



BACKGROUND PAPER 3

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, 4 MARCH 2020

This is a background document 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.

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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] 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) being conducted by the Fair Work Commission (the Commission).

[2] The claims have been dealt with in two groups, Tranche 1 and Tranche 2.

Tranche 1

[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. On 2 September 2019 the Full Bench issued a decision¹ (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;
- reject the UWU's claim to vary the public holiday clause;

¹ [\[2019\] FWCFB 6067](#)

- 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.

[5] On 18 October 2019 the Full Bench issued a decision² (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 determination³ was issued on 21 October 2019 giving effect to the *October 2019 Decision*.

[6] In relation to the claim for a community language skills allowance, Deputy President Clancy published [Background Document 1](#) on 4 December 2019 and [directions](#) have been issued for the hearing of this claim in conjunction with the Tranche 2 proceedings.

[7] In relation to the 24 hour care clause a [Report](#) was published by Commissioner Lee on 14 November 2019 and this claim will be the subject of submissions in the Tranche 2 proceedings.

[8] These two Tranche claims are dealt with in more detail in sections 6 and 7 of [Background Document 1](#).

Tranche 2

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

ABI claims⁴:

- Variation to the client cancellation provision;
- Remote response work;
- Variation to rosters at clause 25.5(d)(ii).⁵

ASU claims:

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

² [\[2019\] FWCFB 7096](#)

³ [PR713525](#)

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

⁵ See Background Paper 2, paragraphs [4] – [5]

HSU claims:

- Broken shifts;
- Minimum engagements;
- Travel;
- Telephone allowance;
- Uniform/damaged clothing allowance;
- Recall to work;
- Cancellation;
- Sleepover and
- Overtime for part-time and casual workers beyond rostered hours/8 hours.

UWU claims:

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

[10] On 6 January 2020, the Commission published [Background Paper 1](#) to assist the parties in the preparation of the submissions for Tranche 2.

[11] [Background Paper 1](#) set out the procedural history of the Tranche 2 proceedings, set out the claims being pressed in Tranche 2 as well as the submissions⁶ and findings sought by the parties in respect of those claims. The [Background Paper](#) also identified the general findings on the evidence sought by the parties.

[12] [Background Paper 1](#) posed a series of questions to parties with an interest in these proceedings. The answers to the questions (and any identified errors in the document) were to be filed according to the timetable set out in the *5 December 2019 Directions*. The submissions received in response to these questions are set out in [Background Paper 2](#).

[13] [Background Paper 1](#) did not deal with the following claims:

- Travel time claims from the Australian Municipal, Administrative, Clerical and Services Union (ASU), the Health Services Union of Australia (HSU) and United Workers' Union (UWU);
- Overtime for part-time and casual workers from the HSU; and
- The minimum engagements claim from the HSU.

⁶ Submissions listed in paragraph [4] of the Commission's [Statement](#) of 3 December 2019

[14] This Background Paper deals with the three claims outlined at paragraph [13] above; the community language allowance claim and the 24 hour clause matter.

[15] **Attachment 1** to this document sets out the evidence relied upon by each party in respect of each of the Tranche 2 claims at paragraph [13] above.

Q.1: Question for all parties: 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.

2. Submissions Filed

[16] Directions issued on 5 December 2019 required the parties to file submissions setting out the following:

- (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).

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

- NDS – Submission [7 February 2020](#) and Reply Submission [27 February 2020](#)
- Ai Group – Submission [10 February 2020](#) and Reply Submission [27 February 2020](#)
- ABI & NSWBC – Submission [10 February 2020](#) and Reply Submission [27 February 2020](#)
- ASU, HSU and UWU (Joint Union Submission) – Submission [10 February 2020](#) and Reply Submission [27 February 2020](#)
- AFEI – Submission [11 February 2020](#) and Reply Submission [27 February 2020](#)

[18] Directions were issued on 18 December 2019 by Deputy President Clancy and required the ASU to file an updated version of the new clause 20.10 which it seeks to have inserted into the Award to provide for a community language skills allowance, together with submissions.

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

- ASU – community language skills allowance submission – [7 February 2020](#)

[20] This Background Paper does **not** summarise the recent submissions received in February 2020 in respect of the Tranche 2 claims.

3. Travel time claims

[21] There are three claims in respect of travel time, filed by the ASU, HSU and UWU.

3.1 The ASU and UWU travel time claims

[22] The ASU and UWU seek to insert a new sub clause **25.7 Travel Time** as follows:

“25.7 Travel Time

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

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

[23] The ASU relies on their [submission](#) dated 2 July 2019 and their [submission in reply](#) dated 2 October 2019.

[24] The UWU relies on their [submission](#) dated 15 February 2019, [supplementary submission](#) dated 1 April 2019 and [further submission in reply](#) dated 3 October 2019.

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

1. Some disability services employees (employed under the SACS classification stream) do not have a base location. They perform their work in a client’s home and locations where their client may need to be taken. Employers need, and arrange for, employees to travel between different locations in order for the employer to carry out their business. Disability support workers generally travel directly to their first client from home and back home after their last client. They rarely attend their employer’s premises. Disability support workers who provide in-home supports are required to hold a driver’s license as condition of employment expected to use their own car for work travel.⁷ The Commission would find that this travel is work.
2. Employers regularly break shifts so that work travel is done in unpaid breaks.⁸

⁷ Anderson, Attachment A

⁸ Steiner, [14]; Kinchin [18]; Rathbone [17]; Encabo, [24]

3. Unpaid travel time, in conjunction with the absence of minimum engagements and broken shifts, means that employees can work over lengthy spans (up to 12 hours),⁹ but the majority of that time may be unpaid. This unpaid time is still effectively controlled by the employer.
4. The evidence before the Commission tends to suggest that, particularly in regional areas, employers operate across large geographical areas. The capacity to work short engagements, and unlimited broken shifts, and not pay employees for travel to and from shifts, has the capacity to create a perverse incentive for employers to operate over greater distances than they otherwise might.¹⁰
5. Unpaid travel time thus reduces the already low wages of disability workers. As Dr Stanford explains the failure to compensate workers for this often-onerous travel time translates into a substantial reduction in effective compensation. Dr Stanford gives the following example:

“...if a part-time worker were required to attend to 4 different clients in the course of a day, with each visit compensated for one hour, and requiring 1 hour of travel or non-compensated down time between assignments plus 30 minutes travel at each end of the day, then the worker spends a total of 8 hours’ time to perform 4 hours of compensated work. Thus their effective compensation per hour spent working or getting to work is cut in half relative to the nominal amount specified in the Award: to under \$11 per hour for a worker at the SACS Grade 1 level.”¹¹
6. The submission that it is too difficult to calculate the length of travel time is without basis. As noted above, disability services employers routinely set rosters and make agreements about regular patterns of work that break shifts so that only time spent directly with the client is paid time.¹² Several employer lay witnesses already pay for travel time.¹³ For example, Ms Wang explains that CASS pays a travel allowance which is calculated based on details entered into a mobile application.¹⁴
7. NDIS Providers may claim up to 30 minutes for the time spent travelling to each participant in city areas, and up to 60 minutes in regional areas.¹⁵ There is no probative evidence that our claim for paid travel time cannot be afforded by employers. No employer party has provided any modelling of the cost of our claim or provided any detail about the cost of paying for travel time.
8. Unpaid travel time in disability services offends the principle of equal remuneration for work of equal or comparable value. Disability services are a sub-sector of the Social and Community Sector, which was found by the Full Bench in the *2011*

⁹ Steiner, [15]; Encabo, Annexure A

¹⁰ Steiner, [11] and Annexure A

¹¹ Stanford, p 25-26

¹² Encabo, Attachment A; Rathbone, Attachment B; Kinchin, [18]; Steiner, [14]-[15]

¹³ Transcript 17 October 2019 PN2612 [Jeffrey Sidney Wright]; Transcript 18 October 2019, PN2887-2890 [Graham Joseph Shanahan]; PN3050-3059 [Deborah Gaye Ryan]; PN3210-3213 [Wendy Mason]

¹⁴ Transcript 18 October 2019, PN3505-3517, 3557-3558

¹⁵ Mark Farthing #2, [21]; NDIS Price Guide 2019-20, CB 2796, p12

*Equal Remuneration Decision*¹⁶ to be a female dominated industry.¹⁷ At [253], the Full Bench made the following findings:

- (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.
9. According to Dr Macdonald, the gendered character of caring work also has an impact on work practices. She concludes that:

“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).”¹⁸

10. In male dominated industries, work travel is generally paid.¹⁹ The ASU has presented the business equipment industry as an exemplary comparator. The sector is too small for there to be ABS data, but the F17’s filed in the past five years record only 3 women employed at the time those agreements were made. The Commission should be satisfied that the business equipment industry is a male-dominated sector. The only distinguishing characteristic between travel in industries with paid travel time and the disability services is that those sectors are male dominated.

Q.2: Question for all other parties: Are the findings proposed by ASU challenged (and if so, which findings are challenged and why)?

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

¹⁶ [\[2011\] FWAFB 2700](#)

¹⁷ Equal Remuneration Case [\[2011\] FWAFB 2700](#), [253]

¹⁸ Macdonald, CB2912-2913

¹⁹ See Appendix A of the ASU’s Submissions of 2 July 2019

1. Employees in home care (and certain types of disability services work) have no ‘*base location*’ that they start at and finish at each day.²⁰
2. The work site for such employees is the home of the client, or locations where the client may need to be taken (such as medical centres, shopping centres, social events).²¹ These workers work in the community.
3. A key feature of the duties of such employees is the provision of services in the clients’ homes or other sites at the direction of the employer. For this to occur, the employee must travel to and between clients at the direction of the employer.²²
4. As a condition of employment, employees are required to have a current driver’s licence.²³
5. Employees are routinely expected to use their own car to travel in between work sites.²⁴
6. There are different approaches to the payment of travel time by employers in the industry:
 - (a) some employers will pay for travel time;²⁵
 - (b) some employers will pay for travel time in between consecutive client engagements but not in between broken shifts;²⁶ and
 - (c) some employers do not pay for travel time and such employers classify time spent travelling between client engagements as a “*break*” in broken

²⁰ Transcript (17/10/19), PN2581-2583 [JEFFREY SIDNEY WRIGHT]; Transcript (18/10/19), PN 2865-2866 [GRAHAM JOSEPH SHANAHAN]

²¹ Statement of Deon Fleming (EX. UV4), dated 16 January 2019, at [9]; Statement of Robert Steiner (EX.ASU2), dated 24 June 2019, at [10]-[11]

²² Supplementary statement of Trish Stewart (EX. UV2), dated 1 April 2019, at [3]; Supplementary statement of Deon Fleming (EX.UV4), dated 28 March 2019, at [7]

²³ Supplementary statement of Trish Stewart (EX. UV2), dated 1 April 2019, at [4] and Annexure A to EX.UV1; Supplementary statement of Deon Fleming (EX.UV4), at [8] and Annexure A

²⁴ Supplementary statement of Trish Stewart (EX. UV2), at [4]; Supplementary statement of Deon Fleming (EX.UV4), at [8]; Transcript (17/10/19), PN2580 [JEFFREY SIDNEY WRIGHT]; Transcript (18/10/19), PN3055- 3057 [DEBORAH GAYE RYAN]

²⁵ Supplementary statement of Trish Stewart (EX. UV2), at [5]; Supplementary statement of Deon Fleming (EX.UV4), at [5]; Transcript (18/10/19), PN2887-2890 [GRAHAM JOSEPH SHANAHAN]

²⁶ Ms Sinclair’s employer does not pay for travel time in between broken shifts (which for her are uncommon), but pays for travel between client engagements: see Statement of Belinda Sinclair dated 16 January 2019 (EX.UV6) at [12]-[13] and Annexure B, rosters from 17 December to 23 December 2018. The roster incorporates an amount of time for travel in the column titled ‘travel time’; Transcript (17/10/19) PN2612 [JEFFREY SIDNEY WRIGHT]; Transcript (18/10/19) PN3050-3059 [DEBORAH GAYE RYAN], PN3210-3213 [WENDY MASON]

shifts, regardless of whether or not those client engagements are consecutive.²⁷

7. Employees covered by the Award can be travelling to and from clients for significant periods of time without payment.²⁸
8. The combination of employers' not paying travel time, broken shifts and a lack of minimum engagements (for part-time employees) can result in a significant amount of '*dead time*' for employees, that is time spent travelling without payment or time spent waiting between broken shifts.²⁹ When this occurs, it is the employee who bears the cost of the idle time and the unpaid travel.³⁰
9. The non-payment of travel time results in lower wages for already low-paid workers.³¹ Home care and disability support workers can be engaged to work broken shifts over a significant span of hours (12 hours maximum)³² that can include a majority of '*time*' that is unpaid but dedicated to the work of the employer.³³ This contributes to financial distress.³⁴
10. The non-payment of travel time creates a disincentive for employees to stay in the sector.³⁵
11. The notion that travel time cannot be paid as it is difficult to calculate is counterfactual; several of the employer witnesses indicated that they already pay travel time.³⁶

²⁷ Statement of Trish Stewart (EX. UV1), dated 17 January 2019, 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]; statement of Robert Steiner (EX.ASU2), at [15]

²⁸ Supplementary statement of Trish Stewart (EX. UV2), at [8]; Statement of Fiona Macdonald (EX.HSU25), dated 15 February 2019, at Annexure FM2, page 88

²⁹ Further statement of Trish Stewart (EX.UV3) dated 1 October 2019, at [6]; Statement of Deon Fleming (EX. UV4), at [22]; Statement of Fiona Macdonald (EX.HSU25) at Annexure FM2, page 88

³⁰ Transcript (17/10/19) PN2274 [JAMES STANFORD]

³¹ Supplementary statement of Trish Stewart (EX. UV2), at [8]; Statement of Fiona Macdonald (EX.HSU25) at Annexure FM2, page 93

³² Clause 25.6(a)

³³ Statement of Fiona Macdonald (EX.HSU25), at Annexure FM2, page 88

³⁴ Further statement of Trish Stewart (EX.UV3), at [13]-[17]

³⁵ Further statement of Trish Stewart (EX.UV3), at [3], [6], and [17], Statement of James Stanford dated 23 September 2019, at [26], [29]-[30]

³⁶ 2 Transcript (17/10/19), PN2612 [JEFFREY SIDNEY WRIGHT]; Transcript (18/10/19), PN2887-2890 [GRAHAM JOSEPH SHANAHAN], PN3050-3059 [DEBORAH GAYE RYAN], PN3210-3213 [WENDY MASON]; in addition Ms Wang indicates that CASS pays a travelling allowance which is calculated based on details logged in a mobile app (PN3505-3517, 3557-3558)

12. Under the NDIS travel time is claimable. Providers can claim up to 30 minutes for the time spent travelling to each participant in city areas, and up to 60 minutes in regional areas.³⁷
13. A fee for travel time can be charged under home care agreements, and service providers in home care also have the ability to set their own rates that ‘costs in’ travel.³⁸
14. There was no probative employer evidence that modelled the cost of its travel time claim, or sought to indicate that it would be prohibitive. This is presumably because several of the employer witnesses already paid for travel time³⁹ as travel time is rightfully payable as ordinary hours of work under the current Award, and in addition, is an everyday and unavoidable cost of providing services in the community.

[27] In summary, the UWU contends that:

‘Employees in the home care and disability services sector perform travel at the direction of their employer in between client locations as a key part of their role.⁴⁰ This work could not occur without travel.

Yet, there are employers who engage employees to travel significant distances to and between clients without any payment for work directed travel. The employer evidence has not indicated that there would be any excessive costs as a result of a travel time clause; rather several witnesses noted they already pay for travel time. Service providers are able to include a fee for travel time in home care arrangements, and travel time is claimable (within limits) under the NDIS⁴¹ and accommodated within government funding for home care packages.

Regardless of the funding arrangements, travel between and to and from client locations is not optional. It is a core requirement of the role of these employees. In the absence of an explicit clause on travel time, some employers are shifting these costs onto low paid workers. This is inconsistent with a fair and relevant safety net of conditions.

We do not concede that travel time is not payable under the terms of the current Award and have current proceedings on this issue in the Queensland Magistrates Court.⁴² These proceedings are unresolved and the employer is disputing the claim. Irrespective of the outcome of this case, it is still necessary to review and vary the Award’s treatment of work related travel as the evidence

³⁷ Supplementary statement of Mark Farthing (EX.HSU2), dated 16 September 2019, at [21]; NDIS Price Guide 2019-20, CB 2796, pg.12

³⁸ 4 Bundle of Home Care Price Guide materials (EX.UV9), see pg. 15, the provider can choose whether or not to charge for staff travel costs; also home care providers set their own prices for services, see Hammondcare pg. 34; NSW Home Support pg. 40; Connectability pg. 42; Baptistcare pg. 44; CASS Care pg. 45; and Community Care Options pg. 46

³⁹ Transcript (17/10/19) PN2612 [JEFFREY SIDNEY WRIGHT]; Transcript (18/10/19), PN2887-2890 [GRAHAM JOSEPH SHANAHAN], PN3050-3059 [DEBORAH GAYE RYAN], PN3210-3213 [WENDY MASON]

⁴⁰ For home care employees’ level 1 and 2, the Award classification is principally directed to ‘domestic assistance’. Namely, the provision of services and care in a client’s home. Similarly, there is recognition in the Award that SACS employees provide disability services in private residences and outreaches (see clause 2, definition of ‘social and community services sector’)

⁴¹ NDIS Price Guide 2019-20, CB 2796, pg.12

⁴² Statement of Jared Marks (EX.UV8)

indicates that there are numerous employers who do not pay travel time under the terms of the Award.’

Q.3: Question for all other parties: Are the findings proposed by UWU challenged (and if so, which findings are challenged and why)?

3.2 The HSU travel time claims

[28] The HSUs travel time claim involves two variations to the SCHADS award.

[29] The HSU seeks a new subclause 25.6(d) to provide a payment for travel that may be undertaken in the course of a break during a broken shift as follows:

‘25.6 Broken shifts

...

(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.’

[30] The HSU seek a variation to entitle disability support workers and home care workers to a travel allowance/reimbursement of \$0.78 per kilometre in respect of all travel.

[31] To this end the HSU seeks to insert, at the end of clause 20.5(a), the following:

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

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

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

(c) between the locations of any client appointments on the basis of the most direct available route.’ (proposed variation in underlined text)

[32] The HSU adopts the submissions of the UWU in respect of travel required of workers.

[33] The HSU seeks the following findings in relation to their claim:

1. Possession of a functioning motor vehicle is all but a pre-condition for the work of disability support and home care workers.

2. Care workers generally travel straight from their homes to their first client, rarely attending the organisation’s workplace first. They are generally not paid for travel to their first appointment, or for travel home from their last appointment, either in wages for the time spent, nor by way of an allowance, for the use of their vehicle to travel for work purposes.

3. Their clients can also change from day to day, so the locations of their first and last appointments will rarely be the same each day and are not always predictable.⁴³

4. In the case of the workers who were the subject of Ms Macdonald's report, only two of the ten disability support workers were paid for the time spent travelling between clients, although most of the workers received a travel allowance based on the kilometres travelled.⁴⁴ Mr Quinn described his work schedule thus:

“On a work day, my schedule is as follows:

a. Leaving my home in Glenorchy, which is about 10km from Hobart, and driving to the home of my first client. Occasionally I will call into the office in Hobart on the way past if there is something I need to pick up, but normally I will go straight to my first client.

b. My work locations vary between 1 and 20 kilometres from my home. Normally I see clients anywhere between Tarooma in the South (approximately 20km from home) Bridgewater in the North (approximately 15km from home). On the odd occasion I will travel further than 20 kilometres. Travel to [sic] for my first appointment varies between 5 minutes and 45 minutes;

c. I am not paid travel time or a kilometre allowance for the travel to my first appointment”⁴⁵

5. Particularly for workers in regional areas, considerable distances may be required to be travelled. For example, Heather Waddell, a home care worker employed by Hammond Care on the South Coast of New South Wales, works in a team that covers an area in excess of 100 kilometres. She travels some 50 kilometres South of her home to Ulladulla to visit clients. She has had to travel up to 80 kilometres to the South, 63 kilometres to the North and more than 50 kilometres West. She has travelled up to 250 kilometres in a day for 4 or 5 paid hours of work.⁴⁶

6. Mr Friend's uncontradicted evidence about the travel required of HSU members in New South Wales was that they:

regularly travel significant distances in order to meet the requirements of role.

