Fair Work Commission: 4 yearly Review of modern awards

FINAL REPLY SUBMISSION

4 YEARLY REVIEW OF MODERN AWARDS: (AM2018/26) SOCIAL, COMMUNITY, HOME CARE AND DISABILITY SERVICES INDUSTRY AWARD 2010 - SUBSTANTIVE ISSUES

FILED ON BEHALF OF:

- **AUSTRALIAN BUSINESS INDUSTRIAL**
- **THE NSW BUSINESS CHAMBER LTD**
- **AGED & COMMUNITY SERVICES AUSTRALIA**
- **LEADING AGE SERVICES AUSTRALIA**

26 FEBRUARY 2020

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BACKGROUND

1. This reply submission is made on behalf of Australian Business Industrial (**ABI**), the New South Wales Business Chamber Ltd (**NSWBC**), Aged & Community Services Australia (**ACSA**), and Leading Age Services Australia Limited (**LASA**) (collectively, "our clients").

2. This reply submission is filed in accordance with the Directions of the Fair Work Commission (**Commission**) issued on 5 December 2019 (the **December Directions**) and Directions of the Commission issued on 18 December 2019 in relation to the community language allowance claim.

3. This reply submission addresses the joint submission of the unions (the ASU, HSU and UWU) dated 10 February 2020 (the **Joint Union submission**).

4. This reply submission is structured into the following sections:

   (a) Part A: reply to the general submissions of the Unions;

   (b) Part B: reply to Unions' position on the findings sought by other parties;

   (c) Part C: reply to Unions' responses to the questions in the Background Paper;

   (d) Part D: reply to the Joint Union submission in relation to the 24-hour care clause; and

   (e) Part E: reply to the ASU Community Language submission.

PART A: REPLY TO GENERAL SUBMISSIONS OF THE UNIONS

5. The Joint Union submission contains a number of general submissions, including:

   (a) submissions regarding the additional witness statement of Steven Miller;

   (b) submissions regarding the implications of the reforms and the evidence around financial performance of service providers;

   (c) submissions regarding minimum engagements;

   (d) submissions regarding travel time; and

   (e) submissions regarding remote response work.

6. We address each of these issues below.

Further Miller Statement

7. The Unions criticise the additional witness statement of Steven Miller filed by NDS on 19 November 2019. That further statement was filed at the request of the Commission following the giving of his evidence at the hearing on 17 October 2019.[1]

8. The Unions contend that the further Miller statement provides data that is "difficult to comprehend and reconcile".[2] Our clients respectfully disagree with that assertion and note that the statement:

   (a) provides useful information about the incidence of broken shifts within a business operating in the disability services sector;

   (b) provides data on a sample size of 2000 shifts worked over a roster period;

   (c) indicates that of those 2,000 shifts, 746 shifts were broken shifts, representing 37.3% of all shifts;

   (d) indicates that of the 746 broken shifts worked:

      89.5% of broken shifts involved one break; and

      10.5% of broken shifts involved more than one break.

9. Such data appears to be of utility to the Commission in determining the issues before it.

10. However, to the extent that the Commission considers there is any uncertainty or deficiency in relation to the further Miller statement for which clarification is needed, the appropriate

[1] See Joint Union submission at [8]-[12].
[2] Ibid at [10].

course of action would be for the Commission to re-list the matter and for Mr Miler to be recalled to give such evidence, rather than to simply disregard the further statement as the Unions appear to suggest should occur.

Further evidence provided by employer witnesses

11. In the course of criticising the further Miller statement, the Unions make a generalised criticism of an alleged "overall pattern of the employers declining to reveal the patterns of work they employ".[3]

12. Our clients reject that suggestion. The employer witnesses in these proceedings have voluntarily given evidence about important matters that are relevant to the industry and to the issues before the Commission. Like the employee witnesses who have given evidence, they have done so to assist the Commission and with a view to ensuring that an appropriate outcome is reached. Of course, there are a range of limitations on an individual witness's ability to provide evidence, particularly where witnesses are giving evidence on behalf of a business.

13. It is notable that while the Unions have criticised the further Miller statement, they have not made any comment at all in relation to the further statement of Wendy Mason filed on 25 November 2019.

14. The further Mason statement provides probative evidence on the incidence of broken shifts within the home care division of BaptistCare NSW & ACT, and the number of breaks within those shifts. The data is also broken down by region. The sample size is reasonable. Given that no challenge has been made to that evidence, it should be accepted by the Commission.

15. The probative value of the further Mason statement should not be diminished by reason of a generalised broadside from the Unions about employers "declining" to reveal working patterns to the Commission.

Submissions regarding reforms and financial issues

16. At [114]-[116] of the Joint Union submission, the Unions take issue with the general proposition advanced by our clients that the consumer-directed-care reforms across the industry have 'fundamentally changed' the operating environment.

17. Our clients are somewhat confused by the Unions' resistance to embrace such a proposition, given that virtually every report ever published about these reforms has reached the same or

[3] Ibid at [11].

similar conclusion. By way of example, the report of Dr Stanford references the 'dramatic transformation'[4] of the disability services industry by reason of these reforms. Other materials filed by the Unions cites the NDIS as having been 'repeatedly described' as 'Australia's largest social reform since the introduction of universal national healthcare'.[5]

18. At [116], the Unions then mischaracterise the financial impact that these reforms have had on service providers. Contrary to the Unions' assertion, there was evidence before the Commission, in the form of the StewartBrown publications[6], outlining the financial health of service providers in the home care sector. There is also significant material before the Commission going towards the financial pressures on providers by reason of the pricing methodology that has been used in setting the price caps contained in the NDIS Price Guide.

Submissions regarding minimum engagements

19. At [40]-[46] of their submissions, the Unions comment on the shortness of shifts within the home care and disability sectors and challenge the proposition that short shifts are an inevitable consequence of the duration of client services.

20. In particular, the Unions submit that the Commission "would not accept" that the practice of short shifts is an inevitable consequence of the shortness of client services.[7] In support of that contention, the Unions:

    (a) refer to macro-level data which suggests that demand for services is increasing;[8]

    (b) assert that the proposition ignores the choices made by employers about the lengths of the shifts they offer; and

    (c) refer to the practice of employers attempting to "bundle" services together to create a shift.

21. We respectfully disagree with above assessment. Our clients maintain that the duration of client services has a significant influence on the length of shifts in the industry. The evidence before the Commission makes it apparent that the two biggest influences on shift length are:

    (a) the duration of the services requested by clients; and

[4] See Stanford Report at [8] (CB1447).
[5] See CB3137.
[6] See CB503 and CB541.
[7] See Joint Union submission at [41].
[8] Ibid.

(b) the employer's ability to bundle different client services together to form a longer shift.

22. The employer may be able to have some influence over the first factor. For example, employers can have discussions with consumers around service length, or contractually impose minimum service lengths on clients. However, such an approach sits uncomfortably with the policy objective of consumer-directed-care and giving consumers choice and control in relation to when and how services are provided to them. Even ignoring this point, the reality is that many services only require a short duration, and so the implication of imposing minimum service lengths on consumers is that consumers will pay more for less service and potentially not receive sufficient care.

23. In relation to the second factor, whether an employer is able to effectively and efficiently 'bundle' a series of discrete client services together will depend on the scale of their operation. For example, there is evidence that HammondCare has some success in building shifts in this way, however they are a very large organisation with significant volume. They are not representative of employers in the home care or disability sector, and the Commission cannot assume that organisations are readily able to bundle work together in an efficient way. This is particularly the case in regional and remote areas.

24. The Unions' reliance on macro-level data is misconceived, as it cannot be contended that a general increase in demand for services will result in clients requesting services of a longer duration or that increases in demand automatically make it easier to bundle services together into longer shifts. There are practical factors such as client location, requested time of service, etc. that impact on organising work.

25. The Unions also mischaracterise our clients' position at [42] of their submission. Our clients did not suggest that "employers are currently able, without any compulsion, to regularly bundle appointments to create 2 hour shifts". That proposition mischaracterises our clients' submission and mischaracterises the state of the evidence before the Commission. In many cases, employers are simply not able to bundle appointments to create two hour shifts.

26. Further, we reject the Unions' suggestion that because some employers might be able to bundle services together to create two hour shifts, the Commission should impose a three hour minimum engagement as some form of incentive to have employers organise work more efficiently.

27. Such an approach appears to be ad-odds with the stated rationale for the imposition of minimum engagement periods.[9]

28. Lastly, we dispute the Unions' contention that our clients' assertion that the imposition of a three-hour minimum engagement for all categories of workers will adversely impact consumers and would adversely impact the ability of the various schemes to deliver on the principles of consumer-directed care is made "without any foundation".

29. With respect, the foundation for our clients' submission is so obvious as to go without saying. As a matter of logic, if a three hour minimum engagement is imposed and employers are not able to bundle client services together to build a three hour pattern of work, the consequence will be one of the following:

    (a) the employer passes the increased labour cost onto the client (for example, by way of a minimum service length requirement);[10]

    (b) the employer absorbs the increased cost; or

    (c) the employer does not provide the service to the relevant clients.

30. In an environment where funding is tight, employers do not have the capacity and so therefore will not readily absorb cost impositions of this type.

31. Therefore, under scenario (a) or (c), consumers are adversely affected. Equally, the ability of the various schemes to deliver on the principles of consumer-directed care are adversely affected.

Submissions regarding travel time

32. We respectfully disagree with the Unions' assertion at [55] of their Joint Submission that our clients "overstate" the difficulties in calculating travel time.

33. Our clients previously outlined the issues with the Unions' travel time proposals in their reply submission of 13 September 2019.[11] None of the issues raised in that submission have been satisfactorily addressed by the Unions.

34. To provide just one example, it is still unclear how the phrase 'reasonable time of travel' is intended to be applied. Does it require employers to pay employees for the *actual* time spent travelling? Does it require employers and employees to reach agreement on a nominated

[9] See [2017] FWCFB 3541.
[10] Subject to price caps in the disability sector under the NDIS.
[11] See in particular Part 8 of that reply submission.

'agreed' period of time? Or does it require the employer to determine what would be a *reasonable* time of travel and pay that amount regardless of the actual time spent travelling on a particular day?

35. None of the issues raised by our clients have been resolved.

36. In relation to the Joint Union submission, our clients do not dispute:

    (a) that service providers need to have "an idea" of the time required to travel between locations of clients in order to roster work; or

    (b) that some employers already compensate employees in some way for travel time; or

    (c) that some employers have arrangements whereby Google Maps is used to compensate employees for travel time.

37. However, again, none of the above propositions address the issues our clients have raised with the Unions' proposal.

38. Lastly, we reject that Unions' submission that an allowance of the kind proposed by our clients is not permitted under section 139. Allowances are clearly permitted. The terms of s.139 make that abundantly clear. The Unions appear to misconstrue the terms of s.139(1)(g) and assert that in order for an allowance to be a permitted term, it must fall into one of the categories listed at s.139(1)(g) (i)-(iii). However, it is apparent that the provision contains a non-exhaustive list of the type of allowances that are permitted.

39. We note that the scope of s.139(1)(g) was considered by a Full Bench of the Commission in *Four yearly review of modern awards* [2015] FWCFB 3523.

