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

Agenda for conference – 10:30am on Thursday 27 May 2021

This document sets the agenda for items to be discussed during the conference on 27 May 2021. A Decision was issued on 4 May 2021 ([2021] FWC 2383). A summary of the decision was also issued. The relevant extracts from the Decision are attached.

The purpose of the conference is to discuss the following matters:

1. Remote response/recall to work claim

The Full Bench concluded that it is necessary to introduce an award term dealing with

remote response work and made the following general observations about such a term:

1. A shorter minimum payment should apply in circumstances where the employee is being paid an 'on call' allowance.

2. There is merit in ensuring that each discrete activity (such as a phone call) does not automatically trigger a separate minimum payment.

3. A definition of 'remote response work' or 'remote response duties' should be inserted into the Award. We note that ABI proposes the following definition:

> 'In this award, remote response duties means the performance of the following activities:
>
> (a) Responding to phone calls, messages or emails;
>
> (b) Providing advice ("phone fixes");
>
> (c) Arranging call out/rosters of other employees; and
>
> (d) Remotely monitoring and/or addressing issues by remote telephone and/or computer access.'

4. The clause should include a mechanism for ensuring that the time spent by an employee working remotely is recorded and communicated to their employer.

The Full Bench expressed the *provisional* view that the minimum payment for remote response work performed between 6.00am and 10.00pm should be 30 minutes and the minimum payment between 10.00pm and 6.00am should be 1 hour. However, they noted that there is an inter-relationship between the minimum payment period and the rate of payment.

2. Clothing and equipment claims

The Full Bench expressed the view that the SCHADS Award should be varied to provide for the reimbursement of reasonable costs associated with the cleaning or replacement of personal clothing which has been soiled or damaged in the course of employment.

Parties were directed confer about the form of a suitable variation, reflecting the view expressed above.

Parties should be prepared to discuss the form of the variation at the conference. If any progress has been made in the discussions between parties to date, it would assist the Commission if the proposed variation could be sent to Chambers.Ross.j@fwc.gov.au prior to the conference.

3. The travel time claim

The Full Bench expressed the view that minimum engagement, broken shifts and travel time are inter-related. Each of these impact on how work is organised and the remuneration for that work. All parties acknowledged the connection between these issues.

The Full Bench noted that the changes proposed in relation to broken shifts and minimum payment periods are likely to result in changes to rostering practices and to how work is organised. These changes may also change the extent of 'unpaid' travel between engagements. Further, the broken shift allowance proposed is intended to compensate for 2 disutilities:

- the length of the working day being extended because hours are not worked continuously, and
- the additional travel time and cost associated with effectively presenting for work on 2 occasions.

The Full Bench accepted, as a general proposition, that employees should be compensated for the time spent travelling between engagements. However, they noted that framing an award entitlement to address this issue raises several issues, including the circumstances in which any payment is to be made and the calculation of that payment. The Full Bench also noted that they were conscious of the s.134 considerations, in particular:

- the needs of the low paid
- the impact on employment costs and the regulatory burden, and
- the need to ensure that any provision is simple and easy to understand.

Parties should be prepared to discuss these issues at the conference.

PRESIDENT

Attachment

1. Remote response/recall to work claim

5.6.1 Background

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

> '**28.4 Recall to work overtime**
>
> An employee recalled to work overtime after leaving the employer's or client's premises will be paid for a minimum of two hours' work at the appropriate rate for each time so recalled. If the work required is completed in less than two hours the employee will be released from duty.'

[2] Clause 20.9 of the Award, 'On Call allowance' states:

> '**20.9 On call allowance**
>
> (a) An employee required by the employer to be on call (i.e. available for recall to duty) will be paid an allowance of 2.0% of the standard rate in respect to any 24 hour period or part thereof during the period from the time of finishing ordinary duty on Monday to the time of finishing ordinary duty on Friday.
>
> (b) The allowance will be 3.96% of the standard rate in respect of any other 24 hour period or part thereof, or any public holiday or part thereof.'

[3] The current on call allowances in the SCHADS Award are $20.12 (clause 20.9(a)) and $39.84 (clause 20.9(b)) respectively.

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

[5] The SCHADS Award does not currently directly address work performed outside of ordinary hours that does not require travel to a physical workplace. As the HSU observes:

> 'The Award provides (at clause 20.9) for payment of an on call allowance for employees who are required to be available for recall to duty.
>
> Clause 28.4 regulates the payment for when an employee is recalled to work. Where an employee is recalled to work overtime after leaving the work, the employee is paid for a minimum of two hours work at the appropriate rate for each recall, but must be released if the work is completed within that period.

The award does not clearly identify whether employees required to perform additional work without attending the place of work are entitled to compensation. Many employees are now able to perform valuable work for the employer outside the employer's premises connecting remotely with employer systems. Such work should be compensated appropriately.

The HSU contends the Award should be amended to make clear that employees required to perform work out of hours should be compensated, with a minimum payment of one hour attached to such work.'[1]

[6] NDS makes a similar point:

'The award is currently silent on how to deal with work performed outside ordinary rostered hours that does not require travel to a physical workplace. This has the potential to create confusion and disputation around the application of clause 28.4 which deals with recall to work overtime.

Since the making of this modern award in 2010 there has been a rapid growth in the use of technology to enable remote working arrangements.

NDS is aware that on call arrangements are widely used throughout the social and community services sector, not just in disability services. The purpose of on call varies but includes availability for dealing with client emergencies, ensuring frontline workers can access advice from senior employees for non-routine circumstances, and in the context of the NDIS, handling short term rostering issues such as client cancellation or employee absences.'[2]

[7] There were initially 3 claims in respect of remote response and recall to work overtime, by ABI, the HSU and ASU. The ABI claim went through a number of different iterations and, as we shall see, the HSU subsequently withdrew its claim.

[8] The submissions and witness evidence relevant to remote response/recall to work claims are set out at **Attachment G**.

5.6.2 The ABI Claim

A The Claim

[9] ABI's *initial* claim is set out at items 5 – 7 in the draft determination filed on 2 April 2019 as follows:

'5. By deleting clause 20.9 and inserting in lieu thereof:

20.9 On call allowance

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

[1] HSU Submission, 15 February 2019 at paras 69 – 72.

[2] NDS Submission, 2 July 2019 at paras 41 – 43.

(i) $17.96 for any 24 hour period or part thereof during the period from the time of finishing ordinary duty on Monday to the time of finishing ordinary duty on Friday; or

(ii) $35.56 in respect of any other 24 hour period or part thereof on a Saturday, Sunday, or public holiday.

6. By inserting new clause 20.10 as follows:

20.10 Remote response

(a) In this award, remote response duties means the performance of the following activities by an employee outside of hours at the direction of, or with the authorisation of, their employer:

(i) responding to phone calls, messages or emails;

(ii) providing advice ('phone fixes');

(iii) arranging call out/rosters of other employees; and

(iv) remotely monitoring and/or addressing issues by remote telephone and/or computer access, in circumstances where the employee is not required to attend their employer's premises, or any other particular place of work, and at a time when the employee is either on call or has not otherwise been rostered to work.

(b) Subject to clause 20.10(f), where an employee is directed or authorised by their employer to perform remote response duties between 6.00am and 10.00pm, the employee will be paid at the applicable rate of pay specified in this Award for any such work performed between these hours, with a minimum payment of 15 minutes.

(c) Where an employee undertakes multiple separate instances of remote response duties during a particular period referred to in clause 20.10(b), and the total time spent performing such duties does not exceed 15 minutes, only one minimum payment is payable.

(d) Subject to clause 20.10(f), where an employee is directed or authorised to perform remote response duties between 10.00pm and 6.00am the employee will be paid at the applicable rate of pay specified in this Award for any such work performed between these times, with a minimum payment of one hour. Where such work exceeds one hour, payment will be made at the applicable rate for the duration of the work.

(e) Where an employee undertakes multiple separate instances of remote response duties during a particular period referred to in clause 20.10(d), and the total time spent performing duties does not exceed one hour, only one minimum payment is payable.

(f) Subject to clause 20.10(g), an employee who performs remote response duties must maintain and provide to their employer a time sheet specifying the time at which they commenced and concluded performing any remote response duty and a description of the work that was undertaken. This record must be provided to the employer prior to the end of the next full pay period or in accordance with any other arrangement as agreed between the employer and the employee.

(g) An employer may implement an alternate method or system for the recording and notification of the details referred to in clause 20.10(f).

(h) An employer is not required to pay an employee for any time spent performing remote duties if the employee does not comply with the requirements of clause 20.10(f) or any alternate method or system pursuant implemented under clause 20.10(g).

(i) For the purposes of this clause, remote response duties do not include employees undertaking administrative tasks such as (but not limited to) reviewing or inquiring about their roster or seeking changes to their roster.

(j) Clause 28.3 does not apply where an employee performs remote response work in accordance with this clause.

7. By deleting clause 28.4 and inserting in lieu thereof:

28.4 Recall to work overtime at the employer's or client's premises

An employee recalled to work overtime after leaving their place of work to attend at a premises where work is performed will be paid for a minimum of two hours' work at the appropriate rate for each time recalled. If the work required is completed in less than two hours the employee will be released from duty. This clause does not apply to an employee performing remote response duties in accordance with clause 20.10 of this Award.'

[10] ABI's initial claim involves a proposed new clause 20.10, as well as consequential amendments to clauses 20.9 and 28.4. Under the proposed new clause 20.10, employees would be entitled to payment for performing remote response duties, with the quantum of such payment and the relevant minimum payment dependent on when the remote response duties are performed.

[11] Specifically, ABI's initial claim proposed that employees be paid:[3]

- at the applicable rate of pay for work performed between 6.00am and 10.00pm, with a minimum payment of 15 minutes, and

- at the applicable rate of pay for work performed between 10.00pm and 6.00am, with a minimum payment of one hour.

[12] In its submission in reply dated 13 September 2019 the UWU did not oppose the insertion of a remote response clause but did not support a clause in the terms proposed by ABI. At [50] – [53] of its submission the UWU submits:

'The variation proposed by ABI and others does not adequately distinguish between remote response work performed whilst on call, and remote response work performed ad hoc, and only requires payment at the applicable rate of pay for remote response work performed.

A distinction between remote response duties performed whilst on call, and not, is necessary. When an employee is not on call, an employee should be able to expect that they are free to go

[3] ABI Draft Determination, 2 April 2010.

about their life without any intrusion from the workplace. This is particularly so when employees are award-reliant. Any remote response duties that the employer requires the employee to perform when they are not on call should be costed at a higher rate. This would encourage an employer to roster effectively, and ensure that an appropriate employee is available 'on call' to address issues that may arise. Placing a higher cost on remote response work performed by employees not on call also provides some compensation for the greater disutility associated with the work.

