

Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Final Submission

Social, Community, Home Care and
Disability Services Industry Award 2010
(AM2018/26)

18 November 2019

Ai
GROUP

AM2018/26 SOCIAL, COMMUNITY, HOME CARE AND DISABILITY SERVICES INDUSTRY AWARD 2010

1. INTRODUCTION

1. The Australian Industry Group (**Ai Group**) files this submission in response to the directions issued by the Fair Work Commission (**Commission**) on 23 October 2019 and an extension of time subsequently granted on 13 November 2019, regarding the *Social, Community, Home Care and Disability Services Industry Award 2010* (**Award**).
2. Specifically, the submission:
 - (a) sets out the claims opposed by Ai Group (noting that Ai Group has not advanced any claims and therefore does not, as such, *press* any variations);
 - (b) identifies which of the submissions filed by Ai Group (and the parts of those submissions) we rely on in relation to the claims being considered in the Tranche 2 proceedings;
 - (c) deals with the evidence adduced during the proceedings on 15 – 18 October 2019, including by identifying the findings that we say should be made in light of the evidence;
 - (d) responds to the amended claims filed by Australian Business Industrial, the NSW Business Chamber, Aged & Community Services Australia and Leading Age Services Australia (collectively **ABLA's Clients**) on 15 October 2019; and
 - (e) responds to the 'remote response' claim filed by the Australian Services Union (**ASU**) on 19 September 2019 and written submissions filed in support of it.
3. All page numbers mentioned in this submission are by reference to the Court Book unless otherwise specified.

2. CLAIMS OPPOSED BY AI GROUP

4. The table at **Attachment A** to this submission identifies:

- (a) The claims advanced by other parties that are opposed by Ai Group;
- (b) The specific parts of the written submissions filed by Ai Group to date upon which it relies in respect of each of those claims. In addition, Ai Group relies on the following parts of its written submissions in respect of all of the relevant claims:
 - (i) Further submission dated 2 May 2019 regarding the evidence of Mr Farthing (pages 624 – 633);
 - (ii) Submission dated 3 July 2019 regarding the results of the Commission’s survey (pages 634 – 639); and
 - (iii) Reply submission dated 13 July 2019 at pages 640 – 706.

3. THE EVIDENCE ADDUCED IN THE PROCEEDINGS – FINDINGS

5. Ai Group submits that the Commission should make the following findings in light of the evidence adduced in the proceedings before the Commission on 15 – 18 October 2019.

General Issues

6. Employees providing disability services in clients' homes perform a range of duties including assisting clients with showering, personal hygiene, meal preparation, taking medication, cleaning, laundry, taking them to public places such as shops or a café, other community engagement activities and taking them to medical appointments.¹
7. Employers face a peak in demand for their services at certain times of the day, such as in the morning and in the evening.²
8. Enterprise bargaining between employers and employees covered by the Award is not common.³
9. Where an enterprise agreement applies, it is uncommon for such an agreement to deliver terms and conditions that are significantly more beneficial to employees than those provided by the Award.⁴ This is at least in part due to the operation of the pricing caps imposed by the NDIS.⁵

¹ See for example Page 1138 at paragraphs 13 – 15 (Statement of A. Encabo); Page 1172 at paragraphs 12 – 13 (Statement of R. Rathbone); Page 2952 at paragraphs 8 – 9 (Statement of P. Wilcock); Page 2956 at paragraph 4 (Statement of H. Waddell); Page 2961 at paragraphs 4 – 5 (Statement of T. Thames) and Page 2966 at paragraph 8 (Statement of B. Lobert).

² Page 4405 at paragraph 53 (Statement of D. Moody) and Page 4410 at paragraph 21 and page 4414 at paragraphs 36 – 37 (Statement of S. Miller).

³ Page 2935 at paragraph 17 (Statement of W. Elrick) and Page 2972 at paragraph 15 (Statement of J. Eddington).

⁴ Page 2929 at paragraph 9 (Statement of M. Farthing); Page 2935 at paragraph 17 (Statement of W. Elrick); Page 2945 at paragraph 5 (Statement of C. Friend) and Page 2972 at paragraphs 15 – 18 (Statement of J. Eddington).

⁵ Page 2929 at paragraph 14 (Statement of M. Farthing).

10. Employees are commonly required to work routinely with a particular client or multiple such clients over a period of time.⁶
11. Such an arrangement benefits the employee (because the employee gains a better understanding of the clients' needs), the employer (because the employee is able to perform their work more efficiently) and the client (because the client develops a rapport with the employee).⁷
12. It is common for employees to be employed by and to be performing work for more than one employer covered by the Award.⁸
13. Some employees find personal satisfaction in undertaking work in the sectors covered by the Award.⁹

The Operation of the NDIS

14. The hours of work of an employee engaged in the provision of disability services in a person's home are dictated by their employer's clients' needs and demands.¹⁰
15. Demand for specific services from an employer fluctuates constantly due to changes to the number of their clients, their budgets, their choices of services, seasonal factors, holidays and medical or clinical factors.¹¹

⁶ Exhibit AIG1 (Staff roster of D. Fleming); Pages 1142 – 1165 (Attachment to statement of A. Encabo); Pages 1178 – 1185 (Attachment to statement of R. Rathbone) Transcript of proceedings on 15 October 2019 at PN469 and PN518; Transcript of proceedings on 16 October 2019 at PN1146, PN1553 – PN1554 and PN1563.

⁷ Transcript of proceedings 15 October 2019 at PN470 – PN474 and PN520 – PN524; Transcript of proceedings 16 October 2019 at PN1555 – PN1561.

⁸ Page 2916 (Statement of F. McDonald at FM-2).

⁹ Page 1140 at paragraph 37 (Statement of A. Encabo); Page 2916 (Statement of F. McDonald at FM-2); Page 2956 at paragraph 3 (Statement of H. Waddell); Page 2965 at paragraph 3 (Statement of B. Lobert); Transcript of proceedings on 15 October 2019 at PN668 and Transcript of proceedings on 16 October 2019 at PN1366 – PN1367.

¹⁰ Page 2962 at paragraphs 5 and 7 (Statement of T. Thames); Page 4482 at paragraph 19 (Statement of D. Fleming); Page 2958 at paragraph 23 (Statement of H. Waddell); Transcript of proceedings on 16 October 2019 at PN1453 – PN1455; Transcript of proceedings on 17 October 2019 at PN2048; Transcript of proceedings on 18 October 2019 at PN2885, PN3047 – PN3048 and PN3315 – 3316.

¹¹ Page 1447 at paragraph 8 and Transcript of proceedings on 17 October 2019 at PN2247.

16. The transition to the NDIS has been financially very challenging for some employers.¹²
17. The cost model underpinning the NDIS pricing arrangements does not make express provision for at least the following entitlements:
- (a) Redundancy pay prescribed by the NES;
 - (b) Paid compassionate leave prescribed by the NES;
 - (c) Community service leave for jury service prescribed by the NES;
 - (d) The cost of providing uniforms pursuant to clause 20.2 of the Award;
 - (e) The uniform allowance prescribed by clause 20.2 of the Award;
 - (f) The laundry allowance prescribed by clause 20.2 of the Award;
 - (g) The first aid allowance prescribed by clause 20.4 of the Award;
 - (h) The vehicle allowance prescribed by clause 20.5(a) of the Award;
 - (i) The telephone allowance prescribed by clause 20.6 of the Award;
 - (j) The heat allowance prescribed by clause 20.7 of the Award;
 - (k) The on call allowance prescribed by clause 20.9 of the Award;
 - (l) An additional week of annual leave for shiftworkers pursuant to clause 31.2 of the Award and the NES; and
 - (m) Overtime rates prescribed by the Award.¹³
- (collectively, **Unaccounted Labour Costs**)

¹² Page 1454 at paragraph 24, Page 1464 at paragraph 51 and Pages 1464 – 1465 at paragraph 53.

¹³ Transcript of proceedings on 15 October 2019 at PN870 – PN886.