Submissions regarding remote response work / recall to work overtime

40. There has been considerable evolution in the positions of the parties during the course of these proceedings in relation to the issue of 'remote response work' or 'recall to work overtime'.

41. It is helpful to summarise the background to these claims.

42. Initially, the participating parties (with the exception of Ai Group) had reached an in-principle agreement in respect of a number of variations, one of which dealt with remote response work (the **Original In-Principle Agreement**).

43. However, on 15 February 2019 the HSU then sought to pursue a different variation in respect of remote response work, which was reflected in its Amended Draft Determination filed on that date.

44. It subsequently became apparent that the Original In-Principle Agreement was not supported by certain parties. In response to that development, our clients filed their own proposal in respect of remote response work. The terms of this proposal were recorded in a Draft Determination filed on 2 April 2019.

45. It was then determined that the competing claims (the HSU claim and our clients' claim) in relation to remote response work would be dealt with as part of the tranche 2 hearing. Submissions in relation to the claims were filed during July 2019.

46. However, conciliation conferences were then held by Commissioner Lee throughout August and September 2019, at which time it appeared that a new in-principle agreement had been reached in respect of a consent variation in relation to a remote response allowance (the **Second In-Principle Agreement**).

47. Accordingly, the ASU noted in their reply submission of 16 September 2019 that:

> *We have not filed evidence or submissions in respect of the ABI Remote Response Claim due to a without prejudice settlement. We reserve our rights to file evidence and submissions in the case that the settlement does not progress*.[12]

48. Equally, the HSU noted in their reply submission of 16 September 2019 that:

> *Consistent with the understanding at the conclusion of the discussion of the parties concerning the remote response allowance in the conciliation conferences before Commissioner Lee in August and September 2019, no submission is made herein in respect of that matter. The HSU reserves its right to make further submissions about that issue subject to the outcome of the discussions in respect of that matter.*

49. However, on 23 September 2019, the ASU then filed a submission advising that, following consultation of its members, it was "no longer a party to" the Second In-Principle Agreement. The ASU enclosed a Draft Determination to that submission.[13] However, it was not clear whether the ASU actively pursued the variation. In their submission, the ASU stated that "If the Commission is minded to make a term dealing with recall to work overtime remotely it should have the following features".[14] They then stated "We filed with this submission a draft determination (see Annexure C) that would give effect to these principles".[15]

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[12] At [44].
[13] ASU submission of 23 September 2019, at Annexure C.
[14] Ibid at [7]
[15] Ibid at [8].

50. In response to that development, the HSU filed a submission on 2 October 2019 in which it purports to endorse the position of the ASU.[16] However, it was not clear from that submission whether the HSU had departed from the Second In-Principle Agreement.

51. In light of the apparent collapse of the Second In-Principle Agreement, our clients filed an alternate remote response proposal, recorded in an Amended Draft Determination filed on 15 October 2019, for which leave was granted to file on 17 October 2019. It was in similar terms to the Second In-Principle Agreement.

52. As it currently stands, there are two competing proposals seeking to regulate what has generally been described to date as 'remote response work':

    (a) our clients' proposal as recorded in their Amended Draft Determination filed on 15 October 2019; and

    (b) the ASU proposal as recorded in Annexure C to their submission of 23 September 2019.

53. Whilst the two competing proposals are structured differently, they appear to be broadly similar in nature. They both purport to regulate the performance of work by employees outside of their normal working hours and away from the workplace. They both provide for payments to employees when undertaking such duties. The key differences are:

    (a) the rate of pay payable for such work;

    (b) the minimum payments for such work; and

    (c) the requirement of employees to keep timesheet records relating to the work.

54. There are three key issues for the Commission to determine in resolving these claims:

    (a) What is the type of work that these proposals are seeking to regulate?

    (b) Does the existing Award appropriately regulate such work?

    (c) If not, what terms and conditions should apply in relation to the work?

[16] See HSU submission of 2 October 2019 at [9].

PART B: REPLY TO UNIONS' POSITION ON FINDINGS SOUGHT BY OTHER PARTIES

55. The Joint Union submission addresses the findings that other parties have invited the Commission to make in these proceedings.

56. At the outset, it is apparent that there is a large number of proposed findings that parties have urged upon the Commission. To assist the Commission, we endeavoured to capture and respond to all of those proposed findings in our submission of 10 February 2020. Part A of that submission contains a table of 212 proposed findings which other parties have invited the Commission to make, along with our clients' position in relation to those proposed findings.

57. That table does not contain the findings sought by our clients.

58. Having regard to the Joint Union submission and the submissions of other parties, we have now developed a table which outlines the status of the findings pursued by our clients. This has been done by reference to the submissions of the other parties as referred to in paragraph 3 above.

59. The table is **attached** to this submission. The table outlines the findings sought by our clients which have not been disputed by any party. Additionally, to the extent that a party has disputed the proposed finding but not advanced any cogent basis for their position, we have included commentary in the table to explain our clients' position in relation to the issue.

60. Notably, in their response to a variety of our clients' proposed findings, the Unions have disputed the finding sought and have "urged caution" in relation to the making of those findings.[17] In many cases, this position has been taken in circumstances where the Unions do not specifically express any basis for the finding to not be made by the Commission.

61. The Unions' request for the Commission to exercise "caution" in respect to certain proposed findings appears to be based on the Unions' concerns around the motives of our clients in seeking those findings and, in particular, due to concerns that the proposed findings would "lay the foundation" for particular submissions to be made about the merits of particular claims.

62. With respect, that is not a proper basis for the factual finding to be resisted. A proposed finding is either established on the evidence as a finding or not. This is particularly the case where the proposed finding is a proposed finding of fact (which can be contrasted with a proposed finding that is in the nature of a submission or conclusion). The Unions' concern with

[17] The specific findings where "caution" has been urged are identified in the attached table.

the potential submissions flowing from proposed findings of fact also undermines the credibility of their opposition to the finding.

63. The Commission should disregard the concerns of the Unions about particular findings and assess each proposed finding having regard to:

    (a) whether the finding is properly dispute; and

    (b) the evidence before the Commission.

64. Where our clients' proposed findings have not been challenged, the Commission should make those findings as sought.

65. Where our clients' proposed findings have been challenged but no sound basis has been disclosed for that challenge, or where the challenged does not address the evidence relied upon in support of the proposed finding, those findings should be made as sought.

66. We otherwise refer to the attached table in relation to our clients' position on their proposed findings.

PART C: REPLY TO UNIONS' RESPONSES TO QUESTIONS IN BACKGROUND PAPER

Question 9

67. While the Unions appear to challenge AFEI's proposed finding [12], we note that their response does not actually dispute the proposed finding but rather simply challenges the evidentiary basis for the proposed finding. In our submission, the Commission can safely conclude that the social and community services sector (or at least the disability services and home care sectors) is made up of a significant proportion of not-for-profit organisations.

Question 15

68. We note that the Unions have submitted, at [164] of their submission, that "There is no reason why the Commission would not give Dr Stanford's evidence significant weight. With respect, we refer to our submission of 10 February 2020 at [23]-[29].

69. Given the position adopted by the ASU in response to the objections taken to the Stanford Report and the fact that the representations made by the interviewees to Dr Stanford were not being relied upon to prove the truthfulness of those factual assertions, the Commission should exercise caution in placing weight on the opinions expressed in the Report by Dr Stanford.

Question 17

70. We note at [175] that the ASU's general findings are said to support three submissions, however only two submissions appear to be articulated in [176] and [177].

71. In relation to the first submission about precarious work in the disability sector, it is questionable whether a broken shift loading will have any impact on working practices within the sector. In our submission, it will merely increase the cost of service providers delivering services.

72. We also do not understand how that first submission relates to the ASU's claim for a community language allowance. It is unclear how a proposed community language allowance will have any impact at all on working practices.

73. In relation to the second submission about attraction and retention of staff, it is also questionable whether the ASU's proposed broken shift loading or community language allowance will have any direct or material impact on attraction and retention. We are not aware of any evidence before the Commission that would substantiate such a finding.

Question 22

74. While the Unions appear to challenge AI Group's proposed finding [1], we note that their response does not actually dispute the proposed finding. Provided the Commission is satisfied that the proposed finding is relevant to the issues in dispute and is established on the evidence, there is no reason for the finding not to be made.

75. We also disagree with the Unions' reasons for challenging the Ai Group's proposed finding [2].

Question 31

76. In response to Question 31, the HSU outline a number of findings which they contend the Commission should make in relation to the issue of broken shifts.

77. Those proposed findings, along with our clients' position in relation to same, are set out in the following table.

Proposed finding	**Our clients' response**
The individualisation and marketisation of social care in the United Kingdom resulted in the adoption of arrangements where workers are paid only for contact time and not for travel time, and short periods of paid time are interspersed with fragmented, variable and unpredictable periods of non-work time. As a consequence social care workers there at greater risk than other workers of not receiving the National Minimum Wage.	We challenge this finding on the bases that: • the impact of any UK reforms are not relevant to the current matter before the Commission; and • there is not a sufficient evidentiary basis for this finding to be made. While the evidence of Dr MacDonald was not challenged, the cited part of her report is not relevant to these proceedings and should not be afforded any weight.
Both the NDIS and the consumer directed care model in in aged care in the home involve the same individualisation and marketisation of those services, meaning that there are similar incentives to adopt like arrangements.	We agree generally that the reforms in the disability services and home care sectors involve the same individualisation and marketisation of services as to the reforms in the UK. However, we question whether any finding can be made about the similarity between the regulatory environments of both jurisdictions, or whether it can be found that there are "incentives to adopt similar arrangements". There is very limited evidence before the Commission about the UK social care system. We do not consider that this finding can be made on the evidence.
The evidence shows the agencies providing disability services in Australia attempt to shift the uncertainty and risk associated with fluctuations in demand and revenue, associated with the changes to funding	We challenge this proposed finding.

Proposed finding	Our clients' response
arrangements, onto their employees, through the imposition of increasingly insecure and unstable employment relationships, rostering practices, and compensation. A clear consequence of this structural shift in the nature of work in the sector has been a marked increase in precarious work practices in various forms, including: casualisation, increased part-time employment, irregular and discontinuous shift assignments, requirements that disability workers work in multiple locations (often in the course of a single day, and often working inside clients' private residences), and the expectation that disability workers provide private or informal transportation services in the course of their work (including transporting clients, in some cases without compensation).	This is incredibly vague, dealing with an abstract concept (the 'shifting' of 'risk' and 'uncertainty'). It also appears to be wholly taken from the Stanford Report which, for reasons previously articulated, cannot be relied upon or given any material weight. This proposed finding is also in the nature of a submission rather than a proposed finding of fact.
The scheduling of discontinuous or split shifts is an increasingly common practice in the disability sector. That practice undermines the quality and sustainability of work in the sector as workers are expected to divide their working days between multiple even shorter shifts. This has the result of reducing their effective hourly wage over the course of the working day, with workers accruing paid time significantly less than the overall hours devoted to the performance the work, travelling to and from clients, waiting between client appointments and being in a state of readiness to perform the work.	We agree with the first sentence, relative to practices prior to the implementation f the NDIS and other similar reforms. We disagree with the remainder of the proposed finding. It is in the nature of a submission rather than a proposed finding of fact.
Disability support workers may work between one and 5 separate "shifts" in the course of any day with "shifts" as short as 30 minutes long, or even as brief as 15 minutes in some cases	Agree, subject to the comment that in the context of broken shifts, each portion of work is not a separate "shift".
Employers in home care have the same capacity and incentive to arrange work in that manner as employers in disability services.	Partly agree. We agree that employers in home care have the same capacity to arrange work as employers in the disability services sector. However, we consider that employers in the disability services sector have a greater incentive to do so due to the pre-regulated nature of the NDIS and the inadequacies of the current pricing levels.
The SCHCDS Award facilitates and incentivises the breaking of the shifts of social and community services employees because it: i. expressly contemplates, and thereby, permits disability services workers and home care workers to be required to work broken shifts;	We disagree. The Award does not incentivise the organisation of work in a particular way. Rather, the organisation of work is driven by client demand, subject to the requirements of the Award.

