Fair Work Commission: 4 yearly Review of modern awards

FINAL SUBMISSION

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

FILED ON BEHALF OF:

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

10 FEBRUARY 2020

TABLE OF CONTENTS

BACKGROUND

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

2. The Commission has recently released a number of Statements and other documents in these proceedings, including:

   (a) a Statement of 3 December 2019[1] (the **December Statement**);

   (b) a Statement of 6 January 2020[2] (the **January Statement**); and

   (c) a Background Paper dated 6 January 2020 (the **Background Paper**), which poses a series of questions to parties with an interest in the proceedings.

3. The January Statement:

   (a) required parties to address the questions contained in the Background Paper in their submissions due on 7 February 2020; and

   (b) invited parties to identify any errors or omissions in the Background Paper.

4. This submission is filed in accordance with the Directions of the Fair Work Commission (**Commission**) issued on 5 December 2019 (the **December Directions**).

5. Pursuant to the December Directions, parties were directed to file written submissions in respect of the following matters:

   (a) whether they agree with or contest the findings sought by other interested parties in the written submissions listed at paragraph [4] of the December Statement;

   (b) in respect of any submissions made in accordance with paragraph (a) above, the reasons for agreeing with or contesting the findings sought, by reference to the evidence;

   (c) any submissions in reply to the written submissions listed at paragraph [4] of the December Statement;

   (d) responses to the questions posed in the Background Paper; and

   (e) submissions in support of the parties preferred position on changes to the 24 hour care clause as set out in the Report issued by Commissioner Lee on 14 November 2019.

[1] [2019] FWCFB 8177.
[2] [2020] FWC 58.

6. Accordingly, this submission is divided into the following sections:

   (a) Part A - Our clients' position in relation to the findings sought by other interested parties;

   (b) Part B - The reasons for our clients' position in relation to agreeing with or contesting the findings sought by other interested parties;

   (c) Part C - Responses to the questions posed in the Background Paper; and

   (d) Part D - Submissions in support of our clients' position in relation to changes to the 24-hour care clause.

PART A: FINDINGS SOUGHT BY OTHER PARTIES

Finding		Our clients' position
Ai Group		
1.	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	**Agree**
2.	Employers face a peak in demand for their services at certain times of the day, such as in the morning and in the evening	**Agree**
3.	Enterprise bargaining between employers and employees covered by the Award is not common	**Disagree**
4.	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. This is at least in part due to the operation of the pricing caps imposed by the NDIS	**Partly agree. See comment in Part B.**
5.	Employees are commonly required to work routinely with a particular client or multiple such clients over a period of time	**Agree**
6.	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)	**Agree**
7.	It is common for employees to be employed by and to be performing work for more than one employer covered by the Award	**Agree**
8.	Some employees find personal satisfaction in undertaking work in the sectors covered by the Award	**Agree**
9.	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	**Agree**
10.	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.	**Agree**
11.	The transition to the NDIS has been financially very challenging for some employers	**Agree**
12.	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;	**Agree**

Finding		Our clients' position
	(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.	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	**Agree**
14.	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	**Agree**
15.	The cost model provides for a profit margin of 2%	**Agree, subject to comment in Part B**
16.	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	**Agree**
17.	Broken shifts are commonly utilised by employers covered by the Award	**Agree**
18.	Employees are commonly rostered to perform work for the same client on multiple occasions during the course of a day	**Agree**
19.	The length of an engagement that forms part of a broken shift can vary from 15 minutes to 7 hours	**Agree**
20.	Some full-time and part-time employees are required to work 30 minute engagements and, in a smaller number of instances, 15 minute engagements	**Agree**
21.	The number of "breaks" in a broken shift can vary from 1 – 5	**Agree**
22.	Client cancellations sometimes result in a broken shift where the employer is unable to provide the employee with other work during the cancelled shift	**Agree**
23.	Broken shifts provide some employees with the flexibility that they desire	**Agree**
24.	Many employees are not paid for time spent travelling to and from clients. This includes travelling between clients and travelling to the first client / from the last client	**Agree**
25.	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	**Agree**
26.	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	**Agree**
27.	In some cases, employees travel directly from one client to the next	**Agree**
28.	In other cases, employees do not travel directly from one client to the next	**Agree**
29.	During a break in a broken shift, employees often undertake non-work-related activities, including spending time at home	**Agree**
30.	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	**Agree**