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

ABI and others' proposed variation also explicitly excludes 'administrative duties' from the ambit of remote response. We oppose this exclusion. If the employer directs or authorises an employee to perform administrative duties outside of ordinary hours, then there is no reason why such duties should not be paid for under this clause.'[4]

[13] In its submission of 23 September 2019, the ASU opposed ABI's claim on the basis that ABI's proposal was lacking in the following respects:

- the description of 'remote response' does not describe work in the SCHADS industry
- an employer would be entitled to *direct* an employee to perform work outside of their ordinary hours
- the proposed clause expands the scope of the current 'on call' term
- the proposed clause makes no distinction between a 'remote response' where an employee is rostered on call and where the employee is not rostered to work
- employees are only paid at the 'applicable rate' for any time worked. Part-time employees may be paid at their minimum rate of pay if they have not worked for more than 10 hours in a day or 38 hours in the week. The work should attract a penalty rate to compensate for the disutility of the work
- employers may refuse payment to employees who do not provide a timesheet but there is no obligation on the employer to inform the employee 'of the appropriate record keeping practices'
- the proposed clause explicitly excludes 'administrative tasks', yet it appears that the application is directed at administrative tasks, and
- clause 28.3 does not apply where an employee performs work under the proposed clause: 'This means employees could be required to attend work after a disrupted rest period or after working a significant amount of overtime'.

[4] UWU Submission, 13 September 2019 at paras 50 – 53.

[14] In its supplementary submissions in reply dated 2 October 2019 the HSU broadly adopted the ASU's submissions.[5]

[15] On 15 October 2019 ABI filed an amended draft determination dealing with 'remote response' directed at seeking to narrow the issues in dispute between the parties.

[16] Later, some minor amendments were made to ABI's proposed variation in its further amended draft determination filed on 10 February 2020. In its final form ABI proposes the following variations:

'3. By deleting clause 20.9 and inserting in lieu thereof:

20.9 On call allowance

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

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

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

4. By inserting at clause 3.1:

3.1 In this Award, unless the contrary intention appears:

Workplace means a place where work is performed except for the employee's residence.

5. By deleting clause 28.4 and inserting in lieu thereof:

28.4 Recall to work

(a) An employee who is recalled to work overtime after leaving the workplace and requested by their employer to attend a workplace in order to perform such overtime work will be paid for a minimum of two hours' work at the appropriate rate for each time recalled. If the work required is completed in less than two hours the employee will be released from duty.

6. By inserting new clauses 28.5 and 28.6:

28.5 Remote response when not on call

(a) An employee who is not required to be on call and who is requested to perform work by the employer via telephone or other electronic communication away from the workplace (a remote response request) will be paid at the appropriate rate for a minimum of one hour's work on each occasion a remote response request is made, provided that multiple remote response requests made and concluded within the same hour shall be compensated within the same one hour's payment. Any time worked continuously beyond one hour will be rounded to the nearest 15 minutes and paid accordingly.

[5] HSU Submission, 2 October 2019 at para 7.

(b) Any further requests to perform remote response work will be paid an additional one hour for each time so requested provided that multiple remote response requests made and concluded within the same hour shall be compensated within the same one hour's payment.

(c) An employee who performs work in accordance with this clause 28.5 must maintain and provide to their employer a time sheet specifying the time at which they commenced and concluded performing any work away from the workplace and a description of the work that was undertaken. This record must be provided to the employer prior to the end of the next full pay period or in accordance with any other arrangement as agreed between the employer and the employee.

(d) The employer is not required to pay an employee for any time spent performing work away from the workplace in accordance with this clause if the employee does not comply with the requirements of clause 28.5(c). Clause 28.5(d) does not apply if the employer has not informed the employee of the reporting requirements.

(e) Clause 28.5 does not apply to an employee performing remote response duties in accordance with clause 28.6 of this Award.

28.6 Remote response when on call

(a) Clause 28.6 applies to an employee who is required to be on call and who is required to perform work by the employer via telephone or other electronic communication away from the workplace.

(b) Where an employee is directed or authorised by their employer to perform remote response duties:

(i) between 6.00am and 10.00pm, the employee will be paid at the appropriate rate specified in this Award for any such work performed between these hours, with a minimum payment of 15 minutes. Where an employee undertakes multiple separate instances of remote response duties during a particular period and the total time spent performing those duties does not exceed 15 minutes, only one minimum payment is payable. Time worked past 15 minutes will be rounded up to the nearest 15 minutes.

(ii) between 10.00pm and 6.00am the employee will be paid at the appropriate rate for a minimum of 45 minutes work on each occasion a remote response request is made, provided that if multiple remote response requests are made and concluded within the same 45 minute period they shall be compensated within the same 45 minute payment. Any time worked continuously beyond each 45 minute period will be rounded up to the nearest 15 minutes and paid accordingly.

(c) An employee who performs remote response duties must maintain and provide to their employer a time sheet specifying the time at which they commenced and concluded performing any remote response duty and a description of the work that was undertaken. This record must be provided to the employer prior to the end of the next full pay period or in accordance with any other arrangement as agreed between the employer and the employee.

(d) The employer is not required to pay an employee for any time spent performing remote duties if the employee does not comply with the requirements of clause 28.6(c). Clause 28.6(d) does not apply if the employer has not informed the employee of the reporting requirements.'

B The Submissions

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

- the *Local Government Award 2020* (at clauses 21.4(c) and 21.6(d))
- the *Local Government (State) Award 2014* (NSW) (at clause 19E)
- the *Water Industry Award 2020* (at clauses 20.4(d) and 20.6(d))
- the *Business Equipment Award 2020* (at clauses 20.6(d) and 20.7), and
- the *Contract Call Centres Award 2020* (at clauses 20.4(c), 20.7).[6]

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

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

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

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

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

[23] AFEI proposes the following amendments to ABI's claim:[7]

'28.5 Remote response when not on call

(a) An employee who is not required to be on call and who is requested by the employer to perform work <u>on a particular occasion for a particular unplanned incident</u> ~~by the employer~~ <u>where the work is a response</u> via telephone or other electronic communication away from the workplace.

[6] This list has been updated to reflect the clause numbering of the new 2020 modern awards.

[7] AFEI Submission, 19 November 2019 at para 1.25.

28.6 Remote response when on call

(a) This clause applies to an employee who is required to be on call and who is required by the employer to perform work on a particular occasion for a particular unplanned incident ~~by the employer~~ where the work is a response via telephone or other electronic communication away from the workplace.'

[24] In reply, ABI acknowledges the concern expressed by AFEI in relation to the wording proposed by its clients for triggering the operation of the clause (that is, where an employee is 'requested or required to perform work by the employer via telephone or other electronic communication away from the workplace').

[25] While ABI accepts that concern, it does not consider that the specific variation proposed by AFEI is sufficiently clear to alleviate the concern raised and submitted:

> 'if the Commission is minded to introduce more precision as to the notion of "remote response work, ABI considers that the better approach to achieving this objective would be to include a definition of "remote response work" or "remote response duties".'[8]

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

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

- Ai Group is not calling for any variation to the SCHADS Award directed at imposing new obligations on employers in relation to 'remote response' work
- should the Full Bench nonetheless be minded to vary the SCHADS Award to include a term relating to 'remote response' work, Ai Group submits that ABI's proposal ought to be preferred over that advanced by the HSU and ASU, and
- ABI's proposal strikes a more reasonable balance between the interests of employers and employees. It is an appropriately conservative approach to the imposition of new obligations upon employers given the potential for such new provisions to have adverse consequences. There is also some difficulty of robustly assessing these matters given the nature and lack of evidentiary material relating to this issue advanced by the parties seeking the change.

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

- to clarify that the recall to work overtime provisions apply in circumstances where an employee is required to return to a workplace that is not their domestic residence to undertake overtime work

[8] ABI Submission, 10 February 2020 at p 58.

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

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

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

[30] In reply, ABI agrees with Ai Group's characterisation of the intention of its proposal and proposed that if the Commission is minded to introduce more precision as to the notion of 'remote response work' or 'remote response duties', then this could be done by inserting a definition in the following terms:

> 'In this award, remote response duties means the performance of the following activities:
>
> (a) Responding to phone calls, messages or emails;
>
> (b) Providing advice ("phone fixes");
>
> (c) Arranging call out/rosters of other employees; and
>
> (d) Remotely monitoring and/or addressing issues by remote telephone and/or computer access.'[9]

[31] The various Unions oppose ABI's amended claim.

[32] In response to ABI's amended claim the HSU relies on its submissions of 2 October 2019,[10] in which it broadly adopted the ASU's submissions which were directed at ABI's initial claim.

[33] In its submission of 19 November 2019, the ASU address ABI's amended claim, as follows:

> 'We note that ABI filed an amended draft determination in respect of their remote response and recall to work overtime clause. Our submissions of 16 September 2019 remain relevant to the amended draft determination. The ABI draft determination does not provide an appropriate rate of payment to employees who are recalled to work overtime away from the workplace. It is also a complicated provision that will be difficult to implement in practice.'[11]

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[9] ABI Submission, 10 February 2020 at p 58.

[10] HSU Submission, 18 November 2019 at para 155.

[11] ASU Submission, 19 November 2019 at para 123.

[34] The UWU submits that [49] and [52] of its submission of 13 September 2019 remain relevant to ABI's amended claim.[12] These paragraphs are set out below:

> '49. ABI and others have filed a draft determination to insert a clause addressing remote response duties. We do not oppose the insertion of a remote response clause, however we do not support the terms as proposed by ABI and others.
> . . .
>
> 52. Remote response duties are performed outside of rostered hours, and should be paid at overtime rates. If remote response duties are not costed effectively, this could result in some employers requiring employees to work multiple instances of remote response across a long period of time, effectively disrupting any rest break the employee is entitled to between shifts.'

[35] The Joint Union submission of 10 February 2020 does not address the terms of ABI's amended claim.

5.6.3 The Union Claims

A The Claim

[36] The HSU initially sought to vary clause 28.4 to include a new sub-clause dealing with circumstances where an employee is required to perform work from home after leaving the employer's or client's premises. Under the HSU proposal, the employee would have been entitled to a minimum of 1 hours' pay at overtime rates 'for each time recalled'.[13]

[37] The following question was posed to the HSU in Background Paper 1 (Q23):

> *How does the proposed clause operate in the event that an employee responds to, say, three phone calls within the same one hour period?*

[38] The HSU responded that it does not press for the adoption of its draft clause and supports the ASU draft determination.[14] We need to say no more about the HSU proposal.

