

**IN THE FAIR WORK COMMISSION**

**Matter No: 2018/26**

**Section 156 - Four Yearly Review of Modern Awards – *Social, Community, Home Care and Disability Services Industry Award 2010* – Substantive review**

**UNITED WORKERS' UNION**

**SUBMISSION ON FINDINGS SOUGHT**

18 November 2019

1. This submission is made in accordance with the directions of the Fair Work Commission ('the Commission'), dated 23 October 2019. We identify here the claims that are pressed, the claims that are opposed and our response to the amended claims of Australian Business Industrial, NSW Business Chamber, Aged and Community Services, and Leading Aged Services (collectively referred to as 'ABI and others'), dated 15 October 2019, and of the Australian Services Union ('ASU'), dated 23 September 2019.
2. We also set out the factual findings that we say should be made and their foundation in the evidence.
3. References to pages in the Court Book are as "CB##" and references to specific paragraphs within documents are in brackets [ ].

**Overview of the United Workers' Union position**

4. United Workers' Union presses 5 claims in tranche 2 of this review.<sup>1</sup> These claims can be identified as:
  - S2 - travel time claim;
  - S37 - broken shifts claim;
  - S3A -variation to rosters clause;
  - S21 –mobile phone allowance claim; and
  - S2A –variation to clothing and equipment allowance (uniforms).
5. The position of United Workers' Union concerning the claims of ABI and others is:
  - change of roster –opposed;
  - client cancellation –primary position: that the clause should be deleted; secondary position: opposed in its entirety in respect of disability support workers, aspects of

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<sup>1</sup> Our draft determination can be found at CB4416.

ABI and other's proposed clause supported with amendment in respect of home care workers; and

- remote response –opposed; the ASU remote response claim is preferred.

6. The United Workers' Union broadly supports the claims of the HSU and the ASU in this review.

### **General findings**

7. A number of findings were made in the earlier decision of the Full Bench in this review published on 2 September 2019<sup>2</sup> ('Tranche 1 Decision') that are relevant to the consideration of Tranche 2 matters. United Workers' Union notes the following relevant findings.
8. A significant number of employees covered by the Award are low paid.<sup>3</sup>
9. Employees in the sector are predominantly female.<sup>4</sup>
10. There is a high proportion of part time employment in the sectors covered by the Award.<sup>5</sup>
11. Funding arrangements are not determinative, and the adequacy of funding (or lack thereof) is a matter for the government. The Commission observed in paragraph [138] that: "*[T]he Commission's statutory function is to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net. It is not the Commission's function to make any determination as to the adequacy (or otherwise) of the funding models operating in the sectors covered by the SCHADS Award. The level of funding provided and any consequent impact on service delivery is a product of the political process; not the arbitral task upon which we are engaged.*"

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<sup>2</sup> [2019] FWCFB 6067.

<sup>3</sup> Tranche 1 Decision, paragraphs [47] and [160].

<sup>4</sup> As above, paragraph [26].

<sup>5</sup> As above.

## United Workers' Union Claims pressed

### *S2 - Travel time claim*

<b>Parts of the Court Book, exhibits, and transcripts relevant to this claim</b>	<b>EX. no</b>	<b>Reference</b>
Draft determination		CB 4416, [7]
NDIS Price Guide 2019-2020		CB 2796, pg.12
Statement of Trish Stewart dated 17 January 2019	UV1	[13]-[16], Annexure A, Annexure B
Supplementary statement of Trish Stewart dated 1 April 2019	UV2	[3]-[8]
Further statement of Trish Stewart dated 1 October 2019	UV3	[2]-[6], [13]-[17]
Oral evidence of Trish Stewart		PN459-468
Statement of Deon Fleming dated 16 January 2019	UV4	[9], [18]-[24], Annexure A, Annexure B
Supplementary statement of Deon Fleming dated 28 March 2019	UV5	[5]-[8]
Oral evidence of Deon Fleming		PN525-532
Statement of Belinda Sinclair dated 16 January 2019	UV6	[12] - [14], Annexure B
Statement of Jared Marks dated 3 October 2019	UV8	[1]-[23], [25], [27]-[35]
Bundle of Home Care Price Guide materials	UV9	Pg. 15, 34, 40, 42, 44, 45, 46
Statement of Robert James Steiner dated 24 June 2019	ASU2	[10]-[11], [15]
Statement of James Stanford dated 23 September 2019	ASU4	[26]-[30]
Oral evidence of James Stanford		PN2229-2279
Supplementary statement of Mark Farthing dated 16 September 2019	HSU2	[21]
Statement of Fiona Macdonald dated 15 February 2019	HSU25	Annexure FM2
Oral evidence of Jeffrey Sidney Wright		PN2612, 2580- 2583
Oral evidence of Deborah Gaye Ryan		PN3050-3059
Oral evidence of Graham Joseph Shanahan		PN2865-2866,

		2887-2890
Oral evidence of Wendy Mason		PN3210-3213
Oral evidence of Joyce Wang		PN3505-3517, 3557-3558
<b>Parts of submissions relevant to this claim</b>		
Submission dated 15 February 2019		CB4419, [116]- [118]
Supplementary submission dated 1 April 2019		CB4446, [1]-[11]
Further submission in reply dated 3 October 2019		CB4468, [3]-[19]

### *Findings sought*

12. The United Workers' Union seeks the following findings in respect of our travel time claim:
13. Employees in home care (and certain types of disability services work) have no '*base location*' that they start at and finish at each day.<sup>6</sup>
14. The work site for such employees is the home of the client, or locations where the client may need to be taken (such as medical centres, shopping centres, social events).<sup>7</sup> These workers work in the community.
15. A key feature of the duties of such employees is the provision of services in the clients' homes or other sites at the direction of the employer. For this to occur, the employee must travel to and between clients at the direction of the employer.<sup>8</sup>
16. As a condition of employment, employees are required to have a current driver's licence.<sup>9</sup>
17. Employees are routinely expected to use their own car to travel in between work sites.<sup>10</sup>
18. There are different approaches to the payment of travel time by employers in the industry:
  - a. some employers will pay for travel time;<sup>11</sup>
  - b. some employers will pay for travel time in between consecutive client engagements but not in between broken shifts;<sup>12</sup> and

<sup>6</sup> Transcript (17/10/19), PN2581-2583 [JEFFREY SIDNEY WRIGHT]; Transcript (18/10/19), PN 2865-2866 [GRAHAM JOSEPH SHANAHAN].