Finding		Our clients' position
31.	Some employers are unable to guarantee additional hours of work to part-time employees due to the operation of the NDIS	**Agree**
32.	Some part-time employees want to work additional hours	**Agree**
33.	The introduction of a requirement to pay a part-time employee at a higher rate of pay for additional hours of work would be a financial disincentive to offering additional hours of work to that employee and may result in an employer electing to instead give those additional hours of work to another employee	**Agree**
34.	Changes to employees' rosters are commonly caused by client cancellations	**Agree**
35.	Changes to employees' rosters are commonly caused by the absence of other employees of the employer	**Agree**
36.	Employee concerns about inadequate uniforms are on occasion dealt with and resolved at the enterprise-level	**Agree**
37.	Some employers provide protective clothing and gloves for employees to wear while working	**Agree**
38.	Some employers provide their employees with mobile phones	**Agree**
39.	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	**Agree**
40.	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	**Agree**
41.	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	**Agree**
42.	Some work-related activities are undertaken by employees while they are not at the workplace in as little as a "few minutes".	**Agree**
National Disability Services		
43.	The Award covers employees across a range of sectors including social and community services, crisis assistance, disability services, home care and family day care	**Agree**
44.	All of the evidence listed in the above table attests that the disability sector has been undergoing significant change since the introduction of the NDIS which has been progressively rolled out across Australia between 2013 and 2020	**Agree**
45.	NDIS is a market based, individualised system designed to give participants more choice and control over their daily lives	**Agree**
46.	The implementation of NDIS has led to an increased fragmentation of how work is performed. While some disability supports continue to be provided in settings such as group homes, and increasing amount of work is performed by individual workers in the homes of individual clients, or on an individual or small group basis in community settings	**Agree**
47.	Employers are under greater market pressure than before to accommodate the needs and preferences of clients and this has a flow on effect to how work needs to be organised	**Agree**

Finding		Our clients' position
48.	The disability sector is characterised by a high level of part-time and casual employment	**Agree**
49.	The price that providers can charge participants for the delivery of services is currently capped by the National Disability Insurance Authority. The price has been developed using a "efficient cost model" which makes assumptions about labour costs	**Agree**
50.	The evidence in these proceedings is that the cost model is deficient in many respects and underestimates labour costs. The NDIA costing model has been criticised in recent years for underestimating true labour costs. Recent price changes have ameliorated this to some extent but there are still deficiencies in the model.	**Agree**
51.	The result is that disability service providers are under increasing financial stress. For example, the NDS State of the Sector Report shows, that while the market is growing, a significant proportion of providers are making overall financial losses and experiencing deteriorating financial performance.	**Agree**
52.	The home care sector is experiencing changes similar to NDIS as a result of consumer directed care	**Agree**
53.	Most of the employer and union claims in tranche 2 of these proceedings, such as client cancellation, broken shift and minimum engagements, travel time, and phone allowances, deal with issues arising from the implementation of NDIS in disability services, and consumer directed care in home care	**Agree**
54.	The NDIS pricing arrangements for client cancellation were significantly changed from July 2019. The effect has been to reduce the financial impact of cancellations for providers. However, it is still the case that participants only pay in the event of cancellation in certain circumstances depending on the amount of notice provided. As a consequence, client cancellations still have a financial impact	**Agree**
55.	The NDIS has driven an increase in the extent of client cancellation in the disability sector, and that it continues to be a feature of the home care sector	**Agree**
56.	Practices appear to vary but there is evidence that some of the time needed for travel between clients is not paid time	**Agree**
57.	Travel in the disability sector is often associated with the use of broken shifts because in-home supports are usually only needed for short periods at certain times of the day, such as meal times.	**Agree**
58.	Disability support workers who are required to work in client homes and in the community are commonly required to own a mobile phone.	**Agree**
59.	Disability support workers use their mobile phones for a combination of work and personal purposes, and may be on plans with unlimited data included.	**Agree**
AFEI		
60.	There are employees who work part-time because it suits them	**Agree**
61.	Part-time employees want to work additional hours	**Partly agree. See comment in Part B.**