18. The component of the NDIS cost model attributed to 'overhead costs' is intended to cover labour costs associated with employees who are not delivering disability services (such as a CEO, managers, payroll staff and HR personnel); as well as capital expenditure.¹⁴
19. The cost model does not expressly factor the Unaccounted Labour Costs into the setting of the component of the cost model attributed to overhead costs.¹⁵
20. The cost model provides for a profit margin of 2%.¹⁶
21. The recently introduced Temporary Transfer Payment (**TTP**) will be paid to an employer in respect of a client's plan that is made from 1 July 2019 only if the client agrees to allow the employer to claim the TTP payment from the funding allocated to the client.¹⁷

Minimum Engagement Periods, Broken Shifts and Travel Time

22. Broken shifts are commonly utilised by employers covered by the Award.¹⁸
23. Employees are commonly rostered to perform work for the same client on multiple occasions during the course of a day.¹⁹
24. The length of an engagement that forms part of a broken shift can vary from 15 minutes to 7 hours.²⁰

¹⁴ Transcript of proceedings on 15 October 2019 at PN891.

¹⁵ Transcript of proceedings on 15 October 2019 at PN888.

¹⁶ Transcript of proceedings on 15 October 2019 at N900.

¹⁷ Transcript of proceedings on 15 October 2019 at PN917.

¹⁸ Page 2936 at paragraph 20 (Statement of W. Elrick); Page 2941 at paragraph 7 (Statement of R. Sheehy); Page 2949 at paragraph 49 (Statement of C. Friend); Page 2973 at paragraph 23 (Statement of J. Eddington); Page 4482 at paragraph 20 (Statement of D. Fleming); Page 4603 at paragraph 13 (Statement of T. Stewart) and Revised statement of R. Steiner at paragraphs 14 – 15.

¹⁹ Pages 1178 – 1185 (Attachment to statement of R. Rathbone); Page 2942 at paragraph 8 (Statement of R. Sheehy); Exhibit AIG1 (Staff roster of D. Fleming); Transcript of proceedings on 16 October 2019 at PN1456 and PN1562 – PN1568.

²⁰ Page 3053 at paragraph 10 (Supplementary statement of S. Quinn); Page 4482 at paragraphs 19 and 21 (Statement of D. Fleming); Exhibit AIG1 (Staff roster of D. Fleming); Page 4603 at paragraph 12 (Statement of T. Stewart); Page 2949 at paragraph 47 (Statement of C. Friend); Revised statement of R. Steiner at paragraph 15; Pages 4613 – 4634 (Statement of T. Stewart at Annexure B) and Transcript of proceedings on 18 October 2019 at PN3047 – PN3048 and PN3052.

25. Some full-time and part-time employees are required to work 30 minute engagements²¹ and, in a smaller number of instances, 15 minute engagements²².
26. The number of “breaks” in a broken shift can vary from 1 – 5.²³ For example:
- (a) In an article attached to the statement of Dr McDonald, which reported the results of qualitative research undertaken in respect of 10 disability support workers, the authors identified that over a period of 30 working days, “the 10 [disability support workers] worked between one and 5 separate shifts per day”.²⁴ This amounts to up to 4 breaks per day.
 - (b) Mr Friend gives evidence that the HSU’s members have reported having “up to four or five breaks”.²⁵
 - (c) Mr Quinn gave evidence that “a typical day of shifts” in his employment involved three breaks over the course of a day.²⁶
 - (d) Exhibit AIG1 (Ms Fleming’s roster during the period of 4 May 2018 – 21 September 2018) demonstrates that Ms Fleming was from time to time required to perform a series of engagements during the course of a day with up to at least 4 breaks in between.

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

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

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

²⁴ Pages 2916 - 2917 (Statement of F. McDonald at FM-2).

²⁵ Page 2950 at paragraph 27 (Statement of C. Friend).

²⁶ Page 2990 at paragraph 27 (Statement of S. Quinn).

- (e) Ms Stewart describes a “typical day” for her as including five breaks between a series of engagements.²⁷
27. Client cancellations sometimes result in a broken shift where the employer is unable to provide the employee with other work during the cancelled shift.²⁸
28. Broken shifts provide some employees with the flexibility that they desire.²⁹
29. Many employees are not paid for time spent travelling to and from clients.³⁰ This includes travelling between clients³¹ and travelling to the first client / from the last client³².
30. The period of time taken by an employee to travel to a client’s place of residence is in some instances as little as 5 minutes.³³
31. The period of time taken to travel to a client’s place of residence can vary from one occasion to the next and be difficult to predict for reasons including traffic.³⁴

²⁷ Page 4604 at paragraph 15 (Statement of T. Stewart).

²⁸ Page 2991 at paragraph 40 (Statement of S. Quinn); Page 3055 at paragraph 34 (Supplementary statement of S. Quinn); Transcript of proceedings on 18 October at PN2881 and Transcript of proceedings on 18 October 2019 at PN3086.

²⁹ Page 2936 at paragraph 21 (Statement of W. Elrick) and Transcript of proceedings on 17 October 2019 at PN2623.

³⁰ Page 1172 at paragraph 17 (Statement of R. Rathbone); Page 1192 at paragraph 16 (Statement of T. Kinchin); Page 2916 (Statement of F. McDonald at FM-2); Page 2949 at paragraph 47 (Statement of C. Friend); Page 2957 at paragraph 13 (Statement of H Waddell); Page 2963 at paragraph 16 (Statement of T. Thames); Page 2967 at paragraph 15 (Statement of B. Lobert); Page 3053 at paragraph 10 (Supplementary Statement of S. Quinn); Page 4482 at paragraph 22 (Statement of D. Fleming); Page 4604 at paragraph 16 (Statement of T. Stewart); Page 4661 at paragraph 6 (Supplementary Statement of T. Stewart); Pages 4720 – 4723 (Statement of J. Marks) and Revised statement of R. Steiner at paragraph 14.

³¹ See for example page 2957 at paragraph 13 (Statement of H. Waddell).

³² See for example page 2963 at paragraph 16 (Statement of T. Thames); Transcript of proceedings on 17 October 2019 at PN2609 – 2611 and Transcript of proceedings on 18 October 2019 at PN2890;

³³ Page 1174 at paragraph 34 (Statement of R. Rathbone); Page 3052 at paragraph 10(b) and page 3054 at paragraph 25 (Supplementary Statement of S. Quinn) and Transcript of proceedings on 18 October 2019 at PN2890.

³⁴ Page 3053 at paragraph 18 (Supplementary statement of S. Quinn); Page 4605 at paragraph 20 (Statement of T. Stewart); Transcript of proceedings on 15 October 2019 at PN459 – PN460 and Transcript of proceedings on 16 October 2019 at PN1573 – PN1574.

32. In some cases, employees travel directly from one client to the next.³⁵
33. In other cases, employees do not travel directly from one client to the next.³⁶
34. During a break in a broken shift, employees often undertake non-work-related activities, including spending time at home.³⁷
35. Some employers endeavour to prepare rosters in a way that maximises their employees' working time and / or minimises the time their employees spend travelling to and from their clients.³⁸

Overtime for part-time employees for work in addition to agreed hours

36. Some employers are unable to guarantee additional hours of work to part-time employees due to the operation of the NDIS.³⁹
37. Some part-time employees want to work additional hours.⁴⁰
38. The introduction of a requirement to pay a part-time employee at a higher rate of pay for additional hours of work would be a financial disincentive to offering

³⁵ Page 2990 at paragraph 28 (Statement of S. Quinn); Page 3052 at paragraph 10 (Supplementary statement of S. Quinn); Transcript of proceedings on 15 October 2019 at PN468; Transcript of proceedings on 16 October 2019 at PN1506 and PN1514 – PN1515 and Transcript of proceedings on 18 October 2019 at PN3536 – PN3540.

³⁶ Page 1140 at paragraph 34 (Statement of A. Encabo); Page 2963 at paragraph 15 (Statement of T. Thames); Page 2990 at paragraph 28 (Statement of S. Quinn); Page 3052 at paragraph 10 (Supplementary statement of S. Quinn); Page 3054 at paragraph 21 (Supplementary statement of S. Quinn); Page 3054 at paragraph 28 (Supplementary statement of S. Quinn); Transcript of proceedings on 15 October 2019 at PN461, PN468, PN525, PN527 and PN531; Transcript of proceedings on 16 October 2019 at PN1570 and PN1572; Transcript of proceedings on 18 October 2019 at PN3536 – PN3540.