<sup>7</sup> Statement of Deon Fleming (EX. UV4), dated 16 January 2019, at [9]; Statement of Robert Steiner (EX.ASU2), dated 24 June 2019, at [10]-[11].

<sup>8</sup> Supplementary statement of Trish Stewart (EX. UV2), dated 1 April 2019, at [3]; Supplementary statement of Deon Fleming (EX.UV4), dated 28 March 2019, at [7].

<sup>9</sup> Supplementary statement of Trish Stewart (EX. UV2), dated 1 April 2019, at [4] and Annexure A to EX.UV1; Supplementary statement of Deon Fleming (EX.UV4), at [8] and Annexure A.

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

<sup>11</sup> Supplementary statement of Trish Stewart (EX. UV2), at [5]; Supplementary statement of Deon Fleming (EX.UV4), at [5]; Transcript (18/10/19), PN2887-2890 [GRAHAM JOSEPH SHANAHAN].

- c. some employers do not pay for travel time and such employers classify time spent travelling between client engagements as a “*break*” in broken shifts, regardless of whether or not those client engagements are consecutive.<sup>13</sup>
19. Employees covered by the Award can be travelling to and from clients for significant periods of time without payment.<sup>14</sup>
20. The combination of employers’ not paying travel time, broken shifts and a lack of minimum engagements (for part-time employees) can result in a significant amount of ‘*dead time*’ for employees, that is time spent travelling without payment or time spent waiting between broken shifts.<sup>15</sup> When this occurs, it is the employee who bears the cost of the idle time and the unpaid travel.<sup>16</sup>
21. The non-payment of travel time results in lower wages for already low-paid workers.<sup>17</sup> Home care and disability support workers can be engaged to work broken shifts over a significant span of hours (12 hours maximum)<sup>18</sup> that can include a majority of ‘*time*’ that is unpaid but dedicated to the work of the employer.<sup>19</sup> This contributes to financial distress.<sup>20</sup>
22. The non-payment of travel time creates a disincentive for employees to stay in the sector.<sup>21</sup>
23. The notion that travel time cannot be paid as it is difficult to calculate is counterfactual; several of the employer witnesses indicated that they already pay travel time.<sup>22</sup>
24. Under the NDIS travel time is claimable. Providers can claim up to 30 minutes for the time spent travelling to each participant in city areas, and up to 60 minutes in regional areas.<sup>23</sup>

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

<sup>13</sup> Statement of Trish Stewart (EX. UV1), dated 17 January 2019, at [16] and Supplementary statement of Trish Stewart (EX. UV2), at [7]-[8]; Statement of Deon Fleming (EX. UV4), at [22]; see also Annexure B (also in evidence in unredacted form as AiG1, *subject to a confidentiality order*); Supplementary statement of Deon Fleming (EX.UV4), at [6]; statement of Jared Marks (EX.UV8) at [23]; statement of Robert Steiner (EX.ASU2), at [15].

<sup>14</sup> Supplementary statement of Trish Stewart (EX. UV2), at [8]; Statement of Fiona Macdonald (EX.HSU25), dated 15 February 2019, at Annexure FM2, page 88.

<sup>15</sup> Further statement of Trish Stewart (EX.UV3) dated 1 October 2019, at [6]; Statement of Deon Fleming (EX. UV4), at [22]; Statement of Fiona Macdonald (EX.HSU25) at Annexure FM2, page 88.

<sup>16</sup> Transcript (17/10/19) PN2274 [JAMES STANFORD].

<sup>17</sup> Supplementary statement of Trish Stewart (EX. UV2), at [8]; Statement of Fiona Macdonald (EX.HSU25) at Annexure FM2, page 93.

<sup>18</sup> Clause 25.6(a)

<sup>19</sup> Statement of Fiona Macdonald (EX.HSU25), at Annexure FM2, page 88.

<sup>20</sup> Further statement of Trish Stewart (EX.UV3), at [13]-[17].

<sup>21</sup> Further statement of Trish Stewart (EX.UV3), at [3], [6], and [17], Statement of James Stanford dated 23 September 2019, at [26], [29]-[30].

<sup>22</sup> Transcript (17/10/19), PN2612 [JEFFREY SIDNEY WRIGHT]; Transcript (18/10/19), PN2887-2890 [GRAHAM JOSEPH SHANAHAN], PN3050-3059 [DEBORAH GAYE RYAN], PN3210-3213 [WENDY MASON]; in addition Ms Wang indicates that CASS pays a travelling allowance which is calculated based on details logged in a mobile app (PN3505-3517, 3557-3558).