[39] The ASU's claim seeks the deletion of clause 28.4 and the insertion of a new clause, as follows:[15]

> '**28.4 Recalled to work overtime**
>
> (a) An employee who is recalled to work overtime after leaving the workplace and requested by their employer to attend a workplace in order to perform such overtime work will be paid for a minimum of two hours' work at the appropriate overtime rate

[12] UWU Submission, 18 November 2019 at para 85.

[13] See HSU Amended Draft Determination, 15 February 2019 at [16].

[14] Joint Union Submission, 10 February 2020 at para 188.

[15] ASU Submission 23 September 2019.

for each time recalled. If the work required is completed in less than two hours the employee will be released from duty.

(b) An employee who is not required to be on call and who is requested to perform work by the employer via telephone or other electronic communication away from the workplace will be paid at the appropriate overtime rate for a minimum of two hours work. Multiple electronic requests made and concluded within the same hour shall be compensated within the same one hour's overtime payment. Time worked beyond two hours will be rounded to the nearest 15 minutes.

(c) An employee who is required to be on call and who is requested to perform work by the employer via telephone or other electronic communication away from the workplace will be paid at the appropriate overtime rate for a minimum of one hours work. Multiple electronic requests made and concluded within the same hour shall be compensated within the same one hour's overtime payment. Time worked beyond one hour will be rounded to the nearest 15 minutes.'

[40] The ASU submits that its proposed variation gives effect to the following principles:[16]

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

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

3. A 2 hour minimum payment at overtime rates should apply where an employee works remotely when they are not required to be on call. This aligns with the minimum payment for a recall to work overtime at the physical workplace.

4. A 1 hour minimum payment should apply where an employee works remotely when they are required to be on call. This aligns the minimum payment for remote work while on call with the minimum payment for work performed during a sleepover.

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

B The Submissions

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

[16] ASU Submission 23 September 2019 at para 7.

[42] The ASU submits that there is 'significant disutility to the employee associated with working outside of ordinary hours even if they are not recalled to the physical workplace.'[17] The ASU relies on the witness statements of Deborah Anderson and Emily Flett in support of its application and submits that:

> 'Both witnesses report that while they derive satisfaction from their work and feel loyal to their clients, the hardship of on call work is significant. Both witnesses describe the severe physical, psychological and social impact on working remotely. In both cases, their employer has offered an above award two hour minimum payment at overtime rates to attract them to the work. Both witnesses report that they would be less willing to do this work if they were paid any less.'[18]

[43] We note that both of the witnesses referred to are rostered to be 'on call'. We also note that the relevant part of Ms Flett's statement was withdrawn following an objection from the employer parties.[19] In these circumstances the ASU is not able to rely on this aspect of Ms Flett's evidence.

[44] The various employer interests oppose the ASU's claim.

[45] ABI states that it is opposed to the ASU claim and has advanced a separate proposal to introduce a remote response duties compensation regime.

[46] In its submission of 18 November 2019 Ai Group identifies 6 broad issues with the ASU claim.

1. Handling multiple requests

[47] Ai Group submits that there is merit in the proposition that any remote response clause should ensure that each discrete activity does not necessarily trigger a separate minimum payment:

> 'It would be unfair to employers if…an employee undertook say three short phone calls…each of only a few minutes duration and the employer was required to provide 6 hours pay'.[20]

[48] Ai Group submits that there is no apparent basis for the ASU proposal that only multiple requests within the same hour are compensated 'within the same one hour's overtime payment when the minimum payment proposed is for two hours' work'.[21] Ai Group submits that under the ASU's proposal an employee could handle 2 separate requests during a 2 hour period and be entitled to more than 2 hours' pay.

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[17] ASU Submission, 23 September 2019 at para 6.

[18] ASU Submission, 23 September 2019 at para 6.

[19] See Exhibit ASU5 – Schedule of employer objections to statements of Emily Flett and Augustino Encabo, para 16. Also see Transcript, 18 October 2019 at PN3353-3380.

[20] Ai Group Submission, 18 November 2019 at para 112.

[21] Ai Group Submission, 18 November 2019 at para 113.

2. The circumstances which attract payment

[49] Ai Group submits that there is a lack of clarity associated with the description of the activities which attract payment under the ASU's proposal. Clauses 28.4(b) and (c) provide that the trigger for payment is when the employee is 'requested to perform work by the employer via telephone or other electronic communication away from the workplace'.

[50] Ai Group submits that it is unclear whether an employee is to be paid for work undertaken away from the workplace in response to a telephone call or electronic communication to work, or whether it is the work of actually answering a telephone call or electronic communication which attracts a payment (Ai Group assumes it is the latter).

[51] Ai Group also submits that an employee who is 'on call' who is checking their phone or emails to check for requests to work may be caught by the ASU proposal and be entitled to payment under clause 28.4(c). Further, clause 28.4(c) does not appear to only apply to circumstances where an employee is working outside of their rostered or scheduled work:

> 'Instead, it simply applies to work that is undertaken away from the workplace. This would capture circumstances where an employee is permitted to work from home or some other convenient location as part of their ordinary duties'.[22]

3. Record keeping

[52] The ASU's proposal contains no mechanism for ensuring that the time an employee spends working remotely is recorded and communicated to their employer.

4. The appropriate rate of pay

[53] The ASU's proposal requires that all remote response work be paid at overtime rates, regardless of whether the work is undertaken during overtime or ordinary hours. Ai Group submits[23] that this is inappropriate for 3 reasons:

(i) employees may be performing their ordinary hours of work at home as part of their usual working arrangements and may be part of their rostered hours of work;

(ii) the proposal 'greatly restricts an employer's capacity to utilise casual and part-time employees to perform work at home at ordinary hourly rates'. At present casual and part-time employees can work outside their rostered hours at ordinary rates, subject to such hours not exceeding specified daily, weekly or fortnightly limits; and

(iii) the work itself is not 'overtime', at least for casual and part-time employees; but would be paid at overtime rates.

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[22] Ai Group Submission, 18 November 2019 at para 118.

[23] Ai Group Submission, 18 November 2019 at para 130; Ai Group Submission, 13 July 2019 at paras 461 – 466.

[54] Ai Group submits that remote response work should only attract the rates that would ordinarily be applicable (which may be ordinary rates, overtime rates or penalty rates).

5. An incentive to put employees 'on call' and minimum payment periods

[55] Ai Group submits that there is 'some logical force' to the ASU's proposal that a remote response or recall clause provide an incentive for an employer to put an employee 'on call' where they may be requested to perform work related activities outside of ordinary working hours; but this should not be overstated. Ai Group agrees with having a shorter minimum payment in circumstances where the employee is paid an 'on call' allowance. Ai Group submits that ABI's proposal provides 'a sensible structure of escalating levels of minimum payment', namely:

- a 2 hour minimum payment to an employee actually required to attend a workplace other than their residence
- a 1 hour minimum payment when required to work remotely while *not* on call, and
- when an employee is 'on call' (and being paid an on-call allowance), a 15 minute minimum payment during the day and a 45 minimum payment at night.

[56] Ai Group submits that the ASU's proposed 2 hour minimum is not justified:

> 'It is disproportionate to what might, at least in some instances, be a very short period of work undertaken without the employee incurring the cost or inconvenience of travelling to some other location…
>
> It is not possible to reconcile the proposition that the employee should be paid for two hours when they perform a small amount of work, in their own home, with the reality that an employee is entitled to two hours payment when they undertake overtime work away from their home under both the current terms of clause 28.4 and the ASU proposed provision.'[24]

6. Issues associated with clause 28.3

[57] Ai Group submits that if we are satisfied that remote response work warrants specific recognition in the SCHADS Award then 'it would be sensible to amend clause 28.3':

> 'Clause 28.3(a) provides for an employee, other than a casual, to have 10 consecutive hours off duty after completing overtime and before the commencement of their ordinary work on the next day or shift.
>
> Clause 28.3(b) provides a further entitlement to double time payments when an employee is not provided the requisite 10 hour break.

[24] Ai Group Submission, 18 November 2019 at paras 139 - 140.

If an employee performs a small amount of work which is undertaken remotely and in the nature of that which appears to be contemplated by ABLA's Clients' and the ASU's claims, it is not justifiable for the application of clause 28.3 to be triggered. For example, an employee who receives a 5 minute phone call during the 10 hour break (by perhaps only an hour before its conclusion) should not be subsequently entitled to a further 10 consecutive hours off duty without loss of pay.

Clause 25.3 does not appear to currently contemplate that work may be undertaken remotely. So much is apparent from the clause's contemplation of an entitlement to be "absent" under clause 28.3(b) until they have had the requisite 10 hour break.'[25]

[58] AFEI opposes the ASU claim and relies on its submissions of 23 July 2019 in response to the HSU's claim to vary the recall to work provisions, in particular:

- work subsequently performed at home does not meet the ordinary meaning of a 'recall', that is 'a person who is recalled is summoned to return to a place in a manner where there is a requirement for the person to return'[26]

- there is no basis for imposing a minimum payment of 1 hour for responding to a phone call or performing any of the other duties identified in the claim when the employee is at home, is not required to leave home and:

    - is not inconvenienced by losing any time associated with travelling to perform work and then returning home

    - is not incurring the expense of unpaid travel to work, and

    - is not expected to wear work clothes or change into a work uniform,

- the proposal imposes a minimum payment at overtime rates for work that does not necessarily involve overtime

- it is likely that the individual incidents of the work identified would take substantially less than 1 hour and could be as short as 5 minutes to respond to a phone call or message. The claim could result in an employee being paid an amount which is 'extremely disproportionate' to the work performed

- the proposal provides that the employee would need to be 'required' to perform work from home:

    'it does not specify who/from where the 'requirement' arises. An employee might claim an entitlement under the provision for working from home where they have self-determined that they are required to perform the work, where this has not been authorised by the employer'.

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[25] Ai Group Submission, 18 November 2019 at paras 150 – 153.

[26] AFEI Submission, 23 July 2019 at para 128 citing [2018] FWC 4334 at [59].

- the provision does not require the employee to provide any evidence of the time undertaken in performing the work from home or the extent of the work performed.

[59] As to the ASU's draft determination, AFEI notes that the provision takes effect when the employee is requested to perform work by the employer via telephone or other electronic communication away from the workplace. AFEI submits that this element of the claim:

> 'This would widen the application of the provision from response work (i.e. being 'recalled to work' due to a specific instruction or direction from an employer on a particular occasion and for a more particular purpose.), to potentially circumstances where an employee undertakes routine/general overtime work (potentially as part of their core responsibilities, pursuant to a general instruction or requirement)… [and] could potentially cause confusion in respect of whether an employee is performing overtime or remote response work, and thus whether remote response provisions will apply.'[27] (footnotes omitted)

[60] AFEI also submits that the ASU's proposed variation could increase the regulation of employees who routinely undertaken overtime work as part of the nature/seniority of their position.