³⁷ Page 1140 at paragraph 34 (Statement of A. Encabo); Page 2963 at paragraph 15 (Statement of T. Thames); Page 2990 at paragraph 29 (Statement of S. Quinn); Page 3052 at paragraph 10 (Supplementary statement of S. Quinn); Page 3054 at paragraph 21 (Supplementary statement of S. Quinn); Page 3054 at paragraphs 27 – 28 (Supplementary statement of S. Quinn); Transcript of proceedings on 15 October 2019 at PN461, PN464, PN525 and PN527; Transcript of proceedings on 16 October 2019 at PN1570 and PN1572; Transcript of proceedings on 18 October 2019 at PN3537.

³⁸ Transcript of proceedings on 17 October 2019 at PN2039, PN2057 – PN2059, PN2070, PN2616 and PN2619; Transcript of proceedings on 18 October 2019 at PN2879, PN2885, PN3141 – PN3142 and PN3534.

³⁹ Transcript of proceedings on 18 October 2019 at PN3589 and PN3604.

⁴⁰ Page 2962 at paragraph 9 (Statement of T. Thames); Page 4603 at paragraph 11 (Statement of T. Stewart); Transcript of proceedings on 17 October 2019 at PN2659 and PN2663 – PN2664.

additional hours of work to that employee and may result in an employer electing to instead give those additional hours of work to another employee.⁴¹

Roster Changes

39. Changes to employees' rosters are commonly caused by client cancellations.⁴²
40. Changes to employees' rosters are commonly caused by the absence of other employees of the employer.⁴³

Uniforms and Clothing

41. Employee concerns about inadequate uniforms are on occasion dealt with and resolved at the enterprise-level.⁴⁴
42. Some employers provide protective clothing and gloves for employees to wear while working.⁴⁵

Telephones

43. Some employers provide their employees with mobile phones.⁴⁶
44. Mobile phones owned by employees and utilised for work purposes are also utilised by those employees for personal purposes including personal phone calls, text messages and internet usage.⁴⁷

⁴¹ Transcript of proceedings on 17 October 2019 at PN2262 – PN2264.

⁴² Page 2953 at paragraph 11 (Statement of P. Wilcock); Page 2962 at paragraph 11 (Statement of T. Thames); Page 4481 at paragraph 15 (Statement of D. Fleming); Page 4481 at paragraph 16 (Statement of D. Fleming); Page 4603 at paragraph 10 (Statement of T. Stewart) and Page 2947 at paragraph 30 (Statement of C. Friend).

⁴³ Page 4481 at paragraph 15 (Statement of D. Fleming); Page 4482 at paragraph 17 (Statement of D. Fleming) and Page 4573 at paragraph 22 (Statement of B. Sinclair).

⁴⁴ Page 4572 at paragraph 19 – 20 (Statement of B. Sinclair).

⁴⁵ Page 2952 at paragraph 13 (Statement of P. Wilcock); Page 2960 at paragraph 34 (Statement of H. Waddell) and Transcript of proceedings on 18 October 2019 at PN3608.

⁴⁶ Page 2942 at paragraphs 12 – 13 (Statement of R. Sheehy); Page 2954 at paragraph 19 (Statement of P. Wilcock); Page 2959 at paragraph 31 (Statement of H. Waddell); Page 2964 at paragraph 22 (Statement of T. Thames) and Transcript of proceedings on 17 October 2019 at PN2585.

⁴⁷ Transcript of proceedings on 15 October 2019 at PN445 – PN447 and PN534 – PN537.

45. Some mobile phone plans are structured such that an employee does not incur any additional cost for work-related phone calls, text messages or internet usage.⁴⁸

Remote Response

46. Some employees undertake work-related activities while they are not at the workplace in circumstances where they are not required by their employer to perform such work.⁴⁹
47. Some work-related activities are undertaken by employees while they are not at the workplace in as little as a “few minutes”.⁵⁰

⁴⁸ Transcript of proceedings on 15 October 2019 at PN448 – PN452 and PN547 – PN549.

⁴⁹ Transcript of proceedings on 15 October 2019 at PN991.

⁵⁰ Transcript of proceedings on 15 October 2019 at PN1003.

4. THE EVIDENCE ADDUCED IN THE PROCEEDINGS – GENERAL

48. In addition to the submissions we have made above regarding the findings that we say should be made by the Commission, we also make the following general observations about the evidence adduced in these proceedings.
49. *Firstly*, it appears that much of the evidence heard in these proceedings regarding the manner in which work is arranged for the purposes of providing disability services is uncontested. What is contested is whether, as a matter of merit, the Award should permit work to be arranged in those ways.
50. *Secondly*, vast portions of the unions' evidence should, in our submission, be given little weight on the basis that the evidence variously constitutes little more than opinion evidence without a proper basis from individual lay witnesses; speculative evidence and hearsay evidence which, in many cases, has been given without the source of the evidence having been identified, thereby compounding the prejudice to respondent parties. The specific elements of the evidence that we say should be given little weight and the bases for those submissions are set out at **Attachment B**.
51. *Thirdly*, we propose to deal with the evidence of Dr Stanford in greater detail.
52. Dr Stanford's evidence was based primarily on two research projects that he and others had undertaken.⁵¹ One of those involved interviews with 19 disability support workers working in the Hunter region of New South Wales.⁵² When asked during cross-examination, Dr Stanford confirmed that the interviewers did not in fact verify whether the interviewees were covered by the Award⁵³ and / or whether an enterprise agreement applied to them⁵⁴. Therefore, the relevance of the interviews that were undertaken cannot be properly assessed. Dr Stanford

⁵¹ Page 1445 at paragraph 3.

⁵² Page 1445 at paragraph 4.

⁵³ Transcript of proceedings on 17 October 2019 at PN2231 – PN2234.

⁵⁴ Transcript of proceedings on 17 October 2019 at PN2235.

also conceded that the results of the research could not be said to be representative of conditions in the industry more generally.⁵⁵

53. The identity of the employees who were interviewed and their employers is not known. In response to objections raised by Ai Group to the relevant elements of Dr Stanford's evidence⁵⁶ on this basis, the ASU confirmed that the evidence is not relied upon to establish the truth of what was said by the 19 interviewees to the interviewers.⁵⁷
54. In our submission, little if any weight should be given to those elements of the evidence to which we objected. Even if the transcripts of the interviews had been produced, the 19 employees were not called to give evidence in these proceedings and as a result, respondent parties did not have an opportunity to test the veracity or relevance of the information they provided during the course of the interviews relied upon.
55. The issue is also, however, relevant to the evidence of Dr Stanford more generally. He testified that his expert opinion was based *primarily* on the 19 interviews he had undertaken⁵⁸ (save for those parts of his evidence that related instead to a research project he undertook regarding the "intensifying skills and training requirements faced by the disability services workforce"⁵⁹). In circumstances where the ASU does not assert the truthfulness of what the interviewees put during the interviews and its truthfulness has not, as a matter of fact, been established, the very basis for Dr Stanford's opinion is substantially undermined.

⁵⁵ Transcript of proceedings on 17 October 2019 at PN2242.

⁵⁶ Paragraph 9, sixth sentence; Paragraph 12, third sentence; Paragraph 26, third sentence; Paragraph 26, fourth sentence and subparagraphs (a) – (h); Paragraph 27; Paragraph 28, part of the final sentence (*These first-hand reports of dissatisfaction with conditions of work in the industry*); Paragraph 29, second sentence; Paragraph 30 and Paragraph 72.

⁵⁷ Transcript of proceedings on 17 October 2019 at PN2176 – PN2188.

⁵⁸ Page 1445 at paragraphs 3 – 4 and transcript of proceedings on 17 October 2019 at PN2223.

⁵⁹ Page 1446 at paragraph 5.

56. For completeness, we note that similar deficiencies also infect the articles attached at Attachments C – F of Dr Stanford's report⁶⁰ and on that basis they, too, should be afforded little weight.
57. *Finally*, in respect of travel time, Dr Stanford gave the following evidence: (our emphasis)
56. Finally, and perhaps most importantly, the Award presently does not specify minimum standards of practice regarding compensation for workers in work-related travel. ... Allowing employers free-reign to organise work in such a fragmented, inefficient and unfair manner will only further degrade effective conditions and compensation in the sector, and clearly exacerbate the challenges of recruitment and retention.
57. ... From the employer's perspective, there is little if any incentive to avoid scheduling work in small, discontinuous blocks (motivated, presumably, by the fragmented and unpredictable nature of demand from clients), nor to geographically plan the assignment of appointments to minimise travel. ...⁶¹
58. Any assertion that employers have "free reign" to organise work ignores the various constraints imposed by the Award on an employer's discretion to roster employees' hours of work. It also ignores the client-focussed operation of the NDIS and, as Dr Stanford puts it in paragraph 57 of his report (extracted above), the "fragmented and unpredictable nature of demand from clients". These various limitations make self-evident that an employer does not have "free reign" over the manner in which they roster work.
59. Respectfully, Dr Stanford's apparent refusal to accept under cross-examination that there are other pre-existing incentives for an employer to arrange work efficiently defies logic. It is in our submission self-evident that an arrangement of work that does not minimise unproductive time or, put another way, does not minimise the period of time during which an employee is not engaged in the provision of services for which an employer is able to charge their client (such as driving or waiting) undermines productivity and reduces the benefit enjoyed by the employer of the employee's labour. The desire to maximise productivity and thus maximise the extent to which chargeable services can be provided to clients

⁶⁰ Pages 1521 – 1610.