25. A fee for travel time can be charged under home care agreements, and service providers in home care also have the ability to set their own rates that ‘costs in’ travel.<sup>24</sup>
26. There was no probative employer evidence that modelled the cost of our travel time claim, or sought to indicate that it would be prohibitive. This is presumably because several of the employer witnesses already paid for travel time<sup>25</sup> as travel time is rightfully payable as ordinary hours of work under the current Award, and in addition, is an everyday and unavoidable cost of providing services in the community.
27. In summary, the evidence justifies the insertion of a clause stating that travel time is payable. Employees in the home care and disability services sector perform travel at the direction of their employer in between client locations as a key part of their role.<sup>26</sup> This work could not occur without travel.
28. Yet, there are employers who engage employees to travel significant distances to and between clients without any payment for work directed travel. The employer evidence has not indicated that there would be any excessive costs as a result of a travel time clause; rather several witnesses noted they already pay for travel time. Service providers are able to include a fee for travel time in home care arrangements, and travel time is claimable (within limits) under the NDIS<sup>27</sup> and accommodated within government funding for home care packages.
29. Regardless of the funding arrangements, travel between and to and from client locations is not optional. It is a core requirement of the role of these employees. In the absence of an explicit clause on travel time, some employers are shifting these costs onto low paid workers. This is inconsistent with a fair and relevant safety net of conditions.
30. We do not concede that travel time is not payable under the terms of the current Award and have current proceedings on this issue in the Queensland Magistrates Court.<sup>28</sup> These proceedings are unresolved and the employer is disputing the claim. Irrespective of the outcome of this case, it is still necessary to review and vary the Award’s treatment of work related travel as the evidence indicates that there are numerous employers who do not pay travel time under the terms of the Award.

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<sup>23</sup> Supplementary statement of Mark Farthing (EX.HSU2), dated 16 September 2019, at [21]; NDIS Price Guide 2019-20, CB 2796, pg.12.

<sup>24</sup> Bundle of Home Care Price Guide materials (EX.UV9), see pg. 15, the provider can choose whether or not to charge for staff travel costs; also home care providers set their own prices for services, see Hammondcare pg. 34; NSW Home Support pg. 40; Connectivity pg. 42; Baptistcare pg. 44; CASS Care pg. 45; and Community Care Options pg. 46.

<sup>25</sup> Transcript (17/10/19) PN2612 [JEFFREY SIDNEY WRIGHT]; Transcript (18/10/19), PN2887-2890 [GRAHAM JOSEPH SHANAHAN], PN3050-3059 [DEBORAH GAYE RYAN], PN3210-3213 [WENDY MASON].

<sup>26</sup> For home care employees’ level 1 and 2, the Award classification is principally directed to ‘domestic assistance’. Namely, the provision of services and care in a client’s home. Similarly, there is recognition in the Award that SACS employees provide disability services in private residences and outreaches (see clause 2, definition of ‘social and community services sector’).

<sup>27</sup> NDIS Price Guide 2019-20, CB 2796, pg.12.

<sup>28</sup> Statement of Jared Marks (EX.UV8).

*S37 - Broken shifts claim*

<b>Parts of the Court Book, exhibits, and transcripts relevant to this claim</b>	<b>EX. no</b>	<b>Reference</b>
Draft determination		CB 4416, [5], [6]
Statement of Trish Stewart dated 17 January 2019	UV1	[13]-[19], Annexure B
Supplementary statement of Trish Stewart dated 1 April 2019	UV2	[7]-[8]
Further statement of Trish Stewart dated 1 October 2019	UV3	[3]-[5], [7]-[17]
Statement of Deon Fleming dated 16 January 2019	UV4	[18]-[24], Annexure B
Supplementary statement of Deon Fleming dated 28 March 2019	UV5	[6]
Statement of Belinda Sinclair dated 16 January 2019	UV6	[12]-[14], Annexure B
Statement of Jared Marks dated 3 October 2019	UV8	[1]-[23], [25], [27]-[35]
Statement of Melissa Coad dated 12 October 2019	UV7	[28]-[30]
Statement of Jeffrey Wright dated 12 July 2019	ABI13	[41], [45]
Statement of Scott Harvey dated 2 July 2019	ABI17	[56]-[59]
Statement of Wendy Mason dated 17 July 2019	ABI8	[71]-[72]
Statement of Fiona MacDonald dated 15 February 2019	HSU25	Annexure FM2
Statement of Robert James Steiner dated 24 June 2019	ASU2	[15]-[20]
Oral evidence of James Stanford		PN2274
Oral evidence of Jeffrey Sidney Wright		PN2543-2570, 2619
Oral evidence of Deborah Gaye Ryan		PN3050, 3086- 3092
Oral evidence of Wendy Mason		PN3231-3236
<b>Parts of submissions relevant to this claim</b>		
Submission dated 15 February 2019		CB4419, [111]- [151]
Supplementary submission dated 1 April 2019		CB4446, [8]-[9]
Submission on NDIS		CB4460, [11]-[20], [25]-[26]

*Findings sought*

31. The United Workers' Union seeks the following findings in respect of our broken shifts claim.

32. Employees in home care and disability services are regularly rostered for broken shifts.<sup>29</sup>

Some employees are rostered to have multiple breaks within a shift.<sup>30</sup>

33. Broken shifts are used as a device by some employers to avoid the payment of travel time, as such employers claim that time spent travelling by the employee in between broken shifts is travel undertaken after a 'break' and unpaid.<sup>31</sup>

34. Multiple broken shifts reduce the earning capacity of low paid workers, as the worker has to be available for lengthy periods of time to receive a few hours of paid work.<sup>32</sup> This is time in which employees could undertake other paid work.<sup>33</sup>

35. The loss of potential earnings contributes to financial distress.<sup>34</sup>

36. Lengthy periods of time where the worker is engaged in the work of the employer but only paid for a few hours is a significant disutility for employees, as this is time that they could be spending with family and friends.<sup>35</sup> This time is not 'free time.'

37. As noted, the Award permits broken shifts to be worked over a span of 12 hours.<sup>36</sup> The combination of broken shifts, employers' not paying travel time and lack of minimum engagements (for part-time employees) can result in a significant amount of 'dead time' for employees, which is time spent travelling without payment or time spent waiting in between broken shifts.<sup>37</sup> When this occurs, it is the employee who bears the cost of the idle time and the unpaid travel time.<sup>38</sup>

<sup>29</sup> Statement of Trish Stewart (EX. UV1), at [13]-[15]; Statement of Deon Fleming (EX. UV4), at [18]-[21].

<sup>30</sup> Statement of Trish Stewart (EX. UV1), at [15], see also Annexure B; Statement of Deon Fleming (EX. UV4), at [20], see also Annexure B (also in evidence in unredacted form as AiG1, *subject to a confidentiality order*).