Proposed finding	Our clients' response
ii. expressly contemplates and thereby permits that the shifts of such workers may be broken more than once and imposes no limit on the number of such breaks during the course of any shift; iii. prescribes no minimum period of total hours of work for a shift to be broken, or any minimum period of work before a shift may be broken, or broken again; iv. contains no minimum engagement for any shift worked by a part-time employee, or casual disability services worker; v. contains no penalty, loading or allowance associated with the break of any shift.	
The capacity of employers to require employees to work broken shifts facilitates the fragmentation and disruption of normal work schedules and complicates the challenges facing disability workers in maintaining healthy work-life balance.	Disagree. The only reference in support of this proposed finding is the Stanford Report. For reasons previously articulated, the Stanford Report cannot be relied upon or given any material weight. It is also questionable whether such a generic finding can be made about whether broken shifts "complicate the challenges facing disability workers in maintaining healthy work-life balance". It is a loaded proposition, prefaced on an assumption that disability workers face challenges maintaining "healthy work-life balance". There was minimal evidence about this issue. It is also presumed that individual employees' abilities to achieve and maintain their 'work-life balance' will differ from individual to individual depending on a range of factors.
Time between portions of broken shifts typically occurs at sub-optimal locations and times of the day, preventing workers from experiencing full "value" for their leisure time. For some workers, breaks between shifts are spent waiting in their cars for the next appointment, or driving home only to have to turn around and drive back out to a later appointment. Although employees may make some use of the break between engagements for their own purposes, a significant proportion of the down time is either lost to the employee due to the need to travel, or of less utility and value to the employee than time.	Generally agree, save that it will ultimately depend on a range of factors such as: • the duration of the break; • the location of the employee at the commencement of the break relative to the employee's home and other services or amenities; • the desire of the employee as to how they wish to spend the time.

Question 32

78. It appears that the HSU have not fully answered this question.

79. Question 36

80. The ASU have indicated[18] that their proposed broken shift loading is intended to be paid "on hours worked during a broken shift". However, the wording of the proposed variations sought by the ASU, as set out in the Draft Determination at CB999, remains ambiguous.

81. Clause 25.6(b)(i) of the ASU's proposed variation in its Draft Determination provides:

> *(b) An employee who works a broken shift will receive:*
>
> *(i) Ordinary pay plus a loading of 15% of their ordinary rate of pay for each hour from the commencement of the shift to the conclusion of the shift inclusive of all breaks; and*
>
> *…*

82. On our reading, clause 25.6(b)(i) of the ASU's proposed variation in its Draft Determination is capable of being interpreted as requiring the loading to be paid on the entire span of the broken shift "inclusive of all breaks".

Question 37

83. We disagree with the Unions' contention that the casual loading does not compensate casual employees for working irregular hours. We also disagree with their assessment of the history of the casual loading.[19]

84. The jurisprudential history of the casual loading clearly indicates that a proportion of the loading is directed towards the disability related to working irregular or unpredictable hours. ABI and NSWBC recently filed extensive submissions on this issue in the 'overtime for casuals' common issues matter (AM2017/51).[20] We rely on those submissions although do not extract them in full in this document.

[18] See Joint Union submission at [228].
[19] See Joint Union submission at [229]-[231].
[20] See submission of 5 July 2019, particular Section 5 (https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am201741-sub-reply-abinswbc-050719.pdf)

85. The ASU place excessive weight on the wording in clause 10.4(e) of the Award as evidencing the purpose of the casual loading in the SCHCDS industry. This is particularly the case when they then, in the following paragraph of their submission:[21]

(a) acknowledge that the AIRC 'did not disclose its reasoning' (which we have assumed is intended to mean they did not disclose detailed reasons) at the time of making the Award; and

(b) acknowledge that the 25% casual loading was considered by the AIRC to be 'sufficiently common to qualify as a minimum standard' across virtually all modern awards.

86. The second point above suggests that the AIRC did not give any detailed industry-specific consideration to the issue when it established a 25% casual loading across all modern awards. Certainly, their decision of 19 December 2008 indicates as much.

87. Further, and against that backdrop, it is notable that there is no uniform formulation across the modern awards system as to *what* the 25% casual loading is intended to compensate for. While the SCHCDS Award only refers to the loading being paid instead of 'paid leave entitlements accrued by full-time employees', other awards are silent[22] and yet other awards call out 'the nature of casual work'.[23]

88. The variation in wording across the modern award system is difficult to reconcile given that the AIRC's decision of 19 December 2008. In the circumstances, the Commission should not place weight on the current formulation of clause 10.4(e) as being the intended purpose of the casual loading.

89. There is no sound basis for the ASU's proposed broken shift allowance to be payable to casual employees in addition to the existing casual loading.

Question 40

90. We refer to [235] of the Joint Union submission. Our clients withdraw the submission that the uniform allowance is payable in circumstances where employers do not provide uniforms.

[21] See Joint Union submission at [230].
[22] See, for example, clause 11.4(b) of the *Storage Services and Wholesale Award 2010*.
[23] See, for example, clause 11.3 of the *State Government Agencies Award 2010*.

Question 50

91. There is no substance to the UWU's submission that the evidence of Mr Shanahan little weight, given that the union did not cross-examine him on this aspect of his evidence. Nor did they raise any objection to this part of his evidence.

Question 52

92. The references at [257] of the Joint Union submission to the transcript of cross-examination of employer witnesses does not appear to have any relevance to the question posed in the Background Paper.

93. The question posed was whether the relevant employer witnesses were cross-examined in respect of the aspect of their evidence relating to their likelihood of losing clients if they charge for cancellation of a service.

Question 60

94. The Unions' assertion at [263] is incorrect. Under the NDIS, employers are prohibited from charging cancellation fees in certain prescribed circumstances. under the current NDIS Price Guide 2019-20 valid from 1 December 2019, employers are only able to claim for cancellations where they are "short notice cancellations". Employers cannot charge for cancellations that do not meet that definition.

PART D: 24 HOUR CARE CLAUSE

95. Our clients are opposed to the Unions' proposed variations to the 24 hour care clause.

96. The Unions propose such significant changes to the existing 24 hour care clause that it would effectively render 24 hour care shifts obsolete. For example, the Unions' proposal involves more than doubling the amount payable to employees when working such shifts.

97. There is no warrant for such a radical variation. This is particularly the case in light of the Commission's observation in its 2 September 2019 decision that, given the "history and the current utilisation of the 24 hour care clause", it is "appropriate to adopt a cautious approach".[24]

98. The Unions' proposal would have significant deleterious impacts on the provision of important care to vulnerable members of the community in their home. It will inhibit the ability of organisations to provide continuity of care, and impact the amount of care that could be provided to consumers within their allocated budgets. It would also likely have the effect of preventing employees who prefer to work 24 hour care shifts from being able to earn a reasonable amount of money in a single block of time, leading to a further fragmentation of working hours in the sector.

99. We address specific aspects of the Unions' proposal as follows.

'Unpaid hours of work'

100. The Unions assert that the 'most significant deficiency' with the 24 our care clause is that the Award does not remunerate employees for 'the whole time' they are required to be present at a workplace. In advancing that submission, the Unions adopt a policy position that all time that an employee is at a client's home and available for duty is 'work' and should be paid as such.

101. We respectfully disagree with that position.

102. At a conceptual level, there is no difference between the 24 hour care clause and clause 25.7 of the Award which regulates sleepovers. Under clause 25.7, an employee may be required to sleep overnight at premises where the client for whom the employee is responsible is located. However, the sleepover period is not 'time worked'. Instead, the sleepover period is compensated by way of a sleepover allowance. The employee is also entitled to further payment where they are required to 'perform work' during the sleepover period.

[24] [2019] FWCFB 6067 at [102].

103. The Unions do not seek to disturb the existing sleepover arrangements, save for pursuing a variation to the facilities to be provided to employees when working sleepovers.

104. The policy position advanced by the Unions in respect of the 24 hour care clause is difficult to reconcile given their position in respect of the sleepovers clause.

105. The same applies in respect of the 'excursions' clause at clause 25.9 of the Award.

106. In any event, the existing 24 hour care clause provides for a 155% loading payable on the 8 hours of working time for each 24 hour care shift, which compensates employees for any disutility associated with working 24 hour care shifts.

107. Interestingly, the Unions then state at [294] that 'the circumstances of an employee working a 24 hour care shift compare unfavourably with a worker on call as the worker's freedom of movement is limited for the entire period of the 24 hour shift'. However, this stands in contrast to other submissions made by the Unions about the 'remote response' proposal. For example, in their submission of 18 November 2019, the ASU submit at [100] that:

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

108. The Unions cannot have it both ways.

109. In respect of the proposed quantum of remuneration proposed under the Unions' clause, it is difficult to comprehend how it would be appropriate for employees to be paid 16 hours' pay at 155% of the appropriate rate in circumstances where:

(a) the employee is only required to perform 8 hours' work; and

(b) the employee is entitled to be paid at double time for any work performed in excess of 8 hours (with a minimum payment of one hours' pay).

110. The proposal defies logic.

'Care work'

111. No sound basis is advanced for the inclusion of a definition of 'care work'. The Unions appear to rely on an unsubstantiated assertion that it is 'likely' that employees will be requested to perform tasks outside the scope of the care plan. We are not aware of any evidence that

would support such an assertion, or any disputes arising in relation to the operation of the existing clause.

Sleep break

112. Our clients do not resist the proposed amendment to the existing clause to provide that:

> *During a 24 hour care shift, the employee will be afforded the opportunity to sleep for a continuous period of eight hours.*

113. This aspect of the Unions' proposal is sensible.

114. However, we do not agree with the other aspects of the Unions' proposal regarding the facilities to be provided to employees, or the time parameters within which the sleep period must occur, or the payment regime where the sleep period is interrupted.

115. This issue of sleeping facilities has already been addressed in the context of the HSU's proposed variation to clause 25.7 dealing with sleepovers. Our clients rely on the submissions already advanced in respect of that issue. We also refer to the wording proposed by our clients in its proposal, as set out in the Report issued by Commissioner Lee on 3 December 2019.