In regional areas, this can include regular travel of 30km-40km, in order to make a single home care visit to a client.

Some members report being asked to in excess of 70km in order to make a home care visit.

⁴³ Thames [16], CB 2963

⁴⁴ Macdonald CB 2916

⁴⁵ Quinn #2 [10], CB 3052

⁴⁶ Waddell [10] – [11], CB 2957

While our members are ordinarily paid for travel between consecutive clients, they usually receive no allowance to use their vehicle in order to get to or from a client, if it is their first or last client of the day.

*In some cases, it may be their only client for the day*⁴⁷

7. Mr Eddington, whose evidence was also not challenged, stated:

“Often home carers in Tasmanian are required to travel significant distances to work for clients. I am aware of employees having to travel between 30 and 50 kilometres to client homes.”⁴⁸
8. Mr Eddington also observed that employers in home care in Tasmania took the approach that travel between engagements more than an hour apart, was not travel in the course of duties, and thus employees were required to bear those costs.⁴⁹
9. Mr Friend reported a similar approach in the industry in New South Wales of not paying any allowance in respect of travel on either side of a “broken shift”.⁵⁰
10. Mr Sheehy, a HSU organiser in New South Wales was aware of members being required to travel up to 50 kilometres to the client’s home before their “shift” of paid work commenced.⁵¹
11. Mr Steiner, a disability worker, can be required to travel up to 84 kilometres from Newcastle to Singleton, which involves a drive of in excess of one hour.⁵² For Mr Steiner, a full-time worker, travel adds a considerable amount of time to work days already lengthy as a consequence of broken shifts.⁵³
12. The evidence before the Commission tends to suggest that, particularly in regional areas, employers operate across large geographical areas. The capacity to work short engagements, and unlimited broken shifts, and not pay employees for travel to and from shifts, creates a perverse incentive for employers to operate over greater distances than they otherwise might.
13. A further burden for workers travelling in regional areas is the risk of accidents on dangerous (or isolated) stretches of road, including accidents involving collision with kangaroos⁵⁴ (or other wildlife). The common requirement to travel in the early morning or as night falls (to provide meals or other domestic assistance at either end of the day) increases that risk.

⁴⁷ Friend [65] – [69], CB 2950 - 2951

⁴⁸ Eddington [21], CB 2973

⁴⁹ Eddington [20], CB 2973

⁵⁰ Friend [70] – [72], CB 2951

⁵¹ Sheehy [9], CB 2942

⁵² 9 Steiner [11], CB 1223

⁵³ Steiner [18], CB 1225

⁵⁴ Waddell [14], 2957-2958

14. The requirement to travel long distances during the course of the working week is not limited to workers in regional areas. Mr Lobert, who works in the east and south-east Melbourne metropolitan area attends clients in locations as far apart as Frankston and Lilydale. He travels about 1000 kilometres in the course of a week,⁵⁵ a significant impost, both in terms of time, and the immediate and ongoing costs.
15. In Mr Quinn's case, the combined effect of broken shifts and work travel means that he travels between home and work about 30 times a week, as there are 2 or three occasions each day when he returns home during a break in the shift during the course of a day.⁵⁶
16. Distance alone is not the only difficulty associated with travel. Geography and traffic flows may compound the demands of travel. For Ms Thames it is commonplace to be required to travel between 12 to 15 kilometres to attend the first client of the day, a distance which on its face doesn't appear extraordinary. However, this involves travelling through traffic from the Eastern suburbs, where she lives, to locations in the inner West, such as Lilyfield, Newtown, Balmain and Petersham.⁵⁷
17. The common approach of employers in the industry appears to be that travel by a worker to the first appointment of the day is not regarded as work related travel, and is not paid as time worked nor compensated by payment of a kilometre allowance. This approach has some attraction at first blush because for many other sorts of workers the journey to and from their workplace is not ordinarily regarded as work travel. However, the comparison is inapposite for a range of reasons:
 - (a) First, many workers now aren't based at their employer's premises. Given the nature of this work and the way it is structured, it is unclear why such a comparison should be regarded as appropriate;
 - (b) Second, there is the compulsion, in almost all cases, for the worker to use their own vehicle to perform the travel, in many cases in order for the vehicle to be employed for (what is accepted to constitute) work-related travel later in the course of the shift, including travel transporting clients and their equipment;
 - (c) Third, for most workers, their workplace is the same location every day, meaning that they are able to establish patterns of travel along a familiar route, often utilising public transport which operates according to known timetables. That is not the case for the workers the subject of the present proceeding. Whilst most employees may choose whether or not to accept an offer of employment from an employer with a known location (taking into account ease of access and transport options); employees in this industry don't have a choice about the locations of the employer's clients;

⁵⁵ Lobert [5] – [6], CB 2966

⁵⁶ Quinn [27] – [30], CB 2990

⁵⁷ Thames [14], [16] – [19]; CB 2963

(d) Fourth, the distances required to be travelled by these workers are variable, not a matter of the worker's choice, and in many cases exceed those ordinarily travelled by workers to and from work.

(e) Fifth, it cannot be assumed that departure for the work location from the worker's home involves any saving of time, or other advantage for the worker, when compared with a notional departure for the same location from the employer's premises with the trip being regarded as work travel.

18. There is little economic justification for taking this approach. The evidence before the Commission showed that under the NDIS, providers can now claim for up to 30 minutes in travel time in city areas and up to 60 minutes in travel time in regional areas⁵⁸ and home care providers may charge clients for travel.⁵⁹ In short, employees are required to absorb a cost of their employer's business to facilitate the employer offering its services at a rate below that which it is entitled to charge under a common regulatory scheme; in other words workers are subsidising the employers' race to the bottom.
19. The approach whereby the first and last trip of the day are not regarded as work travel involves an incentive for employers to break shifts to maximise the number of first and last trips, and to roster clients located the furthest distance away at the start and end of shifts. Such a practice currently occurs.⁶⁰ If that approach is to be maintained or endorsed, the benefits to the employer should be recognised and weighed when considering the Commission's approach to the Award as an entire document.
20. The HSU contends that as a matter of principle the time spent travelling to, from, and between clients, whether or not carried out during a break in a shift, is work, just as much as contact time with clients is regarded as work. It is carried out at the behest of the employer in order to perform the work of the employer, as the employer has arranged it. It should therefore be paid for as work time, and the cost of undertaking all such travel should attract an allowance at the appropriate rate per kilometre. The award should be varied to make those entitlements clear, having regard to the evidence before the Commission.
21. At the least, where shifts may be broken, the reasonable time of travel in the worker's own vehicle between the last client before the shift breaks and the first client upon the recommencement of the shift should be paid for as worked time and attract payment of the per kilometre travel allowance in clause 20.5(a). In the HSU's submission, that approach would strike an appropriate balance in those circumstances, and establish a fair and relevant minimum standard.

Q.4: Question for all other parties: Are the findings proposed by HSU challenged (and if so, which findings are challenged and why)?

⁵⁸ Farthing Supplementary, [10(d)], CB 2982

⁵⁹ UV9; the evidence showed some of the employers included such travel in their price guides

⁶⁰ Thames [16], CB 2963, Sheehy [9], CB 2942

3.3 Responses to ASU, UWU and HSU travel time claims

3.3.1 NDS response to travel time claims

[34] NDS opposes the ASU, UWU and HSU travel time claims.

[35] NDS submits that a range of union witnesses gave evidence regarding travel necessarily undertaken in the course of their duties and as part of broken shift arrangements⁶¹ and submitted that practices appear to vary but there is evidence that some of the time needed for travel between clients is not paid time.⁶²

[36] NDS stated that:

‘Travel in the disability sector is often associated with the use of broken shift because in home supports are usually only needed for short periods at certain times of the day, such as meal times. For example, Robert Steiner gave evidence about the extent of travel in his job. Part of his evidence pointed to the importance of ensuring continuity of support for clients with psychosocial disability. The consequence was that where a client only needed intermittent supports during the day, it was often necessary for the same employee to travel back to provide that support in order to avoid the disruptive effect of different workers attending the client.’

3.3.2 AFEI response to travel time claims

[37] AFEI relies on its submissions of 17 September 2019 and submits further that:

- Firstly, not all disability support workers and home care workers are required to travel considerable distances during the course of their working days in order to perform their work;⁶³ and
- Secondly, where employees do travel a considerable distance, such travel is undertaken on an irregular basis;⁶⁴ and
- Thirdly, employees do not always use their breaks to travel from one client to another;⁶⁵ and
- Fourthly, an employer has limited control over the time it takes for an employee to get from one client to another due to a number of factors including to traffic.

3.3.3 ABI response to travel time claims

[38] ABI relies on their reply submission of 13 September 2019.

[39] ABI submits that:

⁶¹ For example, Waddell [10-14] & PN 1386-1414; Thames [13-16]; Quinn [14-29]; Stewart [3-8]; Steiner [15- 16]

⁶² McDonald Court Book pp 2917-2920; Also, for example, Waddell [13]; Thames [16]; Quinn [10]; Thames [16]

⁶³ PN1391; PN1392; PN1405; PN1407; PN1408; PN1409

⁶⁴ PN1389; PN1395; PN1398; PN1402

⁶⁵ PN464; PN468;PN527; PN525; PN1572

⁶⁶ PN460

‘[o]ur clients do not have any objection to the notion that employees should receive reasonable compensation for time spent travelling in the course of their duties. However, our clients do not consider that the union claims are an appropriate variation for the reasons outlined in our written submissions of 13 September 2019.’

[40] ABI submits that the following findings on the evidence can be made:

- Home care workers and many disability services support workers are required to travel to various locations to provide services to clients.
- Time spent by employees travelling will naturally vary depending on which clients they support on any given day, and where they reside from time to time.
- In the context of broken shifts, in many cases the duration of the break between portions of work does not correspond to the time taken to travel between the respective working locations.
- In breaks between work during a broken shift, employees often do not travel directly from client locations, and often undertake non-work-related activities.⁶⁷
- There are a range of factors that will affect how long it takes an employee to travel from one location to another on any given day (for example, traffic conditions).⁶⁸
- Some service providers adopt a range of practices to remunerate employees in respect of time spent travelling. For example:

(a) Ms Stewart gave evidence that Excelcare paid her normal hourly rate for time spent travelling “between appointments” which was also counted as time worked. However, the employer was said to use Google maps to “get an estimate” for how long the travel should take and this was how our pay was calculated”,⁶⁹

(b) Mr Shanahan gave evidence that Coffs Coast Health & Community Care Pty Ltd pays employees their “normal rate of pay” when travelling between clients, although it was not specified how that payment was calculated or determined;⁷⁰

(c) Mr Shanahan also gave evidence that in “extraordinary circumstances”, the business also pays an additional allowance where employees are required to travel significant distances to provide supports to clients (the example given was where an employee based in Coffs Harbour is required to attend at client at Dorrigo);⁷¹

⁶⁷ Transcript at PN468, Transcript at PN1569-1572

⁶⁸ Transcript at PN459-PN460, Transcript at PN1573-PN1574

⁶⁹ Supplementary Stewart Statement at [5]. See also Supplementary Fleming Statement at [5]

⁷⁰ Transcript at PN2887

⁷¹ Transcript at PN2890

(d) Hammond Care pay an allowance where broken shifts are worked, which is described as “recognizing and compensating employees for possible travel time and kilometres that may be incurred”,⁷²

(e) Hammond Care also have a regime in respect of “Travel in Extraordinary Circumstances”,⁷³

(f) CASS Care Limited pay an allowance in accordance with clause 6.1.1(c) of the CASS Care Limited Enterprise Agreement (Other Than Children’s Services) (NSW) 2018-2021.⁷⁴

Q.5: Question for all other parties: Are the findings proposed by ABI challenged (and if so, which findings are challenged and why)?

[41] To the extent that the Commission finds that the existing broken shifts clause does not meet the modern awards objective of providing a fair and relevant minimum safety net of conditions ABI proposes an “...alternative variation⁷⁵ for the Commission’s consideration which rectifies any issue with the existing broken shifts provision, but which ABI submits, does not suffer from the problems with the union proposals.”

[42] ABI submits that an appropriate way of dealing with the issue of unpaid travel time in the gaps between portions of work in a broken shift is to introduce payment mechanism into the Award in the form of an allowance. ABI submits that its proposal avoids the complexities which arise if the time was to be ‘time worked’.

[43] ABI notes that a number of pre-reform awards dealt with this issue in this way.

[44] For example, clause 29(ii) of the Miscellaneous Workers Home Care Industry (State) Award (AN120341) provided for a payment at the rate of 3% of the ordinary hourly rate per kilometre travelled where employees were rostered to work with consecutive clients. The clause provided:

(ii) Where employees are rostered to work with consecutive clients they shall be paid for the time taken to travel between locations at the rate of three per cent of the ordinary hourly rate per kilometre travelled, excluding travel from the employee’s home to the first place of work and return to home at the cessation of his or her duties; provided that this payment shall not be made if the employee is being otherwise paid under this award.

[45] Similarly, clause 20.4.2 of the Community Services (Home Care) (ACT) Award 2002 (AP816351CRA) had a substantially similarly worded provision. It provided:

⁷² See clause 13.4.5 and Annexure 1 of the HammondCare Residential Care and HammondCare at Home Enterprise Agreement 2018

⁷³ See clause 23.2 of the HammondCare Residential Care and HammondCare at Home Enterprise Agreement 2018

⁷⁴ Transcript at PN3505-3517, PN3557-3558 and PN3629-3647

⁷⁵ See Part 9 of their Reply Submission of 13 September 2019

Where employees are rostered to work with consecutive clients they shall be paid for the time taken to travel between locations at the rate of 3% of the ordinary hourly rate per kilometre travelled, excluding travel from the employee's home to the first place of work and return to home at the cessation of his/her duties.

[46] ABI submits:

‘An allowance such as those mentioned above would appear to be a sensible way of compensating employees for time spent travelling during periods that are expressed in clause 25.6(a) as not being work time.’

9.7 Such an allowance appears to meet the objectives of the Unions in terms of compensating employees for travel time, without any of the complex implications outlined in paragraphs 8.8 to 8.11 above.

9.8 An allowance of this type would also appear to more readily meet the modern awards objective, in the sense that it:

- (a) provides additional remuneration for employees working broken shifts;
- (b) provides an entitlement that is simpler and easier to understand than the Unions' proposals;
- (c) addresses the relative living standards and the needs of the low paid;
- (d) provides a floor entitlement from which parties can collectively bargain;
- (e) does not prevent the utilisation of broken shifts (see the ‘need to promote flexible modern work practices and the efficient and productive performance of work’);
- (f) does not impose an unreasonable regulatory burden on business (notwithstanding it representing a significant new cost imposition on employers).

9.9 As stated at paragraph 7.11 above, our clients are not opposed to the introduction of a form of allowance, subject to there being an appropriate delay to its implementation to provide the industry with time to prepare for its implementation.⁷⁶

Q.6: Question for ABI: In the event the Full Bench finds that the existing broken shifts clause does not meet the modern awards objective is it proposing an amendment in the same terms as the 2 awards mentioned above?

Q.7: Question for all other parties: is the alternative variation proposed by ABI opposed (and if so, why)?

3.3.4 Ai Group response to travel time claims

[47] Ai Group opposes the ASU, UWU and HSU travel time claims.

[48] Ai Group submits that the following findings should be made:

⁷⁶ ABI [submission in reply](#), 13 September 2019 at 9.6 – 9.9

- 1.Many employees are not paid for time spent travelling to and from clients.⁷⁷ This includes travelling between clients⁷⁸ and travelling to the first client / from the last client.⁷⁹
- 2.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.⁸⁰
- 3.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.⁸¹
- 4.In some cases, employees travel directly from one client to the next.⁸²
- 5.In other cases, employees do not travel directly from one client to the next.⁸³
- 6.During a break in a broken shift, employees often undertake non-work-related activities, including spending time at home.⁸⁴
- 7.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.⁸⁵

⁷⁷ 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

⁷⁸ See for example page 2957 at paragraph 13 (Statement of H. Waddell)

⁷⁹ 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

⁸⁰ 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

⁸¹ 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

⁸² 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

⁸³ 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

⁸⁴ 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. 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

⁸⁵ 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

Q.8: Question for all other parties: Are the findings proposed by Ai Group challenged (and if so, which findings are challenged and why)?

4. HSU claim — overtime for part-time and casual workers

4.1 The HSU claim

[49] The HSU seek to amend the amount of hours (10) which must be exceeded in the course of a day by part time employees to be paid overtime rates under clause 28.1(b)(ii), so that it is consistent with the entitlement to overtime rates for full time employees working in excess of rostered ordinary hours (8) under clause 28.1(a). The HSU submits that part time employees are unlikely to accrue 10 hours of paid work in the course of a day.

[50] The HSU proposes that clause 28.1(b)(ii) – (iii) be amended as follows:

28.1(b)(ii) All time worked by part-time or casual employees which exceeds ~~10~~ 8 hours per day, will be paid at the rate of time and a half for the first two hours and double time thereafter, except on Sundays when overtime will be paid for at the rate of double time, and on public holidays at the rate of double time and a half.

28.1(b)(iii) ~~Time worked up to the hours prescribed in clause 28.1(b)(ii) will, subject to clause 28.1(b)(i), not be regarded as overtime and will be paid for at the ordinary rate of pay (including the casual loading in the case of casual employees).~~ All time worked by part-time employees which exceeds the hours agreed in clause 10.3(c) will be treated as overtime and paid at the rate of time and a half for the first two hours and double time thereafter, except on Sundays when overtime will be paid for at the rate of double time, and on public holidays at the rate of double time and a half.

[51] The HSU submits that its claim ‘...is designed to address the inconsistency in the Award as between full-time and part-time employees. The former are paid overtime for work in excess of rostered ordinary hours (i.e. 8 hrs); the latter aren’t entitled to overtime until they have worked 10 hours in the course of a day’.

[52] The HSU submits that given the proportion of part-time workers performing care work; the demands of that work; and the capacity to minimise paid hours of work by the use of broken shifts, there is no warrant for a different approach towards the payment of overtime to part-time workers.

[53] HSU seeks the following findings:

1. The Commission would be satisfied that working in a face to face contact role with clients with disability or requiring assistance due to their age, is likely to be physically and mentally taxing work. Ms Waddell described once working a nine hour shift with the single client, during which period she had no lunch or tea break, and only the opportunity to quickly eat her lunch while continuing to provide care to the client.⁸⁶
2. Mr Lobert describes the demands of the work as follows:

⁸⁶ Waddell [27], CB 2959

- i. “It can be difficult working one on one with someone with a disability for 7 hours or more. Because the work is one on one, you can’t have a break, you can’t get away and you can’t switch off.”⁸⁷
3. Home care workers are often required to shower clients, assisting clients in and out of confined spaces in private homes, which have not been specially designed to facilitate personal care and assistance.⁸⁸ They also provide other forms of domestic assistance, which can be more physically demanding, wearing on the body and tiring than many forms of personal care.⁸⁹
4. Given the manner in which employers routinely work broken shifts, frequently breaking shifts several times during the course of a day, it is unlikely part-time workers would accrue 10 hours of paid work in the course of a day.
5. In Mr Steiner’s case, he is routinely on duty for much longer than the time he paid for; often working for more than 10 hours in a day, but not being paid for all of that time.⁹⁰
6. In Mr Quinn’s case, as set out above, even on a day where his work commenced at 7.30 a.m. and concluded just after midnight, he did not accrue 10 hours of work in total.⁹¹
7. The Award already provides considerable flexibility for employers by providing for all hours of part-time employees up to 38 hours in the course of a week or 76 hours in the course of a fortnight to be paid at single time. This allows employers to utilise part-time care workers on additional days to those they are contracted or rostered. However, where hours extend on any particular day, the rates of pay applicable to such hours should compensate for their unsociable, unpredictable and irregular nature with an overtime loading.

Q.9: Question for all other parties: Are the findings proposed by HSU challenged (and if so, which findings are challenged and why)?