<sup>31</sup> Statement of Trish Stewart (EX. UV1), at [16] and Supplementary statement of Trish Stewart (EX. UV2), at [7]-[8]; Statement of Deon Fleming (EX. UV4), at [22]; see also Annexure B (also in evidence in unredacted form as AiG1, *subject to a confidentiality order*); Supplementary statement of Deon Fleming (EX. UV4), at [6]; statement of Jared Marks (EX. UV8) at [23].

<sup>32</sup> Statement of Trish Stewart (EX. UV1), at [16]; Further statement of Trish Stewart (EX. UV3), at [7]-[8]; Statement of Deon Fleming (EX. UV4), at [23]-[24]; Statement of Robert Steiner (EX. ASU2), at [15]-[17].

<sup>33</sup> Statement of Trish Stewart (EX. UV1), at [17]-[18]; Ms Stewart left the home care sector and now has a new job in a residential aged care facility in which she receives 8 hour shifts, see Further statement of Trish Stewart (EX. UV3), at [9]-[12]; Statement of Deon Fleming (EX. UV4), at [24].

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

<sup>35</sup> Statement of Trish Stewart (EX. UV1), at [19]; Statement of Deon Fleming (EX. UV4), at [24]; Statement of Fiona MacDonald (EX. HSU25), at Annexure FM2, pg.83; Statement of Robert Steiner (EX. ASU2), at [17]-[19].

<sup>36</sup> Clause 25.6(a).

<sup>37</sup> Further statement of Trish Stewart (EX. UV3), at [6]; Statement of Deon Fleming (EX. UV4), at [22].

<sup>38</sup> Transcript (17/10/19) PN2274 [JAMES STANFORD].

38. Multiple broken shifts are a disincentive for employees to stay in the sector.<sup>39</sup>
39. Continuous patterns of work are consistent with ‘*the efficient and productive performance of work*’,<sup>40</sup> and are an appropriate alternative to multiple broken shifts.<sup>41</sup> Rostering patterns that include multiple broken shifts within a span of hours up to 12 hours are inconsistent with the consideration. Several employer witnesses indicated they attempt to provide continuous work broadly because such a pattern of work is efficient, consistent with the productive performance of work and preferred by the worker.<sup>42</sup>
40. Several employer witnesses indicated that it was their preferred practice to roster on the basis that there was only one break any shift (unexpected client cancellation being the main reason to depart from this practice).<sup>43</sup>
41. Care services such as cleaning, medication checks and personal care can be provided in a planned manner.<sup>44</sup> The nature of these services mean that they are largely performed in a routine manner, are low acuity and capable of being planned. The provider and the client must negotiate mutually acceptable times for the service to be provided in advance.<sup>45</sup> In addition, the evidence indicated that there were generally three peak periods of demand (aligned with breakfast, lunch and dinner).<sup>46</sup> The work in this sector can be organised to fit a pattern of continuous work, or if not, into a pattern of a broken shift with only one break.
42. The assertion that clients make demands that make the planning of consistent service delivery challenging is exaggerated.<sup>47</sup> Service providers have the ability to set out what services they

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<sup>39</sup> Further statement of Trish Stewart (EX.UV3), at [3]-[5]; Statement of Fiona MacDonald (EX.HSU25), at Annexure FM2, pg.87.

<sup>40</sup> S134(1)(d) of the modern awards objective.

<sup>41</sup> Ms Sinclair is uncommonly rostered for broken shifts (and mostly for team meetings in the office), otherwise she is generally rostered for a series of client engagements, see Statement of Belinda Sinclair (EX.UV6) at [12]-[13] and Annexure B, rosters from 17 December to 23 December 2018. This is in contrast to Ms Stewart and Ms Fleming, who are generally rostered for multiple broken shifts with consecutive client engagements broken by (unpaid) travel time or ‘*dead time*’, see EX.UV1, Annexure B, and EX.UV4, Annexure B.

<sup>42</sup> Statement of Jeffrey Wright (EX.ABI13) at [41]; Transcript (17/10/19), PN2619 [JEFFREY SIDNEY WRIGHT] ; Transcript (18/10/2019) PN3050 [DEBORAH GAYE RYAN]; Statement of Wendy Mason (EX.ABI8) at [71].

<sup>43</sup> Statement of Jeffrey Wright (EX.ABI13) at [45]; Transcript (18/10/2019) PN3086-3092 [DEBORAH GAYE RYAN]; Statement of Wendy Mason (EX.ABI8) at [72].

<sup>44</sup> Statement of Melissa Coad dated 12 October 2019 (EX.UV7) at [28].

<sup>45</sup> Statement of Melissa Coad (EX.UV7) at [29].

<sup>46</sup> Statement of Jeffrey Wright (EX.ABI13) at [41]; Statement of Graham Shanahan (EX.ABI15) at [37].

<sup>47</sup> Several employer witnesses made assertions in their witness statements to this effect but made concessions in cross examination. For example, Mr Wright in his statement (EX.ABI13), at [38], states that ‘*the provider has no control over their choice, but we need to accommodate it nonetheless*’, however in cross examination Mr Wright agreed that HammondCare did not have a legal obligation to offer services to anyone who demands it at any time of day, and that HammondCare determines the range of services and the pricing that it applies to those services (see PN2543-2551). Similarly, Ms Mason states in her statement (EX.ABI8) at [55] that ‘*the company’s home care activities are based on client demand and therefore rostering takes place around the preferred times of our clients*’ but acknowledged in cross examination that it is a negotiated process between the client and the care facilitator (see PN3230-3237).

will provide, including the times at which they will provide services, and the length of such services.<sup>48</sup>