⁶¹ Pages 1466 – 1467.

(particularly where employers are facing challenging financial conditions, the demand for services under the NDIS is growing and the industry is allegedly facing a labour shortage) is a clear incentive to avoid unnecessarily scheduling work in “small, discontinuous blocks” and to “geographically plan the assignment of appointments to minimise travel”; subject of course to the overriding requirement to meet client needs.

60. In our submission, Dr Stanford’s opinion in this regard should not be afforded any weight. We also note that it is directly inconsistent with evidence in these proceedings provided by certain employers that they endeavour to prepare rosters in a way that maximises their employees’ working time and / or minimises the time their employees spend travelling to and from their clients.⁶²

⁶² Transcript of proceedings on 17 October 2019 at PN2039, PN2057 – PN2059, PN2070, PN2616 and PN2619; Transcript of proceedings on 18 October 2019 at PN2879, PN2885, PN3141 – PN3142 and PN3534.

5. ABLA'S CLIENTS' AMENDED CLAIMS

61. ABLA's Clients' filed an amended draft determination on 15 October 2019.

62. The amended draft determination:

- (a) Suggests that ABLA's Clients are no longer pursuing a variation to clause 25.1 of the Award. If this is the case, Ai Group need no longer rely on its submissions at pages 947 – 948.
- (b) Does not amend ABLA's Clients' position in respect of the variations they seek to clause 25.5(d)(ii). Accordingly, Ai Group continues to rely on its submissions at pages 949 – 953.
- (c) Proposes an amendment to ABLA's Clients' claim in respect of client cancellations. As we understand it, the effect of the change would be to require an employer to pay an employee for a cancelled shift in accordance with the clause if the cancellation occurs in circumstances that enable the employer to charge their client for the cancellation. In the context of the NDIS, this would generally occur where the cancellation occurs with more than 48 hours' notice. The amended claim does not appear to resolve the concerns we have previously raised with ABLA's Clients proposal and on that basis, we continue to rely on our submissions at pages 954 – 961.
- (d) Proposes an amended remote response / recall to work overtime clause; which we respond to in the following section of this submission.

6. REMOTE RESPONSE CLAIMS

63. The issue of what payment an employee should receive when performing 'remote response work' or when they have been 'recalled to work overtime' has received significant attention in the course of the proceedings. It has been dealt with in the context of multiple days of conferencing before the Commission and has been the subject of various proposed changes to the Award.
64. Ultimately, there appear to be three competing proposals (or sets of variations) that are pressed by the Health Services Union (**HSU**), the ASU and ABLA's Clients (as amended on 15 October 2019). Other proposals have also been put before the Commission as a product the various conferencing processes undertaken.
65. Ai Group's reply submission of 13 July 2019 included a comprehensive response to the HSU's proposal.⁶³ Many of the matters there addressed are squarely relevant to a consideration of the proposals now advanced by the ASU and ABLA's Clients. We do not propose to repeat the full detail of that material here.
66. In this section of the submission we address:
- (a) The nature of ABLA's Clients' proposal;
 - (b) The nature of the ASU's proposal;
 - (c) The Award's treatment of remote response work absent a variation; and
 - (d) The evidentiary case advanced.
67. Before delving into the such matters in detail, we clarify Ai Group's overarching position in relation to the respective proposals.
68. Although Ai Group has sought to engage actively and constructively in conferencing processes considering a potential 'remote response clause', we are

⁶³ Pages 781 – 796.

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

69. Should the Full Bench nonetheless be minded to vary the Award to include an term relating to 'remote response' work, we contend that ABLA's Clients' proposal ought to be preferred over that advanced by the HSU and ASU.
70. ABLA's Clients' proposal strikes a more reasonable balance between the interests of employers and employees, as well as an appropriately conservative approach to the imposition of new obligations upon employers given the potential for such new provisions to have adverse consequences combined with the difficulty of robustly assessing such matters given the nature and paucity of evidentiary material relating to this issue advanced by the proponents of a change.

ABLA's Clients' Proposal

71. There are three interconnected elements to ABLA's Clients' proposed variations that relate to 'remote response work'. These are identified in paragraphs 3, 4, 5 and 6 of their amended draft determination filed on 15 October 2019.
72. ABLA's Clients have not advanced any submissions in support of their amended proposal. Nonetheless, the proposal appears be a product of the conferencing process conducted by Commissioner Lee which culminated in a proposal that was circulated by the Commissioner to the parties and other members of the Full Bench in September 2019.
73. In short, given our involvement in the conferencing process before Commissioner Lee, we understand that ABLA's Clients' proposal is intended to achieve the following outcomes:
 - a) Clarify that the recall to work overtime provisions apply in circumstances where an employee is required to return to a workplace that is not their domestic residence in order to undertake overtime work.

- b) Introduce a new mechanism for determining the remuneration of employees for work undertaken at their domestic residence, via telephone or other means of electronic communication, which provides for different entitlements depending upon whether the employee undertakes such work while 'on call' or while not 'on call'.
 - c) Clarify that an employee is required to be 'on call' for the purposes of clause 20.9 if they are required to be available for 'remote response duties'.
74. We anticipate that the contentious elements of ABLA's Clients' proposal will be the proposed new clauses 28.5 and 28.6. Relevantly, the proposed clause 28.5 is cast in the following terms:

28.5 Remote response when not on call

- (a) An employee who is not required to be on call and who is requested to perform work by the employer via telephone or other electronic communication away from the workplace (a remote response request) will be paid at the appropriate rate for a minimum of one hour's work on each occasion a remote response request is made, provided that multiple remote response requests made and concluded within the same hour shall be compensated within the same one hour's payment. Any time worked continuously beyond one hour will be rounded to the nearest 15 minutes and paid accordingly.
- (b) Any further requests to perform remote response work will be paid an additional one hour for each time so requested provided that multiple remote response requests made and concluded within the same hour shall be compensated within the same one hour's payment.
- (c) An employee who performs work in accordance with this clause 28.5 must maintain and provide to their employer a time sheet specifying the time at which they commenced and concluded performing any work away from the workplace and a description of the work that was undertaken. This record must be provided to the employer prior to the end of the next full pay period or in accordance with any other arrangement as agreed between the employer and the employee.
- (d) The employer is not required to pay an employee for any time spent performing work away from the workplace in accordance with this clause if the employee does not comply with the requirements of clause 28.5(c). This clause does not apply if the employer has not informed the employee of the reporting requirements.
- (e) This clause does not apply to an employee performing remote response duties in accordance with clause 28.6 of this Award.

75. Clause 28.6 is cast in relevantly similar terms save that it applies when an employee is 'on call' and provides for a smaller minimum payment for work undertaken. In essence, a minimum payment of 15 minutes applies to work undertaken between 6am and 10pm and a minimum payment of 45 minutes applies to work undertaken between 10pm and 6am.
76. Ai Group understands that the rationale for the lesser payment during the day is that employees will not suffer the same disutility when disturbed during the day when compared to a disturbance that occurs late at night. It is also anticipated that the greatest need to contact an employee outside of their normal working hours will likely be in the period not long after they have left work and, as such, this more conservative minimum payment will to some extent moderate the adverse financial impact of the proposal upon employers.
77. The following definition of "workplace" is proposed by ABLA's Clients for inclusion in the Award:
- Workplace** means a place where work is performed except for the employee's residence.
78. More significantly, it is proposed that clause 20.9, be amended to ensure that being 'on call' includes being available for "remote response duties".
79. We here note that "remote response duties" does not appear to be defined in ABLA's Clients' proposal, although its meaning can be gleaned implicitly from the terms of clauses 28.5 and 28.6. We understand it to be work that is required to be done by the employee via a telephone or other electronic device away from the workplace.