4.2 Responses to HSU claim – overtime for part-time and casual workers

4.2.1 ASU and UWU response to HSU claim

[54] The ASU and UWU support the claims of the HSU.

4.2.2 NDS response to HSU claim

[55] NDS opposes the HSU claim.

4.2.3 AFEI response to HSU claim

⁸⁷ Lobert [21], CB 2968

⁸⁸ Wilcock [10], CB 2953

⁸⁹ Thames [6] – [7], CB 2962

⁹⁰ Steiner [17], CB 1225

⁹¹ Quinn #1 [43], CB 2991

[56] AFEI opposes the HSU claim and relies on its submissions of 23 July 2019.

[57] AFEI submits that the following findings can be made:

1. There are employees who work part-time because it suits them;
 - a. Supported by evidence of United Voice of Ms Sinclair who clarified that her second job is the reason why her window of availability ceases at either 2:30pm or 3:00pm on Mondays, Wednesdays and Fridays.
 - b. Supported by ABI evidence of Mr Wright, who states that “care workers put their availability at the beginning of the day and the end of the day. So they’ve determined – in effect getting a broken shift because they’re not available between a shift in the morning and a shift in the afternoon, because that suits their particular circumstances or responsibilities.”⁹²
2. Part-time employees want to work additional hours
 - a. Supported by United Voice evidence of Ms Sinclair, who acknowledges that she would welcome additional hours.⁹³
 - b. Supported by HSU evidence of Ms Thames.⁹⁴
 - c. Supported by United Voice evidence of Ms Fleming.⁹⁵
 - d. Supported by United Voice evidence of Ms Stewart.⁹⁶
 - e. Supported by evidence of Mr Wright who states “care workers actually try and do what they can to get additional hours”⁹⁷
3. Part-time employees are not being forced to work additional hours where they do not agree to them
 - a. Supported by evidence of Mr Wright who states “work the additional hours is by agreement.”⁹⁸
 - b. Supported by the evidence of ABI witness, Ms Wang, who state “only when they agree, we roster them to work the additional hours”⁹⁹

⁹² PN2623

⁹³ PN674

⁹⁴ Thames Statement (Exhibit HSU28) at [9]

⁹⁵ Fleming Statement (Exhibit UV4) at [17]

⁹⁶ Stewart Statement (Exhibit UV1) at [11]

⁹⁷ PN2659

⁹⁸ PN2727

⁹⁹ PN3603

- c. Supported by evidence of Ms Sinclair.¹⁰⁰
4. If the Award is varied as sought, this would have a detrimental impact on both the availability of part-time employment as a flexible yet permanent work option for employees, and on employer costs
- a. We rely on our submissions of 23 July 2019 at [51] that it is plain the variation would result in a substantially additional cost to employers for offering any additional hours to part-time employees, as compared to casual employees. As a result casual employment would be a more cost-effective form of employment where flexibility is required for both the employer and employee.
- b. We further rely on our submissions of 23 July 2019 at [53] illustrating how the variation would result in part-time employment being a far more costly form of employment than full-time employment. This would inevitably impact the viability of offering part-time employment for those who would prefer reduced permanent hours due to family or other personal commitments.
- c. Evidence of Mr Wright states that the company “would be required to explore other options instead of providing additional hours and have part-time employees only work their contracted hour. This would have a number of negative impacts, including a) a decrease in operational flexibility which assists us in meeting ever changing client demands and needs, b) disadvantaging part-time staff seeking additional hours above their contracted hours, and c) may lead to an increase in casual staff in place of part time employees”.¹⁰¹
- d. Evidence of Ms Wang state “if we guarantee more hours for the part-time workers, we may face the situation we don’t have enough work for them in some occasion”.¹⁰²
5. No evidence was provided in the proceedings about the impact of the current provisions at Clause 28.1(b)(i) and 28.1(b)(ii).

Q.10: Question for all other parties: Are the findings proposed by AFEI challenged (and if so, which findings are challenged and why)?

4.2.4 ABI response to HSU claim

[58] ABI is opposed to the proposed introduction of additional overtime entitlements for part-time employees when working agreed additional hours or when working more than 8 hours a day.

[59] ABI is not opposed to a variation that would provide a mechanism for reviewing and adjusting a part-time employees hours of work where they are regularly working more than their guaranteed minimum number of hours.¹⁰³

¹⁰⁰ PN612-PN613

¹⁰¹ Wright Statement (Exhibit ABI3) at [36]

¹⁰² PN3604

¹⁰³ See ABI Reply Submission of 12 July 2019 at [8.26] - [8.29]

Q.11: Question for ABI: ABI is invited to elaborate on the mechanism it would propose.

[60] ABI submits that the following findings should be made:

1. Employers regularly offer part-time employees work in excess of their contracted hours;¹⁰⁴ By way of example:
 - (a) Mr Shanahan gave evidence that Coffs Coast Health & Community Care Pty Ltd offered 902 additional hours to their part-time employees during the month of May 2019;¹⁰⁵
 - (b) Mr Harvey gave evidence that “all part time community support workers and residential support workers” are engaged to work above contract hours stated in employment contracts;¹⁰⁶
 - (c) Ms Ryan gave evidence that in the past year, part-time employees “have worked 95,000 hours above their contracted hours”;¹⁰⁷
 - (d) Ms Wang gave evidence that in the four weeks between 5 June 2019 and 2 July 2019 a total of 1,863 hours were offered to part-time employees in home ageing services in excess of their contracted hours;¹⁰⁸
 - (e) Mr Wright gave evidence that Hammond Care, in the month of May 2019, provided in excess of 14,000 additional hours above contract hours;¹⁰⁹ and
 - (f) Ms Mason gave evidence that BaptistCare is regularly required to offer part-time employees work in excess of their contracted hour in order to “effectively meet client needs”.¹¹⁰
2. There is fluctuation in the number of hours available to employees on a weekly basis due to a range of reasons including fluctuating client demands, lack of guarantee of services (e.g. clients’ ability to change providers and cease their services), client preferences, etc. This makes it difficult for employers to predict how many hours of work are available/required each week.¹¹¹
3. Many employees would like to receive more hours of work.¹¹²

¹⁰⁴ Shanahan Statement at [29]; Ryan Statement at [56]; Wang Statement at [45]-[48]; Wright Statement at [35]; Mason Statement at [52]

¹⁰⁵ Shanahan Statement at [30]

¹⁰⁶ Harvey Statement at [50]

¹⁰⁷ Ryan Statement at [56]

¹⁰⁸ Wang Statement at [46]

¹⁰⁹ Wright Statement at [35]

¹¹⁰ Mason Statement at [52]

¹¹¹ Wang Statement at [45]; Mason Statement at [52]; Ryan Statement at [55]; Harvey Statement at [50]; Shanahan Statement at [29]

¹¹² Thames Statement at [9]; Stewart Statement at [11]; Transcript at PN597

4. For services delivered under the NDIS, the cost modelling which was used to devise the price caps imposed by the NDIA does not account for overtime rates of pay.¹¹³
5. The imposition of overtime rates to be payable where part-time employees work additional hours will impose a significant additional cost on employers. By way of example:
 - (a) Mr Shanahan gave evidence that if Coffs Coast Health & Community Care Pty Ltd was required to pay part-time employees overtime rates for hours worked in addition to their contracted hours, that would have equated to a cost increase of \$17,400 for the month of May 2019;¹¹⁴
 - (b) Mr Harvey gave evidence that if ConnectAbility was required to pay part-time employees overtime rates for hours worked in addition to their contracted hours, it would be forced to reduce part-time employment opportunities and increase casual employees;¹¹⁵
 - (c) Ms Ryan gave evidence that if Community Care Options was required to pay part-time employees overtime rates for hours worked in addition to their contracted hours it would be unsustainable for the business, primarily because those costs could not be passed onto the consumer;¹¹⁶ and
 - (d) Ms Mason gave evidence that if BaptistCare was required to pay part-time employees overtime rates for hours worked in addition to their contracted hours it would have a “significant economic impact on the business”.¹¹⁷
6. The imposition of overtime rates to be payable where part-time employees work additional hours will also:
 - (a) operate as a deterrent to employers offering such additional hours;¹¹⁸ and
 - (b) likely act as a counter-measure against the desire of many employees to receive more hours of work;¹¹⁹ and
 - (c) likely result in employers employing fewer part-time employees (in favour of either full-time employees or casual employees).¹²⁰
7. There is limited evidence before the Commission relevant to the proposed introduction of overtime rates for work in excess of 8 hours (instead of the current 10-hour trigger).

¹¹³ Court Book at p.489

¹¹⁴ Shanahan Statement at [31]-[32]

¹¹⁵ Harvey Statement at [51]

¹¹⁶ Ryan Statement at [58]

¹¹⁷ Mason Statement at [54]

¹¹⁸ Wang Statement at [49]

¹¹⁹ Wang Statement at [49]; Mason Statement at [53]

¹²⁰ See Shanahan Statement at [32]; Harvey Statement at [51]; Wright Statement at [37]

8. There is limited evidence of employees in the SCHCDS industry working more than 8 hours per day.¹²¹
9. The totality of witness evidence relevant to the proposed introduction of overtime rates for work in excess of 8 hours appears to be:
 - (a) evidence from Mr Quinn about an example of working a 9.75 hour shift;¹²² and
 - (b) evidence from Mr Lobert to the effect that “It can be difficult working one on one with someone with a disability for 7 hours or more”.¹²³

Q.12: Question for all other parties: Are the findings proposed by ABI challenged (and if so, which findings are challenged and why)?

4.2.5 Ai Group response to HSU claim

[61] Ai Group oppose the HSU claims and propose the following findings:

1. Some employers are unable to guarantee additional hours of work to part-time employees due to the operation of the NDIS.¹²⁴
2. Some part-time employees want to work additional hours.¹²⁵
3. 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.¹²⁶

Q.13: Question for all other parties: Are the findings proposed by Ai Group challenged (and if so, which findings are challenged and why)?

5. HSU claim minimum engagement

5.1 Outline of HSU claim

[62] The HSU seeks to introduce uniform 3-hour minimum engagements for all classes of employee: full-time, part-time and casual.

¹²¹ There is very little evidence amongst the lay evidence of employee witnesses of instances where employees have worked in excess of 8 hours in a day.

¹²² Quinn Statement at [30] (Court Book p.3055)

¹²³ Lobert Statement at [21]

¹²⁴ Transcript of proceedings on 18 October 2019 at PN3589 and PN3604

¹²⁵ Page 2962 at paragraph 9 (Statement of T. Thames); Page 4603 at paragraph 11 (Statement of T. Stewart); Transcript of proceedings on 17 October 2019 at PN2659 and PN2663 – PN2664

¹²⁶ Transcript of proceedings on 17 October 2019 at PN2262 – PN2264

[63] The current minimum engagement for casuals is dependent upon the type of work performed, see clause 10.4(c) as follows:

(c) Casual employees will be paid the following minimum number of hours, at the appropriate rate, for each engagement:

(i) social and community services employees except when undertaking disability services work—3 hours;

(ii) home care employees—1 hour; or

(iii) all other employees—2 hours.

[64] The HSU seeks to delete clause 10.4(c) and insert a new clause 10.6 as follows:

‘The minimum engagement for employees under this award will be 3 hours.’

[65] The HSU seek the following findings in relation to their claim:

1. By defining “work” time as only the contact time between the worker and the client, minimum wage obligations are avoided.

Dr Macdonald described the phenomenon, which is common to both the United Kingdom and Australia thus:

“...work scheduling techniques that ‘drain waged-time from the working day’ and the devolution to workers of the risks of variable client demand result in fragmented, often varying and unpredictable work schedules: short periods of paid time (invariably face-to-face contact time with care recipients) are interspersed with other also fragmented, variable and unpredictable periods of unpaid ‘non-work’ time (McCann, 2016: 44–45; Rubery et al., 2015). So, workers have long work days for little recompense, contributing to low pay.”¹²⁷

Dr Macdonald also observed that:

“...workers are often expected to travel long distances from home for very short shifts and can have their work scheduled so that they experience long periods of ‘dead’ time between shifts.”¹²⁸

2. The absence of a minimum engagement period for part-time employees in disability or home care, combined with an unregulated capacity to work broken shifts (clause 25.6), creates a situation which is open to abuse. The Award imposes no limit on the number of breaks within a shift, does not regulate the length of the break, and does not regulate the duration of shifts that may be broken. Employers are free to schedule an unlimited number of engagements coinciding with the periods of face-to-face care for clients, and, by placing breaks between those engagements, eliminate from what is regarded as work

¹²⁷ Macdonald, CB 2912

¹²⁸ Macdonald, CB 2915

time, the time spent travelling to, from, and between clients, writing up notes on clients, or waiting on the next client.

3. As a consequence, the circumstances described in the *Casual and Part-Time Employment Case* as verging on exploitative¹²⁹, that is, shifts of such brevity that the income they generate barely compensates for the time and cost of attendance - can be replicated again and again; even during the course of the same day.

Mr Elrick, a Victorian organiser for the HSU, gave evidence of “shifts” as short as 15 minutes (although the worker was paid for 45 minutes in that instance)¹³⁰. Mr Eddington, a Tasmanian legal and industrial officer employed by the HSU, was aware of shift lengths of as little as 15 minutes, and a common practice of engaging workers for shifts of one hour (the current minimum for a casual employee).¹³¹

Ms Thames, a home care worker employed by Uniting, has worked shifts of half an hour in duration.¹³²

In his evidence to the *Casuals and Part-Time Case Full Bench*, Mr Quinn recounted performing shifts of as short as half an hour.¹³³

Deb Ryan, a witness called by ABI, gave evidence that *Community Care Options* rosters shift lengths as short as 15 minutes.¹³⁴

4. It is difficult to imagine new workers entering the industry (of which there are currently many, but of which many have few skills), being in a position to resist a requirement to perform such short shifts. Mr Lobert, a disability support worker, described generally working shorter shifts (of two hours and one hour) when he commenced working in the industry in 2012. One such two hour shift involved 45 minutes driving each way to perform¹³⁵.
5. Even where enterprise agreements establish minimum engagements, these may be broken into smaller parts¹³⁶, thereby significantly counteracting the benefit of the minimum engagement required. It is difficult to imagine that such an approach could have been envisaged when the Award was being made; the practice that appears to be observed departs radically from the common understanding of the operation of such shifts.¹³⁷

¹²⁹ (2017) 269 IR 125 at 306 [399] & 312 [406]

¹³⁰ Elrick [19], CB 2935

¹³¹ Eddington [22], CB 2973

¹³² Thames [12], CB 2963

¹³³ Thames [12], CB 2963

¹³⁴ Ryan [64], CB 198

¹³⁵ Lobert [12] – [13]; CB 2966

¹³⁶ Friend [46] – [47], CB 2949

¹³⁷ Four yearly review of Modern Awards – Aged Care Award, [2019] FWCFB 5078, [160]-[195]

6. The Commission would be satisfied on the evidence that the breaking of shifts is routine and widespread for homecare and disability workers.

Mr Steiner, an ASU member and disability support worker recounted:

“I am sometimes rostered to work a broken shift. If I work multiple shifts in one day it is most likely because I am working at multiple locations. My employer does not pay me for the time I spend travelling between work locations.”¹³⁸

Mr Steiner set out in detail in his statement how his shifts were frequently broken.¹³⁹ The inconsistency of those arrangements is striking.

Mr Sheehy, a HSU organiser responsible for workers in the aged care and disability sectors, observed:

“Broken shifts are a very common occurrence in the home care sector. It is very common to have at least one split to the shift during the course of the work day, but I know of instances where workers have had two splits to their shifts in a day. That is, the workers have had 3 separate periods of work during the course of the day, with breaks between each period. The periods of work often occur with the same client, with the member providing assistance at different times of the day. I am aware of one member who was rostered to work three separate periods of one or one and a half hours over the course of a day with the same client.”

7. A consequence of the capacity to break shifts at will (without any quid pro quo of a minimum period of work) is that a large part of the day may be taken up accumulating disproportionately few hours of paid work. Witness Mr Quinn described one of his working days:

‘...[o]n 17 July 2019, I worked from 8am-9am, 11am-12pm, 2pm to 5pm and 6:30pm to 7:30pm. So over an 11.5 hour day I worked 6 hours, with two breaks of two hours and one break of 1.5 hours.’¹⁴⁰

8. This approach of employers shifts the burden and risk of delay and downtime onto employees. In the case of Ms Thames’ employer, Uniting, which is covered by an enterprise agreement which provides for a “broken shift allowance” of \$10.74 per break, periods between clients of longer than 10 minutes, but shorter than an hour, are characterised as “gaps” (not “breaks”) and are unpaid.¹⁴¹ No challenge was made to that evidence.
9. A further consequence of the capacity to break shifts at will is that travel to and from client attendances can be transformed into the first and last trip, and thereby treated as unpaid and uncompensated by way of any allowance.

¹³⁸ Steiner [15], CB 1223

¹³⁹ Steiner [16], CB1223ff

¹⁴⁰ Quinn #2 [24], CB 3054

¹⁴¹ Thames [13], CB 2963

In Mr Quinn’s case, work allocation and payment arrangements left him either with periods of dead unpaid time waiting out “in the field” and/or driving back home for a short break, before heading back out again to his next appointment. His employer similarly only pays a split shift allowance for breaks longer than an hour, not including travel time. Breaks from anywhere between 5 minutes to an hour are unpaid.¹⁴² He described his working days as follows:

“At the end of my first appointment, I will then either drive back home for a short gap, or drive on to my next appointment;

Unless the time between the end of the appointment and the start of the next appointment coincides with the Google Maps estimate of time taken to travel between the two locations, my shift will break, and I will have unpaid time prior to the next appointment. That period can be between 5 minutes and 5 hours, but normally my breaks are not longer than 2 hours...;

I continue with that process each day until my final appointment;¹⁴³

...[the employer] pays for travel time and a travel allowance per kilometre. [The employer] calculates travel time using Google Maps. For example, in the second entry in my diary, dated 4 June 2019, I have a 15 minute gap between my first and second client, and my second and third client, and a 45 minute gap between my third and fourth client. I am not paid for all this time, only the time it takes to travel between clients according to Google Maps. So, if [the employer] have calculated on Google Maps that it only takes 10 minutes to travel between those clients, that extra 5 or 35 minutes is unpaid, it is dead time¹⁴⁴

If the break is one hour, but including travel time, then the split shift allowance is not paid. For example, my roster on 12 July 2019 has a one hour break between my first and second clients. I would be paid the time it takes to travel between these clients, according to Google Maps, and the kilometre allowance, but no split shift allowance for that day. In that case, my first two client appointments were each around 10 minutes drive from my home. In the hour gap between the first two appointments I travelled 10 minutes home, and had about 25 minutes at home, before having to leave to travel to the next client.¹⁴⁵

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.¹⁴⁶

10. Mr Quinn also gave evidence of seeing the same client more than once in a day, having the shift broken between such attendances, and not being paid for travel time during the “break” notwithstanding his inevitable return home. Mr Quinn described this situation as follows:

¹⁴² Quinn #2 [15], CB 3053

¹⁴³ Quinn #2 [10], CB 3052

¹⁴⁴ Quinn #2 [14] – [15], CB 3053

¹⁴⁵ Quinn #2 [20], CB 3054

¹⁴⁶ Quinn #2 [21], CB 3054

“If I have a split shift but am not required to travel, then I am not paid any travel time or kilometres for that client. For example, I have one client out in Berriedale whom I see for a 12pm-1pm lunch shift, and then a 3pm-5pm tea shift. 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.”

11. Thelma Thames, a home care worker employed in the Sydney metropolitan region, described waiting in her car during “breaks” in the shift.