43. Similarly, clients in aged care and disability services are capable of making choices within service constraints, and understanding of those constraints.<sup>49</sup> Services are provided pursuant to agreed terms and conditions. Service providers in home care routinely charge differential higher rates for services provided at unsocial hours. For home care, all providers that gave evidence charge differential and higher hourly rates for weekend, public holiday and evening work<sup>50</sup>
44. In summary, there is evidence that justifies amending the Award to limit the amount of breaks within a shift to one. Multiple broken shifts reduce the earning capacity of employees, and are disruptive to the lives of employees. Roster patterns in which multiple broken shifts are used operate on the basis that employees will be available for long periods of time in order to obtain sometimes a few hours of work. Service providers are able to set out the terms on which they provide services and have the capacity to arrange work in a manner that restricts the breaks within a shift to one. There is also a clear preference for some providers to limit breaks in shift to one. The Award should incentivise rostering practices which maximise continuous patterns of work.
45. In respect of the second component of our broken shifts claim, to ensure that an employee working a broken shift will receive the higher of the shift penalty at the start or finish of the shift, no employer evidence was presented on this matter.<sup>51</sup> The Commission can be satisfied that the proposed amendment is consistent with a '*fair and relevant*' minimum standard of conditions.

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<sup>48</sup> Statement of Scott Harvey (Ex.ABI17) at [56] –[59], Transcript (17/10/19), PN2547-2550 [JEFFREY SIDNEY WRIGHT].

<sup>49</sup> Statement of Melissa Coad (EX.UV7) at [30].

<sup>50</sup> See published pricing schedules in Exhibit UV9 '*homecare bundle*': Hammondcare p34; NSW Home Support p40; Connectability p42; Baptistcare p44; CASS Care p45; and Community Care Options p 46.

<sup>51</sup> We note several employer groups do not oppose this claim. See submission in reply of ABI and others re: outstanding union claims) paragraph 7.32 (CB 81), and submission in reply of NDS re: outstanding union claims, paragraph 38 (CB4387).

### *S3A -Variation to Rosters clause*

<b>Parts of the Court Book, exhibits, and transcripts relevant to this claim</b>	<b>EX. no</b>	<b>Reference</b>
Draft determination		CB 4416, [4]
Statement of Trish Stewart dated 17 January 2019	UV1	[9]-[12]
Statement of Deon Fleming dated 16 January 2019	UV4	[13]-[17]
Statement of Belinda Sinclair dated 16 January 2019	UV6	[22]-[26]
Oral evidence of Belinda Sinclair		PN599-616, 745
<b>Parts of submissions relevant to this claim</b>		
Submission dated 15 February 2019		CB4419, [60]-[80]
Further submission in reply dated 3 October 2019		CB4468, [31]-[32]

### *Findings sought*

46. Employees may have their rosters changed regularly, sometimes with little or no notice.<sup>52</sup>
47. Roster changes can be disruptive, and create difficulties for employees :
  - a. in planning budgets;<sup>53</sup> and
  - b. undertaking outside of work activities.<sup>54</sup>
48. Employees regularly agree to roster changes because there is under-employment in the sector and they require additional income.<sup>55</sup>
49. It is uncommon for employees to disagree to roster changes, and where such disagreement occurs, it is for a good reason.<sup>56</sup>
50. No evidence was presented by the employer witnesses that suggested that employees were regularly disagreeing or refusing roster changes without good reason. There was no evidence that employers had issues with excessive overtime payments.
51. On the above evidence, the Commission can be satisfied that inserting a provision providing for the payment of overtime where late roster changes are not agreed to by an employee would have limited cost impact on employers, but would provide a reasonable means of compensation employees when such changes do occur and assist in the development of good rostering practices.

<sup>52</sup> Statement of Trish Stewart (EX. UV1), at [10]-[11]; Statement of Deon Fleming (EX. UV4), at [15]; Statement of Belinda Sinclair (EX. UV6), at [22]-[25]; Transcript (15/10/19), PN605 [BELINDA JANE SINCLAIR].

<sup>53</sup> Statement of Trish Stewart (EX. UV1), at [10]; Statement of Deon Fleming (EX. UV4), at [16]; Statement of Belinda Sinclair (EX. UV6), at [25].

<sup>54</sup> Statement of Belinda Sinclair (EX. UV6), at [25].

<sup>55</sup> Statement of Trish Stewart (EX. UV1), at [11]; Statement of Deon Fleming (EX. UV4), at [17]; Statement of Belinda Sinclair (EX. UV6), at [26]; Transcript (15/10/19), PN604-605 [BELINDA JANE SINCLAIR].

<sup>56</sup> Statement of Trish Stewart (EX. UV1), at [11]; Statement of Deon Fleming (EX. UV4), at [17]; Transcript (15/10/19), PN604-608 [BELINDA JANE SINCLAIR].

*S21 –Mobile phone allowance claim*

<b>Parts of the Court Book, exhibits, and transcripts relevant to this claim</b>	<b>EX. no</b>	<b>Reference</b>
Draft determination		CB 4416, [3]
Statement of Trish Stewart dated 17 January 2019	UV1	[20]-[22]
Oral evidence of Trish Stewart		PN440-457
Statement of Deon Fleming dated 16 January 2019	UV4	[25]-[30]
Oral evidence of Deon Fleming		PN533-549
Statement of Belinda Sinclair dated 16 January 2019	UV6	[15]-[17]
Statement of William Gordon Elrick dated 14 February 2019	HSU3	[30]-[33]
Oral evidence of William Gordon Elrick		PN1075-1080
Oral evidence of Jeffrey Sidney Wright		PN2584-2588
Oral evidence of Graham Joseph Shanahan		PN2865-2872
Oral evidence of Joyce Wang		PN3554-3568
<b>Parts of submissions relevant to this claim</b>		
Submission dated 15 February 2019		CB4419, [81]-[110]
Further submission in reply dated 3 October 2019		CB4468, [33]-[37]

*Findings sought*

52. Employees in home care and disability services are required to have access to, and to utilise, a mobile phone in the course of their duties.<sup>57</sup>

53. Employees are expected by their employers to have access to, and utilise a mobile phone, to:

- a. take directions from their employer;<sup>58</sup>
- b. access work-related apps to maintain records on clients, confirm attendance and input other work-related data;<sup>59</sup>
- c. update their employer of issues with clients;<sup>60</sup>

<sup>57</sup> Statement of Trish Stewart (EX. UV1), at [20]-[22]; Statement of Deon Fleming (EX. UV4), at [28]-[29]; Transcript (16/10/19), PN2584 [JEFFREY SIDNEY WRIGHT]; Transcript (18/10/19), PN2867-2870 [GRAHAM JOSEPH SHANAHAN], PN3554-3559 [JOYCE WANG].