Finding		Our clients' position
62.	Part-time employees are not being forced to work additional hours where they do not agree to them	**Agree**
63.	If the Award is varied as sought, this would have a detrimental impact on both the availability of part-time employment as a flexible yet permanent work option for employees, and on employer costs	**Agree**
64.	Employees covered by the Award provide services which are unique to this sector; services are dictated by client needs	**Agree**
65.	Employees in this sector typically work with the same clients on an ongoing basis	**Agree**
66.	Each portion of work in a broken shift is typically less than three hours in length	**Agree**
67.	Existing arrangements for broken shifts in the Award are appropriate to the industry	**Partly agree. See comment in Part B.**
68.	The variation sought by the HSU would detrimentally impact on the provision of services in this sector, ultimately affecting service users (min engage)	**Agree**
69.	The variation could result in an employer being liable to pay an employee for hours during which no productive work is being performed (min engage)	**Agree**
70.	Client cancellations are usually late notice	**Agree**
71.	Cancellation fees are not always charged to the client	**Agree**
72.	Employers do not benefit financially from a cancelled service	**Agree**
73.	Employees in this sector already own a mobile phone and already use them for work purposes at no additional cost to the employee	**Partly agree. See comment in Part B.**
74.	There are difficulties with disaggregating between work and personal use of the mobile phone	**Agree**
75.	Not all disability support workers and home care workers are required to travel considerable distances during the course of their working days in order to perform their work.	**Agree**
76.	Where employees do travel a considerable distance, such travel is undertaken on an irregular basis	**Agree**
77.	Employees do not always use their breaks to travel from one client to another	**Agree**
78.	An employer has limited control over the time it takes for an employee to get from one client to another due to a number of factors including to traffic	**Agree**
Health Services Union		
79.	Employees covered by the Award are generally paid at, or minimally above, award rates and enterprise bargaining does not deliver any significant wages increases to the employees in the industry.	**Agree generally**
80.	For disability and home care workers, the task of organising together and bargaining collectively is complicated by the fact that they have no "workplace" as such. Union organisers and officials cannot simply schedule meetings at the "workplace" as many of the workers are either at the client's home (or some other location to attend to the client), or in	**Do not know and cannot agree or disagree. See comment in Part B.**

