms Wang's evidence. It is hearsay, the basis for which was not disclosed, and involves speculation.

38. As to the proposed finding at 48[7] that *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,* the Unions note Dr Stanford's evidence that the incentive to allocate work in an efficient way that minimises unproductive time (travel and waiting) was an indirect incentive because the employee bears the cost of travel time and lost-time[12]. While some employers may endeavour to prepare rosters in the manner described by AIG, (and the Unions note in this respect the AIG did not call a single witness to substantiate this proposition), it is evident that across the industry, there are a significant number of employees that are working, or have worked, patterns that do not minimise their unproductive time.[13]

Question 9 (p 25)

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

[12] Stanford XXN, PN2274.
[13] Stanford CB 1453ff, pp 21-25.

39. Neither the ASU nor the UWU challenge the findings proposed by the HSU.

Question 10 (p 27)

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

40. Finding 1 asserts there are employees who work part-time because it suits them. The evidence it cites in support of the proposition indicates the opposite. AFEI relies on Ms Sinclair's evidence, including that her availability ceased at 2.30 p.m. or 3.00 p.m. Ms Sinclair's availability was from 6.00 a.m. every weekday (so covered a normal workday span of 8.5 or 9 hrs), and extended until 6.00 p.m. on Thursdays[14].

41. The Commission will recall Ms Sinclair:
    a. also worked on a casual basis for a pharmacy, performing 10 or 11 hours per week;
    b. earnt about $600 per week gross from her principal role with Wesley Mission;
    c. was seeking additional hours to those she regularly performed for Wesley Mission (30 guaranteed per fortnight).

42. So far as AFEI relies on Mr Wright's evidence about care worker's reasons for nominating their available times, the Commission would give that evidence little weight; it involves speculation about the reasons of other persons.

43. At [57(4)] AFEI contends that if the Award is varied as sought by the HSU that would have a detrimental impact on the availability of part-time employment as a flexible yet permanent work option for employees and on employer costs.

44. The Unions contest that proposed "finding". The argument is speculative. It is equally logical that employers will make efforts to more efficiently manage the

[14] CB 4576

hours of work they require performed and provide part-time employees with guaranteed hours that reflect the real needs of the services.

Question 11 (p 28)

Question for ABI

45. The Unions do not respond to this question.

Question 12 (p 30)

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

46. So far as ABI asserts there are fluctuations in the number of hours available to employees on a weekly basis (at [60(2)]), it is not supported by the evidence cited.

47. None of the employer witnesses cited undertook any analysis of the weekly variation in additional hours. In fact their evidence showed an abundance of additional hours performed on a regular basis by part-time workers, as follows:
    a. Ms Wang's evidence[15] included the total additional hours offered over a 4 week period (1863, performed by its Home Ageing part-time workforce), not the weekly numbers;
    b. Ms Mason's evidence[16] was that her company *regularly* offered part-time employees additional hours but did not assert the existence of any weekly variation;
    c. Ms Ryan asserted that it was "unsustainable" to offer the company's approximately 82 part-time employees additional guaranteed hours[17], in circumstances where she averred those employees had worked an additional 95,000 hours above their contracted hours in the previous year;

[15] Wang CB 207 [45]-[46]
[16] CB 484-5 [52]
[17] CB 196 [55]

d. Mr Harvey asserted the impossibility of providing *rostered* hours that directly matched *contract* hours[18], but at the same time accepted that the company offered part-timers work in excess of their contract hours, and did not provide any detail of any weekly fluctuation in the overall number of hours;
e. Mr Shanahan referred to the *unpredictable nature of the industry and the clients' demands* at the same time as averring that his organisation's 31 part-time employees had been offered 902 additional hours in the month of May, an average of about 7 hours extra work per worker per week.

48. There was no evidence at all of an employer not having sufficient work in any week to acquit the hours of any part-time worker.

49. So far as ABI asserts at [60(5)] that overtime rates will impose a significant additional cost on employers, that proposed finding is premised on the assumption that a penalty rate will not operate in the manner intended and discourage employers from using part-time employees as a casual pool.

50. So far as ABI asserts at [60(6)] that the imposition of overtime rates for additional hours will operate as a deterrent to employers offering such additional hours, the Unions contend as follows the practice would also operate as a deterrent against under-estimating the hours required of part-time workers because both the overtime penalty and the casual loading would operate to discourage such practice.

51. So far as ABI asserts at [60(6)], that the imposition of an overtime penalty would frustrate the desire of part-time employees for more hours of work, the Unions contend it is important to have regard to the desire of employees for additional *definite* hours of work[19].