The ASU's Proposal

80. The ASU has proposed an alternate remote response clause:

28.4 Recall to work overtime

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

81. Each paragraph of the ASU's proposed clause deals with three differing circumstances in which work is performed and sets out differing entitlements or obligations that will apply to each discrete context. We identify the effect of each provision below.

82. The entitlements provided by the ASU's proposed clause 28.4(a) would apply if an employee:

- (a) is recalled to work overtime;
- (b) is so recalled after leaving the workplace, and
- (c) is requested by their employer to attend a workplace in order to perform the overtime.

83. A significant distinguishing characteristic between clause 28.4(a) and the remaining subclauses is that clause 28.4(a) deals with circumstances where an employee is required to perform overtime hours at a worksite other than the employee's residence. The other provisions apply to work undertaken during both overtime and ordinary hours.
84. Where the above conditions are met, an employee would be entitled to be paid for a minimum of two hours pay at overtime rates for each time recalled. However, if the work is completed in less than two hours the employee must be released from duty. That is, the employee would be required to be paid for work that is not actually undertaken.
85. The proposed clause 28.4(b) appears to address circumstances where an employee is requested by their employer to perform work involving use of a telephone or other electronic device while they are away from the workplace and not "required to be on call". Clause 28.4(c) deals with work that is undertaken while on call.
86. Where clause 28.4(b) applies, an employer would be required to pay such an employee at the appropriate overtime rate for a minimum of two hours. Where clause 28.4(c) applies, only a one hour minimum payment is required. We understand this to be directed towards incentivising employers to put employees 'on call'.
87. It is proposed by the ASU that "multiple electronic requests concluded within the same hour shall be compensated within the same one hour's overtime payment." This appears intended to avoid the obviously unfair potential for an employer to otherwise be required to make multiple minimum payments for each instance that a short period of work is performed.

How is 'remote response work' currently treated under the Award?

88. Before addressing the merit or otherwise of the respective proposals, it is convenient to consider the manner in which 'remote response work' is treated under the current Award.

89. Where such activities constitute 'work' undertaken in the course of an employee's employment, they will already attract an entitlement to payment under the Award.
90. Paragraphs 438 to 445 of our submissions of 13 July 2019 deal with the operation of clause 28.4 and its application when an employee is required to perform work remotely. In short, we contend that this provision only provides an entitlement to a payment if an employee is recalled to work overtime and, more specifically, is recalled to work such overtime at an employer or client's premises.
91. In the context of work that is not covered by clause 28.4 of the Award, it is arguable that for casual employees the current minimum payment provisions of the Award will apply to 'remote response work'. However, there is currently no minimum payment required in relation to full-time and part-time employment. Accordingly, the various proposals would impose a significant new obligation upon employers in relation to such types of employees. Currently, an employer is only required to pay an employee for the time they spend working.
92. The rates that would apply to such work would depend on relevant circumstances, such as the type of employee performing the work (i.e. whether they are casual, full-time or part-time) and matters such as the time or day of the week on which it was performed. It may be paid at ordinary rates, overtime rates or at penalty rates applicable for weekend or public holiday work.

The evidentiary case advanced

93. The evidenced adduced in the proceedings does not provide the Commission with the capacity to robustly assess the impact of any of the proposed variations. Nor does it establish that there is a widespread problem that warrants a variation.
94. We have addressed the paucity of material in respect of the HSU's claim in our 13 July 2019 submissions. This includes our submissions regarding the evidence of Dr McDonald.
95. The evidence advanced by the ASU in support of their proposed clause does little to fill the void associated with the HSU's proposal.

96. The ASU criticises the evidence case advanced by ABLA’s Clients as being insufficient to satisfy the Commission that the variation they seek is necessary to achieve the modern awards objective, given the magnitude of the variation proposed, but themselves only appear to have advanced evidence from two lay witnesses in support of their own claim.
97. We have earlier set out findings that we say the Full Bench can make in relation to the relevant claims. In relation to the lay witness evidence upon which the ASU appear to rely in support of their claims we make the following additional observations.

The evidence of Emily Flett

98. Ms Flett works in a role that she describes as “relatively senior role” and as holding “a large amount of responsibility”.⁶⁴ It appears that she works as part of a team that it is dedicated to, and indeed specifically set up to, provide out of hours support. It appears to be a particularly challenging role because she gets “a variety of calls every night” and “spends a lot of time providing risk mitigation and managing crisis.”⁶⁵ The position details attached to her statement indicate that the after-hours service in which she works will “coordinate and manage complex issues which arise out of business hours”.⁶⁶ In short, Ms Flett’s role appears to be a product of special arrangements implemented within Anglicare’s operational structure which might be expected to expose her disproportionately to any negative aspects of working outside of “business hours” and providing on call support. Her experiences cannot be assumed to be reflective, or indeed indicative, of employees in the sector more broadly.
99. It appears that Ms Flett works in what the ASU describes as the “Youth Services Sector”.⁶⁷ The evidence of Ms Flett cannot be extrapolated to establish the nature of all work undertaken remotely in the sectors covered by the Award.

⁶⁴ Pages 1427 – 1428 at paragraph 10.

⁶⁵ Pages 1427 – 1428 at paragraph 10.

⁶⁶ Page 1433.

⁶⁷ Pages 1085 – 1086 at paragraph 5(b).

100. Ms Flett is not paid strictly in accordance with Award but instead receives over-Award entitlements.⁶⁸ Ms Flett works for a major employer in the sector.
101. It is not clear that Ms Flett takes any work-related calls while she is neither rostered to work or on call.

The evidence of Deborah Anderson

102. Ms Anderson manages a large number of staff in two group homes. She monitors emails when she is not rostered to work or be on call and in circumstances where she has not been requested by her employer to undertake such activities. The reason that she does this is, in part, that her employer sends her emails out of hours. Monitoring her emails whilst not at work involves just checking them on her phone and it is something she does early in the evening when she gets home or occasionally on the weekends when she is “free” and has “got a few minutes.”⁶⁹ Ms Anderson accepts that she is not asked to respond to emails from management in personal time and that she is allowed to not check her emails when not working or on call.⁷⁰ We assume that Ms Anderson would not receive any payment for such work under the ASU proposal.
103. Ms Anderson is not usually required to work out of hours unless rostered to be on call. When she is telephoned out of hours (without being on call) this is “usually just a telephone call from a new coordinator or a junior staff member with a quick enquiry”.⁷¹
104. Ms Anderson is allowed to turn her phone off when she is not rostered to work or on call.⁷²
105. Ms Anderson considers that there is a clear expectation that she will be available to answer calls from management outside of working hours but states that this “does not happen very often and has only minor impact on me”.⁷³ It is of course

⁶⁸ Pages 1428 – 1429 at paragraph 16.

⁶⁹ Transcript of proceedings on 15 October 2019 at PN1000 – PN1004.

⁷⁰ Transcript of proceedings on 15 October 2019 at PN1011 – PN1012.

⁷¹ Page 1396 at paragraph 23.

⁷² Transcript of proceedings on 15 October 2019 at PN1013.

⁷³ Page 1396 at paragraph 23.

difficult to reconcile this with her evidence under cross examination that she is permitted to turn her phone off while not at work.

106. Ms Anderson gives evidence in her statement about the kinds of work she is sometimes called upon to undertake when she is 'on call'. However, it is not possible to assess how long she actually spends undertaking such activities based on her evidence. Ms Anderson's evidence about the impact of being 'on call' in paragraph 24 and her statement more broadly, is to a large extent focussed on the negative impacts of either having to be on call or having to return to work, rather than on the difficulties that flow from actually undertaking work remotely.

107. Ms Anderson's perceptions of the difficulties of being 'on call' also appear to in part be based upon a likely erroneous assumption that she cannot access the internet while not at home.⁷⁴ Under cross examination she accepted that she could leave home whilst on call if she had reception. It is trite to observe that remote access to the internet (that is, access whilst away from one's home) is now readily achievable. At the very least, the evidence of Ms Anderson undermines the ASU's assertion that the nature of the work undertaken by employees in this sector is always unable to be undertaken away from an employee's residence. Ms Anderson points to no obstacles other than access to power and reception.⁷⁵

108. Ms Anderson appears to receive above-Award entitlements when on call or required to work whilst on call. Ms Anderson works for the largest provider of disability services in Australia. It should not be assumed that other providers can or do provide similar entitlements.