116. In relation to the proposed time parameters within which the sleep period must occur, there is limited evidence before the Commission as to the specific arrangements currently in place in the sector, and so caution should be taken in imposing prescription around when the sleep period must occur. It is possible that individual clients and carers have agreed to arrangements that depart from the proposed timeframe. Equally, there is no evidence of any issues with sleeping arrangements that would warrant the prescription proposed.

117. In relation to the proposed payment regime for where sleep is interrupted, we note that our clients' proposal has the effect of treating such work as overtime and makes it payable in accordance with the overtime provisions at clause 28.1 of the Award.

Sleepover allowance

118. Our clients accept the apparent logic of employees receiving the equivalent of the sleepover allowance under clause 25.7 when working 24 hour care shifts.

119. However, it must be recognised that clause 25.8 already contains a loading which compensates employees for any disutility associated with working 24 hour care shifts, including the need to be available for duty in a client's home for a 24 hour period. On that basis, if a sleepover allowance is introduced, it logically follows that the 155% loading should be reduced by the equivalent amount.

Additional care work

120. It is difficult to comprehend why employees should receive a payment of 200% of the appropriate rate for time in excess of eight hours spent providing care where, under the Unions' proposal, they would already receive 16 hours' pay at 155% of the appropriate rate. The proposal defies logic and is opposed by our clients.

Meal breaks

121. There is no evidence to support the Unions' speculative assertion that employees 'are not necessarily able to leave the client premises and have actual meal breaks'. This is mere speculative, unsupported by any evidence.

Breaks between shifts

122. Our clients do not oppose the aspect of the Unions' proposal which permits an employee to elect to have a break of not less than 10 hours between the end of a 24 hour care shift and the commencement of another period of work.

123. However, from a practical perspective, such a provision needs to be accompanied by:

(a) a requirement that the employee provide adequate notice of their election for such a rest break, so as to not disrupt an established roster;

(b) in the alternative, clause 25.5(d)(ii) will need to be broadened to enable the employer to change an established roster in response to employees making such an election; and

(c) in respect of part-time employees, a provision explicitly stating that the requirements of clause 10.3(e) do not apply in these circumstances.

Refusal to work more than 8 hours

124. We refer to the proposal advanced by our clients which adequately address this issue.

Accrual of hours

125. This aspect of the Unions' proposal is patently unreasonable. It is inconsistent with the current Award position relating to 24 hour care shifts, excursions and sleepovers, and would create a huge administrative burden for employers. It would also involve a significant cost imposition on employers.

126. The Unions' proposal should not be accepted.

PART E: COMMUNITY LANGUAGE ALLOWANCE ISSUE

Relevant background

127. During the tranche one hearing of these proceedings in April 2019, the ASU pursued a variation to the Award to include an allowance for 'community language and signing work'.[25] Under the ASU's proposal, employees using community language skills as an 'adjunct to their normal duties' would become entitled to one of two categories of an allowance. The allowances were as follows:

(a) a weekly allowance of $45 where the employee uses their skills 'occasionally'; and

(b) a weekly allowance of $68 where the employee uses their skills 'regularly'.

128. The proposed variation also included:

(a) a clause specifying that the employees 'do not replace or substitute for the role of a professional interpreter or translator';

(b) a requirement that employees 'record their use of community language skills'; and

(c) an obligation on the employer to 'provide the employee with accreditation from a language/signing aide agency'.

129. Our clients filed detailed submissions in reply to the ASU claim on 5 April 2019.[26] In that reply submission, our clients raised no fewer than 10 issues with the proposed clause. Other employer parties raised the same or similar issues with the clause in their reply submissions.

130. Notwithstanding the issues raised by employer parties, the ASU filed an Amended Draft Determination on 15 April 2019 (during the course of the hearing) which did not grapple with the legitimate issues raised by the employers. Instead, the ASU effectively proceeded with their proposed clause (albeit with some immaterial variations) and made submissions in support of it during the hearing in April 2019.

131. The ASU had the opportunity during the hearing in April 2019 to address the issues raised by employer parties and to advance a varied clause which rectified some of those issues. Disappointingly, they did not.

[25] See Draft Determination filed 7 November 2018; ASU submission of 18 February 2019; Amended Draft Determination filed 15 April 2019.
[26] See Part 8 of that reply submission.

132. Following the April 2019 hearing, there was then a further process whereby the Commission published a Background Document on 26 April 2019, and parties filed submissions and reply submissions in respect of the matters contained in the Background Document.

133. In the Full Bench decision of 2 September 2019,[27] the Commission did not determine the ASU's claim. Instead, the Commission indicated that a Background Paper would be prepared, and a Statement would be issued setting out how the Full Bench proposed to finalise its consideration of this claim.

134. The Commission published a Statement and the Background Paper on 4 December 2019. A conference was then held between he parties on 17 December 2019.

135. Following that conference, Directions were issued on 18 December 2019 directing the ASU to file an updated version of the new clause 20.10 it seeks to have inserted into the Award, and submissions in support of it, by 7 February 2020.

136. The ASU then filed a submission and a new Draft Determination on 7 February 2020. The variation now sought by the ASU is in the following terms:

> ***20.10 Community Language and Signing Work***
>
> *(a) An employee who, in the course of their normal duties, uses a language other than English to provide services to speakers of a language other than English, or use sign language to provide services to those with hearing difficulties, shall be paid an allowance of 4.90% of the standard rate per week.*
>
> *(b) The allowance in 20.10(a) will apply to eligible part time and casual employees on a pro rata basis on the basis that the ordinary weekly hours of work for full-time employees are 38.*

The new ASU proposal

137. The ASU assert that 'The amended draft determination does not change the substance of the ASU's claim'.[28] Further, the ASU appear to assert that the changes 'narrow the scope of issues in dispute between the parties'.[29]

138. Our clients respectfully disagree with both of those assertions.

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[27] [2019] FWCFB 6067.
[28] See ASU submission of 7 February 2020 at [5].
[29] Ibid at [6].

139. As is evident from the terms of the variation now sought, the ASU's proposed new clause is materially different to that which they have pursued since November 2018.

140. The ASU's assessment of the differences between the two proposals is also incomplete.

141. Further, the ASU submission fails to articulate any reason for most of the changes. With respect, the ASU's approach effectively requires employer parties to 'guess' the intention or rationale for certain changes in the ASU's position without the benefit of any written submissions addressing their new proposal.

Differences between the ASU original proposal and their new proposal

142. The new ASU proposal differs from the original proposal in a number of significant respects:

143. ***First***, the allowance is proposed to apply to a different category of employees.

144. The original proposal was expressed to apply to 'employees using a community language skill as an adjunct to their normal duties'.[30] However, the new proposal is expressed to apply to an employee who, 'in the course of their normal duties', uses a language other than English or provides services in sign language.

145. No explanation is provided by the ASU for this change, other than a general comment that the purpose of the claimed allowance is to provide additional remuneration to employees who use languages other than English (including sign language).[31]

146. ***Second***, the proposal removes the two classes of allowance (for 'occasional' and 'regular' use of the skill) and replaces those with a single allowance payable where an employee uses a language other than English or sign language 'in the course of their duties'.

147. Again, no explanation is offered by the ASU for this change.

148. ***Third***, the proposal removes the limitation on the work anticipated to be performed by employees as initially contained in clause 20.10.5 of the ASU's original proposal, which stated that the relevant employees 'convey straightforward information relating to services provided by the employer, to the best of their ability'.

149. Yet again, no explanation is offered by the ASU for this change. For example, it is not clear whether the clause is now intended to capture a broader class of employees (such as qualified interpreters and translators). In any event, that appears to be the effect.

[30] See clause 20.10.1 of the Amended Draft Determination filed 15 April 2019.
[31] See ASU submission of 7 February 2020 at [5].

150. ***Fourth***, the proposal removes the words initially contained in clause 20.10.5 of the ASU's original proposal, which stated that the relevant employees 'do not replace or substitute for the role of a professional interpreter or translator'.

151. Yet again, no explanation at all is offered by the ASU for this change. Put simply, it is unclear why this wording has been removed?

152. ***Fifth***, the ASU's new proposal removes the words contained in clause 20.10.6 of the ASU's original proposal, which stated that 'Such employees shall record their use of community language skills'.

153. Yet again, no explanation at all is offered by the ASU for this change. This is an unexplained and material departure from the ASU's original proposed clause.

154. ***Sixth***, the ASU's new proposal removes the proposed clause 20.10.7 in its entirety. That clause dealt, at least in part, with the issue of accreditation (which is addressed at paragraph 156 below). However, it also dealt with additional issues which have been stripped out of the ASU's new proposal. These items are:

(a) a requirement that relevant employees 'be prepared to be identified as possessing the additional skill(s)'; and

(b) a requirement that the employees make themselves 'available to use the additional skill(s) as required by the employer'.

155. Yet again, no explanation at all is offered by the ASU for this change. This is an unexplained and material departure from the ASU's original proposed clause. The ASU have failed to advance any submission at all in support of this change.

156. ***Seventh***, the ASU's new proposal removes the accreditation process in the sense that there is no longer any process under the proposed clause for an employee to satisfy the employer that they have the skill for which the allowance would be payable.

157. Again, this is a material departure from the ASU's original proposal.

158. ***Eighth***, the proposal introduces pro-rating of the entitlement in respect of part-time and casual employees.

Expansion of issues in dispute

159. Separate to the differences between the two proposals (as outlined above), while we accept that the new ASU proposal does 'narrow the scope' of *some* issues in dispute between the parties', it is also evident that the new ASU proposal has the opposite effect in some respects,

and actually expands the issues in dispute (and creates new issues in dispute) as compared to their original proposal.

160. The areas in which the ASU's new proposal expands the issues in dispute are as follows:

(a) First, it has the effect of capturing a greater number of employees by reason of the removal of the notion of the skill being used as an 'adjunct' to the employee's duties;

(b) Second, the removal of the notion of employees conveying 'straightforward information' further extends the scope of the proposed clause;

(c) Third, the removal of the notion that the employees did not 'replace or substitute' professional interpreter or translators appears to again extend the scope of the proposed clause;

(d) Fourth, the removal of the record keeping obligation creates a new issue in dispute between the parties; and

(e) Fifth, the removal of any process of accreditation creates a further issue in dispute between the parties.

Fairness considerations

161. It is disappointing that our clients have spent considerable time and resources dealing with the ASU claim over the past 12 months, including during the tranche one hearing in April 2019, to now be met with an entirely new and different claim at such a late stage in the proceedings.

162. The ASU had ample opportunity to reflect on the issues raised by the employer parties in early April 2019, prior to the tranche one hearing, and to revise their proposed variation. Indeed, the ASU did in fact revise their proposed clause when they filed an Amended Draft Determination on 15 April 2019. That would have been the appropriate time (and, as a matter of fairness, the latest time that should be permitted) for the ASU to revise their proposed variation.

163. Our clients are regrettably now required to respond to an entirely different proposed clause.

164. While we accept the 4 yearly review process is not a party-party matter and is often an iterative process, section 577 considerations still apply. In the interests of fairness, our clients respectfully submit that the ASU should not be permitted to pursue a new proposal that materially departs from their original proposal and which expands upon the issues in dispute between the parties.