[18] CB 169 [50]
[19] E.g. Sinclair XXN 15.10.19 PN 675; Thames CB 2962 [9]

52. The Award currently incentivises employers to underestimate the hours that part-time workers will be called upon to perform. The evidence bears out that such underestimation is occurring. An overtime penalty will discourage that approach.

53. So far as ABI points to the absence of evidence about employees working more than 8 hours per day, the Unions say:
    a. the variation is sought as a matter of the operation of fundamental principle to ensure that part-time workers are treated in the same way as full-time workers;
    b. employees *actual* working hours exceed those for which they are paid, because of the practice of breaking shifts, and not treating travel time as time worked, as discussed at length in the Union submissions elsewhere.

Question 13 (p 30)

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

54. Finding 1 asserts that employers are unable to offer additional (regular) hours to part-time workers because of the NDIS. It cites responses by Ms Wang at PN 3589 and 3604 in support of the proposition. The responses do not support that conclusion. Ms Wang referred to "changes" preventing such offers, not to anything concerning the NDIS.

55. To the extent Ms Wang asserted the inability of her organisation to offer either full-time roles or additional guaranteed part-time hours, the evidence calls that assertion very much into doubt. Her evidence was that part-time employees were offered additional hours on a *regular* basis[20] and that the part-time workers in the Home Ageing section of the service had been offered some 1863 hours above their contracted hours in four weeks prior to making her statement[21]. In considering that number it is important to bear in mind that Home Ageing is just

[20] CB 207 [45]
[21] CB 207 [46] – an average of an additional 465 hours per week or 12.25 FTE

one of CASS Care Ltd's operational areas[22], and that the organisation has a total of 114 part-time workers across all areas[23]. So the part-time workers in Home Ageing were being offered additional hours which, on average, exceeded four hours per week.

56. Proposed finding 3 asserts that:

The introduction of a requirement to pay a part-time employee at a higher rate of pay for additional hours of work would be a financial disincentive to offering additional hours of work to that employee and may result in an employer electing to instead give those additional hours of work to another employee.

57. The proposed finding is neither supported by logic, nor by the evidence cited.

58. As to logic, at any point in time each employer has a number of part-time employees with a guaranteed number of hours. Where an employer has hours of work to be performed, and has part-timers who have not met their guaranteed hours of work, and allocates the work to those employees, under the HSU's proposal, the employer would suffer no overtime penalty, and will have complied with the Award. There can be no complaint if the employer declines to offer one part-time employee *additional* hours, where the hours are required to acquit the *guaranteed* regular hours of another part-time employee. If it offers the hours to full-time employees, it faces an overtime loading, or a casual loading in the event it offers the work to casual employees. Once all of the hours of all part-time employees are acquitted, and the employer has hours of work to be performed in excess of the regular hours of its part-time workforce, then under the HSU proposal, it will be in the same position regardless of the part-time employee to whom it offers the hours.

59. Ai Group cites the evidence given by Dr Stanford in cross-examination in support of its argument. Dr Stanford's evidence[24] in fact provides little support for Ai Group's argument. His evidence was that whilst overtime penalties create a

[22] CB 201 [16]
[23] CB202 [22]
[24] 17.10.19, PN 2262ff

disincentive, there are many case where employers are willing to pay a premium in order to elicit a desired labour supply, and whether the disincentive operates in reality depends on a number of factors, including, for example, the costs of retention and recruitment of casual workers[25].

Question 14 (p 36)

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

60. The Unions do not challenge the findings proposed by the HSU.

Question 15 (p 37)

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

61. As to 1, the fact of peak times around meals is accepted. The Unions do not accept that such peaks and troughs justify *multiple* breaks in the course of a day.

62. Proposed finding 2 is an assertion which is vague and general. Neither Mr Wright nor Ms Mason provided any detail or analysis of their organisation's working patterns, their utilisation of broken shifts, the period of breaks, or the period worked on either side of breaks. The Commission would expect that type of analysis could be readily performed if the evidence did indeed support the need for broken shifts, and more than one break during the course of a day.

63. Proposed finding 3, to the effect that employers use their best efforts to avoid short engagements within a broken shift, is based, in part, on the evidence of Mr Miller.