Conclusions as to the evidence advanced

109. The evidence of Ms Flett and Ms Anderson falls well short of justifying the kinds of significant new entitlements proposed by the ASU.

⁷⁴ Page 1396 at paragraph 24.

⁷⁵ Transcript of proceedings on 15 October 2019 at PN1018.

110. To the extent that it occurs, we suggest that it is likely that much of the ‘remote response work’ will be undertaken by relatively senior employees engaged on a permanent rather than casual basis. This would include, for example, circumstances of junior employees contacting more senior staff out of hours for guidance in relation to issues that arise. There is some limited support for such a proposition in the evidence.⁷⁶
111. Given the limited evidence directed at the claims, the Commission should take a conservative approach to the imposition of any obligations upon employers in this regard. Whilst we do not say that that a case for a variation has been made out, if the Commission is minded to make a variation in this regard, it should favour the less extreme proposal advanced by ABLA’s Clients to that proffered by the unions.

Issues associated with handling multiple requests

112. There is merit to the proposition that any remote response clause should ensure that each discrete activity does not necessarily trigger a separate minimum payment. It would be unfair to employers if, for example, an employee undertook say three short phone calls in quick succession, each of only a few minutes duration and the employer was required to provide 6 hours pay. Both the ASU and ABLA’s Clients’ proposals attempt to deal with this issue.
113. Nonetheless, it is not clear why the ASU has proposed that only multiple requests compensated within the same hour shall be compensated within the same one hour’s overtime payment when the minimum payment proposed is for two hour’s work. This raises the prospect of an employee handling two separate requests during a two hour period (rather than a one hour period) being entitled to more than two hour’s pay. There is no apparent basis for this.

⁷⁶ Page 1396 at paragraph 23.

The circumstances which attract payment under the ASU's proposal

114. There is a problematic lack of clarity associated with the description of the activities identified as attracting a payment under the ASU's proposed clauses.
115. Both the proposed clause 28.4(b) and clause 28.4(c) set the catalyst for payment as an employee being "requested to perform work by the employer via telephone or other electronic communication away from the workplace."
116. The manner in which clause 28.4(b) and clause 28.4(c) have been phrased renders them somewhat unclear as to whether an employee is to be paid for work that they undertake away from the workplace in response to receiving a request by telephone or other form of electronic communication to work, or whether it is the work of actually answering a telephone call or responding to an electronic communication that attracts a payment. We assume that it is the latter scenario given that the clause goes on to refer to "multiple electronic requests made and concluded within the same hours' overtime payment." However, this is far from certain.
117. We are also concerned that an employee who is 'on call' may perceive that their activities associated with checking their phone or emails to assess whether they have been contacted by their employer in order to request that they perform work may be caught by the ASU's proposal and consequently expect payment under clause 28.4(c). We assume that this is not intended by the ASU, but again, this is far from clear.
118. A further problem with clause 28.4(c) is that it does not appear to apply only to circumstances where an employee is working outside of their rostered or otherwise scheduled work. Instead, it simply applies to work that is undertaken away from the workplace. This would capture circumstances where an employee is permitted to work from home or some other convenient location as part of their ordinary duties.

The need to provide for record keeping

119. The ASU's proposal does not contain any mechanism for ensuring that the time an employee spends working remotely is recorded and communicated to their employer. Accordingly, a requirement is created to pay an employee for time that they spend undertaking activities in circumstances where an employer may have no practical capacity for an employer to identify or verify how long an employee has spent performing such work.
120. Take, for example, an employee who may compile an email or social media communication at their home. It will typically not be possible for an employer to observe or otherwise verify how long the employee spends on such activities unless such information is recorded in some manner and communicated to the employer.
121. ABLA's Clients' proposal seeks to address these problems through clauses 28.5(c) and 28.5(d) (and the corresponding provisions of 29.6), which provide as follows:
- (c) An employee who performs work in accordance with this clause 28.5 must maintain and provide to their employer a time sheet specifying the time at which they commenced and concluded performing any work away from the workplace and a description of the work that was undertaken. This record must be provided to the employer prior to the end of the next full pay period or in accordance with any other arrangement as agreed between the employer and the employee.
 - (d) The employer is not required to pay an employee for any time spent performing work away from the workplace in accordance with this clause if the employee does not comply with the requirements of clause 28.5(c). This clause does not apply if the employer has not informed the employee of the reporting requirements.
122. Although clause 28.5(d) raises the possibility that an employee may not be paid for work undertaken if they do not comply with the requirements of clause 28.5(c), this is not unreasonable given it only applies if the employer makes the employee aware of the requirement. Regardless, the requirements imposed upon an employee would be modest and it is, in any event, appropriate that they apply with award derived obligations. The provisions strike a reasonable balance.

123. The clauses cited above would constitute permissible Award terms by virtue of s.142, in that they are essential to the practical operation of the other provisions of the clause.

124. We do not however suggest that it is likely that many employers (at least larger employers) will seek to require that employees use electronic methods of recording their work activities away from the workplace, instead of time sheets. This will foreseeably include, for example, requiring employees to log onto tailored 'apps' on mobile electronic devices. To ensure such contemporary realities are reflected in any variation to the Award, we propose the inclusion of a new paragraph 28.5(d) as well as the minor variation and renumbering of clause 28.5(e) as follows:

(d) An employer may implement an alternate method or system for the recording and notification of the details referred to in clause 28.5(c)

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

125. Comparable changes to ABLA's Clients' proposed clause 28.6 should also be made.

126. The changes we propose reflect the approach adopted in the proposed clause that was advanced in conferences before Commissioner Lee by various employer parties and set out at paragraph 432 of our 13 July 2019 submission.

What is the appropriate rate of pay for work contemplated by ABLA's Clients' Proposal and the ASU's Proposal?

127. A major difference between the competing proposals is the rate at which such work should be paid.

128. ABLA's Clients proposal requires that employees be paid at the "applicable rate" for the work undertaken (or notionally undertaken in circumstances where the minimum payment provisions apply).

129. The ASU's proposal requires that all remote response work will be undertaken at overtime rates. This is so regardless of whether the work is undertaken during overtime or ordinary hours. The HSU's proposed variation to clause 28.4 adopts a similar approach.

130. In the context of our response to the HSU's proposal we have already set out reasons as to why this approach is inappropriate. These are set out at paragraphs 461 to 466 of our 13 July 2019 submission and apply with equal force to the ASU's proposal.

Should there be an incentive to put employees 'on call' & what should the relevant minimum payment periods under the clause be?

131. There is some logical force to the ASU's proposal that any remote response/recall to work clause provide an incentive for an employer to put an employee 'on call' in circumstances where it is expected that they may be requested to perform work related activities outside ordinary working hours.⁷⁷ The need for this should not however be overstated.

132. The key reason for an employer requesting that an employee be on 'on call' is that the employee is consequently required to remain able and available to perform work should the need arise. If an employee is not 'on call' they are not required to remain ready to perform work and as such cannot necessarily be relied upon to meet an employer's needs. In many instances this will undoubtedly be incentive enough to put an employee 'on call'. It is not necessary for the Award to penalise an employer for not having put an employee 'on call' in all instances where they are contacted out of hours.

133. Nonetheless, if a remote response clause is to be inserted into the Award, Ai Group agrees with the approach of having a shorter minimum payment applying in circumstances where an employee has already been notified that they are on call and is being paid an on-call allowance.

⁷⁷ Page 1086 at paragraph 7(b).

134. A shorter minimum payment would not only potentially have some incentivising effect, it is also be appropriate given that the employee is already being compensated for being on call – a point to which we will return.
135. In advancing this position we do not accept that the evidence establishes that there is necessarily a widespread problem of employers requiring employees to be on call but not paying the appropriate allowance. Nor can it be assumed that it will always be foreseeable when an employee will need to be contacted ‘out of hours’. Consequently, we do not suggest that a ‘remote response’ clause can be structured to overcome the unexpected need to potentially call an employee outside of their rostered hours by creating a financial penalty or incentive.
136. Nonetheless, ABLA’s Clients’ proposal provides a meaningful financial incentive for an employer to put an employee ‘on call’ if it is anticipated that they will be needed. It achieves this through a sensible structure of escalating levels of minimum payment for an employee required to work outside of their normal hours as follows:
- (a) A two hour minimum payment for an employee who is required to actually attend a workplace other than their residence, and consequently required to engage in travel.
 - (b) A one hour minimum payment when required to work remotely whilst not on call.
 - (c) A 15 minutes minimum payment when required to work during the day in circumstances when they are being paid for being on call and a 45 minute minimum payment when an employee is required to work at night in such circumstances.
137. As already alluded to, in considering the appropriate minimum payment, it must also be borne in mind that an employee is already being paid for the disutility of being ‘on call’ and that no party is pressing for that amount to be increased. In such circumstances, fairness does not dictate that they must necessarily be further significantly compensated for actually being contacted and required to perform work as envisaged.