“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. It’s been extremely hot in Sydney over summer, so sitting in your car can be very uncomfortable.”¹⁴⁷

12. Reports of similar practice were made to Mr Friend, a Bargaining Officer for the Health Services Union NSW Branch, who stated:

“Members commonly report having 1 or 2 hour breaks within broken shifts, which do not give them sufficient time to undertake other constructive activities in between periods of work, particularly when travel between clients is factored in. Members also regularly report having to wait in their car or a public space for their next period of work to commence.”¹⁴⁸

13. The vice of having the capacity to schedule “broken shifts”, with no limit on the length of the break, or the component parts of the shift, was illustrated in the evidence of Heather Waddell, who stated:

“I have been required to travel 50 kilometres to my first client, perhaps attend other clients in the area, then have a long break after having only performed a few hours of work, attend to other clients then travel 50km home. On days like that, I would have to weigh up whether I should wait for hours in my car to save money on travel, or drive home during my breaks. Even though going home involves a long drive it is often the case that there is very little else useful I can do with my time in the areas around client homes. Driving 50 kilometres back home and then back out for the next part of your shift doesn’t work out to be economical. But the other option is to be away from home for 13 hours for only 4 or 5 hours work which is emotionally uneconomical.”¹⁴⁹

14. The absence of any minimum engagement period for disability support workers and home care workers, or structured requirements for the breaking of shifts has enabled practices which are exploitative in the sense discussed by the Casuals and Part-Time Employment Full Bench. A fair and relevant minimum safety net would include a term establishing a minimum engagement, in which the wages

¹⁴⁷ Thames [15], CB 2963

¹⁴⁸ Friend [54] – [55], CB 2949

¹⁴⁹ Waddell [11] – [12], CB 2957

payable are sufficient to compensate employees for the cost of attending the shift. Given the evidence as to the distances regularly required to be travelled by disability support workers in order to perform any shift of work, it is appropriate to set that minimum at three hours, and for that minimum to apply to any engagement. That is, the minimum engagement is not itself breakable, and if a shift is to be broken, each part of the shift should be at least three hours. The evidence of the employers about the demand for disability services shows there are definite peaks of demand of about that length (if not more) at the start and finish of the day.¹⁵⁰

15. The establishment of such a minimum, and the elimination of the capacity to break such period is likely to promote the efficient and productive performance of work - it will create a clear and direct financial incentive¹⁵¹ for employers to manage work allocation in a way which will attract and retain appropriately skilled workers.
16. In addition to the evidence referred to above, the HSU also relies upon the evidence in respect of broken shifts which is referred to in the submission of the United Workers Union.

Q.14: Question for all other parties: Are the findings proposed by the HSU challenged (and if so, which findings are challenged and why)?

5.2 Responses to HSU claim – minimum engagement

5.2.1 NDS response to this claim

[66] NDS opposes the HSU’s minimum engagement claim and seek the following findings:

1. Employer witnesses provided evidence about the need for broken shift arrangements because the demand for certain services in the disability and home care sectors has peaks and troughs, especially around meal-times.¹⁵²
2. Jeffrey Wright and Wendy Mason also provided evidence 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.¹⁵³
3. Employer witnesses also indicated that they sought to avoid short engagements within a broken shift, and aimed to schedule consecutive appointments.¹⁵⁴
4. Although there was evidence of short engagements for employees as portions of a broken shift¹⁵⁵, caution needs to be exercised with the witness evidence as the term

¹⁵⁰ Miller [23], [26], CB 4410, 4411; Moody [53], [58], CB 4405, 4406

¹⁵¹ Stanford XX, 17.10.19, PN 2272 – PN 2277

¹⁵² Miller [40-50] and PN 2042-2056; Shanahan [33-40]; Harvey [53-60]; Wright [44-46]; Mason [66-72]

¹⁵³ Wright [44-46]; Mason [66-72] & PN 3314-3315

¹⁵⁴ Miller PN 2035-2039; Harvey [57-58]; Mason [60-61]

¹⁵⁵ For example, Fleming [19-21]; Stewart [12]; Waddell [21-25]

‘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.¹⁵⁶

5. The oral evidence of Rob Steiner¹⁵⁷ also 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.

Q.15: Question for all other parties: Are the findings proposed by NDS challenged (and if so, which findings are challenged and why)?

5.2.2 AFEI response to this claim:

[67] AFEI relies on its submissions of [23 July 2019](#) and seeks the following findings in support of their claim:

1. Employees covered by the Award provide services which are unique to this sector and dictated by client needs.
 - a. Supported by evidence of HSU of Ms Waddell that her work is rostered around specific times, namely breakfast, lunch and dinner and times specific to client’s need to take medication.¹⁵⁸
 - b. Supported by evidence of ASU of Mr Steiner. Mr Steiner’s shifts are dictated by client needs such as assisting the client with medication and dinner.¹⁵⁹
 - c. Supported by the evidence of Mr Wright who states “rostering takes place around the preferred times of clients as is required by Consumer Directed Care.”¹⁶⁰
 - d. Supported by the evidence of Ms Mason who state “broken shifts are applied based on the needs of our clients...potentially there could be three portions because we might go out in the morning, again at lunch and again in the evening”.¹⁶¹
2. Employees in this sector typically work with the same clients on an ongoing basis.
 - a. Supported by the evidence of Mr Steiner who gave evidence that it is important for him to be the consistent carer at different points in the day,¹⁶² that this level of

¹⁵⁶ See for example, Miller PN 2033-2039; PN 2049-2053

¹⁵⁷ Steiner PN 1552-1569

¹⁵⁸ PN1453-1455

¹⁵⁹ PN1566

¹⁶⁰ Wright Statement at [37]

¹⁶¹ PN3315

¹⁶² PN1568

consistency is important for clients with psychosocial disabilities¹⁶³, consistency is important for the clients routine.¹⁶⁴

b. Mr Steiner mostly work with the same clients both before and after the break in the shift with the effect that he would go to “one client, go to another and then come back in the afternoon”¹⁶⁵

c. Supported by the evidence of Ms Stewart.¹⁶⁶

d. Supported by evidence of Ms Fleming.¹⁶⁷

e. Supported by the evidence of Mr Shanahan who states “they always demand certain staff members at certain times...you ring client B and Client B says ‘No, because I just want Mary to come every week’....the client and the consumer is a centre focus and their choice is paramount now so there’s a more of an emphasis on that than ever before”.¹⁶⁸

3. Each portion of work in a broken shift is typically less than three hours in length.

a. Supported by evidence of Ms Sinclair.¹⁶⁹

b. Supported by evidence of Ms Waddell.¹⁷⁰

c. Supported by evidence of Mr Steve Miller.¹⁷¹

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 affecting service users

a. The evidence of Mr Wright states “if the Company was required to provide a three hour minimum shift to all employees this would remove a significant amount of flexibility and would result in an increase in makeup time where client preference change and cancellation of services occur”.¹⁷²

b. The evidence of Mr Wright states “if we were required to provide a minimum of three hour engagement it may also lead to clients not being able to access 30 minute visits”.¹⁷³

¹⁶³ PN1555

¹⁶⁴ PN1556

¹⁶⁵ PN1562

¹⁶⁶ PN469

¹⁶⁷ PN518

¹⁶⁸ PN2885

¹⁶⁹ PN739

¹⁷⁰ Waddell Statement (Exhibit HSU4) at [22]

¹⁷¹ PN2050

¹⁷² Wright Statement at [42]

¹⁷³ Wright Statement at [43]

c. The evidence of Mr Steiner clarifies that where there is no consistent carer for the client, the consequence would be that it would break up “the order of how things are done”¹⁷⁴ as consistent client means that the employee is able to develop an understanding of the client’s needs.¹⁷⁵

6. The variation could result in an employer being liable to pay an employee for hours during which no productive work is being performed.

a. Supported by evidence of Ms Stewart.¹⁷⁶

b. Supported by evidence of Ms Fleming.¹⁷⁷

Q.16: Question for all other parties: Are the findings proposed by the AFEI challenged (and if so, which findings are challenged and why)?

5.2.3 ABI response to this claim

[68] ABI opposes the HSU’s minimum engagement claim, and rely on their submission of [12 July 2019](#). They summarise their position as follows:

‘ABI oppose any change to the existing minimum engagements for casual employees;

ABI oppose the proposed introduction of any minimum engagement for full-time employees; and

ABI oppose the introduction of a uniform 3 hour minimum for all part-time employees.

However, ABI is not opposed to the introduction of minimum engagements for part-time employees, provided that:

- (a) they are consistent with the existing minimum engagement periods for casual employees; and
- (b) attendances for the purpose of staff meetings and training/professional development are subject to a minimum engagement of one hour.’

[69] ABI submits that the following findings should be made:

1. Short shifts are a very common feature of the SCHCDS industry. This is particularly so in the home care and disability services sectors.¹⁷⁸

¹⁷⁴ PN1558

¹⁷⁵ PN1559

¹⁷⁶ PN461; PN464; PN468

¹⁷⁷ PN525; PN527

¹⁷⁸ HSU submission of 15 February 2019 at [29]; Stanford Statement at [11]; Elrick Statement at [19]; Thames Statement at [12]; Shanahan Statement at [35]; Ryan Statement at [64]; Wang Statement at [56]; Wright Statement at [41]; Mason Statement at [63]

2. It is very common for consumers in the home care and disability services sectors to request services of a short duration. By way of example:
 - (a) Mr Shanahan, Mr Wright and Ms Mason gave evidence that services of less than one hour are common¹⁷⁹, with Mr Shanahan giving evidence that approximately 80% of all client visits are less than one hour;¹⁸⁰
 - (b) Mr Shanahan and Mr Wright both gave evidence that there is client demand for 30-minute services;¹⁸¹
 - (c) Ms Ryan gave evidence that some services are for 15 minutes duration.¹⁸²
3. The incidence of short shifts is reflective of the nature of the services provided in this industry, and the personal care services, domestic care services, and lifestyle services that are provided, which include but are not limited to:¹⁸³
 - (a) Medication prompting;
 - (b) Personal care services (assistance with showering and getting dressed);
 - (c) Meal preparation;
 - (d) Assistance improving skills (e.g. meal planning, teaching cooking skills, support in responsibility for personal hygiene);
 - (e) Domestic assistance (e.g. making beds, vacuuming and mopping floors, cleaning the toilet and bathroom, laundry, shopping for groceries);
 - (f) Transportation and assistance with mobility;
 - (g) Development of social skills and cognitive and emotional support;
 - (h) Community engagement; and
 - (i) Respite care.
4. Due to the high incidence of short duration client services, it is very common for employees to provide a series of short-duration services to different clients throughout a single shift.¹⁸⁴
5. Employers often bundle a series of short-duration client services together to create a shift for employees.¹⁸⁵ Employers also attempt to ‘build’ a shift for workers by

¹⁷⁹ Shanahan Statement at [34]-[35]; Wright Statement at [39]; Mason Statement at [63]

¹⁸⁰ Shanahan Statement at [35]

¹⁸¹ Shanahan Statement at [34], Wright Statement at 40

¹⁸² Ryan Statement at [61]

¹⁸³ See Encabo Statement at [13] and [15]; Thames Statement at [5]; Waddell Statement at [4]; Rathbone Statement at [10] and [12]; Wilcock Statement at [9]

¹⁸⁴ Shanahan Statement at [38]; Harvey Statement at [57]; Ryan Statement at [64]-[66]; Wright Statement at [41]; Mason Statement at [59]

¹⁸⁵ Shanahan Statement at [36]; Wright Statement at [41]; Mason Statement at [71]; Harvey Statement at [57]- [58]; Ryan Statement at [65]

combining numerous client services so that the shift is attractive to employees.¹⁸⁶ This rostering practice is easier in metropolitan areas where there is a high volume of customers located within close proximity to each other, however it can be challenging to ‘build’ a shift of work in regional and rural areas.¹⁸⁷

6. Client preferences and principles of continuity of care can also impact the shift lengths that are provided to employees.¹⁸⁸
7. Employers regularly engage employees to work shifts of a duration of less than three hours.¹⁸⁹ The evidence indicates that it can be difficult to provide employees with shifts longer than two hours¹⁹⁰, and employers may struggle to meet client demand over peak periods if required to provide shifts of three hours.¹⁹¹
8. The imposition of a three-hour minimum engagement for all categories of workers:
 - (a) will impose a significant financial strain of employers;¹⁹²
 - (b) may adversely affect customer service levels or prevent service providers from providing particular services;¹⁹³
 - (c) will significantly impact on staff rostering workloads and reduce flexibility.¹⁹⁴
9. The imposition of a three-hour minimum engagement for all categories of workers will also adversely impact consumers and adversely impact the ability of the various schemes to deliver on the principles of consumer-directed care.

Q.17: Question for all other parties: Are the findings proposed by ABI challenged (and if so, which findings are challenged and why)?

6. ASU Community language skills allowance claim

[70] On 2 September 2019, we issued a Decision¹⁹⁵ stating that we did not propose to determine the ASU’s claim at that time and that a Background Paper would be prepared summarising the submissions, evidence and other material before us. We also indicated we would issue a Statement setting out how we propose to finalise our consideration of this claim.

[71] A Statement¹⁹⁶ and [Background Paper](#) were published on 4 December 2019 (the 4 December 2019 Background Paper). The 4 December 2019 Background Paper sets out:

¹⁸⁶ Transcript at PN3050

¹⁸⁷ Mason Statement at [57]-[58]

¹⁸⁸ Wright Statement at [38]; Mason Statement at [55]

¹⁸⁹ Wang Statement at [56], Mason Statement at [61]

¹⁹⁰ Shanahan Statement at [39]; Wright Statement at [41]; Mason Statement at [61]

¹⁹¹ Shanahan Statement at [38]

¹⁹² Shanahan Statement at [40]; Ryan Statement at [71]; Wang Statement at [63]; Mason Statement at [65]

¹⁹³ Harvey Statement at [60]

¹⁹⁴ Ryan Statement at [72]; Wright Statement at [42]

¹⁹⁵ [2019] FWCFB 6067

¹⁹⁶ [2010] FWC 8251

- A summary of the ASU’s submissions in support of the claim (at [5] – [10]);
- A summary of the evidence:
 - Dr Ruchita (at [11] – [17]);
 - Ms Nadia Saleh (at [18] – [25]);
 - Mr Lou Bacchiella (at [26] – [32]); and
 - Ms Natalie Lang (at [33] – [26]).
- A summary of the employer submissions:
 - ABI (at [37] – [50]);
 - Ai Group (at [51] – [70]);
 - AFEI (at [71]); and
 - NDS (at [72] – [75]).

[72] On 26 April 2019, the Commission issued a Background Document setting out the provisions from Modern Awards and Modern Enterprise Awards which contained references to translators and interpreters or contained some form of language allowances.

[73] Below is a list of the modern awards and modern enterprise awards referred to in the Background Document:

1. Aboriginal Community Controlled Health Services Award 2010;
2. Aged Care Award 2010;
3. Airline Operations—Ground Staff Award 2010;
4. Amusement, Events and Recreation Award 2010;
5. Australian Bureau of Statistics (Interviews) Enterprise Award 2016;
6. Australian Capital Territory Public Sector Enterprise Award 2016;
7. Australian Government Industry Award 2016;
8. Australian Public Service Enterprise Award 2015;
9. Broadcasting, Recorded Entertainment and Cinemas Award 2010;
10. Christmas Island Administration Enterprise Award 2016;
11. Health Professionals and Support Services Award 2010;
12. Nurses and Midwives (Victoria) State Reference Public Sector Award 2015; and
13. Parliamentary Departments Staff Enterprise Award 2016.

[74] Parties were directed to file any submission in relation to the Background Document and in particular, whether the information was correct and the relevance of the information to this matter by 17 May 2019. Any interested party wishing to file a submission in reply was directed to do so by 31 May 2019.

[75] The submissions filed in response to those directions are summarised in the 4 December 2019 Background paper, as follows:

- ASU (at [79] – [81]; in reply at [107] – [113]);
- NDS (at [82] – [83]);
- ABI (at [84] – [89] and [102] – [106]); and
- AFEI (at [90] – [101]).

[76] During the course of proceedings on 16 April 2019, this Full Bench requested information regarding other industrial instruments that contain community language allowances. Directions issued on 1 May 2019 directed the ASU and Ai Group to file in the

Commission any agreed material they considered relevant by 17 May 2019. Interested parties who wished to respond to the joint material filed by the ASU and Ai Group were directed to file by 31 May 2019, and any remaining submissions in reply were directed to be filed by 7 June 2019.

[77] The joint submissions of the ASU and Ai Group identified a list of 39 awards and agreements that contained language allowance provisions:

1. Clause 15 of the North Australian Aboriginal Justice Agency Enterprise Agreement 2015-2019;
2. Clause 48 and Schedule H of the Australian Fisheries Management Authority Enterprise Agreement 2016;
3. Clause 15 of the Northern Territory Council of Social Service Inc. (NTCOSS) Enterprise Agreement 2017;
4. Clause 20 of the Central Australian Aboriginal Family Legal Unit Aboriginal Employee Collective Agreement 2013-2017;
5. Clause 5.09 of the Indian Ocean Territories (Administration) Enterprise Agreement 2018;
6. Clause 20 of the Central Land Council Enterprise Agreement 2017-2020;
7. Clause 63 of the Fair Work Ombudsman Enterprise Agreement 2017-2020;
8. Clause 29.8 of the Department of Agriculture and Water Resources Enterprise Agreement 2017-20;
9. Clause 5.17 of the Department of the Environment and Energy Enterprise Agreement 2016-2019; 10. Clause 4.11 of the Aboriginal Hostels Limited Enterprise Agreement 2017;
11. Clause 18 and Table 2 of the Lake Macquarie City Council Enterprise Agreement 2018;
12. Clause 6.3 of the National Disability Insurance Agency Enterprise Agreement 2016-2019;
13. Clause 25 and Attachment A of Schedule 4 of the Australian Taxation Office (ATO) Enterprise Agreement 2017;
14. Clause 61 of the Department of Health Enterprise Agreement 2019-2022;
15. Clause 4.4 of the Department of Social Services Enterprise Agreement 2018 to 2021
16. Clause 50 of the Office of the Commonwealth Ombudsman Enterprise Agreement 2017-2020;
17. Clause 6.11 and Item 1 of Schedule 3 of the WaterNSW Enterprise Agreement 2018;
18. Clause 143 of the Fair Work Commission Enterprise Agreement 2017-2020;
19. Clause 132 and Part J of the Australian War Memorial Teamwork Agreement 2017-2020;
20. Clause 54 of the Northern Land Council Enterprise Agreement 2018;

21. Clause 31 and Attachment C of the Federal Court of Australia Enterprise Agreement 2018-2021; 22. Clause D7 and Part D of the Department of Human Services Agreement 2017- 2020;
23. Clause 54 of the Darebin City Council Enterprise Agreement 2018 - 2022;
24. Clause 21.3 and Schedule 2 of the Broken Hill City Council Consent Award 2015;
25. Clause 18.4 of The City of Sydney Wages/Salary Award 2014;
26. Clause 15(xii) and Table 2 of the Local Government (State) Award 2017 [NSW];
27. Crown Employees (Public Sector – Salaries 2018) Award [NSW];
28. Clause 20 and Schedule B of the Service NSW (Salaries and Conditions) Employees Award 2016; 22
29. Clause 12.18 of the Australian Capital Territory Public Sector Enterprise Award 2016 [ACT];
30. Clause 11.15 o the Australian Public Service Enterprise Award 2015;
31. Clause 11.10 of the Christmas Island Administration Enterprise Award 2016;
32. Clause 11.15 of the Parliamentary Departments Staff Enterprise Award 2016;
33. Clause 31.4 of the Victorian Public Service Enterprise Agreement 2016;
34. Clause 50 and Table 1 of the Crown Employees (Administrative and Clerical Officers – Salaries) Award 2007;
35. Clause 50 and Table 1 of the Crown Employees (Public Service Conditions of Employment) Reviewed Award 2009;
36. Clause 3.8 of the State Government Entities Certified Agreement 2015 (QLD);
37. Clause 12.7 of the Department of Education and Training Teacher Aides’ Certified Agreement 2015 (QLD);
38. Clause 2.1 of the Part-Time Interpreters or Translators (Public Service) (SA) Award; and
39. Clause 9.8 of the Australian Bureau of Statistics (Interviewers) Enterprise Award 2016.

[78] Of this agreed list, 26 appear to be enterprise collective agreements, eight appear to be modern enterprise awards and five appear to be state reference public sector awards.

[79] Also during the proceedings on 16 April 2019, Ai Group tendered the CLAS Handbook 2018: a six-page document issued by Multicultural NSW of the NSW Government. This document outlines that NSW Government agencies must provide language assistance programs for people who do not speak English well, or at all, to access government services. The Handbook suggests that the CLAS assists agencies to provide those language services by remunerating employees who are selected for CLAS and use community language skills as part of or in addition to their normal duties.