[25] 17.10.19, PN 2267

64. The Commission will recall Mr Miller's evidence on 17 October 2019, in response to questions from the Bench, was as follows:

There is a final question for you. In response to a question from Mr Robson, I had understood your evidence to be, Mr Miller, that in relation to - I'm talking here about employee shifts that you would roster in response to client demand?---Yes.
I had understood your evidence to be that the minimum duration of a shift would be two hours and that was the case for casual and part-time employees. Was that what you said?---No, that wasn't my intent behind that answer. Our minimum engagement is two hours, but that doesn't refer to a single
shift length. That's my understanding of our - - -
All right. So how do you see it working?---Again I'm not an expert on our industrial agreement so this is my interpretation of our wording if it's a minimum engagement of two hours in a single day, but I would have to defer back to - - -
No, no, that's all right. I wasn't so much asking you for an interpretation of the agreement or the award?---Yes.
I was just trying to get an understanding of is your practice - - -?---Yes.
What is your practice in relation to rostering part-time employees, for example. If you had a split shift, for argument's sake, on a particular day - - -?---Yes.
- - - or even a single continuous shift on a day, do you have any information about, well, what is the usual practice in relation to how long such an employee is engaged continuously? For example, with a part-timer - - -?---Yes.
- - - is it the usual practice that they would work for a minimum period of time on each day? Continuously here is what I'm talking about?---Mm-hm.
For argument's sake, if you had a split shift and they were working a period in the morning and a period in the afternoon, is there a usual minimum period that applies to both the morning and afternoon; because I think I've misunderstood your answer to Mr Robson and I just want to understand in a bit more detail how you go about that. I appreciate that you don't have the material in front of you and you'll need to confer with your rostering staff, and you can provide that material to Mr Pegg. Okay?---I would certainly like to, yes, have a look at the data on that rather than making any sort of assumptions.
That's fine?---I would say that we apply - we try to apply in the rostering practice day-to-day some fair and reasonable sort of, you know, allocation of shifts and we try to avoid calling people in for shorter shifts if we can.[26]

65. Mr Miller then provided a supplementary statement dated 19 November 2019. Despite the clear invitation from the Commission to do so, his statement studiously failed to answer the question about the minimum period of engagement. Second, the statement only quantified broken shifts where there was a break of more than an hour in length, begging the question why such a definition was required unless it is that employer's practice to "break" shifts for a lesser period.

[26] Miller XXN 17.10.19 PN2061ff

66. In the covering email filing that statement, NDS claimed that Mr Miller was unable to extract the evidence about the minimum portions of the shift. In those circumstances, it is difficult to understand how his evidence can provide the basis for any factual finding about employer practice.

67. As to the proposed finding at [66[(5)], the Unions do not accept Mr Steiner's evidence provides support for multiple breaks. Whilst Mr Steiner accepted that there were benefits in continuity of care by the same worker[27], and that some clients required more than one attendance in the course of a day[28], it does not follow that this evidence demonstrated that "breaks" between attendances are required.

68. Ms Mason's[29] statement does not contain data about the minimum engagements. If her statement is relied upon for its evidence of employer goodwill and best efforts, it does not demonstrate how those sentiments result in any practical outcomes for employees of her service.

Question 16 (p 39)

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

69. The proposed finding at [67(4)], the finding is urged without reference to evidence. The Unions contest the assertion that the arrangements for broken shifts are appropriate to the industry. The evidence supports the conclusion that the current arrangements fail to provide a fair and relevant minimum safety net of terms and conditions for employees.

70. The proposed finding at [67(5)], that the variation sought by the HSU would detrimentally impact on the provision of services in the sector, ultimately affecting service users, is based on speculation and conjecture. It is not clear how, as a

[27] Steiner XXN 16.10.19 PN 1554-1561
[28] Ibid PN1562
[29] CB 486 [60] – [63]

matter of logic, the loss of flexibility Mr Wright foresees would impact on services, nor how the requirement for minimum engagements would necessarily detrimentally impact the continuity of care about which Mr Steiner was questioned.

71. The proposed finding at [67(6)], that the variation could result in an employer being liable to pay an employee for hours during which no productive work is being performed is based on the assumption that employers have no ability to manage the deployment of their workforces or affect the timing of the services they deliver in any way. The Commission would think the inclusion of a minimum engagement requirement would encourage employers to manage their work so as to make productive use of their employees for the period.

72. The evidence cited does not support the finding. It does not follow from Ms Stewart's evidence that she has gaps between periods of work[30] that the work performed by her on either side of those gaps was not sufficient to constitute the minimum engagement sought, nor that it would not be possible to provide such work. Ms Fleming's evidence, similarly as to gaps between 2 and 3 hours between periods of work does not support the finding proposed.

Question 17 (p 41)

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

73. As to the proposed finding at [69(1)], the Unions do not accept that such shifts are a common feature of the *industry*. Rather, the evidence only went so far as to show that such shifts are prevalent in the *working arrangements* of home care and disability services workers, not the other categories of workers within the industry.