138. The evidence advanced in the proceedings does not establish that employees suffer a level of disruption or disutility flowing from the performance of 'remote response work' which would justify a payment beyond that proposed by ABLA's Clients (or indeed that even the amounts proposed by ABLA's Clients are justified).

The ASU's proposal for a two minimum payment when an employee is not 'on call'

139. Ai Group contends that a two hour minimum payment for work undertaken at an employee's home is not justifiable, regardless of whether or not the employee is 'on call'. It is disproportionate to what might, at least in some instances, be a very short period of work undertaken without the employee incurring the cost or inconvenience of travelling to some other location. The evidence of Deborah Anderson provides a useful illustration of limited impact that such work can sometimes have on an employee. In her written statement she states:

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

140. It is not possible to reconcile the proposition that employee should be paid for two hours when they perform a small amount of work, in their own home, with the reality that an employee is entitled to two hours payment when they undertake overtime work away from their home under both the current terms of clause 28.4 and the ASU's proposed provision.

141. It would also be disproportionate and indeed anomalous to afford an employee a two hour minimum payment for undertaking the kind of work contemplated by the clause in circumstances where the Award does not require any minimum payment for part-time or full-time employment generally and, in the context of casual employment, includes significantly shorter minimum engagement periods in some circumstances.

142. It must also be considered that an employee who is not 'on call' cannot be *required* to undertake work. That is, they are free to turn off their phone or not check their email. This is further justification for providing less than a two hour minimum payment, as proposed by the ASU.
143. Even the HSU have not proposed a two hour minimum payment in circumstances where work is undertaken remotely.
144. Ai Group has previously opposed the inclusion of a one hour minimum payment in the context of the HSU's proposal. We maintain our view that, even in circumstances where an employee is not on call, a payment of one hour is arguably excessive; especially in circumstances where the trigger for this can be a call or email requiring only a few minutes of work be undertaken at an employee's choice.
145. Nonetheless, we acknowledge that ABLA's Clients' proposal does provide a fairer and more appropriate approach than that proposed by either union.

Response to the ASU's submissions regarding the previous proposal advanced by ABLA's Clients

146. We here address various elements of the ASU's submissions dated 23 September 2019 that are directed at the previous proposal advanced by ABLA's Clients. We do so notwithstanding the amended claim advanced by ABLA's Clients as various matters of contest remain relevant.
147. Paragraph 3 of the ASU's submission raised a concern that under the previous proposal "an employer would be entitled to direct an employee to perform work outside of their ordinary hours of work" and that "currently, an employee would be entitled to refuse to work these if they were unreasonable under s.62 of the Fair Work Act 2009 (Cth)".
148. We do not understand the current proposal of ABLA's Clients to enable an employer to direct an employee to perform work outside of their ordinary hours. Instead, the proposal regulates the payment that must be provided for when 'remote response work' is undertaken. Moreover, the proposal is in no way

inconsistent with the operation of s.62 and does not detract from the protections that the section affords employees.

Issues associated with clause 28.3

149. If the Full Bench is satisfied that remote response work occurs with sufficient frequency in this sector to warrant specific recognition in the Award, it would be sensible to amend clause 28.3 to take account of this.
150. Clause 28.3(a) provides for an employee, other than a casual, to have 10 consecutive hours off duty after completing overtime and before the commencement of their ordinary work on the next day or shift.
151. Clause 28.3(b) provides a further entitlement to double time payments when an employee is not provided the requisite 10 hour break.
152. If an employee performs a small amount of work which is undertaken remotely and in the nature of that which appears to be contemplated by ABLA's Clients' and the ASU's claims, it is not justifiable for the application of clause 28.3 to be triggered. For example, an employee who receives a 5 minute phone call during the 10 hour break (by perhaps only an hour before its conclusion) should not be subsequently entitled to a further 10 consecutive hours off duty without loss of pay.
153. Clause 25.3 does not appear to currently contemplate that work may be undertaken remotely. So much is apparent from the clause's contemplation of an entitlement to be "absent" under clause 28.3(b) until they have had the requisite 10 hour break.

Attachment A

	Claims	Party advancing claim	Draft determination	Ai Group Submissions Relied Upon
1	Change in roster – proposed clause 25.5(d)(ii)(B)	ABLA	Amended draft determination filed on 15 October 2019	pp. 949 - 953
2	Client cancellation	ABLA	Amended draft determination filed on 15 October 2019	pp. 954 – 961
3	Recall to work overtime / Remote response	ABLA	Amended draft determination filed on 15 October 2019	pp. 18 – 36 of submission dated 18 November 2019.
4	Recall to work overtime / Remote response	ASU	pp.1124 – 1125.	pp. 18 – 36 of submission dated 18 November 2019.
5	Broken shift loading	ASU	pp. 999 - 1000	pp.725 - 737
6	Travel time	ASU	p. 1001	pp. 917 - 940
7	Minimum engagement periods	HSU	p. 2835	pp.707 - 724
8	Broken shifts	HSU	pp. 2835 - 2836	pp.725 – 728 pp.737 - 751
9	Overtime rates for part-time and casual employees after 8 hours' work	HSU	p. 2837	pp. 752 - 755
10	Overtime for part-time employees for work in addition to agreed hours	HSU	p. 2837	pp. 756 - 771
11	Recall to work overtime / Remote Response	HSU	pp. 2837 - 2838	pp. 781 – 796
12	Sleepovers	HSU	p. 2838	pp. 797 – 799
13	Damaged clothing	HSU	p. 2836	pp. 807 – 810
14	Telephone allowance	HSU	p. 2836	pp. 811 – 819
15	Travel time	HSU	pp. 2835 - 2836	pp. 917 - 940
16	Vehicle allowance	HSU	p. 2838 pp. 2835 - 2836	pp. 917 – 930 pp. 941 – 944
17	Broken shifts	United Voice	p. 4417	pp.725 – 728 pp.737 - 751
18	Roster changes	United Voice	p. 4417	pp. 772 - 780
19	Uniforms	United Voice	p. 4416	pp. 800 – 806
20	Telephone allowance	United Voice	pp. 4416 – 4417	pp. 811 – 819
21	Travel time	United Voice	p. 4418	pp. 917 - 940

Ai Group submits that the evidence identified in this document would be inadmissible if the Commission were bound by the rules of evidence and that for the reasons identified it should be given little weight by the Commission.

Witness evidence tendered by the ASU

Augustino Encabo (pages 1137 - 1140)

	Paragraphs	Basis
1	34, final sentence	Opinion
2	36, first sentence	Speculation
3	37, fourth sentence	Hearsay / Opinion / Relevance
4	39, second sentence	Speculation
5	39, final sentence	Speculation

Richard Rathbone (pages 1171 - 1189)

	Paragraphs	Basis
1	17, final sentence	Hearsay (particularly prejudicial because source not identified)
2	29, first sentence	Opinion / Relevance
3	34, third sentence	Speculation
4	35, second sentence	Speculation

Robert Steiner (Exhibit ASU2)

	Paragraphs	Basis
1	17, final sentence	Opinion / Speculation
2	19, second sentence: "because businesses might not be open when I am off work"	Opinion / Speculation

Deborah Anderson (pages 1394 - 1414)

	Paragraphs	Basis
1	26, first sentence	Opinion / Relevance
2	26, fourth sentence	Speculation
3	26, fifth sentence	Speculation
4	26, sixth sentence	Speculation
5	27, first sentence: "but if something like this proposal was brought in as compulsory I would seriously consider leaving the industry"	Speculation / Relevance
6	27, final sentence	Opinion / Relevance

Emily Flett (pages 1427 - 1441)