5.6.4 The Evidence

[61] ABI relies on the evidence of 3 witnesses: Mr Darren Mathewson,[28] Ms Deb Ryan[29] and Mr Scott Harvey.[30]

[62] Mr Mathewson is the Executive Director at Aged and Community Service Australia for NSW, Australian Capital Territory, Tasmania and Victoria. Mr Mathewson's evidence was general in nature in which he describes the aged care workforce[31] and the various reforms and programs in the home sector including consumer directed care. At [72] – [74] of his statement Mr Mathewson deals with the impact of various reforms on financial performance in the sector.

[63] Ms Ryan is the CEO of Community Care Options Limited. Community Care Options Limited provides aged care home care packages and NDIS services; and employs about 170 employees. Ms Ryan's evidence relating to recall to work is set out at [73] – [76] and [78] – [79] of her statement:

> 'We don't recall employees to the workplace, but we have staff on call. We provide an above award on call allowance.

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[27] AFEI Submission, 19 November 2019 at paras 1.9 – 1.10.

[28] See generally, Exhibit ABI2 – Witness Statement of Darren Mathewson, 12 July 2019; Transcript, 17 October 2019, cross-examination at PN2303 – PN2518.

[29] See generally, Exhibit ABI6 – Witness Statement of Deb Ryan, 12 July 2019; Transcript, 18 October 2019, cross-examination at PN2946 – PN3095.

[30] See generally, Exhibit ABI7 – Witness Statement of Scott Harvey, 2 July 2019; Transcript, 18 October 2019, cross-examination at PN3107 - PN3152.

[31] Exhibit ABI2 – Witness Statement of Darren Mathewson, 12 July 2019 at paras 19 – 24.

The Company provides an on call service to clients and staff between6.00am and 8.30am and 4.30pm to 10.00pm Monday to Friday, and from 6.00am to 10.00pm on weekends and public holidays.

The person on call only answers the phone, they don't have to go out and attend to anything. We pay $50.00 per day on weekdays and $100.00 per weekend day. Employees are allocated two weeks per year for on call. They work one full week on call in first 6 months and one in second six months. They are paid $450.00 for the week (in addition to their wages) to answer the phone and manage whatever the call requires.

Some days the on call person will receive no calls, and some days they could receive 10 calls.

Reasons that clients use the on call service can be to change their service, to inform us that they are going to hospital and for cancellations. Clients are asked only to use the on call service if the issue is urgent.

Employees use the on call service to call in sick or if they need to change their shift. They also use the service if they require support with a client issue. We encourage employees to use it for this purpose as we want our staff to feel well supported. The on call person will assist by amending the roster.'

[64] Mr Harvey is the Operations Manager at ConnectAbility Australia Limited. ConnectAbility provides a range of social, community home care and disability services to over 600 clients across the Hunter Region and Central Coast regions of NSW, and employs about 270 employees. Mr Harvey's evidence relating to 'recall to work' is set out at [61] – [63] of his statement:

'ConnectAbility has an on-call team for its community supports service provision. This role is currently provided by Team Leaders and Rostering staff. Community support workers are not engaged to provide on-call responsibility as part of their role.

ConnectAbility also has an on-call team for supported independent living (SIL) operations. This role is currently provided by accommodation coordinators and managers. Residential support workers are not engaged to provide on-call responsibilities as part of their role.

The on-call process is implemented to ensure Direct Support staff members have access to emergency support and advice after hours. The on call role is to provide advice to minimise any risk, ensure compliance with legislative requirements and policy and procedure and to provide support to staff experiencing critical issues.'

[65] The ASU relies on aspects of Dr Stanford's evidence, the Muurlink Report and the evidence of 2 witnesses: Ms Deborah Anderson[32] and Ms Emily Flett.[33]

[66] Ms Anderson is a Shared and Supported Living Coordinator with The Leisure Life Village NSW. Ms Anderson is rostered to be 'on call' once a week, from 5.00pm until 8.00am the following morning and sometimes on weekends (between 9.00am and 9.00am). Ms

[32] See generally, Exhibit ASU1 – Witness Statement of Deborah Anderson, 2 September 2019.

[33] See generally, Exhibit ASU8 – Witness Statement of Emily Flett, 22 September 2019.

Anderson sets out the duties she performs while 'on call', at [17] – [22] of her statement which include:

- responding to emergencies
- administrative tasks such as rostering
- providing phone advice and assisting less experienced staff, including providing advice on medication issues and recommending corrective action when equipment is not functioning correctly, and
- finding staff members to fill in when another staff member is sick or has to leave work early.

[67] Ms Anderson is paid an above Award allowance of $30.00 when rostered on call between Monday and Friday, and $50.00 when rostered on call on weekends and public holidays. When working while rostered on call Ms Anderson is paid at the rate of time and half for the first 2 hours and double time after that.[34]

[68] At [23] of her statement Ms Anderson states that she is 'not usually required to work out of hours unless…rostered to be on call':

> 'I am not usually required to work out of hours unless I am rostered to be on call. If I am contacted out of hours, this is usually just a telephone call from a new coordinator or a more junior staff member with a quick enquiry. There is no overt expectation from my employer to do this work. However, there is a clear expectation that I will be available to answer calls from management outside of working hours. But this does not happen very often and has only minor impact on me.'

[69] Ms Anderson discusses the impact of on call work at [24] of her statement:

> 'When I am on call, I cannot leave my home as I need to have phone, internet and computer access. I must also be ready and able to respond to any requests for work. I cannot go anywhere nor do anything else. This is particularly difficult on weekends when doing an on call shift from 9am until 9am. This causes high anxiety for me as I could be called out to any site to handle difficult incidences. This has occurred 3 times so far, and once resulted in me having to do a 23 hour shift. This can also result in me being required to attend at two places at the one time which is highly stressful as I can't go to a house to attend an incident when I am already attending an incident at another house.'

[70] Ms Flett is an After Hours Practitioner with Anglicare Victoria. Ms Flett works in a team that provides after hours on call support to staff, volunteers and young people in Anglicare's care:

> 'I work in a dedicated team that provides after hours on call support to staff, volunteers and young people in our care. We work from the Anglicare Offices in Collingwood, we respond to phone calls from all regions of the metro area. This position tests you out because you get a variety of

[34] Exhibit ASU1 – Witness Statement of Deborah Anderson, 2 September 2019 at para 22.

> calls every night, some of these calls are day to day issues, such as staffing matters, but we spend a lot of our time providing risk mitigation and managing crisis. The position is relatively senior as it holds a large amount of responsibilities and Anglicare staff calling in can use this management structure for support, guidance and direction, while out of hours for their regular line manager.
>
> Anglicare created our dedicated on-call team to address the impact of on call work on staff performing their regular duties during the day time and to reduce the impacts on them as previously, house managers, specialist practitioners and other frontline staff were required to be on call. Now this work has been given to our team so appropriate breaks can be structured in to a roster and we reduce burnout on valuable staff.'[35]

[71] Ms Flett works 10 to 15 'recall' hours each fortnight and is paid 2 hours' pay at double time when she receives a call.[36]

[72] Ms Flett discusses the impact of on call work at [21] – [25] of her statement, noting that if she works through the night on call she feels exhausted the following day; 'cannot exercise at a high level', 'cannot ride my motorbike or pushbike', finds it 'harder to engage' with her partner friends and family and doesn't have the energy to socialise.

[73] As to Dr Stanford's evidence we have already observed that the Stanford Report has 'serious deficiencies' (see [171] – [186] above) and that we have derived little assistance from Dr Stanford's evidence.

[74] We have also already dealt with the Muurlink report (see [154] – [157]), noting that while its direct relevance to the claims before us is somewhat limited, we accept the general proposition that working irregular or unsystematic hours can have a negative effect on physical and psychological health. We also accept, again as a general proposition, that a worker's sense of control at work is connected to worker well-being.

[75] In relation to both the ABI and ASU witness evidence we would make the general observation that the evidence is largely confined to 'on call' work. The evidence is of limited relevance to the circumstances where an employee is not 'on call', or rostered to work, who is contacted and required to perform certain work functions remotely without physically attending work premises.

[76] In our view the following findings are largely uncontentious:

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

2. Given the nature of the SCHADS sector it is necessary to have arrangements in place for out of hours work.[37]

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[35] Exhibit ASU8 – Witness Statement of Emily Flett, 22 September 2019 at paras 9 – 10.

[36] Exhibit ASU8 – Witness Statement of Emily Flett, 22 September 2019 at para 16 'and no more if I receive 20/30 calls in that same period, once I get a call in the next call block after the two hours I will again be paid another two hour block'.

[37] Exhibit ABI6 – Witness Statement of Deb Ryan, 12 July 2019 at para 78.

3. Employers have different practices in place for ensuring that employees are available to receive calls or otherwise respond to emergencies or other inquiries or issues that may arise.[38]

4. There is disutility associated with performing work outside of ordinary hours in circumstances where the employee is not recalled to a physical workplace (i.e. remote response work).

[77] The evidence does not support any findings beyond these general propositions.

5.6.5 Consideration

[78] It seems to us that there is broad support from most of the employer interests and the Unions for the introduction of a term in the SCHADS Award dealing with 'remote response' work, or work performed by employees outside of their normal working hours and away from their working location.

[79] We agree that it is necessary to introduce an award term dealing with remote response work and make the following general observations about such a term:

1. A shorter minimum payment should apply in circumstances where the employee is being paid an 'on call' allowance.

2. There is merit in ensuring that each discrete activity (such as a phone call) does not automatically trigger a separate minimum payment.

3. A definition of 'remote response work' or 'remote response duties' should be inserted into the Award. We note that ABI proposes the following definition:

   'In this award, remote response duties means the performance of the following activities:

   (a) Responding to phone calls, messages or emails;

   (b) Providing advice ("phone fixes");

   (c) Arranging call out/rosters of other employees; and

   (d) Remotely monitoring and/or addressing issues by remote telephone and/or computer access.'[39]

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

[39] ABI Submission, 10 February 2020, p 58.

4. The clause should include a mechanism for ensuring that the time spent by an employee working remotely is recorded and communicated to their employer.

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

[81] In essence the ASU seeks to introduce a regime whereby:

- employees who are *not* required to be on call but are requested to perform work while away from the workplace are paid at the appropriate overtime rate for a minimum of 2 hours work, with time worked beyond 2 hours rounded to the nearest 15 minutes, and

- employees who are required to be 'on call' and requested to perform work away from the workplace while on call will be paid at the appropriate overtime rate for a minimum of 1 hours' work, with time worked beyond 1 hour rounded to the nearest 15 minutes.