[80] A description of the Handbook is set out at [115] to [121] of the 4 December 2019 Background Paper.

[81] In relation to the CLAS, we sought further information regarding the scheme including:

- How does the scheme operate?
- How does the scheme intersect with employers who operate under this award?
- Are there similar schemes operating in other states?
- If so, what are the relevant funding arrangements?
- Further information regarding the accreditation process and arrangements for community language skills

[82] Directions issued on 1 May 2019 directed the ASU to file any information they considered relevant to this request by 17 May 2019. Interested parties who wished to respond to the material filed by the ASU were directed to file submissions by 31 May 2019, and any submissions in reply were directed to be filed by 7 June 2019.

[83] The ASU's reply and ABI's response to those directions are set out at [122] to [129] of the 4 December 2019 Background Paper.

[84] In a further request made during the course of proceedings on 16 April 2019, we asked parties to consider whether community language skills are contemplated within the existing classification structure. Interested parties were directed on 1 May 2019 to make submissions relating to whether community language skills are contemplated within the existing classification structure by 17 May 2019. Any interested parties who wished to respond were directed to file submissions by 31 May 2019, and any submissions in reply were directed to be filed by 7 June 2019.

[85] The submissions in response to those directions are summarised in the 4 December 2019 Background Paper, as follows:

- ASU (at [131] – [133] and reply at [143]);
- NDS (at [134] – [138]);
- ABI (at [139] – [140]); and
- AFEI (at [141] – [142]).

[86] A conference of interested parties was held on 18 December 2019 to discuss the ASU's claim. Further to that conference the following additional directions were made:

- a) The ASU was to file an updated version of the new clause 20.10 it seeks to have inserted into the Social, Community, Home Care and Disability Services Industry Award 2010 to provide for a community language skills allowance and written submissions in support by 4:00 pm on Friday 7 February 2020.
- b) Interested parties were to file any submissions in reply by 4:00 pm on Monday 24 February 2020.
- c) Submissions were to be filed in Word format via email to amod@fwc.gov.au
- d) Interested parties are required to address the proposed new clause 20.10 at the hearing of this matter that is listed to take place on Wednesday 11 March 2020 at 9:30 am.

[87] The ASU filed a [submission](#) dated 7 February 2020. In its submission the ASU confirms that its amended claim is as follows:

20.10 Community Language and Signing Work

(a) An employee who, in the course of their normal duties, uses a language other than English to provide services to speakers of a language other than English, or use sign language to provide services to those with hearing difficulties, shall be paid an allowance of 4.90% of the standard rate per week.

(b) The allowance in 20.10(a) will apply to eligible part time and casual employees on a pro rata basis on the basis that the ordinary weekly hours of work for full-time employees are 38.

[88] The amended claim seeks to address issues raised by the various employer organisations and narrow the scope of the issues between the parties. Specifically:

- (a) The amended variation clarifies to whom the allowance would apply. The allowance would apply to an employee ‘who, in the course of their normal duties, uses a language other than English to provide services to speakers of a language other than English’ or provide services in sign language to those with hearing difficulties.
- (b) The amended variation eliminates the distinction between occasional and regular use of community language skills.
- (c) The allowance is set at 4.90 per cent of the standard rate, equivalent to the allowance for occasional use in the original draft determination.
- (d) The allowance applies pro-rata to part-time and casual employees on the basis that ordinary weekly hours of a full-time employee are 38.
- (e) The obligation in the original draft determination for an employer to provide accreditation has been deleted.

[89] The ASU notes the submissions of various employer parties that only accredited interpreters should be entitled to the payment of this allowance. The ASU rejects that submission. In its Reply Submission of 4 June 2019 and oral submissions of 16 April 2019, the ASU notes that many skilled and experienced employees in the SACS sector lack formal qualifications because many people find work in the sector *after* having been client or a beneficiary of an organization. This is said to be reflected in the classification structure for SACS employees; even at the highest classifications levels (Levels 7 and 8) there is no requirement for employees to hold any formal qualifications. The ASU submits that the Commission should find that employers require the use of community language skills and that most employees who use those skills do not have accreditation. If formal accreditation was made a prerequisite for being paid the allowance, employers would simply continue using the community language skills of their unaccredited employees without being required to pay the allowance, accordingly it would be unfair to impose such a requirement.

[90] Reply submissions were filed by:

- [NDS](#)
- [Ai Group](#)
- [ABI](#)
- [AFEI](#)

NDS Reply Submission dated 27 February 2020

[91] The NDS primarily relies on its previous submissions opposing this claim¹⁹⁷ and submits that the revised claim partially addresses some of the drafting concerns raised by various parties.

[92] Specifically, the amendment to apply the allowance on a pro rata basis to part-time and casual employees is appropriate.

[93] Further, the removal of the distinction between “*regular*” and “*occasional use*” helps to reduce the likelihood of dispute over ill-defined terms. However, NDS submits that the concept of using language skills “*in the course of their normal duties*” still suffers from a lack of precision regarding what extent of use counts as part of normal duties. The deletion of the requirement around accreditation removes an unclear administrative burden but does not resolve the question of how to determine whether an employee has language skills that they are required to use that would justify the imposition of an allowance.

[94] Further, the NDS submits that the quantum of the allowance remains too high. NDS’ earlier submission compared rates of pay for interpreters set by other modern awards and demonstrated that the SCHADS award already pay rates that are approximately equivalent¹⁹⁸, and went on to analyse how the existing classification structure already comprehends this level of skill and responsibility.¹⁹⁹ NDS contends that in the disability sector there is the added difficulty of how to charge clients for this allowance when the language skills may only be required for a minority of clients who are supported by the worker.

Ai Group Reply Submission dated 27 February 2020

[95] Ai Group filed submissions in opposition to the ASU’s previous community languages claim.²⁰⁰ It makes further submissions in opposition to the ASU’s amended claim and submissions.

[96] Ai Group advance five points in response to the amended claim:

1. A strikingly unfair aspect of the proposed new clause is that its application is not limited to circumstances where an employee uses their secondary language skills *at the direction of their employer*. Given the multicultural nature of Australian society, many employers now engage employees who happen to possess secondary language skills. It is likely the case that in some instances such employees may, by virtue of coincidence rather than design or intent, be required to work with clients who speak the same other language.
2. The claim does not limit the application of the clause to circumstances where the use of the secondary language adds value to the work of the employee. Without in any

¹⁹⁷ NDS Submission in Reply 5 April 2019 at [8]-[17]; and NDS Submission 17 May 2019 at [2]-[8] responding to a Background Document from FWC, and at [19]-[31]

¹⁹⁸ NDS Submission 17 May 2019 at [3]-[7]

¹⁹⁹ *Ibid* at [19]-[31]

²⁰⁰ Ai Group submission dated 8 April 2019 at pages 104 – 125

way calling for the introduction of a new allowance of the nature proposed, Ai Group submits that, if a claim for a new allowance were to be entertained, any resulting clause should be limited in its application to circumstances where an employer has expressly requested or required an employee to use the relevant skills. This will mitigate the adverse effect on some employers by enabling them to manage or control their exposure to such a claim. It will also reduce the prospect of the employee receiving an additional payment under the safety net in circumstances where there is no real increase in the value of their work flowing from their exercise of relevant language skills.

3. There is no requirement that employees possess any particular level of competence in their use of the secondary language. The Award should not require payment simply because an employee exercises some rudimentary skills in a particular language other than English. This would be unfair to their employer. Any provision of the nature proposed by the ASU should stipulate an objective measure of proficiency which must be passed in order for the allowance to be payable.
4. It is unclear what justification there is for the particular quantum of allowance proposed. This is entirely unsatisfactory given that the ASU has proposed a not insubstantial quantum.
5. It is unclear whether an employee is only to receive the allowance in the week that they use the skill or whether it is payable on a regular or ongoing basis. It would be obviously unfair for an employer to be required to pay an allowance on an ongoing basis for only occasional use.

ABI Reply Submission dated 27 February 2020

[97] ABI submits that the ASU's proposed new clause is materially different to that which they have pursued since November 2018 and that the ASU's assessment of the differences between the two proposals is also incomplete.

[98] ABI contends that the ASU submission fails to articulate any reason for most of the changes and that the ASU's approach effectively requires employer parties to 'guess' the intention or rationale for certain changes in the ASU's position without the benefit of any written submissions addressing their new proposal.

[99] ABI submits that the new ASU proposal differs from the original proposal in a number of significant respects:

1. The allowance is proposed to apply to a different category of employees. The original proposal was expressed to apply to 'employees using a community language skill as an adjunct to their normal duties'.²⁰¹ However, the new proposal is expressed to apply to an employee who, 'in the course of their normal duties', uses a language other than English or provides services in sign language.

²⁰¹ See clause 20.10.1 of the Amended Draft Determination filed 15 April 2019

No explanation is provided by the ASU for this change, other than a general comment that the purpose of the claimed allowance is to provide additional remuneration to employees who use languages other than English (including sign language).²⁰²

2. The proposal removes the two classes of allowance (for ‘occasional’ and ‘regular’ use of the skill) and replaces those with a single allowance payable where an employee uses a language other than English or sign language ‘in the course of their duties’. Again, no explanation is offered by the ASU for this change.
3. The proposal removes the limitation on the work anticipated to be performed by employees as initially contained in clause 20.10.5 of the ASU’s original proposal, which stated that the relevant employees ‘convey straightforward information relating to services provided by the employer, to the best of their ability’. Again, no explanation is offered by the ASU for this change. For example, it is not clear whether the clause is now intended to capture a broader class of employees (such as qualified interpreters and translators). In any event, that appears to be the effect.
4. The proposal removes the words initially contained in clause 20.10.5 of the ASU’s original proposal, which stated that the relevant employees ‘do not replace or substitute for the role of a professional interpreter or translator’. Yet again, no explanation at all is offered by the ASU for this change. Put simply, it is unclear why this wording has been removed?
5. The ASU’s new proposal removes the words contained in clause 20.10.6 of the ASU’s original proposal, which stated that ‘Such employees shall record their use of community language skills’. Yet again, no explanation at all is offered by the ASU for this change. This is an unexplained and material departure from the ASU’s original proposed clause.
6. The ASU’s new proposal removes the proposed clause 20.10.7 in its entirety. That clause dealt, at least in part, with the issue of accreditation (which is addressed at paragraph **Error! Reference source not found.** below). However, it also dealt with additional issues which have been stripped out of the ASU’s new proposal. These items are:
 - (a) a requirement that relevant employees ‘be prepared to be identified as possessing the additional skill(s)’; and
 - (b) a requirement that the employees make themselves ‘available to use the additional skill(s) as required by the employer’.Yet again, no explanation at all is offered by the ASU for this change. This is an unexplained and material departure from the ASU’s original proposed clause. The ASU have failed to advance any submission at all in support of this change.
7. The ASU’s new proposal removes the accreditation process in the sense that there is no longer any process under the proposed clause for an employee to satisfy the

²⁰² See ASU submission of 7 February 2020 at [5]

employer that they have the skill for which the allowance would be payable. Again, this is a material departure from the ASU's original proposal.

8. The proposal introduces pro-rating of the entitlement in respect of part-time and casual employees.

[100] ABI accepts that the new ASU proposal does 'narrow the scope' of *some* issues in dispute between the parties', but submits that it is also evident that the new ASU proposal has the opposite effect in some respects, and actually expands the issues in dispute (and creates new issues in dispute) as compared to their original proposal.

[101] The areas in which the ASU's new proposal are said to expand the issues in dispute are as follows:

- (a) First, it has the effect of capturing a greater number of employees by reason of the removal of the notion of the skill being used as an 'adjunct' to the employee's duties;
- (b) Second, the removal of the notion of employees conveying 'straightforward information' further extends the scope of the proposed clause;
- (c) Third, the removal of the notion that the employees did not 'replace or substitute' professional interpreter or translators appears to again extend the scope of the proposed clause;
- (d) Fourth, the removal of the record keeping obligation creates a new issue in dispute between the parties; and
- (e) Fifth, the removal of any process of accreditation creates a further issue in dispute between the parties.

[102] ABI submits that, in the interests of fairness, the ASU should not be permitted to pursue a new proposal that materially departs from their original proposal and which expands upon the issues in dispute between the parties.

[103] ABI also notes that the evidence relied upon in support of the ASU's new claim is the evidence of witnesses heard during the tranche one hearing in April 2019.

[104] ABI submits that given the material departure by the ASU of the variation sought:

'it is questionable whether that evidence can still be relied upon in support of the new variation, or whether the Commission may need to consider recalling the witnesses. This provides another reason why the Commission should not permit the ASU to pursue its new proposal'.

[105] ABI opposes the new ASU proposal and continues to rely on its reply submissions of 5 April 2019 in respect of the claimed introduction of a community language allowance,²⁰³ the oral submissions made during the Tranche 1 hearing, their further submission of 19 May 2019, and further reply submission of 3 June 2019.

²⁰³ See Part 8 of that reply submission, noting that certain aspects of that submission are no longer applicable to the new ASU claim

[106] ABI submits that, as was the case with their original proposal, the ASU have failed to demonstrate that the ability to communicate in more than one language is a ‘highly sought skill’ in the social and community sector. They have also failed to demonstrate that it is ‘very common for organisations to seek employees who are multilingual.’

[107] The evidence before the Commission on these topics was limited to:

- (a) two employees²⁰⁴ who work in very specific multicultural-focussed businesses; and
- (b) an employer²⁰⁵ from a similar organisation (Metro Assist, formerly known as Metro Migrant Resource Centre).

[108] ABI submits that such evidence does not accurately represent the industry. Nor does it provide a sufficient basis to make good the submissions advanced by the ASU in support of the claim. While certain employers may value the ability of an employee or prospective employee to speak a community language other than English, the reality is that employers in the SCHADS industry value a whole range of different life skills, experiences and attributes. Further, use of a community language is not an issue that arises across the industry or even in a large part of the industry, and so a community language allowance is appropriately dealt with at the enterprise level through bargaining.

[109] Allowances payable to employees who are required in the course of their work to speak a language other than English are by no means a common feature of the modern awards system. Indeed, only 6 modern awards out of approximately 122 contain a language allowance. On that basis, there should be some compelling industry-specific basis for including such a term in a modern award.

[110] Turning to the specific terms of the new ASU proposal, ABI contends that the proposed clause is deficient in the following respects:

- (a) Firstly, under the proposed clause, the entitlement to an allowance is triggered where an employee ‘uses’ a second language or sign language to provide services to particular individuals. ABI submits the trigger for an allowance of this type should be the employer ‘requiring’ or ‘directing’ an employee to use their second language, rather than the employee simply deciding to use it.
- (b) Secondly, the proposed variation does not include any requirement for employees to have their community language skill accredited by an appropriate body as a precondition of receiving the allowance. The removal of any requirement for accreditation has the consequence of there being no objective basis for an employee to be assessed as having the skill, and no capacity or process for the employer to determine whether the employee has the skill.
- (c) Thirdly, the accreditation issue gains even more importance under the ASU’s new proposal given that the wording about the employees not ‘replac[ing] or substitut[ing] for the role of a professional interpreter or translator’ has been

²⁰⁴ Ruchita and Nadia Saleh

²⁰⁵ Lou Bacchiola

removed. It now appears that the ASU intends for these employees to effectively replace professional translation services²⁰⁶ but without any accreditation requirement.

- (d) Lastly, ABI submits there is no explanation as to how the ASU arrived at the quantum of the allowance sought, nor sufficient evidence that would allow the Commission to make a proper assessment as to the value of the skill. It says the ASU has failed to articulate the rationale for the quantum of the allowance claimed and no submission has been made in respect of why the amount sought is an appropriate amount.

AFEI Reply Submission dated 27 February 2020

[111] AFEI oppose the amended claim and continue to rely on its written submissions filed on 8 April 2019 and 22 May 2019.

[112] In response to the amended claim, AFEI advance the following seven points:

1. Many of the concerns identified in its submissions²⁰⁷ in respect of the original claim continue to apply in respect of the amended claim, including:
 - The effect of the clause would mean that the payment of the allowance would apply irrespective of whether the employer has requested or required the employee to use a language other than English and or use sign language, and in circumstances where the employer has no verification of the employee's actual skill level;
 - the limited evidence relied upon by the ASU in support of this claim;
 - eligibility for the allowance would apply without the requirement for the employee to have a qualification and or proof of proficiency; and
 - the allowance claimed is significantly higher than, and disproportionate to the majority of interpreter/language/translator allowances in other Modern Awards/Modern Enterprise Awards;
2. There are issues with proportionality in regard to the quantum that is being sought. For example, a social and community services employee level 2 who uses a language other than English in the course of their normal duties (persons at this level can hold a diploma) would be earning more than a social and community services employee level 3 (persons at this level include graduates with a three or four year degree).
3. In respect of the lack of proof of formal qualifications/accreditation required from the employee's prior to the applicability of the proposed allowance, the ASU submit that such an imposition would be unfair.²⁰⁸ However, verification of the utility of the skill is an important factor in establishing the value of the skill. Similar to the first aid allowance, at clause 20.4 of the award, the employee must hold a certificate

²⁰⁶ See for example the Ruchita statement at [18]-[22]; Saleh statement at [33]-[37]; Bacchiola statement at [18]-[22]

²⁰⁷ AFEI submissions dated 8 April 2019 at [31], [32], and [33]. AFEI submissions dated 22 May 2019 at [13] – [15], [18] – [19]

²⁰⁸ ASU submissions dated 7 February 2020 at [7]

as one of the prerequisites prior to the first aid allowance becoming applicable. A similar imposition should apply to proposed clause 20.10 prior to the allowance being applicable.

4. The amended claim could have far-reaching consequences and include an employee who speaks a language other than English only once or twice or a person who can recite a single phrase in a language other than English (for example “what is your name?”), in the course of the employee’s normal duties, and would be entitled to the allowance on a weekly basis. Such a consequence would be inconsistent with section 134(f) of the Fair Work Act 2009 (Cth).
5. There are issues with how usage of the language would be monitored given that a significant number of employees under the award in the social and community and home care stream work one-to-one with clients.
6. This claim adds to the complexity of an already very complex award (for example, the resulting effect of this claim could be employers issuing directions to employees (who can speak a language other than English) to not speak in the other language in order to ensure that the allowance is only payable in circumstances where the second language is actually required by the employer). In addition, the extra formalities, obligations and administrative burden on employers are inconsistent with section 134(g) of the Fair Work Act in regard to the need to ensure a simple, easy to understand, stable and sustainable modern award system.
7. The evidence does not establish that the proposed clause 20.10 is necessary to achieve the modern awards objective.

7. 24 hour care clause matter

[113] The Uwu and the HSU seek to delete clause 25.8 which provides as follows:

25.8 24 hour care

This clause only applies to home care employees.

- (a) A 24 hour care shift requires an employee to be available for duty in a client’s home for a 24 hour period. During this period, the employee is required to provide the client with the services specified in the care plan. The employee is required to provide a total of no more than eight hours of care during this period.
- (b) The employee will normally have the opportunity to sleep during a 24 hour care shift and, where appropriate, a bed in a private room will be provided for the employee.
- (c) The employee engaged will be paid eight hours work at 155% of their appropriate rate for each 24 hour period.

[114] The Unions also seek a consequential amendment to clause 25.7(a) as follows:

25.7 Sleepovers

(a) A sleepover means when an employer requires an employee to sleep overnight at premises where the client for whom the employee is responsible is located (including respite care) ~~and is not a 24 hour care shift pursuant to clause 25.8 or an excursion pursuant to clause 25.9.8.~~

[115] In summary, the submissions advanced in support of the deletion of clause 25.8 are as follows:

- the clause is unclear, in that it provides no certainty regarding the hours of work of an employee or the sleeping arrangements to be applied;
- the clause is rarely used;
- the entire engagement is ‘work’ and should be remunerated as such;
- the clause does not adequately compensate employees, or provides for remuneration at a “discounted rate”, for the time they are required to be available for work;
- the clause may breach s.323 of the Act because it permits an employer to require an employee to work for a 24 hour period but does not require the employer to pay the employee in full for that work;
- the clause creates situations where an employee is effectively liable to work in excess of the notional hours attributed to the engagement, and the hours that such engagements will ‘require’ the employee to work are not foreseeable; and
- leaving employees for lengthy periods on duty dealing with complex interpersonal matters is problematic.