165. It is also relevant to note that the evidence relied upon in support of the ASU's new claim is the evidence of witnesses heard during the tranche one hearing in April 2019. Given the material departure by the ASU of the variation sought, it is questionable whether that evidence can still be relied upon in support of the new variation, or whether the Commission may need to consider recalling the witnesses. This provides another reason why the Commission should not permit the ASU to pursue its new proposal.

166. Notwithstanding the above, we address the new ASU proposal in further detail below.

Our clients' position in relation to the new ASU proposal

167. Our clients oppose the new ASU proposal.

168. Our clients continue to rely on their reply submissions of 5 April 2019 in respect of the claimed introduction of a community language allowance.[32] Additionally, our clients rely on the oral submissions made during the tranche one hearing, their further submission of 19 May 2019, and further reply submission of 3 June 2019.

169. Notwithstanding that the ASU have attempted to rectify a variety of issues with their original proposed variation, the Commission should not grant the new claim.

170. As was the case with their original proposal, the ASU have failed to demonstrate that the ability to communicate in more than one language is a 'highly sought skill' in the social and community sector. They have also failed to demonstrate that it is 'very common for organisations to seek employees who are multilingual'.

171. The evidence before the Commission on these topics was limited to:

(a) two employees[33] who work in very specific multicultural-focussed businesses; and

(b) an employer[34] from a similar organisation (Metro Assist, formerly known as Metro Migrant Resource Centre).

172. Such evidence does not accurately represent the industry. Nor does it provide a sufficient basis to make good the submissions advanced by the ASU in support of the claim.

[32] See Part 8 of that reply submission, although we note that certain aspects of that submission are no longer applicable to the new ASU claim.
[33] Ruchita and Nadia Saleh.
[34] Lou Bacchiela.

173. While certain employers may value the ability of an employee or prospective employee to speak a community language other than English, the reality is that employers in the SCHADS industry value a whole range of different life skills, experiences and attributes.

174. Further, use of a community language is not an issue that arises across the industry or even in a large part of the industry, and so a community language allowance is appropriately dealt with at the enterprise level through bargaining.

175. As the Background Paper of 26 April 2019 and subsequent written submissions demonstrated, allowances payable to employees who are required in the course of their work to speak a language other than English are by no means a common feature of the modern awards system. Indeed, only 6 modern awards out of approximately 122 contain a language allowance. On that basis, there should be some compelling industry-specific basis for including such a term in a modern award.

176. Turning to the specific terms of the new ASU proposal, the proposed clause is deficient in the following respects:

(a) Firstly, under the proposed clause, the entitlement to an allowance is triggered where an employee 'uses' a second language or sign language to provide services to particular individuals. In our submission, the trigger for an allowance of this type should be the employer 'requiring' or 'directing' and employee to use their second language, rather than the employee simply deciding to use it.

(b) Secondly, the proposed variation does not include any requirement for employees to have their community language skill accredited by an appropriate body as a precondition of receiving the allowance. The removal of any requirement for accreditation has the consequence of there being no objective basis for an employee to be assessed as having the skill, and no capacity or process for the employer to determine whether the employee has the skill.

(c) Thirdly, the accreditation issue gains even more importance under the ASU's new proposal given that the wording about the employees not 'replac[ing] or substitut[ing] for the role of a professional interpreter or translator' has been removed. It now appears that the ASU intends for these employees to effectively replace professional translation services[35] but without any accreditation requirement.

[35] This was certainly the flavour of the evidence. See for example the Ruchita statement at [18]-[22]; Saleh statement at [33]-[37]; Bacchiela statement at [18]-[22].

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

177. The new and revised ASU claim should be dismissed.

AUSTRALIAN BUSINESS LAWYERS & ADVISORS
26 February 2020

ATTACHMENT: TABLE OUTLINING STATUS OF OUR CLIENTS' FINDINGS

No.	Proposed finding	Status	Comment / Response
1.	There have been significant regulatory changes in the disability services and home care sectors over recent years. These have included: (a) the introduction of the National Disability Insurance Scheme which has been progressively implemented throughout Australia from July 2013; (b) the introduction of reforms in the home care sector since around 2012.	Not challenged	
2.	A key feature of those regulatory changes was the transition from traditional 'block funding' models to individualised funding arrangements underpinned by the principle of 'consumer-directed care'.	Not challenged	
3.	The principle of 'consumer-directed care' involves providing individual consumers with choice and control over what services are provided to them, when and where those services are provided, how those services are provided, and by whom those services are provided.	Not challenged	
4.	These reforms have fundamentally changed the operating environment in the following ways:		
	(a) service providers now have less certainty in relation to revenue;	Not challenged	
	(b) service providers are experiencing greater volatility in demand for services, as consumers have a greater ability to terminate their service arrangements;	Not challenged *	* The Unions make some observations about the evidence relied upon to support this finding but do not appear to seriously challenge or dispute the finding. The finding should be made as sought.
	(c) there has been an increase in the number of service providers in the market;	Not challenged	
	(d) service providers are exposed to greater competition for business;	Not challenged	

No.	Proposed finding	Status	Comment / Response
	(e) service providers have reduced levels of control in relation to the delivery of services, as individual consumers have more control over the manner in which services are provided to them;	Disputed	The Unions misconstrue the proposed finding and conflate the notions of "reduced control" and "compulsion" to provide services. Our clients do not suggest the reforms have resulted in employers being "compelled" to provide services. It logically follows that where consumers have increased control or a greater 'voice' in relation to when, where, how and by whom services are delivered, the providers of those services experience a consequential reduction in the capacity to impose services on consumers.
	(f) there is a greater fragmentation of working patterns, as the employer is now less able to organise the work in a manner that is most efficient to it;	Disputed	The Unions do not dispute that there is a "greater fragmentation of working patterns". However, they dispute that there is sufficient evidence before the Commission to make the finding sought. With respect, this finding should be uncontroversial. With consumers exercising greater voice over when services are delivered to them, employers are less able to dictate to consumers when services are delivered and consequently are less able to organise work in the most efficient manner.
	(g) greater choice and control for consumers has led to greater rostering challenges by reason of: (i) an increase in cancellations by clients;	Disputed	The Unions raise issue with the lack of footnoting in support for this proposition that there has been an increase in cancellations. However, in other parts of our submission we footnoted extensive

No.	Proposed finding	Status	Comment / Response
	(ii) an increase in requests for changes to services by consumers; and (iii) an increase in requests for services to be delivered by particular support workers.		evidence about the incidence and frequency of client cancellations. See for example the evidence referred to in items 23 and 24 of this table. The incidence and frequency of client cancellations cannot seriously be disputed. Indeed, see the Unions' response to proposed findings set out in in items 23 and 24 of this table. The Unions did not challenge proposed finding 24. The Unions also dispute the link between client cancellations, roster changes and requests for services to be delivered by particular support workers, and rostering challenges. With respect, it is self-evident that client cancellations, change requests by consumers and other specific requests lead to rostering challenges.
5.	It is also widely accepted that clients benefit from having continuity of care in the sense that care is provided by the same employee or group of employees.	Not challenged *	* The Unions' position on this finding is curious. On the one hand, they generally accept at [133] that many clients and their families desire services to be provided by the same employee or group of employees, and that it "may" make the work "more pleasant" for clients. They also refer specifically to the evidence of Mr Fleming which supports this finding.

No.	Proposed finding	Status	Comment / Response
			However, they then suggest the proposed finding is "vague" and should be treated with "some caution". They do not articulate in what way the finding is vague. And the basis for their request to treat the finding with caution is stated to be due to their concern about the submissions that may flow from the factual finding. With respect, that is not a proper basis for the factual finding to be resisted, and undermines the credibility of their opposition to the finding. The finding should be made.
6.	The implementation of the NDIS is overseen by the National Disability Insurance Authority (the **NDIA**) which is an independent statutory agency. As part of its market stewardship role, the NDIA imposes price controls on some supports by limiting the prices that registered providers can charge for those supports and by specifying the circumstances in which registered providers can charge participants for supports. These prices are contained in the NDIS PB Support Catalogue 2019-20.	Not challenged	
7.	The prices and rules contained in the Price Guide are monitored by the NDIA's Pricing Reference Group. The prices are typically updated on an annual basis by way of an Annual Price Review. The Pricing Reference Group helps guide NDIS price regulation activities and decisions.	Not challenged	
8.	The NDIA uses an Efficient Cost Model to: (a) estimate the costs to disability service providers of employing disability support workers to deliver supports through the NDIS; and (b) inform its pricing decisions in respect of the supports delivered by disability support workers on which it imposes price limits.	Not challenged	

No.	Proposed finding	Status	Comment / Response
9.	The Efficient Cost Model purports to estimate the costs of delivering a billable hour of support taking into account "all of the costs" associated with every billable hour.	Not challenged	
10.	In relation to labour costs, the Efficient Cost Model uses the SCHCDS Award as "the foundation" of its assumptions and methodology.	Not challenged	
11.	Notwithstanding the above, the Efficient Cost Model does not contain any specific provision for, or does not account for, a range of actual or contingent costs proscribed by the SCHCDS Award which are associated with delivering services. These missing cost items include: (a) overtime (b) redundancy pay; (c) paid compassionate leave; (d) paid community service leave (for jury service); (e) the supply of uniforms or payment of a uniform allowance; (f) all other allowances payable under the Award, including: (i) the laundry allowance; (ii) meal allowances; (iii) the first aid allowance; (iv) the motor vehicle kilometre reimbursement; (v) the telephone allowance; (vi) the heat allowance; (vii) the on-call allowance; (viii) the additional week's annual leave for shift workers; and (ix) rest breaks during overtime.	Not challenged	

No.	Proposed finding	Status	Comment / Response
12.	Additionally, the Efficient Cost Model contains other assumptions that have the effect of further underestimating the true costs of service providers in delivering services under the NDIS. For example: (a) The Efficient Cost Model does not account for payroll tax; (b) the Efficient Cost Model does not account for over-Award payments under applicable enterprise agreements; (c) the Efficient Cost Model assumes that 80 percent of the disability support workforce is permanently employed (which witness Mark Farthing described this as "highly inaccurate"), which results in the model underestimating the costs incurred by service providers where their workforce consists of casual employees at a rate of greater than 20 percent of the overall frontline workforce; (d) the Efficient Cost Model assumes 'utilisation rates' (paid time that is billable compared to overall paid time) of between 87.7% and 92%, which does not provide sufficient allowance for essential non-billable tasks such as administration, handover, training, team meetings, and other non-chargeable tasks; and (e) the Efficient Cost Model assumes that a support worker is employed in a particular classification for each type of support delivery, but in reality the employee delivering the support may actually be at a higher pay-point.	Not challenged	
13.	The NDIA has been aggressive in its price regulation activities in trying to set the absolute minimal cost so as to control the cost to government of the NDIS as a whole.	Not challenged	
14.	The price regulation controls applied by the NDIA do not enable employers to recover the full employment costs incurred for the services provided to participants under the NDIS.	Disputed	We accept that this proposed finding is overstated. We invite the Commission to make a revised finding to the effect that:

No.	Proposed finding	Status	Comment / Response
			Due to the Efficient Cost Model not containing specific provision for certain Award entitlements, in some cases the price regulation controls applied by the NDIA may not enable employers to recover the full employment costs incurred for the services provided to participants under the NDIS. This finding should be uncontroversial given that the proposed findings at items 11, 12 and 13 of this table have not been challenged.
15.	Employers in the disability services sector have been under significant financial strain since the introduction of the NDIS. By way of example: (a) there were considerable transitional issues with the rollout of the NDIA due to the size, speed and complexity of the reform; (b) The cost of transitioning to the NDIS and interacting with new systems and processes added to providers' cost bases and affected their financial position; (c) The pricing model has had a negative effect on the sector; (d) As at February 2018, while some providers had profitable operating models, many were struggling; (e) In 2018 providers reported concern that financial losses will lead to a market failure; and (f) Providers held concerns in 2018 that they would not be able to continue providing services at the current prices.	Not challenged	
16.	The home care sector is primarily funded by the Commonwealth Government. The Commonwealth Government controls the supply of services and packages, the levels of funding, the regulatory framework, the administrative infrastructure for payment of subsidies and consumer entry and navigation through the system.	Not challenged	

No.	Proposed finding	Status	Comment / Response
17.	There are three main categories of service or packages in the home care sector. They are as follows: *The Commonwealth Home Support Program (**CHSP**)* (a) The CHSP commenced in 2015 and provides ongoing or short-term care and support services. The CHSP provides funding to a considerably large number of aged persons, however there is no data retained in relation to the demand for the program. (b) The CHSP relies on grants for funding and, with the exception of recent additional funds being provided to existing providers to increase their services, at no time recently has there been an open round for funding, funding has not been available on an annual basis and there is no clarity as to when funding will be released. *Home Care Packages (**HCPs**)* (a) HCPs were introduced in 2013 to replace a number of other programs. The introduction of HCPs also saw the introduction of consumer-directed care and individualised funding. (b) CDC has seen a shift in the way that care is provided to participants and the model encourages greater choice on the part of the consumer. Following further reform in 2017, HCPs are now directly allocated to the person requiring the support rather than to providers and with their funding the participant then selects the provider they prefer. *Veteran Programs* (a) Veterans' Home Care (VHC) provide funding to certain eligible veterans who require assistance to continue to live independently. There is also a DVA Community Nursing Program to enhance the independence of veterans. While the programs hold similarities to the other home care programs, they are funded separately through Department of Veteran Affairs.	Not challenged	

No.	Proposed finding	Status	Comment / Response
18.	Providers in the home care sector are under financial strain following the rollout of CDC. While some providers have been operating under CDC since 2010 when it was first piloted, other providers have only been operating under this approach for approximately 12 months.	Disputed	We accept that the footnoting in support of this finding was deficient. We rely on the StewartBrown publications to demonstrate that the home care sector is under significant financial strain. See reports at CB503 and CB541.
19.	There has been a decline in the overall performance of home care providers, which is reported as being attributable to increased competition 'caused by the introduction of consumers being able to choose the provider from whom they receive their services'.	Not challenged	
20.	Reports show that while revenue has been increasing in the sector, the revenue levels of HCP providers are so low that they border on being unsustainable (taking into account the money providers are required to spend in relation to technology, staff recruitment, retention and growth).	Not challenged	
21.	Many employers in the SCHCDS industry are not-for-profit organisations with a strong mission to support the community. Accordingly, many service providers in the SCHCDS industry are not primarily motivated by profitability and other commercial considerations.	Not challenged *	* The Unions do not challenge the proposed finding, however assert that the evidence "falls short" of establishing those motivations as facts. With respect, if the finding is not challenged and the proposition is accepted by the Unions and other parties, the Commission should accept the proposition. A failure to adduce evidence in support of an issue that is not in dispute should not prevent the Commission making a finding.
22.	Equally, many employees working in the SCHCDS industry are motivated by factors other than purely economic benefit. For example:	Not challenged *	* The Unions do not appear to seriously challenge the proposed finding. This is not surprising given the evidence of their own witnesses.

No.	Proposed finding	Status	Comment / Response
	(a) Ms Stewart stated that she "loved working in home care", "loved the clients" and "felt that I made a difference in the lives of my clients"; (b) Ms Sinclair stated that she changed careers from environmental engineering to home care as she "was looking for a career which was more fulfilling" and that "I like the idea of promoting person-centred care for older individuals in our community"; (c) Ms Waddell gave evidence that she "gain[s] satisfaction from knowing that I have made a difference to peoples' lives…"; (d) Mr Encabo stated "I have strong emotional attachments to my work and the people I support. I have been an advocate for people with a disability since I was caring for my first wife. My connection to this sector is deeply personal"; and (e) Mr Lobert stated "Initially what I liked about the work was the people and making a difference in peoples' lives. Now I also like that you don't have to take the work home with you, and that working one on one, you're only responsible to the person you're working with".		Instead, the Unions make a submission about the relevance of this finding or the weight to be attributed to it. However, the finding has not been challenged in a factual sense, and so should be made.
23.	Client cancellation events occur frequently in both the disability and home care sectors. By way of example: (a) Mr Shanahan gave evidence that Coffs Coast Health & Community Care Pty Ltd experience client cancellations on a "regular basis"; (b) Mr Harvey gave evidence that ConnectAbility experiences client cancellation events on a "daily basis"; (c) Ms Ryan gave evidence that Community Care Options experiences client cancellations on "at least a daily basis"; (d) Ms Wang gave evidence that CASS Care Limited experiences client cancellations on a "regular basis"; and	Not challenged *	* The Unions agree that client cancellation events "occur" in both the disability and home care sectors, but appear to dispute that they occur "frequently". They note that the "incidence depends on the business practices" of the particular provider. While that is trite, the evidence nevertheless provides a sufficient basis for the Commission to find that client cancellation events occur "frequently" in both the disability and home care sectors. See examples of the evidence to which

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	(e) Mr Wright gave evidence that Hammond Care experiences client cancellations on a "frequent basis".		we have referred and which have not been challenged.
24.	In terms of the incidence of client cancellation events, the evidence was as follows: (a) Ms Wang gave evidence that "approximately 40 visits are cancelled per week" at CASS and, in the month of May 2019, 3.83% of visits were cancelled (180 of 4,700 total scheduled visits); (b) Mr Wright gave evidence that during May 2019 there were 2,708 cancellations out of 47,704 scheduled services which equates to 5.68% of services cancelled for the month; (c) Ms Mason gave evidence that BaptistCare experiences "a high proportion of client cancellations on a very regular basis" and that in the month of May 2019 5,140 of 35,083 services were cancelled, which equates to 14.65% of scheduled services; and (d) Mr Harvey gave evidence that ConnectAbility experienced 1,134 cancellations during the financial year ending 30 June 2018.	Not challenged	
25.	Clients cancel scheduled services for a range of reasons including ill health or injury, an unscheduled medical appointment, hospitalisation, transfer into permanent residential care, death, family visits, complex behavioural issues, social appointments, the client refuses to have the replacement worker if their usual worker is absent that day, the client is not home at the time of the scheduled service, holidays, poor weather, and festival celebrations.	Not challenged	
26.	As to the timing of client cancellations, the balance of the evidence tends to suggest that most client cancellations occur in the 24 hours prior to the commencement of the scheduled service. For example:	Not challenged	

No.	Proposed finding	Status	Comment / Response
	(a) Mr Shanahan gave evidence that clients typically give notice of a cancellation on the day when a client goes into hospital, permanent care, or when they pass away; (b) Mr Harvey gave evidence that 75% of cancellations occurring at ConnectAbility during the financial year ending 30 June 2018 were made within 24 hours or not provided at all; (c) Ms Ryan gave evidence that for the time period 1 April 2019 to 30 June 2019 Community Care Options had clients cancel their services on the same day on 205 separate occasions; (d) Ms Wang gave evidence that: (i) In home ageing services, while more notice is typical, cancellations for unexpected reasons are usually less than 24 hours; and (ii) In disability services most cancellation notice is overnight and less than 24 hours; and (e) Mr Wright gave evidence that for Hammond Care "the vast majority of client cancellations are within 0 to 6 hours of the scheduled commencement time of the service".		
27.	The frequency of cancellation events causes significant rostering challenges for businesses. While employers endeavour to redeploy employees to other productive work where cancellation events occur, it is not always possible to do so for a range of reasons.	Not challenged	
28.	Funding schemes have different terms in respect of cancellations. Employers are in some cases prohibited from charging cancellation fees. For example, where disability services are provided under the NDIS, service providers must comply with the cancellation rules in the NDIS Price Guide 2019-20. Some service providers have adopted cancellation policies and practices whereby they do not always charge cancellation fees (or charge lower cancellation fees than permitted to) even though they are permitted to under the applicable regulatory system.	Not challenged*	* The Unions "urge caution" regarding this finding but do not specifically challenge any aspect of this finding or express any basis for the finding to not be made by the Commission. We dispute the Unions' assertion that "there was no evidence before the Commission that

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	For example, Mr Shanahan gave evidence that Coffs Coast Health & Community Care Pty Ltd has a policy whereby they only charge clients for one hour of a cancelled service regardless of the scheduled duration of the service.		employers in the disability sector have adopted cancellations policies that do not reflect NDIA funding arrangements". See Ryan Statement at [49] (CB195) and Wang Statement at [38] (CB206).
29.	Employers encounter difficulties in finding alternative work for employees at the time of their rostered shift when a scheduled client service is cancelled by the client.	Not challenged.	
30.	There is broad support from both employer and union parties for the introduction of a term in the Award dealing with 'remote response' work, or work performed by employees outside of their normal working hours and away from their working location.	Disputed	Notwithstanding the apparent differences in views about the type of work to be regulated, we do press this proposed finding.
31.	Employees covered by the Award are requested or required, from time to time, to perform 'remote work' (i.e. work away from the workplace) at times outside of their rostered working hours.	Not challenged	
32.	Having arrangements in place for out of hours work is necessary, given the industry.	Not challenged	
33.	Employers have different practices in place for ensuring that employees are available to receive calls or otherwise respond to emergencies or other inquiries issues that may arise.	Not challenged	
34.	Many inquiries that are fielded by employees when on-call or otherwise when not performing work do not require more than a few minutes of time.	Disputed	We dispute that we have mischaracterised or 'cherry-picked' an 'innocuous' reference in Ms Anderson's statement in support of this finding. No part of Ms Anderson's evidence is more innocuous than any other part of her evidence. There are other parts of Ms Anderson's evidence that appear to support this finding (e.g. PN1002-1004). In any event, Ms Anderson's evidence is somewhat unclear, and certainly does not suggest that each task or item of work required to be