[82] ABI's amended claim also provides for different entitlements depending upon whether the employee is required to be 'on call' for the purpose of clause 20.9 (and paid an on call allowance).

[83] If an employee is *not* 'on call' a remote response request is paid at the 'appropriate rate' for a minimum of 1 hours' work on each occasion a remote response request is made, provided that multiple remote response requests made and concluded within the same hour are compensated within the same 1 hour's payment.

[84] If an employee is 'on call' then the relevant minimum payment in respect of performing remote response work depends on *when* the remote response duties are performed. ABI proposed that employees be paid:[40]

- at the minimum rate of pay for work performed between 6.00am and 10.00pm, with a minimum payment of 15 minutes, and

- at the applicable rate of pay for work performed between 10.00pm and 6.00am with a minimum payment of 45 minutes.

[85] In all circumstances remote response work is paid at 'the appropriate rate'; it is only the minimum payment which varies. We return to this issue shortly.

[86] Determining an appropriate monetary entitlement for this type of work involves an assessment of the value of the work and the extent of disutility associated with the time at which the work is performed. In the *Penalty Rates Case*, the Full Bench observed at [202]:

[40] ABI Submission, 2 July 2019 at para 6.6.

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

[87] As mentioned earlier, we accept that there is disutility associated with performing remote response work. However, the level of disutility associated with employees performing remote response work is less than that experienced by employees who are recalled to a physical workplace or who are 'on call' to be recalled to work, as employees are not required to:

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

[88] The ASU's proposal requires that *all* remote response work be paid at overtime rates. Further, if the employee is not 'on call' (and receiving an 'on call' allowance) they are paid overtime rates for a minimum of 2 hours. If they are 'on call' the minimum payment is one hour at overtime rates.

[89] We are not persuaded that the ASU's proposed minimum payments are warranted. We agree with Ai Group's submission in respect of this aspect of the ASU's claim:

'It is disproportionate to what might, at least in some instances, be a very short period of work undertaken without the employee incurring the cost or inconvenience of travelling to some other location…

[90] We see the logic inherent in the structure of ABI's minimum payment regime but take a different view as to the minimum periods prescribed. Our *provisional* view is that the minimum payment for remote response work performed between 6.00am and 10.00pm should be 30 minutes and the minimum payment between 10.00pm and 6.00am should be 1 hour. However, we note that there is an inter-relationship between the minimum payment period and the rate of payment.

[91] The rate of pay applicable to remote response work (as opposed to the minimum payment) is problematic.

[92] The ASU contends that all remote response work is to be paid at overtime rates, regardless of whether the work is undertaken during overtime or ordinary hours.

[93] ABI's amended claim provides that all remote response work is paid at 'the appropriate rate'. Proposed clause 28.6(b)(i) states that 'the employee will be paid at *the appropriate rate specified in this Award for any such work performed between these hours*'.

[94] It seems to us that the expression 'the appropriate rate' lacks clarity in this context and is apt to confuse. The 'appropriate rate' for such work depends on a range of factors, such as:

- Is the employee a full-time, part-time or casual employee?
- Is a shift allowance applicable?
- In which sector does the employee work? (e.g. if the employee is a full-time employee different overtime rates apply depending on whether they are a 'disability services, home care and day care employee' or a 'social and community services an crisis accommodation employee': see clause 28.1(a))
- Does the remote response work constitute work in excess of 38 hours per week?
- Is the remote response work being performed on a Saturday or Sunday?

It seems to us that ABI's formulation – 'the appropriate rate' – gives rise to considerable complexity; a simpler formulation would be preferable. In our view, this issue requires further consideration and will be the subject of a conference. Prior to the conference, ABI will be asked to provide further elaboration as to the meaning of 'the appropriate rate', as applied in a range of circumstances. A Notice of Listing for the Conference will be issued shortly.

2. Clothing and equipment claims

From decision

6.1 BACKGROUND

[95] Clause 20.2 of the SCHADS Award currently provides:

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

[96] There are 2 claims before us which seek to vary clause 20.2.

[97] The HSU seeks to introduce a new 'damaged clothing allowance' requiring employers to compensate employees for damage or soiling of any clothing or other personal effects (excluding hosiery) in the course of employment.

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

[99] The submissions and witness evidence relevant to the clothing and equipment claims are set out at **Attachment J**.

6.2 THE HSU CLAIM

[100] The HSU seeks to insert a new provision at clause 20.3 (and renumber current clauses 20.3 – 20.9) as follows:[41]

> **'20.3 Damaged clothing allowance**
>
> (i) Where an employee, in the course of their employment suffers any damage to or soiling of clothing or other personal effects (excluding hosiery), upon provision of proof of the damage, employees shall be compensated at the reasonable replacement value of the damaged or soiled item of clothing.
>
> (ii) This clause will not apply where the damage or soiling is caused by the negligence of the employee.'

[101] Under the proposed clause employers must compensate employees to the amount of the 'reasonable replacement value', for 'any damage to, or soiling of, clothing or other personal effects (excluding hosiery)' which occurs during the employee's employment, save where the damage or soiling is caused by the employee's negligence.

A Submissions

[102] The grounds advanced by the HSU in support of its claim are:

- an assertion that many employees, particularly support workers in home care and disability services, wear their own clothes to work and are not provided with a uniform[42]
- a submission that employees' clothes are at risk of being soiled or damaged in the course of their duties,[43] and
- an assertion that employees' clothes 'will frequently become damaged, soiled or worn' given the nature of the work they do.[44]

[103] The HSU submits that employees are obliged by their roles to take their clients as they find them, and to provide care and assistance to them because they are incapable of carrying out those tasks themselves.

[104] The various employer interests oppose the HSU's claim.

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[41] HSU Amended Draft Determination, 15 February 2019.

[42] HSU Submission, 15 February 2019 at para 61.

[43] Ibid.

[44] Ibid at para 62.

[105] ABI points to a number of drafting and practical issues with the proposed clause, in particular a lack of precision around how the replacement value of clothing is to be calculated and the phrase 'suffers any damage':

> 'It is not clear how an employer should determine what the "reasonable replacement value" is, and whether the employer would be required to replace a second hand piece of clothing with a new piece of clothing.'[45]

[106] ABI initially submitted that if an employer does not provide the employee with a uniform, then clause 20.2 entitled the employee to receive a uniform allowance. It was contended that this uniform allowance could be used to purchase clothes to wear to work, and, if those clothes become damaged in the course of their employment, to replace them. However, in its reply submission of 26 February 2020 ABI withdrew the submission that the uniform allowance is payable in circumstances where the employers do not provide uniforms.[46] We agree with ABI's concession. It seems clear that, as the Unions contend,[47] clause 20.2(b) only provides that the uniform allowance applies to employees required to wear uniforms.

[107] Ai Group submits that there is no probative evidence or material sufficient to satisfy the Commission that the proposed clause is necessary to ensure that the SCHADS Award achieves the modern awards objective. Further, Ai Group contends that the HSU's claim is unfair to employers in various ways:[48]

- the proposed clause would appear to apply even where an employee elects not to use equipment, clothing or protective effects provided by an employer for the very purpose of ensuring that an employee's clothing and personal effects are protected from damage and/or soiling

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

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

- the proposed clause does not require an employee to provide proof of the 'reasonable replacement value' or absolve an employer from their liability to reimburse an employee where such proof is not provided.

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[45] ABI Submission, 12 July 2019 at para 10.8.

[46] ABI Submission, 26 February 2020 at para 90.

[47] Joint Union Submission, 10 February 2020 at para 27.

[48] Ai Group submission, 26 February 2020 at para 149.

[108] AFEI opposes the claim and submits that the proposed variation would result in 'uncertainty and inappropriate additional cost to employers and that the issue is more appropriately addressed at the enterprise level through bargaining'.[49]

[109] AFEI makes the following points in opposing the claim:[50]

- in some circumstances an employee could receive compensation where no loss has arisen
- the proposal does not require that the employee actually purchases the clothing which has been damaged or soiled, or even that the employee owned the clothing. Hence, the employee could seek payment to cover a cost they have not incurred
- the proposal allows an employee to claim an uncapped amount of compensation for the replacement of clothing or personal affects
- the proposal does not require the employee to provide evidence that the damage occurred during the course of employment and did not involve negligence by the employee

[110] NDS opposed the claim but did not advance any submissions in support of its position; though it does comment on the evidentiary findings sought by the HSU.

[111] Business SA acknowledged that:[51]

- not all workplaces provide uniforms, or the uniform provided will be a company shirt and not pants and there is a requirement for employees to wear some of their own clothing, and
- employees covered by the SCHADS Award may undertake work that results in the soiling or damage of clothing, such as using harsh cleaning chemicals or from bodily fluids.

[112] Business SA submits that:

> 'It is not unusual for employees to wear their own clothes to work and general wear and tear of such clothing should not be the liability of the employer. Employees are expected to take all reasonable care necessary to protect their clothing.'[52]

[113] As to the wording of any proposed clause Business SA submits that the standard wording for award terms dealing with the reimbursement of clothing is that used in the *Manufacturing and Associated Industries and Occupations Award 2020* (Manufacturing Award). We return to this issue later.

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[49] AFEI Submission, 23 July 2019 at para 154.

[50] AFEI Submission, 23 July 2019 at paras 149 – 152.

[51] Business SA Submission, 15 July 2019 at paras 6 – 7.

[52] Business SA Submission, 15 July 2019 at para 9.

B Evidence

[114] The HSU contends that the reality of work in the industry, particularly for home carers and disability support workers, is that employees wear their own clothes to work and are at risk of their clothing being soiled or damaged in the course of their duties.[53] Relying on the evidence of Ms Waddell,[54] Ms Wilcock,[55] and Mr Sheehy[56] the HSU contends that care work is likely to damage employees' clothing and seeks a finding to that effect.