[116] ABI, NDS and AFEI oppose the claims to delete clause 25.8 and the consequential amendment to clause 25.7.

[117] In the course of its submissions, ABI observed that there may be a lack of clarity in respect of some aspects of the operation of the current clause: the clause is silent as to what happens when an employee is required to work more than 8 hours of work; the lack of certainty about the hours of work of an employee; and that the clause is unclear regarding aspects relating to sleeping.²⁰⁹ In particular, ABI acknowledges that the clause does not specify what happens where an employee is required to perform more than 8 hours’ work during a 24 hour care shift and notes that there is a degree of tension in the provision in that an employee is required to be available for duty for a 24 hour period and yet an employee is required to provide a total of no more than eight hours of care during the period. ABI submits that although an employee is not required to perform any more than 8 hours’ work there may be occasions where additional work (if an employee agrees to perform it) is required which would be regulated by the overtime provisions.

[118] During the course of oral argument Mr Scott, on behalf of ABI, indicated that his clients would not oppose the following amendments to the 24 hour care clause:

- the language in clause 25.7(c) being inserted into the 24 hour care clause;
- to the extent that an employee is required to perform more than 8 hours work then that work being treated as overtime and is paid in accordance with clause 28; and

²⁰⁹ Ibid at 6.22 – 6.30

- with an amendment to the effect that a broken shift can only be worked by agreement with the employee.²¹⁰

[119] In the September 2019 Decision the Full Bench expressed a *provisional* view and set out a process for addressing the issues raised:

[101] We reject the HSU’s contention that the 24 hour care clause is ‘rarely used’. As mentioned earlier, the Survey Results show that around one in ten enterprises (11.2 percent) that responded to the Survey used 24 hour shifts between 1 March 2018 and 1 March 2019 and that of those providers that use the 24 hour care clause, on average, rostered a home care employee to work a 24 hour shift 304 times per year. We find that 24 hour care shifts are used in the industry and, further, while only a minority of employers used the 24 hour care clause, those who do utilise the clause do so regularly.

[102] Given the history and the current utilisation of the 24 hour care clause, we think it is appropriate to adopt a cautious approach to the claim that the clause should be deleted.

[103] We acknowledge there are deficiencies in the 24 hour care clause. As submitted by the HSU (and effectively conceded by ABI and the NDS) the clause lacks clarity and fails to address some important matters regarding the practical operation of the clause. In addition to the matters mentioned at [97] to [99] above we would add that the mechanism whereby an employee may refuse to work more than 8 hours when on a 24 hour care shift is unclear.²¹¹

[120] Despite these deficiencies the Full Bench expressed the *provisional* view that the clause be retained noting that the existing clause does not provide a fair and relevant minimum safety net and that it requires amendment.

[121] The following process to address the issues raised was proposed:

1. The interested parties are to confer with respect to the amendments to be made to the clause to ensure that it achieves the modern awards objectives.
2. The discussions between the parties will be facilitated by Commissioner Lee and a conference will be convened shortly for that purpose.
3. Arising out of the discussions and conferences a Joint Report will be prepared setting out the extent of agreement and any remaining matters in dispute (Note: in the event that the parties are unable to reach a substantial measure of agreement we will revisit our provisional view regarding the proposed deletion of the term).
4. Interested parties will be given an opportunity to make submissions in relation to the Joint Report and in support of their preferred position.
5. We will list the matter for further oral hearing, if we decide that is the appropriate course.

[122] A [Report](#) was published by Commissioner Lee on 14 November 2019 and this claim will be the subject of submissions in the Tranche 2 proceedings.

²¹⁰ Transcript at [1997] – [2000]

²¹¹ [\[2019\] FWCFB 6067](#) at [101] - [105]

[123] Annexure A to the Report sets out ABI's preferred draft, as follows:

25.8 24 hour care

This clause only applies to home care employees.

- (a) A 24 hour care shift requires an employee to be available for duty in a client's home for a 24 hour period. During this period, the employee is required to provide the client with the services specified in the care plan. The employee is required to provide a total of no more than eight hours of care during this period.
- (b) An employer may only require an employee to work a 24 hour care shift by agreement.
- (c) The employee will normally have the opportunity to sleep during a 24 hour care shift and, 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.
- (d) The employee engaged will be paid eight hours work at 155% of their appropriate rate for each 24 hour period.
- (e) If the employee is required to perform more than eight hours' work during a 24 hour care shift, that work shall be treated as overtime and paid in accordance with the overtime provisions at clause 28.1. An employer and employee may utilise the TOIL arrangement in accordance with clause 28.2.
- (f) An employee may refuse to work more than 8 hours' work during a 24 hour care shift in circumstances where the requirement to work those additional hours is unreasonable.

[124] Annexure B to the Report sets out the Union's proposed draft, as follows:

This clause only applies to home care employees

- (a) A **24 hour care** shift requires an employee to be available for duty in a client's home for a 24 hour period. During this period, the employee is required to provide the client with the services specified in the care plan. The employee is required to provide a total of no more than eight hours of care during this period.
- (b) For the purposes of this clause, "care" shall mean the performance of any task that assists a client with daily living.
- (c) An employer may only require an employee to work a 24 hour care shift by agreement.
- (d) During a 24 hour care shift, the employee will be afforded the opportunity to sleep for a continuous period of eight hours (the "sleep break") during a 24 hour care shift and will be provided with:
 - (i) a separate and securely lockable room with a peephole or similar in the door, a bed and a telephone and internet connection in the room; and
 - (ii) a bed, bedside lamp and clean linen;
 - (iii) access to food preparation facilities;
 - (iv) access to appropriate temperature control; and
 - (v) free board and lodging.
- (e) The sleep break shall not commence earlier than 10pm and shall not finish later than 7am.
- (f) An employee required to work a 24 hour care shift will be paid the sleepover allowance prescribed by clause 25.7.

(g) In the event that:

- (i) the sleep break is interrupted by the client for any reason, whether to deliver services specified in the care plan or not; or
- (ii) the employee is otherwise required to provide more than eight hours of care;

the employee shall be paid double time for the period of such interruption or the provision of such care, with a minimum payment of one hour.

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

- (i) 16 hours at 155% of their appropriate rate and;
- (ii) three meal allowance payments prescribed by clause 20.3.

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

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

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

[125] In his report, Commissioner Lee identified four areas of apparent agreement in respect of the ABI and Union's draft clauses:

- The Unions indicate that clause 25.8(a) of the ABI preferred draft reflects the terms of the current Award provision and do not propose any amendment to this clause;
- The Unions agree that it is appropriate that a 24-hour care shift should only be worked by agreement as per 25.8(b) of ABI's preferred draft;
- The Unions indicate that clause 31.2(a) of the ABI preferred draft reflects the terms of the current Award provision and do not propose any amendment to this clause; and
- The Unions agree that employees who regularly work 24-hour care shifts should be classified as a shift worker for the purposes of the NES. For clarity, the Unions propose that 'regularly' is defined within sub-clause 31.2(b) as follows:

“For the purposes of this sub clause, an employee will regularly work 24 hour care shifts if the employee works four or more 24 hour care shifts during the yearly period in respect of which their annual leave accrues;”

[126] The submissions filed in February 2020 address the ABI and Union proposals.

[127] In its submission of 7 February 2020 NDS accepts that there are deficiencies in the existing clause, in particular:

- the clause is silent as to what happens when an employee is required to work more than 8 hours;
- the lack of certainty about the hours of work of an employee; and

- the clause is unclear regarding sleeping including that the current clause does not expressly provide that employees will be provided with ‘a safe and clean space to sleep’.

[128] NDS supports the draft clause proposed by ABI and submits that it addresses the deficiencies identified above. In addition, proposed new clause 25.8(b) provides additional protection for employees by requiring that a 24 hour care shift may only be worked by agreement with the employee.

[129] NDS also notes that it is proposed that clause 31.2 be varied to provide that employees who ‘regularly work’ 24 hour care clauses will be entitled to an additional weeks’ annual leave. NDS opposes the Unions’ proposal that an additional week of annual leave accrue after four 24 care shifts in a year submitting that it is ‘out of kilter’ with the requirement that shiftworkers work 10 weekends to qualify for additional leave. NDS submit that if ABI’s proposed clause needs to be amended to clarify the meaning of ‘regular’ then it would propose the following amendment:

‘31.2(b) an employee who works 24 hour care shifts in accordance with clause 25.8 on 10 or more weekends during the yearly period in respect of which their annual leave accrues...’

Q.18: Question for all other parties: Do you support or oppose NDS’ proposal to clarify the meaning of ‘regular’?

[130] In Part D of its submission of 10 February 2020, ABI summarises the key aspects of its proposal, as follows:

1. The inclusion of a requirement that employers may only require an employee to work a 24 hour care shift by agreement. This will have the effect of prohibiting an employer from rostering an employee for a 24 hour care shift unless that employee has specifically agreed to work 24 hour care shifts. It is acknowledged that 24 hour care shifts are a nonstandard type of shift, and so it is appropriate that employees have the ability to opt-out of working such shifts.
2. An amendment to clause 25.8(b) to remove the words ‘where appropriate’, and to bolster the type of facilities that are required to be provided to employees when working 24 hour care shifts. It is proposed that the wording from clause 25.7(c) be adopted so that employers are required to provide employees 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.’

The removal of the words ‘where appropriate’ has the effect of ensuring that all employees are provided with appropriate sleeping facilities when undertaking 24 hour care shifts. In other words, we acknowledge that it will always be appropriate to provide such facilities.

ABI submits that the facilities outlined in its proposal are an appropriate minimum standard. While it will often be the case that employee will be provided with additional facilities, we do not consider that a more formulaic or prescriptive

entitlement is appropriate in the context of a minimum legislated standard applying across the industry nationally.

3. The inclusion of a new clause 25.8(e) to make it clear that where an employee is required to perform more than 8 hours' work, that work will be treated as overtime and paid in accordance with the overtime provision at clause 28.1. This rectifies the existing uncertainty about what happens when an employee performs more than 8 hours' work during a 24 hour care shift. ABI submits that it is appropriate that such additional work be classed as overtime, given that it exceeds the contemplated number of hours of work for the shift.

As a matter of consistency and simplicity, ABI argues that it would be appropriate that the existing overtime arrangements at clause 28.1 apply. However, ABI acknowledge that this creates an unusual outcome of part-time and casual employees by reason of how clause 28.1 applies.

Under clause 28.1(a), a full-time employee would receive:

- (a) the rate of time and a half for the first two hours and double time thereafter for all authorised overtime on Monday to Saturday;
- (b) the rate of double time for all authorised overtime on a Sunday; and
- (c) the rate of double time and a half for all authorised overtime on a public holiday.

However, under clause 28.1(b), part-time and casual employees only receive overtime where they work:

- (a) in excess of 38 hours per week or 76 hours per fortnight; or
- (b) in excess of 10 hours per day.

This would mean that where part-time or casual employees work 24 hour care shifts and perform more than 8 hours' work in any 24 hour care shift, the additional hours will not necessarily attract overtime rates. For example, where an employee performs 9 hours' work during a 24 hour care shift and does not work in excess of 38 hours per week or 76 hours per fortnight.

If the Commission considers the above position to be inappropriate, it may be necessary to include specific overtime provisions into clause 25.8 rather than simply referring back to the existing clause 28.1. Another option would be to vary clause 28.1 to rectify the apparent anomaly.

Q.19: Question for ABI: ABI is invited to provide a draft of an amendment to clause 25.8

4. The inclusion of a mechanism for an employer and employee to agree to utilise the existing TOIL arrangements under clause 28.2 where an employee works in excess of 8 hours during a 24 hour care shift. It is submitted this to be an appropriate inclusion given that the existing Award allows for TOIL arrangements to be entered into where overtime entitlements are triggered.

5. A new proposed clause 25.8(f) to provide that an employee may refuse to perform more than 8 hours' work where the requirement to do so is unreasonable. ABI submits it has taken account of the formulation that exists at subsection 62(2) of the Act and given the circumstances appear to be analogous, it considers this to be an appropriate formulation.

[131] In conclusion, ABI contends that its proposal reflects a cautious approach. It rectifies the deficiencies identified by the Commission in relation to the existing 24 hour care clause, but does not propose any further significant alteration to the existing clause. ABI does not consider that there is any evidentiary or merit basis for any further material amendment to the provision.

[132] In its Final Reply Submission of 26 February 2020 ABI responds to the Unions' proposed variations to the 24 hour care clause (at [95] – [126]).

[133] The Joint Union submission of 10 February 2020 addresses the 24 hour clause at [291] – [311].

[134] The Unions' primary submission is that the commission should consider phasing out the clause over a 3 year period:

‘That will allow sufficient time for that cohort of employers who utilise the clause to make alternative arrangements, such as by engaging in enterprise bargaining for appropriate terms and conditions to cover such work patterns.’

[135] In the event that the clause is to remain in the award the Unions propose amendments to the clause in accordance with the clause attached (and marked ‘A’) to their submissions.

Q.20: 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?

[136] The features of the Unions' proposed clause are discussed at [293] – [311] of the Joint Union submission, as follows:

Unpaid hours of work

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

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

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

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

- (a) 16 hours of payment at 155% of the employee's appropriate rate of pay - (h)(i);
- (b) a sleepover allowance for the 8 hour sleep break portion of the shift - (f); and
- (c) ensuring all hours of work in the shift are treated as such for all purposes - (j)

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

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

Care work

The union proposed clause contains a definition of care work at subclause (b). A definition is necessary as the current clause provides a limit of 8 hours 'care'. However, the proximity of the worker makes it likely they will be requested to perform tasks outside the scope of the plan. The definition assists to clarify the scope of duties the worker is obliged to perform.

Sleep break

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

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

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

- (i) a separate and securely lockable room with a peephole or similar in the door, a bed and a telephone and internet connection in the room;
- (ii) a bed, bedside lamp and clean linen;
- (iii) access to food preparation facilities;
- (iv) access to appropriate temperature control; and
- (v) free board and lodging.

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

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

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

Additional care work

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

The overtime rate for part time and casual employees in clause 28.1(b)(ii) is time and a half for the first two hours and then double time thereafter, after ten hours of work per day.²¹²

Meal breaks

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

Breaks between shifts

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

Refusal to work more than 8 hours

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.

Accrual of hours

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

[137] AFEI deals with the 24 hour clause at 3.1 to 3.7 of its submission of 11 February 2020. AFEI strongly opposes the Unions' claim noting that there is 'no evidentiary basis on which such wholesale changes ... could be justified'. Further, AFEI submits:

'The unions' claims would undermine the operation of the provision to the point where it would be unworkable, through the unjustifiable and exorbitant additional costs associated with clauses f, g, h, I, j and k. The claims would also impose unnecessary and unwarranted restrictions on the manner in which the care is provided, to the detriment of the care recipient, such as in clauses e, and potentially unjustifiable hardship for the care recipient in clause d.'²¹³

[138] AFEI withdraws its objection to clause (f) of the ABI draft concerning working 'additional hours' but remains opposed to ABI's proposal to extend the additional annual leave entitlement to employees who regularly work 24 hour care shifts.

Q.21: Question for AFEI: Does it oppose any other aspect of ABI's proposal?

²¹² For part time and casual employees in clause 28.1(b)(i), except on Sundays and public holidays. Different provisions apply to full time employees in clause 28.1(a)

²¹³ AFEI submission 11 February 2020 at 3-4

ATTACHMENT 1 – Tranche 2 claims – list of evidence relied upon for each claim

Note: Attachment 1 does not deal with the evidence in the community language allowance claim and the 24 hour clause matter (see Question 1).

Claimant Party	Exhibit No.	Evidence	Date	Pinpoint reference
ASU - Broken Shift Penalty Rate				
ASU	ASU4	Expert Report of Dr Jim Stanford	September 2019	
		Oral Evidence of Dr Jim Stanford	17 October 2019	PN2216-PN2289
		<i>Predictability and control in working schedules</i> by Dr Olav Muurlink		CB 1686
		<i>ELRR – Wage Theft, underpayment and unpaid work in marketised social care</i> – by F McDonald, D Bentham and J Malone	22 February 2018	CB 2772
	ASU9	Witness Statement of Richard Rathbone	13 February 2019	CB 1171
	ASU7	Witness Statement of Tracy Kinchin	24 June 2019	CB 1190
	ASU2	Witness Statement of Robert Steiner	24 June 2019	PN1534-PN1613
	ABI17	Witness Statement of Scott Harvey	2 July 2019	CB 162
	Transcript	Oral evidence of Jeffrey Sidney Wright	17 October 2019	PN2543-2570, 2619
		National Disability Services – Australian Disability Workforce Report	July 2018	CB 1828
		<i>NDIS Costs Productivity Commission Paper</i>	October 2017	CB 1884
		NDIS Price Guide 2019-2020	1 December 2019	CB 2796
	ABI16	Witness Statement of Deborah Gaye Ryan	12 July 2019	CB 190
	Transcript	Oral evidence of Deborah Gaye Ryan	18 October 2019	PN3050, 3086-3092
	Transcript	Oral evidence of Mr Steven Miller	17 October 2019	
ABI	HSU26	Witness Statement of Robert Sheehy	15 February 2019	Para. 7.