<sup>58</sup> Transcript (16/10/19), PN2584 [JEFFREY SIDNEY WRIGHT]; Transcript (18/10/19), PN2867-2870 [GRAHAM JOSEPH SHANAHAN].

<sup>59</sup> Statement of William Gordon Elrick dated 14 February 2019 (EX.HSU3), at [31] - [33]; Transcript (16/10/19), PN2587-88 [JEFFREY SIDNEY WRIGHT]; Transcript (18/10/19), PN2865 [GRAHAM JOSEPH SHANAHAN], PN3554-3559 [JOYCE WANG].

<sup>60</sup> Transcript (18/10/19), PN2872 [GRAHAM JOSEPH SHANAHAN].

- d. access and read client care plans;<sup>61</sup>
- e. call clients who may not answer the door to their home;<sup>62</sup>
- f. undertake medication checks with clients;<sup>63</sup>
- g. advise clients when running late;<sup>64</sup>
- h. be advised of roster changes via call or text;<sup>65</sup>
- i. check emails relating to roster changes or work related communications;<sup>66</sup> and
- j. report workplace hazard/incidents.<sup>67</sup>

54. There are different approaches to the attribution of the cost of mobile phones usage by employers in the home care and disability sector:

- a. there are employers that will provide employees with a mobile phone to use for work purposes and pay for associated costs;<sup>68</sup> and
- b. there are employers that do not provide employees with a mobile phone to use, but require employees to use their own mobile phones for work purposes.<sup>69</sup> In this case, the Award does not clearly mandate that employees are reimbursed for the cost of the mobile phone, or for costs of work-related charges

55. In circumstances in which the employer did not provide a mobile phone, or reimburse for associated costs, the evidence indicated that:

- a. not all employees in this industry have a smartphone, and not all employees have a phone with the capabilities to access the relevant apps as required by their employer;<sup>70</sup>
- b. employees are in effect directed by their employer to upgrade to a smartphone, or upgrade their smartphone, in order to be able to access apps required by the employer;<sup>71</sup>
- c. employees may have to pay for a higher level plan than they otherwise would; and<sup>72</sup>

<sup>61</sup> Statement of Trish Stewart (EX. UV1), at [22].

<sup>62</sup> Statement of Belinda Sinclair (EX. UV6), at [15].

<sup>63</sup> Statement of Trish Stewart (EX. UV1), at [20]; Statement of Deon Fleming (EX. UV4), at [29].

<sup>64</sup> Statement of Trish Stewart (EX. UV1), at [20]; Statement of Deon Fleming (EX. UV4), at [27]; Statement of Belinda Sinclair (EX. UV6), at [15].

<sup>65</sup> Statement of Belinda Sinclair (EX. UV6), at [16].

<sup>66</sup> Statement of Deon Fleming (EX. UV4), at [27]; Statement of Belinda Sinclair (EX. UV6), at [17]; Transcript (15/10/19), PN539 [DEON LEIGH FLEMING]; Transcript (16/10/19), PN2586 [JEFFREY SIDNEY WRIGHT]; Transcript (18/10/19), PN2870 [GRAHAM JOSEPH SHANAHAN].

<sup>67</sup> Statement of Belinda Sinclair (EX. UV6), at [15].

<sup>68</sup> Transcript (16/10/19), PN2584-2588 [JEFFREY SIDNEY WRIGHT].

<sup>69</sup> Statement of Trish Stewart (EX. UV1), at [21]; Statement of Deon Fleming (EX. UV4), at [30]; Statement of Belinda Sinclair (EX. UV6), at [16].

<sup>70</sup> Statement of Deon Fleming (EX. UV4), at [27]; Statement of William Gordon Elrick (EX. HSU3), at [31]; Transcript (15/10/19), PN1075-1080 [WILLIAM GORDON ELRICK].

<sup>71</sup> Statement of Deon Fleming (EX. UV4), at [27].

<sup>72</sup> Statement of Trish Stewart (EX. UV1), at [21]; Transcript (15/10/19), PN453-455 [TRISH STEWART].

- d. the work-related cost of an appropriate mobile phone can be a significant portion of the overall cost, and in some cases, equally as significant as the costs of personal use.<sup>73</sup>

56. No employer evidence was presented that suggested that a mobile phone allowance would be costly or prohibitive.

57. There is evidence indicating the insertion of a mobile phone allowance in terms of our claim into the Award is necessary. A mobile phone for workers under the Award providing services in the community is a vital '*tool of trade*' and required, in effect, at the direction of employers.

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<sup>73</sup> Transcript (15/10/19), PN440-445 [TRISH STEWART]; PN533-538 [DEON LEIGH FLEMING].

*S2A –Variation to Clothing and equipment allowance (uniforms)*

<b>Parts of the Court Book, exhibits, and transcripts relevant to this claim</b>	<b>EX. no</b>	<b>Reference</b>
Draft determination		CB 4416, [1]
Statement of Belinda Sinclair dated 16 January 2019	UV6	[18]-[21]
<b>Parts of submissions relevant to this claim</b>		
Submission dated 15 February 2019		CB4419, [48]-[59]

*Findings sought*

58. Employees in this sector may be required by their employer to wear a uniform.<sup>74</sup>
59. Employees may not be provided with an adequate number of uniform items.<sup>75</sup>
60. Where an employee is not provided with an adequate number of uniforms, the employee may have to wash their uniforms multiple times per week.<sup>76</sup>
61. The evidence justifies the inclusion of a definition of what is considered an ‘adequate’ number of uniforms.