Finding		Our clients' position
	their cars between appointments. That impediment may account, in part, for the low wage outcomes achieved even where bargaining occurs.	
81.	There is significant casualisation of (at least) disability workers, with the National Disability Services Australian Disability Workforce Report of July 2018 reporting that 46% of disability support workers are casual.	**Agree generally**
82.	A further related feature of the workforce covered by the Award, observed by Dr Macdonald in her report, and borne out by the employer evidence is the regular expectation of performing hours of work additional to the employee's scheduled or rostered hours, often at short notice.	**Disagree**
83.	The expectation of both disability and home care part-time employees is that they perform work additional to their contracted hours.	**Disagree**
84.	In his report, Dr Stanford noted that average hours of work are low and highly variable. Dr Stanford described an increase in precarious work practices for disability support workers; not just casualisation, but also an increase in part-time employment, irregular and discontinuous shift assignments, the requirement to work in multiple locations (often in private residences), and the expectation that workers will provide transportation services. As well as instability and precarity, Dr Stanford recorded elevated levels of mental and physical stress being suffered by workers.	**Disagree**
85.	Dr Muurlink explains how the unpredictable nature of work (a reality for both casual and part-time workers under this Award) has clear implications for the ability of workers to maintain work-life balance. Where work has a regular and predictable "beat", the worker may synchronise their health behaviours with work; for example, establish regular family meal times or exercise routines and schedule doctors' appointments or other self-care activities. Unpredictability of work presents challenges to health, both: (a) structural challenges (the reduced ability to engage in positive health behaviours or reduced access to services); and (b) physical and psychological challenges (the reduced sense of control, and reduced rhythmicity/increased change). The latter category of challenges, whilst less tangible, are no less significant. A worker's sense of control is one of the most critical psychological variables in determining health responses to stressors such as work conditions. In a study of a large Hungarian dataset, a perceived absence of control at work was the second strongest work-related predictor of premature death from cardio-vascular disease and the most powerful predictor of female ischaemic heart disease mortality. Dr Muurlink notes the same author reports a connection between sense of control and well-being. Similar findings appeared in an Australian study of nurses, a group of workers with obvious parallels to the workers covered by the Award.	**Do not know and cannot agree or disagree. See comment in Part B.**
86.	There is also the potential for a compounding adverse impact when an absence of job security/underemployment is combined with irregular work.	**Do not know and cannot agree or disagree. See comment in Part B.**

Finding		Our clients' position
87.	The above features represent a real problem for the attraction and retention of appropriately skilled workers to the industry.	**Do not know and cannot agree or disagree. See comment in Part B.**
88.	The gendered nature of the work performed by many of the workers covered by the Award was the subject of comment in the Equal Remuneration Case [2011] FWAFB 2700. There, the Full Bench accepted (at [253]) the following propositions about work performed under the Award: (a) much of the work in the industry is "caring" work; (b) the characterisation of work as caring work can disguise the level of skill and experience required and contribute, in a general sense, to a devaluing of the work; (c) the evidence of workers, managers and union officials suggests that the work, in the SACS industry, again in a general sense, is undervalued to some extent; and (d) because caring work in this context has a female characterisation, to the extent that work in the industry is undervalued because it is caring work, the undervaluation is gender-based.	**Agree. See comment in Part B.**
89.	The gendered nature of the work also has an impact at the level of work practices. Dr Macdonald concludes: '*Non-payment of social care work is supported by the gendered legacy of care work as women's work (Hayes, 2017; Palmer and Eveline, 2012). With care work continuing to be mainly performed unpaid by women in the family, it is often regarded as performed for altruistic reasons and as unskilled and not deserving of decent pay. These norms have a powerful role in social care, influencing employer strategies and also workers' preparedness to perform unpaid work. Furthermore, much social care work is performed in not-for-profit agencies that have long traditions and strong norms of volunteering that contribute to pressures on workers (Baines et al., 2017).'*	**Do not know and cannot agree or disagree. See comment in Part B.**
90.	Mark Farthing, the National Campaigns and Projects Officer of the Health Services Union has provided a further witness statement dated 16 September 2019 (Court Book: 2981) detailing (at [10]) the significant changes to funding under the NDIS as a consequence of the NDIA's publication of the 2019-2020 Price Guide, as follows: (a) general price increases and significant above-inflation increases for therapists and attendant care and community participation supports, with the price for attendant care and community participation supports delivered during the daytime on a weekday to a standard needs participant increasing from the previous financial year by 9.78% (or 18.01% when the TTP Payment is taken into account); (b) the introduction of a Temporary Transformation Payment (TTP), loading calculated at 7.5% of Level 1 (standard needs) prices, but applicable in respect of Level 2 and Level 3 supports as well (subject to satisfaction of conditions about price transparency; (c) a doubling of the remote and very remote loadings (from 20% and 25% to 40% and 50% respectively);	**Agree**