[115] Mr Sheehy is the Manager, Aged Care and Disabilities with the HSU NSW Branch and in that role deals with HSU members and employers in the home care sector covered by the SCHADS Award. Mr Sheehy gave evidence that:

- some employers in the industry do not provide any, or sufficient, uniforms to their employees working in home care[57]
- the nature of the work done by home carers means that clothes become damaged, dirty or worn quickly,[58] and
- workers in the industry are performing all types of personal care – getting people dressed, showering, preparing food, feeding clients and dealing with bodily fluids.[59]

[116] Ms Waddell is employed as a Community Care worker for HammondCare; her role involves assisting clients with all their daily activities of living, including socialisation, personal care and home maintenance. This includes showering, dressing, administering medication from Webster packs, house cleaning, cooking, shopping, caring for their pets, leisure activities and community engagement. At [33] – [34] of her statement Ms Waddell says:

> 'We don't get uniforms at our work so we have to wear our own clothes. These get damaged and worn out very quickly with the kind of work we do. With cleaning we have to use the cleaning products the client wants us to use or has available. Often this is harsh chemicals like bleach that can splash and ruin our clothes. Clothing can also get spoiled with bodily fluids.
>
> Hammond Care does provide single use aprons and goggles that we can use, for example when dealing with bodily fluids. These are kept at head office and we'd need to drive to head office before our shift to pick them up if we are rostered to them. I don't do this because the head

[53] Exhibit HSU27 – Witness Statement of Pamela Wilcock, 15 February 2019 at para 11; Exhibit HSU4 – Witness Statement of Heather Waddell, 15 February 2019 at para 36.

[54] Exhibit HSU4 – Witness Statement of Heather Waddell, 15 February 2019.

[55] Exhibit HSU27 – Witness Statement of Pamela Wilcock, 15 February 2019.

[56] Exhibit HSU26 - Witness Statement of Robert Sheehy, 15 February 2019.

[57] Exhibit HSU26 - Witness Statement of Robert Sheehy, 15 February 2019 at para 14.

[58] Exhibit HSU26 - Witness Statement of Robert Sheehy, 15 February 2019 at para 15.

[59] Exhibit HSU26 - Witness Statement of Robert Sheehy, 15 February 2019 at para 16.

office is usually in the opposite direction of my clients, and it doesn't work out economically to make that trip.'[60]

[117] Ms Wilcock is also employed as a Community Care worker with HammondCare; her role involves helping out clients with personal care including showers, toileting, applying creams. At [12] – [14] of her statement Ms Wilcock says:

'My role involves a lot of cleaning. We also make our clients' beds, and sometimes they request us to make up other beds in the house as well.

When cleaning we have to use whatever cleaning products the client has in their home. We usually end up using harsh chemicals like bleach. Using those products can ruin our clothes. Hammond Care does provide us with protective clothing and gloves.

We also have to often have to clean bodily fluids or urine. Often we're not dealing just with clients but with their pets as well, and I've had to clean urine and faeces from a dog that the client isn't able to care for.'[61]

[118] Mr Elrick also gave evidence relevant to this claim. In his role as an area organiser for the HSU Victoria No.2 Branch, Mr Elrick regularly visits worksites and engages with members about issues they are experiencing at work. At [38] – [44] of his statement, Mr Elrick says:

'When supporting a person with a disability it is best to be dressed casually as it creates less barriers between the client and support worker, and makes clients feel comfortable and at ease, it assists in avoiding unwanted attention in the public. inclusion. I'm only aware of a few disability services employers who require uniforms to be worn.

Uniforms are common in the home care services which undertake a cleaning heavy practice…

Clients with behaviours of concern will often damage clothing to the point they need replacing.

There are other ways a worker's clothing also suffers greater wear and tear in the course of work. If you are cleaning you may spill or splash cleaning products on your clothes which causes fading and a breakdown of the clothing. In services that require medical supports, a worker will often want to have two separate wardrobes, one for work and one for personal. Work clothes will often be looser fitting for ease during manual handling, and washed more regularly due to close proximity with bodily fluids.

Some employees will have extra pairs of shoes that they use while showering clients. The additional pair of shoes are just a pair that can get wet and be dried out over the shift, to avoid having to wear wet shoes all days.

Many worksites will provide surgical booties although these aren't always effective of stopping water from a shower.'[62]

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[60] Exhibit HSU4 – Witness Statement of Heather Waddell, 15 February 2019 at paras 33 – 34.

[61] Exhibit HSU27 – Witness Statement of Pamela Wilcock, 15 February 2019 at paras 12 - 14.

[62] Exhibit HSU3 - Witness Statement of William Elrick, 14 February 2019 at paras 38 – 39, 41 – 44.

[119] ABI submits that the evidence is somewhat mixed in relation to practices in the home care sector and that the evidence as to the frequency with which employees' clothing or uniforms become damaged is limited and vague:[63]

(a) Mr Elrick states that 'Uniforms are common in the home care services which undertake a cleaning heavy practice'[64]

(b) the witnesses employed by Wesley Mission are provided with uniforms,[65] whereas Mr Sheehy states that some employers in the home care industry do not provide any uniforms, and the witnesses employed by HammondCare are not provided with uniforms[66]

(c) Mr Elrick makes a generic assertion, unsupported by any specific evidence, that clients will 'often damage clothing to the point they need replacing'[67]

(d) Mr Elrick also outlines a couple of ways in which an employee's clothing may get damaged. However, these appear to be more in the vein of hypothetical scenarios or hearsay rather than testimony of real events that actually occurred[68]

(e) Ms Wilcock gave evidence that she is required to use cleaning products which can 'ruin our clothes', however she then states that HammondCare 'does provide us with protective clothing and gloves',[69] and

(f) Ms Waddell gave evidence that her clothes 'get damaged and worn out very quickly'[70], however she does not provide any specific examples of that occurring, information about what items of clothing have been damaged, when the last time this occurred, etc.

[120] We note here that the Unions do not agree with ABI's characterisation of Mr Elrick's evidence and submit that his evidence was not 'hypothetical' but based on his 7 years' experience in disability support and social and community services roles, as well as his experience as a union organiser in the SACS sector. Nor did the Unions agree with ABI's characterisation of the evidence of Ms Wilcock and Ms Waddell.

[121] Ai Group challenges the breadth of the proposition advanced by the HSU and aspects of the evidence relied on in support of that proposition. Ai Group submits that the evidence cited does not establish the *likelihood* of care work causing damage to employees' clothing.

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[63] ABI Submission, 19 November 2019 at paras 9.8 – 9.9.

[64] Exhibit HSU3 - Witness Statement of William Elrick, 14 February 2019 at para 39.

[65] Exhibit UV6 - Witness Statement of Belinda Sinclair, 16 January 2019 at para 18.

[66] Exhibit HSU26 - Witness Statement of Robert Sheehy, 15 February 2019 at para 14.

[67] Exhibit HSU3 - Witness Statement of William Elrick, 14 February 2019 at para 41.

[68] Exhibit HSU3 - Witness Statement of William Elrick, 14 February 2019 at para 42.

[69] Exhibit HSU27 – Witness Statement of Pamela Wilcock, 15 February 2019 at para 13.

[70] Exhibit HSU4 – Witness Statement of Heather Waddell, 15 February 2019 at para 33.

[122] AFEI also submits that the evidence does not support a finding that 'many employees, particularly support workers in home care and disability services, wear their own clothes to work and are not provided with a uniform':

> 'For example, Mr Elrick, although not a support worker himself, observes that uniforms are common in the home care sector, Ms Sinclair, a home care worker, is provided with shirts to wear by her employer and also paid a uniform allowance, and Mr Sheehy, who is not a support worker, concedes that some employers in the home care sector provide uniforms whilst others do not.'[71] (footnotes omitted)

[123] AFEI also submits that the evidence of Ms Waddell and Ms Wilcock, who both work for the same employer, does not support the variation proposed, as both Ms Waddell and Ms Wilcock confirm that they are provided with protective clothing by their employer.[72]

[124] NDS accepts the finding proposed by the HSU to the extent there is likely to be some truth to the proposition that care work could cause damage to clothing, but challenges the significance of the proposed finding in the context of the existing Award provisions relating to uniforms and laundry.[73]

[125] We begin our consideration of the evidentiary findings by addressing some of the employer observations about the evidence.

[126] ABI points to Mr Elrick's evidence and in particular to his statement that 'Uniforms are common in the home care services which undertake a cleaning heavy practice'.[74] We acknowledge that there is some tension between Mr Elrick's evidence and that of other witnesses, but note that Mr Elrick's statement that 'Uniforms are common' is qualified by the reference to 'services which undertake a cleaning heavy practice'. Hence Mr Elrick's evidence is not that *all* home care services provide uniforms. We would also note that in his role as a HSU organiser Mr Elrick primarily deals with members and employers in the social and community sector, as opposed to the home care sector.

[127] ABI also contends that, although limited, the evidence suggests that employers provide various forms of personal protective equipment for use by employees such as 'protective clothing', 'gloves', 'single use aprons' and 'goggles'. Ai Group advances a similar submission.

[128] In support of this contention ABI points to the fact that some protective clothing is available to employees at HammondCare. However, we note that at paragraph [34] of her statement, Ms Waddell states:

> 'Hammond Care does provide single use aprons and goggles that we can use, for example when dealing with bodily fluids. These are kept at head office and we'd need to drive to head office before our shift to pick them up if we are rostered to them. I don't do this because the head office

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[71] AFEI Submission, 11 February 2020 at 2-62.

[72] AFEI Submission, 11 February 2020 at 2-63.

[73] NDS Submission, 7 February 2020 at para 3.4.

[74] Exhibit HSU3 - Witness Statement of William Elrick, 14 February 2019 at para 39.

is usually in the opposite direction of my clients, and it doesn't work out economically to make that trip.'[75]

[129] Further, Mr Jeffrey Wright, the CEO of HammondCare, confirmed during the course of cross-examination that HammondCare home care employees were required to travel from home directly to their first client, rather than reporting to HammondCare's premises first:

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

They are required to go directly to the client's home?---First client.'[76]

[130] On the basis of this evidence it appears that personal protective equipment may *not* be practically available to *some* employees, as they have to pick up such equipment in their own time and cover the cost of travel themselves.

[131] We agree with the observation by a number of the employer parties that the evidence in respect of this claim is limited; however despite these limitations a number of propositions are largely uncontentious.

[132] We agree with ABI's contention that the limited evidence suggests that it is common for support workers in the disability services sector to not wear uniforms when undertaking work and that:

'The benefits of such an approach include that it helps to break down barriers between support workers and clients and avoids unwanted attention when in public.'[77]

[133] We also agree with the employers that the HSU's assertion that employees' clothes '*frequently* become damaged, soiled or worn' given the nature of the work they do, overstates the evidence. However, it is likely that *some* employees will have their clothing damaged or soiled because of the work they are required to undertake.

C Consideration

[134] It seems to us that an award variation is warranted to provide for the reimbursement of reasonable costs associated with the cleaning or replacement of personal clothing which has been soiled or damaged in the course of employment. The issue then becomes the form of such an award term.

[135] As mentioned earlier, Business SA advanced a submission regarding the wording of any proposed clause and referred to what it described as the 'standard wording' dealing with

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[75] Exhibit HSU4 – Witness Statement of Heather Waddell, 15 February 2019 at para 34.