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			performed while on-call takes a significant period of time. The remainder of the Unions' response to this finding refers to generalised evidence about the 'demands' of being on-call. It does not go towards the time taken to perform each discrete task while on-call.
35.	It is difficult for employers to monitor the time that employees spend performing remote response work.	Disputed	Although the Unions appear to dispute this finding, their response merely discloses that they "do not accept that monitoring the time spent by employees performing remote work would be any more onerous" than other work. With respect, that does not directly address the finding proposed, and skates around the issue of whether or not it is "difficult" for employers to monitor the time that employees spend performing remote response work. The Unions' response does not provide any proper basis for contesting this finding.
36.	Short shifts are a very common feature of the SCHCDS industry. This is particularly so in the home care and disability services sectors.	Not challenged	
37.	It is very common for consumers in the home care and disability services sectors to request services of a short duration. By way of example: (a) Mr Shanahan, Mr Wright and Ms Mason gave evidence that services of less than one hour are common, with Mr Shanahan	Not challenged	

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	giving evidence that approximately 80% of all client visits are less than one hour; (b) Mr Shanahan and Mr Wright both gave evidence that there is client demand for 30 - minute services; (c) Ms Ryan gave evidence that some services are for 15 minutes duration.		
38.	The incidence of short shifts is reflective of the nature of the industry, and the personal care services, domestic care services, and lifestyle services that are provided. These services include (but are not limited to): (a) Medication prompting; (b) Personal care services (assistance with showering and getting dressed); (c) Meal preparation; (d) Assistance improving skills (e.g. meal planning, teaching cooking skills, support in responsibility for personal hygiene); (e) Domestic assistance (e.g. making beds, vacuuming and mopping floors, cleaning the toilet and bathroom, laundry, shopping for groceries); (f) Transportation and assistance with mobility; (g) Development of social skills and cognitive and emotional support; (h) Community engagement; and (i) Respite care.	Not challenged	
39.	Due to the high incidence of short duration client services, it is very common for employees to be engaged to provide a series of short-duration services to different clients throughout a single shift.	Not challenged	
40.	Employers often bundle a series of short-duration client services together to create a shift for employees. Employers also attempt to 'build' a shift for workers	Not challenged	

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	by combining numerous client services so that the shift is attractive to employees. This rostering practice is easier in metropolitan areas where there is a high volume of customers located within close proximity to each other, however it can be challenging to 'build' a shift of work in regional and rural areas.		
41.	Client preferences and principles of continuity of care can also impact the shift lengths that are provided to employees.	Not challenged	
42.	As to overall shift length, employers regularly engage employees to work shifts of a duration of less than three hours. By way of example, the evidence demonstrated that: (a) It is common for employees to work two hours shifts; (b) It can be difficult to provide employees with shifts longer than two hours; and (c) Employers may struggle to meet client demand over peak periods if required to provide shifts of three hours.	Not challenged	
43.	The imposition of a three-hour minimum engagement for all categories of workers: (a) will impose a significant financial strain of employers; (b) may adversely affect customer service levels or prevent service providers from providing particular services; (c) will significantly impact on staff rostering workloads and reduce flexibility.	Not challenged	
44.	The imposition of a three-hour minimum engagement for all categories of workers will also adversely impact consumers and adversely impact the ability of the various schemes to deliver on the principles of consumer-directed care.	Not challenged	
45.	Broken shifts are an essential feature of the home care and disability services sectors.	Disputed in part	The Unions agree that broken shifts are a "common" feature of the home care and disability services sectors but disagree that they are an "essential" feature.
46.	There is a very high incidence of broken shifts in the home care and disability services sectors.	Not challenged	

No.	Proposed finding	Status	Comment / Response
47.	There are clear peaks in demand for services at different times throughout the day. For example, in the home care sector, there are two clear peak times for the delivery of services: during the morning, and then in the evening. There is also a less pronounced third peak time at around lunch time.	Not challenged	
48.	It is very common for consumers in the home care and disability services sectors to request services of a short duration.	Not challenged *	* The Unions "urge caution" regarding this finding but do not challenge the finding or express any basis for the finding to not be made. The finding should be made as sought.
49.	Most broken shifts involve two portions of work and one break. However, occasionally it is necessary for broken shifts to involve more than one break.	Disputed	While the Unions dispute this finding, the evidence overwhelmingly supports the finding being made. We refer to: • the Wright Statement at [45]; • the Mason Statement at [72]; • the further Miller Statement filed 19 November 2019; • the further Mason Statement filed 25 November 2019.
50.	Consumers in rural and remote areas require services more than once per day for short periods of time.	Not challenged *	* The Unions do not challenge this factual finding, subject to it being limited to "some" consumers. The finding should be made with that modification.
51.	Where broken shifts are worked, there is significant variation in the duration of the break period. Some broken shifts involve a break period of less than one hour, while other broken shifts involve a break period of 6-8 hours.	Not challenged	
52.	Employers engage in a range of practices in relation to remunerating employees when working a broken shift. By way of example: (a) Some employers provide a broken shift allowance; and (b) Other employers only have employees work a broken shift by agreement.	Not challenged *	* The Unions do not challenge this factual finding, save that they make some submissions about the variation in specific practices adopted by certain employers. The finding should be made as sought.

No.	Proposed finding	Status	Comment / Response
53.	The introduction of a 15% 'broken shift loading' will impose an additional cost on businesses. Such an allowance is not accounted for in the existing funding arrangements, including under the NDIS.	Not challenged	
54.	Many employees work additional hours in excess of their contracted hours.	Not challenged	
55.	Employers regularly offer part-time employees work in excess of their contracted hours. By way of example: (a) Mr Shanahan gave evidence that Coffs Coast Health & Community Care Pty Ltd offered 902 additional hours to their part-time employees during the month of May 2019; (b) Mr Harvey gave evidence that "all part time community support workers and residential support workers" are engaged to work above contract hours stated in employment contracts; (c) Ms Ryan gave evidence that in the past year, part-time employees "have worked 95,000 hours above their contracted hours"; (d) Ms Wang gave evidence that in the four weeks between 5 June 2019 and 2 July 2019 a total of 1,863 hours were offered to part-time employees in home ageing services in excess of their contracted hours; (e) Mr Wright gave evidence that Hammond Care, in the month of May 2019, provided in excess of 14,000 additional hours above contract hours; and (f) Ms Mason gave evidence that BaptistCare is regularly required to offer part-time employees work in excess of their contracted hour in order to "effectively meet client needs".	Not challenged	
56.	There is fluctuation in the number of hours available to employees on a weekly basis due to a range of reasons including fluctuating client demands, lack of guarantee of services (e.g. clients' ability to change providers and cease their services), client preferences, etc. This makes it difficult for employers to predict how many hours of work are available/required each week.	Not challenged	

No.	Proposed finding	Status	Comment / Response
57.	Many employees would like to receive more hours of work.	Not challenged	
58.	For services delivered under the NDIS, the cost modelling which was used to devise the price caps imposed by the NDIA does not account for overtime rates of pay.	Not challenged	
59.	The imposition of overtime rates to be payable where part-time employees work additional hours will impose a significant additional cost on employers. By way of example: (a) Mr Shanahan gave evidence that if Coffs Coast Health & Community Care Pty Ltd was required to pay part-time employees overtime rates for hours worked in addition to their contracted hours, that would have equated to a cost increase of $17,400 for the month of May 2019; (b) Mr Harvey gave evidence that if ConnectAbility was required to pay part-time employees overtime rates for hours worked in addition to their contracted hours, it would be forced to reduce part-time employment opportunities and increase casual employees; (c) Ms Ryan gave evidence that if Community Care Options was required to pay part-time employees overtime rates for hours worked in addition to their contracted hours it would be unsustainable for the business, primarily because those costs could not be passed onto the consumer; and (d) Ms Mason gave evidence that if BaptistCare was required to pay part-time employees overtime rates for hours worked in addition to their contracted hours it would have a "significant economic impact on the business".	Not challenged	
60.	The imposition of overtime rates to be payable where part-time employees work additional hours will also:	Not challenged	

No.	Proposed finding	Status	Comment / Response
	(a) operate as a deterrent to employers offering such additional hours; and (b) likely act as a counter-measure against the desire of many employees to receive more hours of work; and (c) likely result in employers employing fewer part-time employees (in favour of either full-time employees or casual employees).		
61.	There is limited evidence before the Commission relevant to the proposed introduction of overtime rates for work in excess of 8 hours (instead of the current 10-hour trigger).	Not challenged	
62.	There is limited evidence of employees in the SCHCDS industry working more than 8 hours per day.	Not challenged	
63.	The totality of witness evidence relevant to the proposed introduction of overtime rates for work in excess of 8 hours appears to be: (a) evidence from Mr Quinn about an example of working a 9.75 hour shift; and (b) evidence from Mr Lobert to the effect that "It can be difficult working one on one with someone with a disability for 7 hours or more".	Not challenged	
64.	Rates of mobile phone and smart phone ownership in Australia are very high. Recent data suggests that: (a) approximately 83 per cent, or 15.97 million Australian adults, own a smart phone; and (b) approximately 96 per cent, or 18.57 million Australian adults, own a mobile phone.	Not challenged	
65.	Given the very high rates of mobile phone ownership in Australia, it would be highly unusual for someone working in the SCHCDS industry to not already own a mobile phone.	Not challenged *	* While the Unions do not challenge the finding, they note that not <u>all</u> employees in the sector will own a mobile phone. With respect, no such

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			finding is sought. The finding should be made as sought.
66.	The evidence adduced during the proceedings was mixed as to whether employees are required to use their personal mobile phones during work. For example: (a) Mr Elrick stated that "Generally speaking, most workers will only use their personal phone for the purposes of being contacted for shifts, and not during work"; [emphasis added] (b) However, Ms Wilcock, Ms Waddell and Mr Lobert all stated that they are required to use either the company-issued mobile phone (in the case of Ms Wilcock and Ms Waddell) or their personal mobile phone (in the case of Mr Lobert) in the course of their duties.	Disputed	The Unions disagree that the evidence was 'mixed' in the sense that it did not consistently demonstrate that employees are required to use their personal mobile phones during work. However, they did not articulate the basis for their disagreement or otherwise seek to challenge the evidence relied upon to support such a finding. No basis has been disclosed for the Commission not to make the finding sought.
67.	The evidence adduced during the proceedings was also mixed as to whether or not employers provide employees with mobile phones. For example: (a) Mr Sheehy gave evidence that "many of the aged care employers are now providing phones to employees; (b) that proposition was supported by Ms Wilcock, Ms Waddell and Ms Thames, all of whom stated that their employer provides them with a phone (which Ms Wilcock described as being "common these days"); (c) there was also evidence of employers providing employees with a 'tablet computer' and not a mobile phone; (d) however, Mr Lobert stated that none of his three employers provide their employees with a mobile phone. Ms Sinclair and Ms Stewart are also not provided with a mobile phone by her employer; and (e) Mr Elrick gave evidence of a "growing trend" of employers in the industry requiring employees to use their personal mobile phones.	Disputed	The Unions disagree that the evidence was 'mixed' in the sense that it did not consistently demonstrate that employers provide employees with mobile phones. However, they did not articulate the basis for their disagreement or otherwise seek to challenge the evidence relied upon to support such a finding. No basis has been disclosed for the Commission not to make the finding sought.