	HSU5	Witness Statement of Christopher Friend	15 February 2019	Para 49
	HSU28	Witness Statement of James Eddington	15 February 2019	Para 23
	ABI9	Witness Statement of Joyce Wang	12 July 2019	Paras 65-67
	ABI3	Witness Statement of Jeffrey Wright	12 July 2019	Paras 44-45
	ABI5	Witness Statement of Graham Shanahan	18 October 2019	Para 37
	ABI8	Witness Statement of Wendy Mason	17 July 2019	Paras 67, 72
	ABI6	Witness Statement of Deb Ryan	12 July 2019	Paras 67, 70
	HSU4	Witness Statement of Heather Waddell	15 February 2019	Paras 23
	ABI	Supplementary Statement of Wendy Mason	25 November 2019	Paras. 8 – 18.
NDS	NDS	Supplementary Statement of Steven Miller	19 November 2019	Paras. 3 – 7.
ABI	AB19	Witness Statement of Joyce Wang	12 July 2019	p. 200.
	ABI2	Witness Statement of Darren Mathewson	12 July 2019	p. 211.
	ABI3	Witness Statement of Jeffrey Wright	12 July 2019	p. 470.
	ABI8	Witness Statement of Wendy Mason	17 July 2019	p. 477.
		NDIA Efficient Cost Model for Disability Support Workers		p. 489.
		NDIA Efficient Cost Model		p. 501.
		Stewart & Brown – Aged and Financial Performance Survey – Sector Report – Financial Year 2018		p. 503.
		Stewart & Brown – Aged and Financial Performance Survey – Sector Report – December 2018		p. 541.
UWU— Broken Shifts				
UWU		Draft determination		CB 4416, [5], [6]
	UV1	Witness Statement of Trish Stewart	17 January 2019	[13]-[19], Annexure B

	UV2	Supplementary Statement of Trish Stewart	1 April 2019	[7]-[8]
	UV3	Further Statement of Trish Stewart	1 October 2019	[3]-[5], [7]-[17]
	UV4	Witness Statement of Deon Fleming	16 January 2019	[18]-[24], Annexure B
	UV5	Supplementary statement of Deon Fleming	28 March 2019	[6]
	UV6	Witness Statement of Belinda Sinclair	16 January 2019	[12]-[14], Annexure B
	UV8	Witness Statement of Jared Marks	3 October 2019	[1]-[23], [25], [27]-[35]
	UV7	Witness Statement of Melissa Coad	12 October 2019	[28]-[30]
	ABI3	Witness Statement of Jeffrey Wright	12 July 2019	[41], [45]
	ABI7	Witness Statement of Scott Harvey	2 July 2019	[56]-[59]
	ABI8	Witness Statement of Wendy Mason	17 July 2019	[71]-[72]
	HSU25	Witness Statement of Fiona MacDonald	15 February 2019	Annexure FM2
	ASU2	Witness Statement of Robert James Steiner	24 June 2019	[15]-[20]
	Transcript	Oral evidence of James Stanford	17 October 2019	PN2274
	Transcript	Oral evidence of Jeffrey Sidney Wright	17 October 2019	PN2543-2570, 2619
	Transcript	Oral evidence of Deborah Gaye Ryan	18 October 2019	PN3050, 3086-3092
	Transcript	Oral evidence of Wendy Mason	18 October 2019	PN3231-3236
HSU – Broken Shifts				
AFEI	Transcript	Oral evidence of Heather Waddell	16 October 2019	PN1453-1455.
	Transcript	Oral evidence of Robert Steiner	16 October 2019	PN1566.
	ABI3	Witness Statement of Wright	12 July 2019	Para. 37.
	Transcript	Oral evidence of Wendy Mason	18 October 2019	PN3315.
NDS	NDS2	Witness Statement of Steven Miller	28 June 2019	Paras. 40-50.
	Transcript	Oral evidence of Steven Miller	17 October 2019	PN 2033-2039; PN 2049- 2053

	ABI5	Witness Statement of Graham Shanahan	18 October 2019	Paras. 33-40
	ABI7	Witness Statement of Scott Harvey	2 July 2019	Paras. 53-60
	ABI3	Witness Statement of Jeffrey Wright	12 July 2019	Paras. 44-46
	ABI8	Witness Statement of Wendy Mason	17 July 2019	Paras. 55-72
	Transcript	Oral evidence of Wendy Mason	18 October 2019	PN 3314-3315
	ABI9	Witness Statement of Joyce Wang	12 July 2019	Paras. 65-67
	ASU2	Witness Statement of Rob Steiner	24 June 2019	Paras. 15-16
	Transcript	Oral evidence of Rob Steiner	16 October 2019	PN 1552- 1569
	UV4	Witness Statement of Deon Fleming	16 January 2019	Paras. 19-21
	UV1	Witness Statement of Trish Stewart	17 January 2019	Paras. 12.
	HSU4	Witness Statement of Heather Waddell	15 February 2019	Paras. 21-25.
ABI	ABI9	Witness Statement of Joyce Wang	12 July 2019	p. 200.
	ABI2	Witness Statement of Darren Mathewson	12 July 2019	p. 211.
	ABI3	Witness Statement of Jeffrey Wright	12 July 2019	p. 470.
	ABI8	Witness Statement of Wendy Mason	17 July 2019	p. 477.
		NDIA Efficient Cost Model for Disability Support Workers		p. 489.
		NDIA Efficient Cost Model		p. 501.
		Stewart & Brown – Aged and Financial Performance Survey – Sector Report – Financial Year 2018		p. 503.
		Stewart & Brown – Aged and Financial Performance Survey – Sector Report – December 2018		p. 541.
Ai Group	HSU3	Witness Statement of William Elrick	15 February 2019	At paras 19-20, CB2935-2936.
	HSU26	Witness Statement of Robert Sheehy	15 February 2019	At paras 7-8; CN2941

	HSU5	Witness Statement of Christopher Friend	15 February 2019	At paras 47-49; CB2949.
	HSU28	Witness Statement of James Eddington	15 February 2019	At para 23, CB2973
	UV4	Witness Statement of Deon Fleming	16 January 2019	At paras 19-21; CB4482.
	UV1	Witness statement of Trish Stewart	17 January 2019	At paras 12-13, CB4603; Annexure B.
	ASU2	Revised Witness Statement of Robert Steiner	16 October 2019	At paras. 14-15.
	ASU9	Attachment to Statement of Richard Rathbone	13 February 2019	
	AIG1	Staff Roster of Deon Fleming	16 January 2019	
	HSU25	Witness Statement of Fiona MacDonald	15 February 2019	FM-2; 2917.
	HSU32	Supplementary Statement of Scott Quinn	3 October 2019	At para 10; CB3053.
	Transcript	Oral statement of Heather Waddell	16 October 2019	PN1456; PN1562-1568
	Transcript	Oral statement of Deborah Ryan	18 October 2019	PN3047- PN3048; PN3052.
	HSU4	Witness Statement of Heather Waddell	15 February 2019	Paras 21-22; CB2958.
	HSU28	Witness Statement of Thelma Thames	15 February 2019	Para. 12 at p. 2962; para. 15 at p. 2963
	HSU31	Witness Statement of Scott Quinn	16 December 2015	Para 20-29, p. 2989-2990.
	HSU32	Supplementary Statement of Scott Quinn	3 October 2019	para 34 at p. 3055, para 10 at p. 3052
	UV1	Witness Statement of Trish Stewart	17 January 2019	pp. 4613-4634, p. 4604 at para. 15.
	ASU2	Revised Statement of Robert Steiner	16 October 2019	Para. 15.
	AIG1	Staff Roster of Deon Fleming	16 January 2019	
	HSU29	Witness Statement of Bernie Lobert	15 February 2019	Para 22, at p. 2973.
	HSU25	Witness Statement of Fiona MacDonald	15 February 2019	pp. 2916-2917

	HSU3	Witness Statement of William Elrick	15 February 2019	Paras 21- 23, p. 2963.
	HSU26	Witness Statement of Robert Sheehy	15 February 2019	Para 7 at p. 2942
	HSU5	Witness Statement of Christopher Friend	15 February 2019	Para. 57 at p. 2950.
	ASU10	Witness Statement of Augustino Encabo	13 February 2019	p. 1140 at para 34.
	Transcript	Oral evidence of Trish Stewart	15 October 2019	PN461, PN464, PN525 and PN527
	Transcript	Oral evidence of Robert Steiner	16 October 2019	PN1570 and PN1572
	Transcript	Oral evidence of Joyce Wang	18 October 2019	PN3537
ASU – Recall to work overtime away from the workplace				
ASU		Court Book – draft determination		CB 1124
	ASU4	Expert Report of Dr Jim Stanford	September 2019	
	Transcript	Oral Evidence of Dr Jim Stanford	17 October 2019	PN2216-PN2289
		<i>Predictability and control in working schedules</i> by Dr Olav Muurlink		CB1686, pp 6, 11- 12, and 17
	ASU8	Witness Statement of Emily Flett	22 September 2019	CB1427
	ASU1	Statement of Deborah Anderson	2 September 2019	
	Transcript	Oral evidence of Deborah Anderson	15 October 2019	PN981-1030
HSU - Minimum engagement				
HSU		Draft determination		CB 2835 - 2836
	HSU1	Statement of Mark Farthing	15 February 2019	
	HSU3	Statement of William Elrick	15 February 2019	Para. 19.
	HSU4	Statement of Heather Waddell	15 February 2019	Paras. 11-12.
	HSU5	Statement of Christopher Friend	15 February 2019	Paras 46-55.
	HSU25	Statement of Fiona Macdonald	15 February 2019	

	HSU26	Statement of Robert Sheehy	15 February 2019	Paras 7-8.
	HSU27	Statement of Pamela Wilcock	15 February 2019	
	HSU28	Statement of Thelma Thames	15 February 2019	Paras. 12-13.
	HSU29	Statement of Bernie Lobert	15 February 2019	Paras. 12-13.
	HSU30	Statement of James Eddington	15 February 2019	Para. 22.
	HSU31	Statement of Scott Quinn	16 December 2015	Para. 20.
	HSU32	Supplementary statement of Scott Quinn	3 October 2019	Paras. 10-24.
	ASU4	Witness Statement of Dr James Stanford	September 2019	
	ASU2	Witness Statement of Robert Steiner	24 June 2019	Paras. 15-16.
	NDS2	Witness Statement of Steven Miller	28 June 2019	Paras. 23-26.
	NDS1	Witness Statement of David Moody	12 July 2019	Paras. 53-58.
	Transcript	Oral evidence of Dr James Stanford	17 October 2019	PN 2272 – PN 2277
NDS	NDS2	Witness Statement of Steven Miller	28 June 2019	Paras. 40-50.
	Transcript	Oral evidence of Steven Miller	17 October 2019	PN 2033-2039; PN 2049- 2053
	ABI5	Witness Statement of Graham Shanahan	18 October 2019	Paras. 33-40
	ABI7	Witness Statement of Scott Harvey	2 July 2019	Paras. 53-60
	ABI	Witness Statement of Jeffrey Wright	12 July 2019	Paras. 44-46
	ABI8	Witness Statement of Wendy Mason	17 July 2019	Paras. 55-72
	Transcript	Oral evidence of Wendy Mason	18 October 2019	PN 3314-3315
	ABI9	Witness Statement of Joyce Wang	12 July 2019	Paras. 65-67
	ASU2	Witness Statement of Rob Steiner	24 June 2019	Paras. 15-16
	Transcript	Oral evidence of Rob Steiner	16 October 2019	PN 1552- 1569

	UV4	Witness Statement of Deon Fleming	16 January 2019	Paras. 19-21
	UV1	Witness Statement of Trish Stewart	17 January 2019	Paras. 12.
	HSU4	Witness Statement of Heather Waddell	15 February 2019	Paras. 21-25.
AFEI	ABI3	Witness Statement of Jeffrey Wright	12 July 2019	Para. 37 – 43.
	Transcript	Oral evidence of Robert Steiner	16 October 2019	PN1562, PN1566, PN1568, PN1555- 1556, PN1558-1559
	HSU4	Witness Statement of Heather Waddell	15 February 2019	Para 22.
	ABI18	Witness Statement of Wendy Mason	17 July 2019	
	Transcript	Oral evidence of Trish Stewart	15 October 2019	PN461; PN464; PN468; PN469.
	Transcript	Oral evidence of Graham Shanahan	18 October 2019	PN2885.
	Transcript	Oral evidence of Deon Fleming	15 October 2019	PN518; PN525; PN527.
	Transcript	Oral evidence of Belinda Sinclair	15 October 2019	PN739.
	Transcript	Oral evidence of Steve Miller	17 October 2019	PN2050.
	Transcript	Oral evidence of Heather Waddell	16 October 2019	PN1453-1455.
	Transcript	Oral evidence of Wendy Mason	18 October 2019	PN3315.
ABI	ABI5	Witness Statement of Graham Shanahan	18 October 2019	Paras. 34-39.
	ABI7	Witness Statement of Scott Harvey	2 July 2019	Paras. 57-60.
	ABI6	Witness Statement of Deb Ryan	12 July 2019	Paras. 61-67, 72.
	ABI9	Witness Statement of Joyce Wang	12 July 2019	Para. 56.
	ABI2	Witness Statement of Darren Mathewson	12 July 2019	
	ABI3	Witness Statement of Jeffrey Wright	12 July 2019	Paras. 38-42.
	ABI8	Witness Statement of Wendy Mason	17 July 2019	Paras. 57-63, 71.

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	ASU4	Witness Statement of James Stanford	September 2019	Para. 11.
	HSU3	Witness Statement of William Elrick	15 February 2019	Para. 19.
		Witness Statement of Thelma Thames	15 February 2019	Paras. 5, 12.
	ASU10	Witness Statement of Augustino Encabo	13 February 2019	Paras. 13, 15.
	HSU4	Witness Statement of Heather Waddell	15 February 2019	Para. 4.
	ASU9	Witness Statement of Richard Rathbone	13 February 2019	Paras. 10-12.
	HSU27	Witness Statement of Pamela Wilcock	15 February 2019	Para. 9.
	Transcript	Oral evidence of Deborah Ryan	18 October 2019	PN3050.
Ai Group	HSU3	Witness Statement of William Elrick	15 February 2019	At paras 19-20, CB2935-2936.
	HSU26	Witness Statement of Robert Sheehy	15 February 2019	At paras 7-8; CN2941
	HSU5	Witness Statement of Christopher Friend	15 February 2019	At paras 47-49; CB2949.
	HSU30	Witness Statement of James Eddington	15 February 2019	At para 23, CB2973
	UV4	Witness Statement of Deon Fleming	16 January 2019	At paras 19-21; CB4482.
	UV1	Witness statement of Trish Stewart	17 January 2019	At paras 12-13, CB4603; Annexure B.
	ASU2	Revised Witness Statement of Robert Steiner	16 October 2019	At paras. 14-15.
	ASU9	Attachment to Statement of Richard Rathbone	13 February 2019	
	AIG1	Staff Roster of Deon Fleming	16 January 2019	
	HSU25	Witness Statement of Fiona MacDonald	15 February 2019	FM-2; 2917.

	HSU32	Supplementary Statement of Scott Quinn	3 October 2019	At para 10; CB3053.
	Transcript	Oral evidence of Heather Waddell	16 October 2019	PN1456.
	Transcript	Oral evidence of Robert Steiner	16 October 2019	PN1562-1568.
	Transcript	Oral evidence of Deborah Ryan	18 October 2019	PN3047- PN3048; PN3052.
	HSU4	Witness Statement of Heather Waddell	15 February 2019	Paras 21-22; CB2958.
	HSU28	Witness Statement of Thelma Thames	15 February 2019	Para. 12 at p. 2962.
	HSU31	Witness Statement of Scott Quinn	16 December 2015	Para 20-27, p. 2989
	HSU32	Supplementary Statement of Scott Quinn	3 October 2019	para 34 at p. 3055.
	UV1	Witness Statement of Trish Stewart	17 January 2019	pp. 4613-4634, p. 4604 at para. 15.
	ASU2	Revised Statement of Robert Steiner	16 October 2019	Para. 15.
	AIG1	Staff Roster of Deon Fleming	16 January 2019	
	HSU29	Witness Statement of Bernie Lobert	15 February 2019	Para 22, at p. 2973.
	HSU25	Witness Statement of Fiona MacDonald	15 February 2019	pp. 2916-2917
	HSU3	Witness Statement of William Elrick	15 February 2019	Paras 21- 23, p. 2963.
	HSU26	Witness Statement of Robert Sheehy	15 February 2019	Para 7 at p. 2942
	HSU5	Witness Statement of Christopher Friend	15 February 2019	Para. 57 at p. 2950.
HSU – Travel time				
HSU	HSU1	Witness Statement of Mark Farthing	15 February 2019	
	HSU2	Further Statement of Mark Farthing	16 September 2019	Para. 10(d).
		NDIS Price Guide 2019-20		
	HSU3	Witness Statement of William Elrick	15 February 2019	
	HSU4	Witness Statement of Heather Waddell	15 February 2019	At paras. 10-14.

	HSU5	Witness Statement of Christopher Friend	15 February 2019	At paras 65-72.
	HSU25	Witness Statement of Fiona Macdonald	15 February 2019	CB 2916
	HSU26	Witness Statement of Robert Sheehy	15 February 2019	At para. 9.
	HSU27	Witness Statement of Pamela Wilcock	15 February 2019	
	HSU28	Witness Statement of Thelma Thames	15 February 2019	At paras 14-19.
	HSU29	Witness Statement of Bernie Lobert	15 February 2019	At paras 5-6.
	HSU30	Witness Statement of James Eddington	15 February 2019	At paras 20-21.
	HSU31	Witness Statement of Scott Quinn	16 December 2015	
	HSU32	Supplementary statement of Scott Quinn	3 October 2019	At paras. 10, 27-30.
	ASU2	Witness Statement of Robert Steiner	24 June 2019	At paras 11, 18.
	UV9	Bundle of Home Care Price Guide materials		
NDS	HSU25	Witness Statement of Fiona McDonald	15 February 2019	Court Book pp. 2917-2920.
	HSU4	Witness Statement of Heather Waddell	15 February 2019	Paras. 10-14.
	HSU	Oral evidence of Heather Waddell	16 October 2019	PN1386-1414
	HSU28	Witness Statement of Thelma Thames	15 February 2019	Paras. 13-16.
	HSU	Supplementary Statement of Scott Quinn	3 October 2019	Paras. 14-29.
	UV1	Witness Statement of Trish Stewart	17 January 2019	Paras. 3-8.
	ASU2	Witness Statement of Rob Steiner	24 June 2019	Paras 15-16.
	Transcript	Oral evidence of Robert Steiner	16 October 2019	PN1569.
ABI	ABI2	Witness Statement of Darren Mathewson	12 July 2019	p. 211.
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	Transcript	Oral evidence of Trish Stewart	15 October 2019	PN459-PN460; PN468
	Transcript	Oral evidence of Robert Steiner	16 October 2019	PN1569- PN1572; PN1573-PN1574
	Transcript	Oral evidence of Graham Shanahan	18 October 2019	PN2855
Ai Group	ASU9	Witness Statement of R Rathbone	13 February 2019	p. 1172 at para. 17
	ASU	Witness Statement of Tracy Kinchin	24 June 2019	p. 1192 at para 16
	HSU25	Witness Statement of Fiona MacDonald	15 February 2019	p. 2916
	HSU5	Witness Statement of Christopher Friend	15 February 2019	p. 2949 at para. 47
	ASU4	Witness Statement of Heather Waddell	15 February 2019	p. 2957 at para. 13
	HSU28	Witness Statement of Thelma Thames	15 February 2019	p. 2963 at para 16
	HSU29	Witness Statement of Bernie Lobert	15 February 2019	p. 2967 at para. 15
	UV4	Witness Statement of Deon Fleming	16 January 2019	p. 4604 at para. 16
	HSU31	Witness Statement of Scott Quinn	16 December 2015	p. 2990 at para. 28.
	HSU32	Supplementary Statement of Scott Quinn	3 October 2019	p. 3053 at para. 10.
	UV1	Witness Statement of Trish Stewart	17 January 2019	p. 4604 at para 16
	UV2	Supplementary Statement of Trish Stewart	1 April 2019	p. 4661 at para. 6
	UV8	Witness Statement of Jared Marks	3 October 2019	pp. 4720-4723.
	ASU2	Revised Statement of Robert Steiner	16 October 2019	Para 14.

	Transcript	Oral evidence of Steven Miller	17 October 2019	PN2039; PN2057-2059; PN2070; PN3537
	Transcript	Oral evidence of Jeffrey Wright	17 October 2019	PN2609-2611; PN2616; PN2619
	Transcript	Oral evidence of Graham Shanahan	18 October 2019	PN2879- PN2890.
	Transcript	Oral evidence of Scott Harvey	18 October 2019	PN3141-3142, PN3534.
HSU – telephone allowance				
HSU	HSU3	Witness Statement of William Elrick	15 February 2019	At paras 30-33; CB 2933-2940
	HSU4	Witness Statement of Heather Waddell	15 February 2019	At paras 31-32; CB 2956-2960
	HSU5	Witness Statement of Christopher Friend	15 February 2019	CB 2945-2951
	HSU26	Witness Statement of Robert Sheehy	15 February 2019	At paras 11-13; CB 2941-2944
	HSU27	Witness Statement of Pamela Wilcock	15 February 2019	CB 2952-2955
	HSU28	Witness Statement of Thelma Thames	15 February 2019	CB 2961-2964
	HSU29	Witness Statement of Bernie Lobert	15 February 2019	At paras 18-20; CB 2965-2968
	HSU30	Witness Statement of James Eddington	15 February 2019	CB 2969-2980
	HSU32	Supplementary statement of Scott Quinn	3 October 2019	At paras 23, 35; CB 3051-3079
	ASU2	Witness Statement of Robert Steiner	24 June 2019	CB 1225
	Transcript	Oral evidence of Jefferey Wright	17 October 2019	PN2584-2588
	Transcript	Oral evidence of Graham Shanahan	18 October 2019	PN2865-2870
AFEI	UV1	Witness Statement of Trish Stewart	17 January 2019	Para 21.
	Transcript	Oral evidence of Deon Fleming	15 October 2019	PN547-PN549.
	Transcript	Oral evidence of Deborah Anderson	15 October 2019	PN1005; PN1011 – PN1013; PN441.
	Transcript	Oral evidence of Trish Stewart	15 October 2019	PN448; PN452.