[76] Transcript, 17 October 2019, PN2580-PN2581.

[77] Exhibit HSU3 - Witness Statement of William Elrick, 14 February 2019 at para 38.

the reimbursement of damaged clothing in the Manufacturing Award.[78] Business SA referred to clause 32.2(d) of the Manufacturing Award which states:

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

[136] In Background Paper 1 we posed the following question to all other parties:

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

[137] In a joint submission of 10 February 2020 the Unions state that they would not oppose a clause similar to that in the Manufacturing Award being inserted into the SCHADS Award, subject to removing the qualification where the damage is suffered as a consequence of the *negligence* of the employer. The Unions submit:

> 'negligence should not be the touchstone for reimbursement for damaged clothing or equipment. The fact that such loss is suffered in the course of the employment should be sufficient to ground an entitlement to reimbursement'.[79]

[138] AFEI and Ai Group contend that there is no warrant for inserting such a term. AFEI goes on to observe that the term in the Manufacturing Award:

> 'is very specific in detail and relates to (a) specifically foreseeable damage in the industry, and (b) the kind of damage that would foreseeably result in the item being destroyed/no longer functional, and (c) reduces the ambit for dispute about the application of the provisions.'[80]

[139] ABI submits that a sufficient evidentiary case has not been advanced that would justify the insertion of a clause of this type and that:

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[78] Business SA submission, 12 July 2019, at para 11.

[79] Joint Union Submission, 10 February 2020 at para 242.

[80] AFEI Submission, 11 February 2020 at 2-65.

'The Manufacturing Award regulates very different industries and occupations to the SCHCDS Award, and so in that sense it is not an appropriate 'benchmark' in relation to an issue such as damage to clothing, etc.

The clause in the Manufacturing Award also has quite a confined operation, in that it only applies where prescribed items are "damaged or destroyed by fire or molten metal or through the use of corrosive substances". This means that, by way of example, an employer would not be liable to compensate an employee for damaged spectacles where they drop them on a concrete floor. However, if the clause is migrated to the SCHCDS Award, it is not clear what industry-specific limitation would be adopted. For that reason, our clients are concerned that the adoption of this clause may drastically broaden the operation of the clause compared to how it currently operates under the Manufacturing Award.

There are also particular peculiarities to the clause in question. For example, it is unclear how subclauses (i) and (ii) interrelate and operate, given that sub-clause (i) appears to be quite broad and so would capture most circumstances that might arise under sub-clause (ii). As a general proposition, we do not consider that the Manufacturing Award clause is an appropriate clause to borrow from.'[81]

[140] NDS submits that the existing award provision regarding uniforms and laundry is sufficient but goes on to submit:

'However, if the award were to be varied to address the HSU claim in relation to clothing other than uniforms, the proposed clause could be a reasonable starting point for drafting, subject to addressing concerns such as those raised by Ai Group and AFEI. Those concerns relate to identifying what the value of the clothing is, what extent of damage is necessary to require replacement, and confirming that the damage is work related.'[82] (footnotes omitted)

[141] We are not attracted to the variation of the SCHADS Award to insert a provision in the same terms as clause 32.2(d) of the Manufacturing Award, largely for the reasons identified by ABI and AFEI. Nor do we think that negligence should be a prerequisite to reimbursement of soiled or damaged clothing.

[142] We direct that the parties confer about the form of a suitable variation, reflecting the views expressed above. A conference will be convened to facilitate those discussions.

6.3 THE UWU CLAIM

[143] As mentioned earlier, the SCHADS Award provides that in circumstances where an employee is required by their employer to wear a uniform the employer must supply the employee 'with an adequate number of uniforms appropriate to the occupation', free of cost. The Award does not prescribe what an 'adequate number of uniforms' is; what is 'adequate' will depend on the circumstances.

[144] The UWU seeks to insert a new clause 20.3(b) as follows:[83]

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[81] ABI Submission, 10 February 2020, p 62.

[82] NDS Submission, 7 February 2020, p 12.

[83] UWU Submission, 15 February 2019 at para 58.

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

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

A Submissions

[146] The UWU submits:

> 'Employees covered by the Award should be provided with enough uniforms to ensure that they are able to attend work in a clean uniform, without having to wash their uniforms more than once a week.
>
> The evidence indicates that there are employees in this sector who are not provided with an adequate number of uniforms.'[84]

[147] The UWU contends that the variation proposed is 'in line with' the modern awards objective, specifically:[85]

- s.134(1)(a): the variation would assist the low paid to meet their needs; employees covered by the SCHADS Award can generally be considered 'low paid' and many work part-time, and
- s.134(1)(c): participation in the workforce is 'facilitated by the dignity in having a clean uniform'.

[148] Ai Group, Business SA and AFEI all advanced submissions opposing the claim.

[149] ABI submits that a sufficient case has not been made out for the proposed variation and does not accept the contention advanced by the UWU that 'the decision as to what constitutes an 'adequate' amount of uniforms is often made solely by the employer'.[86] ABI submits that the Award terms are clear, and the obligation requires an objective assessment as to the adequacy of the number of uniforms to be provided, having regard to the particular circumstances. If there is any dispute about the number of uniforms provided by a particular employer, the matter can be resolved through the application of the dispute resolution procedure provided for in the Award including, if necessary, the involvement of the Commission.

B Evidence

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

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[84] UWU Submission, 15 February 2019 at paras 54 – 55.

[85] UWU Submission, 15 February 2019 at para 59.

[86] ABI Submission, 12 July 2019 at para 10.11.

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

- Ms Sinclair gave evidence that she was initially provided with only 2 shirts upon commencement of employment, however was then given an additional shirt and then a further 3 additional shirts after requesting additional uniforms from her employer (such that she then had a total of 6 shirts).

[151] ABI contends that there is no evidence that would support a finding that the current terms of the Award are not operating satisfactorily and nor is there evidence of any disputes having been initiated in relation to the provision or non-provision of uniforms.[87]

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

1. Employees in this sector may be required by their employer to wear a uniform.[88]

2. Employees may not be provided with an adequate number of uniform items.[89]

3. Where an employee is not provided with an adequate number of uniforms, the employee may have to wash their uniforms multiple times a week.[90]

[153] The only evidence referred to by the UWU in support of these propositions is that of Ms Belinda Sinclair.[91]

[154] Ms Sinclair is employed by Wesley Mission as a part-time home care worker on a contract that guarantees her a minimum of 30 hours work per fortnight. Ms Sinclair works 5 days a week, Monday to Friday. Ms Sinclair's evidence was that she was initially provided with 2 uniform shirts which identified her as a Wesley Mission care worker.[92] Wesley Mission has a uniform policy that care workers must wear the shirts when attending clients. After requesting more shirts, on a number of occasions, she was eventually provided with 5 uniform shirts. Ms Sinclair was also paid a laundry allowance each fortnight.

[155] The evidence relied upon does not make good the UWU's proposition that employees are not being provided with an adequate number of uniform items. The UWU has failed to establish a sufficiently cogent merit case in support of its proposed variation. We dismiss the UWU's claim.

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[87] ABI Submission, 19 November 2019 at paras 9.13 – 9.14.

[88] Exhibit UV6 - Witness Statement of Belinda Sinclair, 16 January 2019, at para 18.

[89] Ibid at [19].

[90] Ibid.

[91] Exhibit UV6 - Witness Statement of Belinda Sinclair, 16 January 2019.

[92] Exhibit UV6 - Witness Statement of Belinda Sinclair, 16 January 2019, at paras 18 – 21; Transcript, 15 October 2019 at PN628-PN641.

3. The travel time claim

From decision

5.4.1 Background – the current SCHADS Award term

[156] Clause 20.5 of the SCHADS Award deals with travelling, transport and fares as follows:

> '**20.5 Travelling, transport and fares**
>
> (a) Where an employee is required and authorised by their employer to use their motor vehicle in the course of their duties, the employee is entitled to be reimbursed at the rate of $0.80 per kilometre.
>
> (b) When an employee is involved in travelling on duty, if the employer cannot provide the appropriate transport, all reasonably incurred expenses in respect to fares, meals and accommodation will be met by the employer on production of receipted account(s) or other evidence acceptable to the employer.
>
> (c) Provided that the employee will not be entitled to reimbursement for expenses referred to in clause 20.5(b) which exceed the mode of transport, meals or the standard of accommodation agreed with the employer for these purposes.
>
> (d) An employee required to stay away from home overnight will be reimbursed the cost of reasonable accommodation and meals. Reasonable proof of costs so incurred is to be provided to the employer by the employee.'

[157] It is apparent from the terms of clause 20.5 that it only applies where an employee is required and authorised by their employer to use their motor vehicle in the course of their duties and, further, the clause only provides for reimbursement of travel expenses and not for travelling time.

5.4.2 The Claims

[158] There are 3 claims in respect of travel time.

[159] The ASU and UWU seek to insert a new award term - clause 25.7 - Travel Time, as follows: [93]

> '**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

[93] UWU Submission, 1 April 2019 at paras 1 – 11 and draft determination; ASU Submission, 2 July 2019 at paras 1 – 58.

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.'

[160] The HSU's claim involves 2 variations to the SCHADS award. First, 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.'

[161] Second, the HSU seeks a new entitlement to a travel allowance for disability support workers and home care workers of $0.78 per kilometre in respect of all travel. In particular, the HSU seeks to vary clause 20.5(a), as follows:

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

(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)

[162] ABI advances an alternate variation for consideration (see below).

[163] The submissions and witness evidence relevant to the Union travel time claims are set out at **Attachment E.**

5.4.3 The Submissions

A Union submissions

[164] The ASU relies on its submission dated 2 July 2019 and its submission in reply dated 2 October 2019.

[165] The UWU relies on its submission dated 15 February 2019, supplementary submission dated 1 April 2019 and further submission in reply dated 3 October 2019.

[166] 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. 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 NDIS 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. 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 indicates that there are numerous employers who do not pay travel time under the terms of the Award.'[94] (footnotes omitted)

[167] The HSU adopts the submissions of the UWU in respect of travel required of workers.[95]

B Employer submissions

(i) NDS

[168] NDS opposes the ASU, UWU and HSU travel time claims and submits that current practices with respect to travel undertaken during a broken shift vary but there is evidence that some of the time needed for travel between clients is not paid time.

[169] NDS submits 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.'[96]

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[94] UWU Submission, 18 November 2019 at paras 27 – 30.

[95] HSU Submission, 18 November 2019 at para 82.

[96] NDS Submission, 19 November 2019 at para 41.