	Paragraphs	Basis
1	10, first sentence: “Anglicare created our dedicated on-call team to address the impact of on call work on staff performing their regular duties during the day time and to reduce impacts on them as”	Hearsay / Opinion / Speculation
2	10, final sentence: “so appropriate breaks can be structured in to a roster and we reduce burnout on valuable staff”	Hearsay / Opinion / Speculation
3	16, final sentence: I understand that it was necessary for my employer to offer this condition to attract sufficiently skilled staff to the after hours on call team”.	Hearsay / Opinion / Speculation
4	19, fourth sentence: “This is important for many of the other people in my team”	Hearsay / Opinion / Speculation
5	19, sixth sentence	Opinion / Speculation
6	20, second sentence	Hearsay from unidentified sources / Opinion / Speculation – evidence as to the statement of mind of other unidentified employees

7	20, sixth sentence	Hearsay from unidentified sources / Opinion / Speculation – evidence as to the statement of mind of other unidentified employees
8	25, second sentence	Speculation
9	25, third sentence	Speculation

Dr James Stanford (pages 1442 – 1685)

	Paragraphs	Basis
1	9, sixth sentence	Hearsay - particularly prejudicial as sources not identified
2	12, third sentence	Relevance
3	26, third sentence	Hearsay - particularly prejudicial as sources not identified
4	26, fourth sentence and paragraphs (a) – (h)	Hearsay - particularly prejudicial as sources not identified
5	27	Hearsay - particularly prejudicial as sources not identified the prior representations are speculative
6	28, part of the first sentence: <i>These first-hand reports of dissatisfaction with conditions of work in the industry</i>	Hearsay - particularly prejudicial as sources not identified
7	29, second sentence	Hearsay - particularly prejudicial as sources not identified
8	30	Hearsay - particularly prejudicial as sources not identified
9	69	Speculation / Opinion without proper basis
10	72	Hearsay - particularly prejudicial as sources not identified

Witness evidence tendered by the HSU

Robert Sheehy (pages 2941 – 2943)

	Paragraphs	Objection
1	9, first sentence	Submission / Opinion
2	19, final sentence	Hearsay (particularly prejudicial as source not identified; potentially second hand hearsay)

Christopher Friend (pages 2945 - 2951)

	Paragraphs	Objection
1	7	Submission / Opinion
2	9, first sentence	Hearsay – particularly prejudicial because sources not identified
3	9, second sentence	Hearsay – particularly prejudicial because sources not identified
4	15, first sentence	Opinion
5	16	Hearsay – particularly prejudicial because sources not identified and because the hearsay evidence is in part about employees’ opinions of the state of mind of their employers

6	20	Opinion
7	22	Opinion / Submission
8	23	Hearsay – particularly prejudicial because sources not identified
9	24	Hearsay – particularly prejudicial because sources not identified
10	25	Hearsay – particularly prejudicial because source not identified
11	26	Opinion / Speculation / Hearsay - particularly prejudicial because source not identified
12	28	Submission / Opinion
13	29	Speculation / Submission
14	32	Submission / Opinion
15	33	Submission / Opinion / Speculation
16	34	Submission / Opinion
17	35	Submission / Opinion
18	36	Hearsay – particularly prejudicial because sources not identified

19	38	Opinion
20	39	Hearsay – particularly prejudicial because sources not identified
21	40	Opinion / Hearsay – particularly prejudicial because source not identified
22	41	Hearsay – particularly prejudicial because sources not identified
23	42	Submission / Opinion
24	44	Opinion / Submission
25	45	Submission / Opinion
26	48	Submission
27	51	Submission / Opinion
28	52	Submission / Opinion
29	53	Submission
30	54	Hearsay – particularly prejudicial because sources not identified
31	55	Hearsay – particularly prejudicial because sources not identified

32	56	Hearsay – particularly prejudicial because sources not identified
33	58	Hearsay – particularly prejudicial because sources not identified
34	59, first sentence	Opinion / Hearsay – particularly prejudicial because sources not identified
35	65	Opinion / Hearsay – particularly prejudicial because sources not identified
36	66	Opinion / Speculation / Hearsay – particularly prejudicial because source not identified
37	67	Hearsay – particularly prejudicial because sources not identified
38	68	Hearsay – particularly prejudicial because sources not identified
39	69	Speculation / Hearsay – particularly prejudicial because sources not identified
40	70	Opinion / Hearsay – particularly prejudicial because sources not identified
41	71	Speculation
42	73	Opinion
43	74	Hearsay – particularly prejudicial because sources not identified

Pamela Wilcock (pages 2952 - 2955)

	Paragraphs	Basis
1	13, third sentence	Speculation
2	15, first sentence: “and my fellow care workers (as best as I can understand as the union delegate)	Opinion / Speculation / Hearsay – particularly prejudicial as sources not identified
3	17, second sentence	Opinion / Speculation
4	17, fourth sentence	Relevance
5	17, fifth sentence	Relevance
6	17, final sentence	Opinion / Speculation / Hearsay – particularly prejudicial as sources not identified
7	23, second sentence	Opinion / Speculation / Hearsay – particularly prejudicial as sources not identified
8	24, first sentence	Opinion
9	24, second sentence	Opinion / Speculation / Hearsay – particularly prejudicial as sources not identified

Heather Waddell (pages 2956 - 2960)

	Paragraphs	Basis
1	12, second sentence	Opinion
2	12, third sentence	Opinion
3	12, final sentence: "which is emotionally uneconomical"	Opinion
4	33, second sentence	Opinion
5	34, final sentence: "and it doesn't work out economically to make that trip"	Opinion

Thelma Thames (pages 2961 – 2964)

	Paragraph	Basis
1	19	Hearsay (particularly prejudicial as sources not identified)

James Eddington (pages 2969 – 2980)

	Paragraph	Basis
1	21, final sentence	Hearsay (particularly prejudicial as sources not identified)

Mark Farthing (pages 2981 - 2986)

Note: During the proceedings on 15 October 2019, the HSU confirmed that it does not rely on the evidence identified below in support of its submissions about the nature or extent of recent changes to NDIS funding arrangements.¹

	Paragraphs	Basis
1	10, first sentence: "significant"	Submission / Opinion
2	10(a), first sentence: "significant"	Submission / Opinion
3	19, first sentence: "substantially"	Submission / Opinion
4	20: "well and truly"	Submission / Opinion
5	20: "significant"	Submission / Opinion
6	22, second sentence: "significant"	Submission / Opinion

Scott Quinn (pages 2988 – 3050)

	Paragraphs	Basis
1	13, second sentence	Opinion / Speculation

¹ Transcript of proceedings on 15 October 2019 at PN800 – PN809.

2	14, second sentence	Submission / Opinion
3	38	Hearsay – particularly prejudicial as source(s) / Speculation

Scott Quinn (pages 3051 – 3079)

	Paragraph	Objection
1	16, second sentence: “Google Maps will display the best route and the time and kilometres between the locations”	Speculation / Opinion / Hearsay (unidentified source)
2	21, second sentence: “but 25 minutes isn’t long enough to start a task”	Opinion
3	27, final sentence: “even though practically there is nothing else for me to do but to drive home and drive back in that time”	Opinion
4	31	Submission / Speculation / Opinion
5	34, “it can become problematic and expensive”	Opinion / Speculation
6	34, third sentence	Opinion / Speculation

Witness evidence tendered by United Voice

Deon Fleming (pages 4480 - 4567)

	Paragraphs	Basis
1	28	Hearsay

Belinda Sinclair (pages 4570 – 4601)

	Paragraphs	Basis
1	12, last sentence	Hearsay
2	13, second sentence	Hearsay
3	21, first sentence	Opinion / submission
4	21, second sentence	Speculation

Trish Stewart (pages 4602 – 4660)

	Paragraphs	Basis
1	19, second sentence	Speculative
2	21, third sentence	Hearsay
3	21, last sentence	Speculative

Jared Marks (pages 4720 – 4769)

	Paragraphs	Basis
1	1, “which address the monetary loss caused by the defendant's failure to pay travel time”	Submission / Opinion
2	14, “for the failure to pay wages for periods of time home care workers undertook work related travel at the direction of their employer”	Submission / Opinion
3	23	Submission / Opinion
4	24	Speculation / Opinion
5	25	Submission

6	27, second sentence	Submission
7	28	Submission / Opinion
8	29	Submission / Opinion
9	31	Submission / Opinion
10	32	Submission / Opinion
11	33 – 34	Relevance