[30] Stewart XXN 15.10.19 PN 461

74. The Unions contest that short shifts are a necessary or fundamental feature of the industry, and/or a product of the fact that clients require services of a short duration. Many other service industries provide services of a short duration, but nonetheless offer shifts of a reasonable length to employees.

75. Although the length of attendances on clients may be relatively short, the overall demand for services is great and increasing. With the introduction of the NDIS, an estimated $22 billion per year will ultimately be allocated to providing supports to some 475,000 clients (of which 300,000 are currently registered)[31]. There is strong growth in employment of about 11% per year[32], consistent with the Productivity Commission's projection that the disability care workforce will need to roughly double from 2014-2015 levels to meet the demand created by the NDIS[33]. That demand is likely to be compounded in many areas by the fact that turnover of workers in the industry is three times higher than elsewhere in the labour force[34]. Counter-intuitively in those circumstances, the average hours of work performed by workers has decreased since 2015, particularly (also counter-intuitively) in medium to large organisations[35].

76. The contention that short shifts are the inevitable result of short appointments ignores the choices made by employers about the length of the shifts that they offer, and the role played in those choices by the fact that the Award provides no minimum engagement for part-time employees. Although ABI contends that employers attempt to "bundle" services to create a shift, the Commission might think employers would try harder on that front, and achieve even better results, if compelled to do so by a different Award provision. If employers are currently able, without any compulsion, to regularly bundle appointments to create 2 hour shifts[36] the Commission would be confident in establishing a minimum 3 hour engagement. Such a term would promote the efficient and productive performance of work consistent with s.134(1)(d) of the FW Act, and would

[31] Stanford, CB 1451 [15]
[32] Stanford, CB 1452 [19]
[33] Productivity Commission, CB 2138
[34] Stanford, CB 1452 [18(f)]
[35] *Australian Disability Workforce Report*, CB1851 -1852
[36] ABI Submissions at 5.13(a)

facilitate the retention of skilled workers in an industry presently struggling to do so.

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

78. ABI's assertion that the imposition of a three hour minimum engagement will adversely impact consumers (at [69(9)] is made without any foundation.

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

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

    a. provide workers with sufficient remuneration from a shift as to make the shift viable, when regard is had to the time and cost involved in preparing for and travelling to and from the shift;
    b. promote the efficient performance of work;
    c. contribute to the attraction and retention of skilled workers into the industry.

Question 18 (p 58)

Question for all other parties: Do you support or oppose NDS' proposal to clarify the meaning of 'regular'?

81. The Unions oppose the NDS proposal. A 24 hour care shift has greater disutility for employees than the performance of shift work on weekends. Under the Award, weekend work is subject to a maximum span of 8 hours (or 10 hours by agreement, or for part time and casual employees), with overtime payable for hours worked beyond that. This means that employees will have time to sleep, rest and recover in their own home between shifts. Weekend work is also subject

to the provision that employees should receive meal and rest breaks during the shift.

82. Under the current Award, an employee will only 'normally' have an opportunity to sleep. There are no penalties for circumstances when an employee is continuously woken up during sleep to attend to the client, or is required to perform work at intervals which prevent the employee having an uninterrupted appropriate period of sleep. There is also no requirement for the employee to be provided with breaks during the shift, or during the periods when "work" (as contemplated in the clause) is being performed.

83. Even if these matters were addressed, an employee working a 24 hour care shift faces a higher level of disutility because they must be away from family, friends and their own personal obligations for a period of 24 hours. This is a significant period of time in which to be performing work.

84. It is appropriate that 'regular' be defined as the HSU and the UWU have advanced, that is, as the performance of 4 or more 24 hour care shifts across an year.

Question 20 (p60)

Question for the Unions: does the clause attached to their submission differ (and if so, in what respects) from the clause at Annexure B to Commissioner Lee's report?

85. The clause attached to the Union's submission of 10 February 2020 differs from the clause we submitted on 13 November 2019 in the following ways:

    a. Clause 25.8(a) has been amended to add the terms '*and may not be required to perform duties outside the scope of the care plan or be unreasonably required to provide more than eight hours of care*.'

    b. Clause 25.8(g) has been amended to add the terms '*provided that nothing in this clause shall be regarded as obliging an employee to perform duties outside the scope of the care plan or provide more than eight hours of care where such requirement is unreasonable*.'

86. The amendments were made to address the Commission's concerns about how an employee may be able to refuse to work more than 8 hours. As stated in the Unions' submission of 10 February 2020:

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

AUSTRALIAN SERVICES UNION

HEALTH SERVICES UNION

UNITED WORKERS UNION

10 MARCH 2020