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<sup>74</sup> Statement of Belinda Sinclair (EX. UV6), at [18].

<sup>75</sup> Statement of Belinda Sinclair (EX. UV6), at [19].

<sup>76</sup> Statement of Belinda Sinclair (EX. UV6), at [19].

**United Workers' Union response to the claims of ABI and others**

***ABI and others claim: Change of roster - Opposed***

<b>Parts of the Court Book, exhibits, and transcripts relevant to this claim</b>	<b>EX. no</b>	<b>Reference</b>
Statement of Trish Stewart dated 17 January 2019	UV1	[9]-[12]
Statement of Deon Fleming dated 16 January 2019	UV4	[13]-[17]
Statement of Belinda Sinclair dated 16 January 2019	UV6	[22]-[26]
Oral evidence of Belinda Sinclair		PN599-616, 745
<b>Parts of submissions relevant to this claim</b>		
Submission in reply		CB4449 [13]-[28]

*Findings sought*

62. Roster changes for employees can be frequent under the terms of the current Award.<sup>77</sup>
63. Roster changes can be disruptive, and create difficulties for employees:
- a. in respect of planning budgets;<sup>78</sup> and
  - b. in planning outside of work activities.<sup>79</sup>
64. It is uncommon for employees to disagree to roster changes, and where such disagreement occurs, it is with reason.<sup>80</sup>
65. Employees regularly agree to roster changes because there is under-employment in the sector and they need the additional income.<sup>81</sup>
66. No evidence was presented by any employer witness that identified any deficiencies in the current clause 25.5(d) (ii). Further, no evidence was presented supporting any need for further exceptions from the requirement to provide 7 days' notice of a roster change.
67. The Commission can be satisfied on the evidence that employers currently have significant practical flexibility to make roster changes. There is no evidence that would justify any further exceptions to the requirement to provide 7 days' notice of a roster change.

<sup>77</sup> Statement of Trish Stewart (EX. UV1), at [10]-[11]; Statement of Deon Fleming (EX. UV4), at [15]; Statement of Belinda Sinclair (EX. UV6), at [22]-[25]; Transcript (15/10/19), PN605 [BELINDA JANE SINCLAIR].

<sup>78</sup> Statement of Trish Stewart (EX. UV1), at [10]; Statement of Deon Fleming (EX. UV4), at [16]; Statement of Belinda Sinclair (EX. UV6), at [25].

<sup>79</sup> Statement of Belinda Sinclair (EX. UV6), at [25].

<sup>80</sup> Statement of Trish Stewart (EX. UV1), at [11]; Statement of Deon Fleming (EX. UV4), at [17]; Transcript (15/10/19), PN604-608 [BELINDA JANE SINCLAIR].

<sup>81</sup> Statement of Trish Stewart (EX. UV1), at [11]; Statement of Deon Fleming (EX. UV4), at [17]; Statement of Belinda Sinclair (EX. UV6), at [26]; Transcript (15/10/19), PN604-605 [BELINDA JANE SINCLAIR].

*ABI claim: Client cancellation*

<b>Parts of the Court Book, exhibits, and transcripts relevant to this claim</b>	<b>EX. no</b>	<b>Reference</b>
NDIS Price Guide 2019-2020		CB 2796, pg.12-13
Statement of Trish Stewart dated 17 January 2019	UV1	[10]
Statement of Deon Fleming dated 16 January 2019	UV4	[13]-[16]
Further statement of Mark Farthing dated 16 September 2019	HSU2	[6]-[10], [23]-[32]
Oral evidence of Belinda Sinclair		PN745
Oral evidence of Darren John Mathewson		PN2421-2424
Oral evidence of Graham Joseph Shanahan		PN2891-2897
Oral evidence of Deborah Gaye Ryan		PN3020-3032, PN3075-3080
Cross examination of Deb Ryan: Same Day Cancellation Log – <b>subject to confidentiality order</b>	HSU15	
Community Care Options Home Care Agreement Template	HSU16	
Oral evidence of Scott Raymond Harvey		PN3117-3140
Oral evidence of Wendy Mason		PN3220-3249, PN3273-3280
Baptist Care Commonwealth Home Support Programme (CHSP) pro-forma Service Agreement	HSU19	
Baptist Care Home Care Agreement	HSU20	
<b>Parts of submissions relevant to this claim</b>		
Submission in reply dated 13 September 2019		CB4419, [29]-[48]
Submission on NDIS dated 17 May 2019		CB4460, [11]-[18]

*Findings sought*

United Workers’ Union primary position – that clause 25.5(f) should be deleted

68. It is common for employer’s to cancel rostered shifts of part time employees (without payment) under the provisions of the current clause 25.5(f).<sup>82</sup>

<sup>82</sup> Statement of Trish Stewart (EX. UV1), at [10]; Statement of Deon Fleming (EX. UV4), at [13]-[16].

69. Where an employee has a rostered shift cancelled without payment by their employer, the employee will lose out on income that the employee expected for the week, and this can result in financial uncertainty and detriment.<sup>83</sup>
70. Changes to NDIS policy that came into effect in July 2019 enable providers to claim back a greater amount with respect to client cancellations.<sup>84</sup>
71. Home care providers are able to set out the terms and conditions upon which they will provide services to a client, including terms about cancellation of services.<sup>85</sup>
72. Home care providers can charge a client for a cancelled service provided this is in accordance with the service agreement in place between the provider and the client.<sup>86</sup>
73. Home care providers may *chose* not to charge a client for a cancellation for reasons that may include demonstrating sensitivity to the client and retaining/gaining client business.<sup>87</sup>
74. Employer witness evidence regarding the loss of clients if clients were charged for the cancellation of a service should be given very little weight as such a statement is general speculation.<sup>88</sup>
75. Depending on the timing of a cancelled service, a service provider may be able to both recover money from the client, and cancel the shift of the employee without payment of wages.<sup>89</sup>

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<sup>83</sup> Statement of Trish Stewart (EX. UV1), at [10]; Statement of Deon Fleming (EX. UV4), at [13]-[16]; Transcript (15/10/19), PN745 [BELINDA JANE SINCLAIR].