(ii) AFEI

[170] AFEI opposes the ASU, UWU and HSU travel time claims and relies on its submissions of 17 September 2019 and submits further that:[97]

- 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;
- where employees do travel a considerable distance, such travel is undertaken on an irregular basis;
- employees do not always use their breaks to travel from one client to another; and
- 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 traffic.

(iii) ABI

[171] ABI relies on its reply submission of 13 September 2019 and submits that:

> '[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.'[98]

[172] 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 variation' for consideration which, it submits rectifies any issue with the existing broken shifts provision, but does not suffer from the problems with the union proposals.[99]

[173] 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 a payment mechanism into the Award in the form of an allowance. ABI submits that this proposal avoids the complexities which arise if the time was to be 'time worked'.

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

[175] 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:

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[97] AFEI Submission, 19 November 2019 at paras G-2 to G-5.

[98] ABI Submission, 19 November 2019 at para 14.6.

[99] ABI Submission, 13 September 2019 at part 9.

'(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.'

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

'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.'

[177] ABI submits:

'9.6 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.'[100]

[100] ABI Submission, 13 September 2019 at paras 9.6 – 9.9.

[178] It is convenient to note here that NDS does not oppose the alternate proposal advanced by ABI.[101] AFEI does not oppose ABI's proposal 'in principle' but seeks an opportunity to comment on the terms of any variation determination to give effect to the proposal.[102]

[179] Ai Group acknowledges that an allowance of the type contained in the relevant pre-modern awards may alleviate some of the concerns it has with the Unions' proposals (such as the complexities associated with measuring time spent travelling and the treatment of such time as time worked), but notes that ABI's proposal raises the following issues:[103]

(a) How is the quantum of the allowance to be determined?

(b) In what circumstances would the allowance be payable?

(c) Should the employee be required to provide a written record of the number of kilometres travelled? Should payment be contingent on the provision of such a record and its verification?

[180] Ai Group submits that if we form the view that ABI's proposal warrants further consideration then parties should be given a further opportunity to address the issue before a final determination is made.

[181] The Unions oppose any variation in the form proposed by ABI.[104] In their joint submission of 10 March 2020 the Unions advance 4 arguments in support of their position:[105]

1. The ABI proposal would amount to a small and inadequate compensation to the employee travelling for work. When an employer directs an employee to undertake work at different locations, the employee is in service to the employer, and the time spent travelling between those locations should be treated as time worked.

2. An allowance should deal with some additional duty, expense or disability and not for what are hours of work.

3. If travel between clients were to be considered an allowance rather than time-worked, employees working long days with multiple clients would rarely be entitled to overtime, save for when working beyond the 12 hour span for a broken shift, despite devoting many hours to the employer's business.

4. The submission that the Union's travel time proposals are unworkable cannot be sustained. The evidence is that employers in the home care sector and in disability services have regard to travel time when rostering employees. Employers have also adopted methods of recording work travel for the purposes of paying the travel allowance.

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[101] NDS Submission, 10 March 2020 p 2.

[102] AFEI Submission, 11 March 2020 at paras B-26 to B-27.

[103] Ai Group Submission, 11 March 2020, p 4.

[104] See generally, ASU Submission, 2 October 2019 at paras 14 – 27; HSU Submission, 2 October 2019 at paras 42 – 47; UWU Submission, 3 October 2019 at paras 6 – 12; Joint Union Submission, 10 February 2020 at paras 49 – 66.

[105] Joint Union Submission, 10 March 2020 at para 33.

(iv) Ai Group

[182] Ai Group opposes the ASU, UWU and HSU travel time claims for the reasons set out in its submissions of 16 September 2019.[106]

5.4.4 The Evidence

[183] In our view the evidence supports the following findings:

1. Employees in home care and certain work in disability services have no '*base location*' where they start and finish each day.[107] 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.

2. Home care workers and many disability services support workers are required to travel to various locations to provide services to clients.

3. Time spent by employees travelling varies depending on which clients they support on any given day and where they reside, and a range of factors may affect how long it takes an employee to travel from one location to another on any given day.[108]

4. Most employees are not paid for time spent travelling to and from clients,[109] (which includes travelling between clients[110] and travelling to the first client / from the last client).[111] Some employees covered by the Award can be travelling to and from clients for significant periods of time without payment.[112]

5. There are a range of practices adopted by some employers to remunerate employees in respect of time spent travelling. For example:

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[106] Ai Group Submission, 16 September 2019.

[107] Transcript, 17 October 2019, cross-examination of Jeffrey Wright at PN2581-PN2583; Transcript, 18 October 2019, cross-examination of Graham Shanahan at PN2865-PN2866.

[108] Transcript, 15 October 2019, cross-examination of Trish Stewart at PN459-PN460; Transcript, 16 October 2019, cross-examination of Robert Steiner at PN1573-PN1574.

[109] Exhibit ASU9 – Witness Statement of Richard Rathbone, 13 February 2019 at para 17; Exhibit ASU7 – Witness Statement of Tracy Kinchin, 24 June 2019 at para 16; Exhibit HSU25 – Witness Statement of Fiona Macdonald, 15 February 2019 at Annexure FM-2 at pp 87; Exhibit HSU5 – Witness Statement of Christopher Friend, 15 February 2019 at para 47; Exhibit HSU4 – Witness Statement of Heather Waddell, 15 February 2019 at para 13; Exhibit HSU28 – Witness Statement of Thelma Thames, 15 February 2019 at para 16; Exhibit HSU29 – Witness Statement of Bernie Lobert, 15 February 2019 at para 15; Exhibit HSU32 – Supplementary Witness Statement of Scott Quinn, 3 October 2019 at para 10; Exhibit UV4 – Witness Statement of Deon Fleming, 16 January 2019 at para 22; Exhibit UV1 – Witness Statement of Trish Stewart, 17 January 2019 at para 16; Exhibit UV2 – Supplementary Witness Statement of Trish Stewart, 1 April 2019 at para 6; Exhibit UV8 – Witness Statement of Jared Marks, 3 October 2019; Exhibit ASU2 – Witness Statement of Robert Steiner, 15 October 2019 at para 14.

[110] Exhibit HSU4 – Witness Statement of Heather Waddell, 15 February 2019 at para 13.

[111] Exhibit HSU28 – Witness Statement of Thelma Thames, 15 February 2019 at para 16; Transcript, 17 October 2019, cross-examination of Jeffrey Wright at PN2609-PN2611; Transcript, 18 October 2019, cross-examination of Graham Shanahan at PN2890.

[112] Exhibit UV2 - Supplementary Witness Statement of Trish Stewart, 1 April 2019 at para 8; Exhibit HSU25 – Witness Statement of Fiona Macdonald, 15 February 2019 at Annexure FM2, p 88.

(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'.[113]

(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.[114]

(c) Mr Shanahan gave evidence that in 'extraordinary circumstances' the business also pays an additional allowance where employees are required to travel significant distances to provide support to clients (the example given was where an employee based in Coffs Harbour is required to attend a client at Dorrigo).[115]

(d) HammondCare pays 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'.[116]

(e) HammondCare also has a regime in respect of 'Travel in Extraordinary Circumstances'.[117]

(f) CASS Care Limited pays 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.[118]

6. As mentioned earlier, employees report a range of adverse consequences with working broken shifts with short engagements and unpaid travel time (see finding 6 above at [232].

5.4.5 Consideration

[184] As mentioned earlier, minimum engagement, broken shifts and travel time are inter-related. They each impact on how work is organised and the remuneration for that work. All parties acknowledge the connection between these issues. For example, the ASU accepts that if its claim for paid travel time is successful then the quantum of its broken shift allowance

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[113] Exhibit UV2- Supplementary Witness Statement of Trish Stewart, 1 April 2019 at para 5; Exhibit UV5 – Supplementary Witness Statement of Deon Fleming, 28 March 2019 at para 5.

[114] Transcript, 18 October 2019, cross-examination of Graham Shanahan at PN2887.

[115] Transcript, 18 October 2019, cross-examination of Graham Shanahan at PN2890.

[116] Exhibit ABI1 – HammondCare Residential Care and HammondCare at Home Enterprise Agreement 2018 at clause 13.4.5 and Annexure 1.

[117] Exhibit ABI1 - HammondCare Residential Care and HammondCare at Home Enterprise Agreement 2018 at clause 23.2.

[118] Transcript, 18 October 2019, cross-examination of Joyce Wang at PN3505-3517, PN3557-3558 and PN3629-3647.

claim (15%) should be less; because the claimed loading includes a component to compensate for the disutility of unpaid travel time.[119]

[185] In sections 5.2 and 5.3 we have:

- decided to introduce a minimum engagement for part-time employees by deleting clause 10.4(c) and inserting a new clause 10.5 to provide the following minimum payment for part-time and casual employees:
    - social and community service employees (except when undertaking disability work) – 3 hours' pay, and
    - all other employees – 2 hours' pay,
- decided to vary clause 25.6 to define a broken shift as a shift consisting of 2 separate periods of work with a single unpaid 'break' (other than a meal break) and to accommodate the occasional need for a broken shift to involve more than one unpaid break subject to:
    - a maximum of 2 unpaid 'breaks' in the shift
    - a 2 break shift would be subject to the agreement of the employee, on a per occasion basis, and
    - a 2 break shift would be subject to an additional payment, in recognition of the additional disutility (relative to a single break shift), and
- expressed the following *provisional* views:
    - the additional remuneration for working a broken shift under clause 25.6 of the SCHADS Award should be an allowance calculated as a percentage of the standard weekly rate
    - an employee working a 'one break' broken shift under clause 25.6 should receive a broken shift allowance of 1.7% of the standard rate, per broken shift ($17.10 per broken shift)
    - the broken shift allowance payable for a 2 break broken shift be set at 2.5% of the standard rate ($25.15 per broken shift), and
    - an employee who is a day worker performing work outside of the ordinary span of hours (including as part of a period of work in a broken shift) is entitled to overtime for such work.

[186] The changes we propose to make are likely to result in changes to rostering practices and to how work is organised. It may also change the extent of 'unpaid' travel between engagements. Further, the broken shift allowance we propose is intended to compensate for 2 disutilities:

- the length of the working day being extended because hours are not worked continuously, and

[119] ASU Submission, 2 July 2019 at para 56.

- the additional travel time and cost associated with effectively presenting for work on 2 occasions.

[187] As a general proposition we accept that employees should be compensated for the time spent travelling between engagements. But framing an award entitlement to address this issue raises several issues, including the circumstances in which any payment is to be made and the calculation of that payment. We are also conscious of the s.134 considerations, in particular:

- the needs of the low paid

- the impact on employment costs and the regulatory burden, and

- the need to ensure that any provision is simple and easy to understand.

[188] This issue requires further consideration. A conference will be convened to discuss the next steps.