NDS	HSU	Witness Statement of Robert Sheehy	15 February 2019	Paras. 11-13.
	HSU27	Witness Statement of Pamela Wilcock	15 February 2019	Paras. 19-20.
	HSU4	Witness Statement of Heather Waddell	15 February 2019	Paras. 31-32.
	Transcript	Oral evidence of Heather Waddell	16 October 2019	PN1386-1414.
	HSU28	Witness Statement of Thelma	15 February 2019	Para. 22.
	UV4	Witness Statement of Deon Fleming	16 January 2019	Paras. 25-30.
	Transcript	Oral evidence of Deon Fleming	15 October 2019	PN533-540
	UV1	Witness Statement of Trish Stewart	17 January 2019	Paras. 20-22.
	Transcript	Oral evidence of Trish Stewart	15 October 2019	PN445-456.
ABI	ABI2	Witness Statement of Darren Mathewson	12 July 2019	p. 211
	ABI3	Witness Statement of Jeffrey Wright	12 July 2019	p. 470
	ABI8	Witness Statement of Wendy Mason	17 July 2019	p. 477
		NDIA Efficient Cost Model for Disability Support Workers		p. 489.
		NDIA Efficient Cost Model		p. 501.
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HSU – recall to work				
ABI	ABI7	Witness Statement of Scott Harvey	2 July 2019	p. 162.
	ABI6	Witness Statement of Deb Ryan	12 July 2019	p. 190.
		NDIA Efficient Cost Model for Disability Support Workers		p. 489.
		NDIA Efficient Cost Model		p. 501.
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HSU – client cancellation				
HSU	HSU1	Statement of Mark Farthing	15 February 2019	CB 2926-2932
	HSU2	Further Statement of Mark Farthing	16 September 2019	CB 2981-2987
		NDIS Price Guide 2019-20		CB 4321 - 4368
	HSU3	Statement of William Elrick	15 February 2019	CB 2933-2940
	HSU4	Statement of Heather Waddell	15 February 2019	CB 2956-2960
	HSU5	Statement of Christopher Friend	15 February 2019	CB 2945-2951
	HSU25	Statement of Fiona Macdonald	15 February 2019	CB 2909-2923
	HSU26	Statement of Robert Sheehy	15 February 2019	CB 2941-2944
	HSU28	Witness Statement of Thelma Thames	15 February 2019	CB 2961-2964
	HSU32	Supplementary statement of Scott Quinn	3 October 2019	CB 3051-3079
	HSU14	Cross examination of Deb Ryan: CCO Schedule of rates	18 October 2019	
	HSU15	Cross examination of Deb Ryan: Same Day Cancellation Log	18 October 2019	
	HSU19	Baptist Care Pro forma Service Agreement		
	HSU20	Baptist Care Home Care Agreement		
	Transcript	Oral evidence of Graham Shanahan	18 October 2019	PN 2897
	Transcript	Oral evidence of Wendy Mason	18 October 2019	PN 3226 - 3249
AFEI	ABI7	Witness Statement of Scott Harvey	2 July 2019	PN3136.
	Transcript	Oral evidence of Graham Shanahan	18 October 2019	PN2897.
	Transcript	Oral evidence of Jeffrey Wright	17 October 2019	PN2702 - PN2704.

	Transcript	Oral evidence of Wendy Mason	18 October 2019	PN3274; PN3321.
	ABI9	Witness Statement of Joyce Wang	12 July 2019	PN3612
HSU – sleepover				
HSU	HSU3	Witness Statement of William Elrick	15 February 2019	At para 27; CB 2933-2940
ABI	ABI2	Witness Statement of Darren Mathewson	12 July 2019	p. 211.
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HSU – overtime for part-time and casual workers beyond rostered hours/ 8 hours				
HSU	HSU3	Statement of William Elrick	15 February 2019	CB 2933-2940
	HSU4	Statement of Heather Waddell	15 February 2019	At para. 27; CB 2956-2960
	HSU5	Statement of Christopher Friend	15 February 2019	CB 2945-2951
	HSU25	Statement of Fiona Macdonald	15 February 2019	CB 2909-2923
	HSU26	Statement of Robert Sheehy	15 February 2019	CB 2941-2944
	HSU27	Statement of Pamela Wilcock	15 February 2019	At para. 10; CB 2952-2955
	HSU28	Witness Statement of Thelma Thames	15 February 2019	At paras 6-7; CB 2961-2964
	HSU29	Statement of Bernie Lobert	15 February 2019	At para. 21; CB 2965-2968
	HSU30	Statement of James Eddington	15 February 2019	CB 2969-2980
	HSU31	Statement of Scott Quinn	16 December 2015	At para. 43; CB 2988-3050
	HSU32	Supplementary statement of Scott Quinn	3 October 2019	CB 3051-3079

	ASU2	Witness Statement of Robert Steiner	24 June 2019	At para. 17; CB 1225
AFEI	Transcript	Oral evidence of Belinda Sinclair	15 October 2019	PN674
	Transcript	Oral evidence of Jeffrey Wright	17 October 2019	PN2623; PN2659; PN2727.
	UV4	Witness Statement of Fleming	16 January 2019	Para 17.
	UV1	Witness Statement of Stewart	17 January 2019	Para. 11
	HSU28	Witness Statement of Thames	15 February 2019	Para. 9.
	Transcript	Oral evidence of Joyce Wang	18 October 2019	PN3603; PN3604
	ABI3	Witness Statement of Wright	12 July 2019	Paras. 35- 36.
AFEI	Transcript	Oral evidence of Scott Harvey	18 October 2019	PN3136.
	Transcript	Oral evidence of Graham Shanahan	18 October 2019	PN2897;
	Transcript	Oral evidence of Jeffrey Wright	17 October 2019	PN2702 - PN2704.
	Transcript	Oral evidence of Wendy Mason	18 October 2019	PN3274; PN3321.
	Transcript	Oral evidence of Joyce Wang	18 October 2019	PN3612
ABI	ABI5	Witness Statement of Graham Shanahan	18 October 2019	Paras. 29-32.
	ABI7	Witness Statement of Scott Harvey	2 July 2019	Paras. 50-51.
	ABI6	Witness Statement of Deb Ryan	12 July 2019	Para. 56-58.
	ABI9	Witness Statement of Joyce Wang	12 July 2019	Paras. 45-48.
	ABI2	Witness Statement of Darren Mathewson	12 July 2019	
	ABI3	Witness Statement of Jeffrey Wright	12 July 2019	Paras. 35-37.
	ABI8	Witness Statement of Wendy Mason	17 July 2019	Paras. 52-54.
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	HSU5	Witness Statement of Christopher Friend	15 February 2019	Para. 20.
	HSU29	Witness Statement of Bernie Lobert	15 February 2019	Para. 21.
	HSU27	Witness Statement of Pamela Wilcock	15 February 2019	Para 4.
	HSU28	Witness Statement of Thelma Thames	15 February 2019	Para. 9.
	HSU31	Witness Statement of Scott Quinn	16 December 2015	Para. 15.
	ASU10	Witness Statement of Augustino Encabo	13 February 2019	Para. 21.
	ASU9	Witness Statement of Rathbone	13 February 2019	Paras. 21-22.
	HSU31	Witness Statement of Scott Quinn	16 December 2015	Para. 30.
	Transcript	Oral evidence of Jeffrey Wright	17 October 2019	PN2659; PN2662-2664.
Ai Group	Transcript	Oral evidence of Joyce Wang	18 October 2019	PN3589- PN3604.
	HSU28	Witness Statement of Thelma Thames	15 February 2019	p. 2962 at para. 9.
	UV1	Witness Statement of Trish Stewart	17 January 2019	p. 4603 at para. 11.
HSU – uniform/damaged clothing allowance				
HSU	HSU3	Witness Statement of William Elrick	15 February 2019	CB 2933-2940
	HSU4	Witness Statement of Heather Waddell	15 February 2019	At paras 15-16; 33-34; CB 2956-2960
	HSU26	Witness Statement of Robert Sheehy	15 February 2019	At paras 14-16; CB 2941-2944
	HSU27	Witness Statement of Pamela Wilcock	15 February 2019	At paras 13-14; CB 2952-2955
	HSU28	Statement of Thelma Thames	15 February 2019	CB 2961-2964
ABI	ABI2	Witness Statement of Darren Mathewson	12 July 2019	p. 211
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UWU – variation to clothing and equipment allowance (uniforms)				
UWU		Draft determination		CB 4416, [1]
	UV6	Witness Statement of Belinda Sinclair	16 January 2019	[18]-[21]
ABI	ABI2	Witness Statement of Darren Mathewson	12 July 2019	p. 211
		NDIA Efficient Cost Model for Disability Support Workers		p. 489
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Ai Group	UV6	Witness Statement of Belinda Sinclair	16 January 2019	p. 4572 at paras 19-20.
	HSU27	Witness Statement of Pamela Wilcock	15 February 2019	p. 2952 at para. 13
	HSU4	Witness Statement of Heather Waddell	15 February 2019	p. 2960 at para 34.
	Transcript	Oral evidence of Joyce Wang	18 October 2019	PN3608
UWU – travel time				
UWU		Draft determination		CB 4416, [7]
		NDIS Price Guide 2019-2020		CB 2796, pg.12
	UV1	Witness Statement of Trish Stewart	17 January 2019	[13]-[16], Annexure A, Annexure B
	UV2	Supplementary statement of Trish Stewart	1 April 2019	[3]-[8]

	UV3	Further statement of Trish Stewart	1 October 2019	[2]-[6], [13]-[17]
		Oral evidence of Trish Stewart	15 October 2019	PN459-468
	UV4	Witness Statement of Deon Fleming	16 January 2019	[9], [18]-[24], Annexure A, Annexure B
	UV5	Supplementary statement of Deon Fleming	28 March 2019	[5]-[8]
	Transcript	Oral evidence of Deon Fleming	15 October 2019	PN525-532
	UV6	Witness Statement of Belinda Sinclair	16 January 2019	[12] - [14], Annexure B
	UV8	Statement of Jared Marks	3 October 2019	[1]-[23], [25], [27]-[35]
	UV9	Bundle of Home Care Price Guide materials		Pp. 15, 34, 40, 42, 44, 45, 46
	ASU2	Statement of Robert James Steiner	24 June 2019	[10]-[11], [15]
	Transcript	Oral evidence of James Stanford	17 October 2019	PN2229-2279
	HSU2	Further statement of Mark Farthing	16 September 2019	[21]
	<i>HSU25</i>	Statement of Fiona Macdonald	15 February 2019	Annexure FM2
	Transcript	Oral evidence of Jeffrey Sidney Wright	17 October 2019	PN2612, 2580-2583
	Transcript	Oral evidence of Deborah Gaye Ryan	18 October 2019	PN3050-3059
	Transcript	Oral evidence of Graham Joseph Shanahan	18 October 2019	PN2865-2866, 4 2887-2890
	Transcript	Oral evidence of Wendy Mason	18 October 2019	PN3210-3213
	Transcript	Oral evidence of Joyce Wang	18 October 2019	PN3505-3517, 3557-3558
ABI	ABI2	Witness Statement of Darren Mathewson	12 July 2019	p. 211.
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	Transcript	Oral evidence of Trish Stewart	15 October 2019	PN459-PN460; PN468
	Transcript	Oral evidence of Robert Steiner	16 October 2019	PN1569-PN1572; PN1573-PN1574
	Transcript	Oral evidence of Graham Shanahan	18 October 2019	PN2855
UWU – variation to rosters clause				
UWU	ABI2	Witness Statement of Darren Mathewson	12 July 2019	p. 211.
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	FWC	Draft determination		CB 4416, [4]
	UV1	Witness Statement of Trish Stewart	17 January 2019	[9]-[12]
	UV4	Witness Statement of Deon Fleming	16 January 2019	[13]-[17]
	UV6	Statement of Belinda Sinclair	16 January 2019	[22]-[26]
	Transcript	Oral evidence of Belinda Sinclair	15 October 2019	PN599-616, 745
Ai Group	HSU27	Witness Statement of Pamela Wilcock	15 February 2019	p. 2953 at para. 11
	HSU28	Witness Statement of Thelma Thames	15 February 2019	p. 2962 at para. 16
	UV4	Witness Statement of Deon Fleming	16 January 2019	pp. 4481-82 at paras 15-17
	UV1	Witness Statement of Trish Stewart	17 January 2019	p. 4603 at para 10
	HSU5	Witness Statement of Christopher Friend	15 February 2019	p. 2947 at para. 30.

	UV4	Witness Statement of B Sinclair	16 January 2019	p. 4573 at para. 22.
UWU – mobile phone allowance claim				
UWU		Draft determination		CB 4416, [3]
	UV1	Statement of Trish Stewart	17 January 2019	[20]-[22]
	Transcript	Oral evidence of Trish Stewart	15 October 2019	PN440-457
	UV4	Witness Statement of Deon Fleming	16 January 2019	[25]-[30]
	Transcript	Oral evidence of Deon Fleming	15 October 2019	PN533-549
	UV6	Statement of Belinda Sinclair	16 January 2019	[15]-[17]
	HSU3	Statement of William Gordon Elrick	14 February 2019	[30]-[33]
	Transcript	Oral evidence of William Gordon Elrick		PN1075-1080
	Transcript	Oral evidence of Jeffrey Sidney Wright	17 October 2019	PN2584-2588
	Transcript	Oral evidence of Graham Joseph Shanahan	18 October 2019	PN2865-2872
	Transcript	Oral evidence of Joyce Wang	18 October 2019	PN3554-3568
AFEI	UV1	Witness Statement of Trish Stewart	17 January 2019	Para 21.
	Transcript	Oral evidence of Deon Fleming	15 October 2019	PN547-PN549.
	Transcript	Oral evidence of Deborah Anderson	15 October 2019	PN1005; PN1011 – PN1013; PN441.
	Transcript	Oral evidence of Trish Stewart	15 October 2019	PN448; PN452.
Ai Group	HSU26	Witness Statement of Robert Sheehy	15 February 2019	p. 2942 at paras 12-13.
	HSU27	Witness Statement of Pamela Wilcock	15 February 2019	p. 2954 at para. 19
	HSU4	Witness Statement of Heather Waddell	15 February 2019	p. 2959 at para. 31
	HSU28	Witness Statement of Thelma Thames	15 February 2019	p. 2964 at para. 22.
	Transcript	Oral evidence of Trish Stewart	15 October 2019	PN445-452.
	Transcript	Oral evidence of Deon Fleming	15 October 2019	PN534-PN537; PN547-549.

	Transcript	Oral evidence of Jeffrey Wright	17 October 2019	PN2585
ABI and others—variation to the client cancellation provision				
ABI	ABI5	Witness Statement of Graham Shanahan	18 October 2019	Paras. 20-27.
	ABI7	Witness Statement of Scott Harvey	2 July 2019	Paras. 32-43.
	ABI6	Witness Statement of Deb Ryan	12 July 2019	Paras. 46-50.
	ABI9	Witness Statement of Joyce Wang	12 July 2019	Paras. 35-40.
	ABI2	Witness Statement of Darren Mathewson	12 July 2019	
	ABI3	Witness Statement of Jeffrey Wright	12 July 2019	Paras. 25-29, 38.
	ABI8	Witness Statement of Wendy Mason	17 July 2019	Paras. 40-42.
		NDIA Efficient Cost Model for Disability Support Workers		Court Book p. 503, 541.
		Stewart and Brown – <i>Aged and Financial Performance Survey – Sector Report – Financial Year 2018</i>		Court Book p. 541.
UWU		NDIS Price Guide 2019-2020		CB 2796, pg.12-13
	UV1	Witness Statement of Trish Stewart	17 January 2019	[10]
	UV4	Witness Statement of Deon Fleming	16 January 2019	[13]-[16]
	HSU2	Further statement of Mark Farthing	16 September 2019	[6]-[10], [23]-[32]
	Transcript	Oral evidence of Belinda Sinclair	15 October 2019	PN745
	Transcript	Oral evidence of Darren John Mathewson	17 October 2019	PN2421-2424
	Transcript	Oral evidence of Graham Joseph Shanahan	18 October 2019	PN2891-2897
	Transcript	Oral evidence of Deborah Gaye Ryan	18 October 2019	PN3020-3032, PN3075-3080
	HSU15	Cross examination of Deb Ryan: Same Day Cancellation Log – subject to confidentiality order	18 October 2019	

	HSU16	Community Care Options Home Care Agreement Template		
	Transcript	Oral evidence of Scott Raymond Harvey	18 October 2019	PN3117-3140
	Transcript	Oral evidence of Wendy Mason	18 October 2019	PN3220-3249, PN3273-3280
	HSU19	Baptist Care Commonwealth Home Support Programme (CHSP) pro-forma Service Agreement		
	HSU20	Baptist Care Home Care Agreement		
ABI and others—Remote response				
ABI	ABI7	Witness Statement of Scott Harvey	2 July 2019	
	ABI6	Witness Statement of Deborah Ryan	12 July 2019	Para. 78.
	ABI2	Witness Statement of Darren Mathewson		
		NDIA Efficient Cost Model for Disability Support Workers		Court Book p. 489.
Ai Group	Transcript	Oral evidence of Deborah Anderson	15 October 2019	PN991; PN1005-1007.
ABI and others – variation dealing with client cancellation and make-up time				
ABI	ABI5	Witness Statement of Graham Shanahan	18 October 2019	Paras. 20-27.
	ABI7	Witness Statement of Scott Harvey	2 July 2019	Paras. 32-43.
	ABI6	Witness Statement of Deb Ryan	12 July 2019	Paras. 46-50.
	ABI9	Witness Statement of Joyce Wang	12 July 2019	Paras. 35-40.
	ABI2	Witness Statement of Darren Mathewson	12 July 2019	
	ABI3	Witness Statement of Jeffrey Wright	12 July 2019	Paras. 25-29, 38.
	ABI8	Witness Statement of Wendy Mason	17 July 2019	Paras. 40-42.
		NDIA Efficient Cost Model for Disability Support Workers		Court Book p. 503, 541.

		Stewart and Brown – <i>Aged and Financial Performance Survey – Sector Report – Financial Year 2018</i>		Court Book p. 541.
ASU	ASU4	Expert Report of Dr Jim Stanford	September 2019	
	Transcript	Oral Evidence of Dr Jim Stanford	17 October 2019	PN2216-PN2289
		<i>Predictability and control in working schedules</i> by Dr Olav Muurlink		CB 1686
	HSU2	Further statement of Mark Farthing	16 September 2019	[6]-[10], [23]-[32]
		NDSI Price Guide 2020		CB 2796, pp 12-13
	ABI7	Witness Statement of Scott Harvey	2 July 2019	CB 162, pp 166.
	ABI17	Oral evidence of Scott Raymond Harvey	18 October 2019	PN3117-3140
	NDS2	Witness Statement of Steven Miller	28 June 2019	CB 4408.
	Transcript	Oral Evidence of Steven Miller	17 October 2019	PN1992-PN2081
	ABI9	Witness Statement of Joyce Wang	12 July 2019	CB200
	Transcript	Oral evidence of Joyce Wang	18 October 2019	PN3554-3568
NDS	NDS1	Witness Statement of David Moody	12 July 2019	Paras. 64-66
	NDS2	Witness Statement of Steven Miller	28 June 2019	Para 40-50.
	ABI5	Witness Statement of Graham Shanahan	18 October 2019	Paras. 20-28.
	ABI7	Witness Statement of Scott Harvey	2 July 2019	Paras. 32-48.
	ABI6	Witness Statement of Deb Ryan	12 July 2019	Paras. 46-53.
	ABI9	Witness Statement of Joyce Wang	12 July 2019	Paras. 25-42.
	ABI3	Witness Statement of Jeffrey Wright	12 July 2019	Paras. 25-31.
	ABI8	Witness Statement of Wendy Mason	17 July 2019	Paras. 40-48.

ABI and others – variation dealing with hours of work and rostering				
ASU	ASU4	Expert Report of Dr Jim Stanford	September 2019	
	Transcript	Oral Evidence of Dr Jim Stanford	17 October 2019	PN2216-PN2289
		<i>Predictability and control in working schedules</i> by Dr Olav Muurlink		CB 1686
	ASU10	Witness Statement of Augustino Encabo	13 February 2019	CB 1137, [19]-[21]
	ASU9	Witness Statement of Richard Rathbone	13 February 2019	CB 1171
	ASU	Witness Statement of Tracy Kinchin	24 June 2019	CB 1190
		Witness Statement of Emily Flett	22 September 2019	CB 1427, [14], [19]-[20].
	ASU2	Statement of Robert Steiner	24 June 2019	
UWU	UV1	Witness Statement of Trish Stewart	17 January 2019	[9]-[12]
	UV4	Witness Statement of Deon Fleming	16 January 2019	[13]-[17]
	UV6	Statement of Belinda Sinclair	16 January 2019	[22]-[26]
	Transcript	Oral evidence of Belinda Sinclair	15 October 2019	PN599-616, 745