<sup>84</sup> Further statement of Mark Farthing dated 16 September 2019 (EX.HSU2) at [6]-[10], [23]-[32]; Transcript (18/10/19), PN3118-3127 [SCOTT RAYMOND HARVEY].

<sup>85</sup> Transcript (17/10/19), PN2421-2424 [DARREN JOHN MATHEWSON]; Transcript (18/10/19), PN3020-3029, 3075-3080 [DEBORAH GAYE RYAN]; Community Care Options Home Care Agreement Template (EX.HSU16); PN3237-3249 [WENDY MASON]; Baptist Care Commonwealth Home Support Programme (CHSP) pro-forma Service Agreement (EX.HSU19); Baptist Care Home Care Agreement (EX.HSU20).

<sup>86</sup> Transcript (18/10/19), PN2891-2897 [GRAHAM JOSEPH SHANAHAN], PN3020-3029, 3075-3080 [DEBORAH GAYE RYAN]; Cross examination of Deb Ryan: Same Day Cancellation Log – subject to confidentiality order (EX.HSU15); Community Care Options Home Care Agreement Template (EX.HSU16); PN3237-3249 [WENDY MASON]; Baptist Care Commonwealth Home Support Programme (CHSP) pro-forma Service Agreement (EX.HSU19); Baptist Care Home Care Agreement (EX.HSU20). Note: Mr Wright provided evidence that cancellation fees cannot be charged under the CHSP however later admitted that this understanding was based on what he had heard from “*operations people who are in that space within the organisation*” (see transcript (17/10/19) PN2645-2651, and PN2702-2706). His evidence on this issue should not be preferred, as it is hearsay evidence that directly contradicts other evidence in this matter including that of Mr Shanahan (PN2894), Ms Mason (PN3239) and the terms of the Baptist Care Commonwealth Home Support Programme (CHSP) pro-forma Service Agreement (EX.HSU19). Similarly, Ms Wang provided evidence that if a client cancelled the service, CASS would not be able to recover income as the clients held the funding, but this evidence is also hearsay, and should not be preferred as she admitted funding arrangements were not her responsibility, and her evidence was based on “*what I have heard from*” work colleagues (PN3611-PN3616).

<sup>87</sup> Transcript (18/10/19), PN2891-2897 [GRAHAM JOSEPH SHANAHAN], PN3273-3274 [WENDY MASON].

<sup>88</sup> Statement of Graham Shanahan (EX. ABI5), dated 28 June 2019, at [28].

<sup>89</sup> Transcript (18/10/19), PN3031-32 [DEBORAH GAYE RYAN]; Cross examination of Deb Ryan: Same Day Cancellation Log – subject to confidentiality order (EX.HSU15); also, this is the logical conclusion from considering the interaction of cancellations clauses within service agreements (see Baptist Care Commonwealth Home Support Programme (CHSP) pro-forma Service Agreement (EX.HSU19); Baptist Care Home Care Agreement (EX.HSU20)) with the terms of clause 25.5(f) of the Award.

76. The evidence does not support an extension of the clause 25.5(f) to disability services.
77. Rather, the evidence justifies the removal of clause 25.5(f) altogether, as there is evidence that client cancellations in home care are often chargeable. In disability services, due to changes made in July 2019 in the NDIS Price Guide 2019-20, an unlimited amount of client cancellations are now claimable.<sup>90</sup>
78. An industrial standard that allows employers to receive payment for a service which is not provided and for which the worker is not paid for is incompatible with a fair and relevant safety-net of terms and conditions.
79. The evidence also shows that providers in home care may *chose* not charge a client for a cancellation for business reasons. The provider's decision in this respect should not result in an employee losing out on payment for a rostered shift. It is also evident that clause 25.5(f) results in low paid employees suffering financial detriment. As such, clause 25.5(f) should be deleted.

Alternative position –if the Commission determines a client cancellation clause should be retained for home care workers

80. For the above reasons, the evidence justifies the removal of a provision enabling an employer to withhold payment for home care workers where a client has cancelled. To that extent we support ABI's draft determination with respect to client cancellation, as their proposed clause removes the capacity for an employer to withhold payment to home care workers for client cancellations.
81. We note ABI's amended draft determination filed on 15 October 2019 deals with one issue raised within our submission dated 23 September 2019 (the clause reference as raised in paragraph [38] at the second dot point) but we otherwise press our objections to other elements of their proposed clause as stated in paragraphs [35] to [39].
82. We do not support any extension of a client cancellation clause to disability support workers as set out in paragraphs [40] to [48] of that same submission.

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<sup>90</sup> NDIS Price Guide 2019-2020, CB 2796, pg.12-13

**ABI and others claim: Remote response**

<b>Parts of submissions relevant to this claim</b>	<b>Reference</b>
Submission in reply, dated 13 September 2019	[49],[52]

83. ABI and others filed an amended draft determination in respect of their remote response clause on 15 October 2019.
84. We made a submission in response to ABI's original claim in our submission in reply made on 13 September 2019.<sup>91</sup>
85. Paragraphs [49] and [52] of our reply submission remain relevant to the amended claim and we rely on those paragraphs.
86. The United Workers' Union notes that the ASU has filed a proposed remote response claim dated 23 September 2019. The ASU remote response claim provides for employees to be paid a 2 hour minimum when undertaking remote response duties when not on call, and a 1 hour minimum when undertaking remote response duties when on call.
87. We support the ASU remote response claim, as it provides a more appropriate rate of payment to employees undertaking remote response duties.

**United Workers' Union  
18 November 2019**

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<sup>91</sup> Paragraphs [49]-[54].