No.	Proposed finding	Status	Comment / Response
68.	Employees use their personal mobile phones for both personal purposes and for work purposes, and it is unclear what proportion is used for personal purposes and what proportion is used for work.	Not challenged *	The Unions noted that extent of usage will vary depending on a range of factors. The Unions assert that both Ms Stewart and Mr Fleming's evidence was that their work usage of their phones was "significant" (see page 50 of their submission). However, that is a clear mischaracterisation of the evidence, particularly in respect of Ms Stewart. The transcript references provided by the Unions paint a different picture. The finding should be made as sought.
69.	There was limited evidence in relation to the extent of usage by employees of mobile phones for work purposes. The totality of evidence before the Commission in relation to the extent of mobile phone usage by employees is as follows: (a) Mr Fleming gave evidence that he uses his phone for work related reasons "regularly" and stated that he "would make approximately 10 calls per week on the mobile"; (b) Ms Sinclair gave evidence that she would "normally make two to eight calls each working week"; and (c) Ms Stewart gave evidence that she normally makes two to three calls per working day.	Disputed	The Unions appear to misunderstand the finding. The finding relates to the extent of usage by employees. However, they refer to their previous submissions and evidence which deals with different issues. None of the material they refer to relates to the issue of extent of usage by employees. The Unions do not provide any proper basis for challenging this finding or otherwise explain why the finding is not accurate. The finding should be made as sought.
70.	In light of the above, it cannot be concluded that employees' usage of personal mobile phones while working is substantial.	Disputed	See comments above in relation to items 68 and 69. There is no proper basis for disputing this finding. The finding should be made as sought.
71.	It is open to conclude that the proportion of work-related usage of personal mobile phones by employees is modest.	Disputed	See comments above in relation to items 68 and 69. The Unions have mischaracterised the

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			evidence of Ms Stewart in particular (see PN442-PN445). There is no proper basis for disputing this finding. The finding should be made as sought.
72.	Lastly, employees' costs in respect of their mobile phone ownership and/or usage appears to vary considerably. By way of example: (a) Mr Fleming's mobile phone bill is approximately $65 per month; while (b) Ms Stewart's mobile phone bill is approximately $170 per month.	Agreed	
73.	There is limited evidence before the Commission in respect of the proposed variations concerning clothing and uniforms.	Not challenged	
74.	The evidence suggests that it is common for support workers in the disability services sector to not wear uniforms when undertaking work. The benefits of such an approach include that it helps to break down barriers between support workers and clients and avoids unwanted attention when in public.	Not challenged	
75.	The evidence is somewhat mixed in relation to practices in the home care sector. For example: (a) Mr Elrick states that "Uniforms are common in the home care services which undertake a cleaning heavy practice"; and (b) The witnesses employed by Wesley Mission are provided with uniforms; whereas (c) Mr Sheehy states that some employers in the home care industry do not provide any uniforms; and (d) the witnesses employed by Hammond Care are not provided with uniforms.	Not challenged	
76.	The evidence as to the frequency with which employees' clothing or uniforms become damaged is limited and vague. For example:	Disputed	The Unions dispute that Mr Elrick's evidence is 'hypothetical' and submit that his evidence is based on his 7 years' experience in the industry.

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	(a) Mr Elrick makes a generic assertion, unsupported by any specific evidence, that clients will "often damage clothing to the point they need replacing"; (b) Mr Elrick also outlines a couple of ways in which an employee's clothing may get damaged. However, these appear to be more in the vein of hypothetical scenarios or hearsay rather than testimony of real events that actually occurred; (c) Ms Wilcock gave evidence that she is required to use cleaning products which can "ruin our clothes", however she then states that Hammond Care "does provide us with protective clothing and gloves"; and (d) Ms Waddell gave evidence that her clothes "get damaged and worn out very quickly", however she does not provide any specific examples of that occurring, information about what items of clothing have been damaged, when the last time this occurred, etc.		We respectfully dispute that. His evidence is in hypothetical terms. Even taking his evidence at its highest, it simply provides generalised commentary about what might or can or will happen, without any specific examples at all. It should be given minimal weight, if any. The Unions also assert that HammondCare does not make PPE "practically available" to employees because it is kept at Head Office. However, there is no evidence of Ms Waddell making inquiries with HammondCare about being provided with the items or asking for them to be made "practically available". For example, if Ms Waddell was to have requested that the items be given to her, HammondCare may have made arrangements to deliver them to her.
77.	The above evidence is limited to two employees working for the same single employer.	Not challenged	
78.	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".	Disputed	See comment in item 76 above. We press this finding, although accept that the evidence on this point is confined to a small number of employers.
79.	The evidence as to the number of uniforms provided by employers is also limited. For example: (a) Mr Sheehy states that "Other employers will provide only one t-shirt a year", however the identity of these employers is not disclosed, and no further detail is provided; and (b) Ms Sinclair gave evidence that she was initially provided with only two shirts upon commencement of employment, however	Not challenged	

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	was then given an additional shirt and then a further three additional shirts after requesting additional uniforms from her employer (such that she then had a total of six shirts). (c) There is no evidence that would support a finding that the current terms of the Award are not operating satisfactorily. (d) Finally, there is no evidence of any disputes having been initiated in relation to the provision or non-provision of uniforms.		
80.	There is insufficient evidence to conclude that the current clause 25.7(c) dealing with sleepovers is not operating satisfactorily.	Disputed	The Unions challenge this finding, however in their response at [280] do not refer to any specific evidence on topic and simply make a general assertion that "The HSU provided evidence that supports our claim". In the absence of any clear reference to the specific evidence relied upon, the Unions' assertion should be rejected, and the proposed finding should be made.
81.	Further, when one considers the specific items that the HSU seek to have expressly included in clause 25.7(c): (a) There is no evidence before the Commission of employers not providing employees with a 'separate' room to sleep in when undertaking a sleepover; (b) There is no evidence before the Commission of employers not providing employees with a 'clean linen'; (c) There is no evidence about whether it is customary for employers to provide employees with a 'securely lockable room'; (d) There is no evidence about whether it is customary for employers to provide employees with a room 'with a peephole or similar in the door';	Disputed	In disputing this finding, the Unions refer to the evidence of Mr Elrick. However, the only relevant part of Mr Elrick's statement (para [27]) does not provide a basis to dispute the finding sought. Even taking Mr Elrick's evidence at its highest, it provides nothing more than: • an opinion (the first sentence); • an example of an unknown period where he slept in the office in a sub-optimal environment. However, the passage fails to disclose when this occurred, who the employer was, etc. such that the generalised

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	(e) There is no evidence about whether it is customary for employers to provide employees with a 'lamp'; and (f) There is no evidence of any disputes having occurred in relation to the provision or non-provision of any of the abovementioned facilities or items.		assertion could not be properly tested through cross-examination, and so should be given little weight; and • hearsay evidence from unidentified people about various issues such as uncomfortable beds (which should also be given little or no weight). The finding withstands the Union challenge and should be made.
82.	There appears to be general agreement between the parties about the rostering challenges facing service providers in the disability services and home care sectors as a consequence of the introduction of consumer-directed care.	Disputed in part	The Unions assert our clients have "overemphasised" the rostering challenges and "downplayed" the control service providers have in determining service delivery. However, the Unions have not indicated *how* or *in which ways* our clients have done these things. In the absence of further articulation, the finding should be made.
83.	Since the introduction of consumer-directed care, there has been an increase in working hours variability.	Not challenged *	* The Unions agree that there has been an increase in working hours variability since the introduction of consumer-directed care. However, they then express a general view about why this has occurred.
84.	A very common (if not the most common) item that is sought by employers in enterprise bargaining is a departure from the requirements of clause 10.3(c) of the Award.	Disputed in part	The Unions agree that it is "not uncommon" for employers to seek to depart from the requirements of clause 10.3(c), however do not agree that it is "necessarily the most common bargaining request".

No.	Proposed finding	Status	Comment / Response
			We accept the evidence does not go as high as to substantiate a finding that a departure from the requirements of clause 10.3(c) of the Award is "the most common" bargaining request. However, the evidence demonstrates that it is a "very common" request. See Friend Statement at [13] and Farthing Statement at [15].
85.	It is common for employees' rosters to change regularly. It is also common for roster changes to occur with less than 7 days' notice.	Agreed	
86.	Changes to employees' rosters are made for operational reasons and generally in order to meet the needs of the vulnerable customers to which the organisation is providing care services.	Not challenged *	* The Unions accept that changes to employees' rosters are "generally" made for operational reasons.
87.	There is considerable complexity associated with rostering frontline support work staff. Rostering staff and matching staff with clients requires a consideration of a number of factors including client preferences, continuity of care, employee gender, client location, travel time, staff skills, personality issues, car size, etc.	Not challenged *	* The Unions have not provided any specific reason for this finding to not be made, nor have they challenged the evidence which is relied upon in support of the finding. There is no proper basis for disputing this finding. The finding should be made as sought.
88.	Home care workers and many disability services support workers are required to travel to various locations to provide services to clients.	Not challenged	
89.	Time spent by employees travelling will naturally vary depending on which clients they support on any given day, and where they reside from time to time.	Not challenged *	* While the Unions purport to challenge this finding, their response discloses that they agree that "time spent travelling between locations may vary".

No.	Proposed finding	Status	Comment / Response
			The Unions then "urge caution" regarding this finding, notwithstanding that they have agreed with it.
90.	In the context of broken shifts, in many cases the duration of the break between portions of work does not correspond to the time taken to travel between the respective working locations.	Not challenged *	* While the Unions purport to challenge this finding, their response does not appear to seriously challenge the factual finding. They simply make a submission about the proportion of broken shits that involve disparities between the duration of the break and the duration of travel between locations. There is no proper basis for disputing this finding. The finding should be made as sought.
91.	In breaks between work during a broken shift, employees often do not travel directly from client locations, and often undertake non-work-related activities.	Not challenged *	* While the Unions purport to challenge this finding, their response does not appear to challenge the proposed factual finding (they appear to implicitly accept the proposed finding). There is no proper basis for disputing this finding. The finding should be made as sought.
92.	There are a range of factors that will affect how long it takes an employee to travel from one location to another on any given day (for example, traffic conditions).	Not challenged *	* While the Unions purport to challenge this finding, their response states that the finding "is trite". On that basis, the finding should be made as sought.
93.	Some service providers adopt a range of practices to remunerate employees in respect of time spent travelling. For example: (a) Ms Stewart gave evidence that Excelcare paid her normal hourly rate for time spent travelling "between appointments" which was also counted as time worked. However, the employer was	Not challenged *	* The Unions agree that practices vary. On that basis, the finding should be made as sought.

No.	Proposed finding	Status	Comment / Response
	said to use Google maps to "get an estimate" for how long the travel should take and this was how our pay was calculated"; (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; (c) Mr Shanahan also gave evidence that in "extraordinary circumstances", the business also pays an additional allowance where employees are required to travel significant distances to provide supports to clients (the example given was where an employee based in Coffs Harbour is required to attend at client at Dorrigo); (d) Hammond Care pay an allowance where broken shifts are worked, which is described as "recognizing and compensating employees for possible travel time and kilometres that may be incurred"; (e) Hammond Care also have a regime in respect of "Travel in Extraordinary Circumstances"; (f) CASS Care Limited pay an allowance in accordance with clause 6.1.1(c) of the CASS Care Limited Enterprise Agreement (Other Than Children's Services) (NSW) 2018- 2021.		