Finding		Our clients' position
	(d) increases to the time that may be charged for travelling to participants; (e) clear provision for charging for some non face-to-face activities; (f) abolition of the limit on cancellations that may be charged in a year, and a new policy whereby a cancellation fee at 90% of the service may be charged in most cases where two days notice is not given.	
91.	The changes effected by the 2019-2020 Price Guide mean that many of the criticisms of the NDIS made in (or relying on) the 'UNSW Report' are either no longer apposite, or do not apply with the same force as previously.	**Partly agree. See comment in Part B.**
92.	Evidence from witnesses from the large aged care organisations illustrated the significant financial opportunities presented by the move to Consumer Directed Care in Aged Care. Based on the published reports available to date, HammondCare's financial position has improved dramatically in the period since the introduction of consumer directed care, based in part on its diversified service offering and integrated range of services (that is, offering aged care services in the home, and gaining an obvious competitive advantage in attracting custom for its residential care services). HammondCare's home care business increased by 13.8% in the 2017-2018 financial year. In the period from 2015 to the 2018 financial year, it produced surpluses, increased its overall annual turnover significantly, and significantly expanded its total asset base. It also established new offices throughout New South Wales and the ACT	**Disagree.**
93.	The rollout of the NDIS is anticipated to ultimately increase employment in the disability sector by some 70,000 full-time equivalent positions, or a doubling of the workforce in the sector. Given the prevalence of part-time work in the sector, this will mean workers well in excess of that number will require training to develop the skills necessary to provide the care.	**Partly agree. See comment in Part B.**
94.	Turnover in the industry is currently high, with over one quarter of workers changing jobs within the course of a year. That figure is three times that in the Australian labour force otherwise	**Partly agree. See comment in Part B.**
95.	The disjuncture between the skill levels required to perform the work, and the skill level of those retained, and between the demands of the work and the conditions under which it is performed, represents an obvious risk for attraction and retention of workers within the industry. Those risks are already being realised, with substantial numbers of new advertised positions remaining unfilled. The disjuncture also poses risks for the quality of care being provided to participants, with research across a range of disciplines showing quality of care depends on the stability, tenure, training and motivation of the workforce.	**Do not know and cannot agree or disagree. See comment in Part B.**
96.	A striking feature of the work of both disability support workers and home care workers is that the worker is frequently required to use their own vehicle to travel between, and/or carry out client appointments	**Partly agree. See comment in Part B.**
97.	In New South Wales, most home care employers do not provide their employees with a company vehicle to undertake their duties	**Agree**

Finding		Our clients' position
98.	Workers' vehicles are often used to transport clients and clients' wheelchairs, walking frames and the like	**Agree**
99.	In some cases, the necessity to provide a currently registered and insured vehicle appears in the contract of employment	**Agree**
100.	Even where enterprise agreements establish minimum engagements, these may be broken into smaller parts, thereby significantly counteracting the benefit of the minimum engagement required	**Do not know and cannot agree. See comment in Part B.**
101.	A further consequence of the capacity to break shifts at will is that travel to and from client attendances can be transformed into the first and last trip, and thereby treated as unpaid and uncompensated by way of any allowance.	**Disagree.**
102.	Care workers generally travel straight from their homes to their first client, rarely attending the organisation's workplace first. They are generally not paid for travel to their first appointment, or for travel home from their last appointment, either in wages for the time spent, nor by way of an allowance, for the use of their vehicle to travel for work purposes	**Agree generally.**
103.	Their clients can also change from day to day, so the locations of their first and last appointments will rarely be the same each day and are not always predictable	**Partly agree. See comment in Part B.**
104.	Particularly for workers in regional areas, considerable distances may be required to be travelled. For example, Heather Waddell, a home care worker employed by Hammond Care on the South Coast of New South Wales, works in a team that covers an area in excess of 100 kilometres. She travels some 50 kilometres South of her home to Ulladulla to visit clients. She has had to travel up to 80 kilometres to the South, 63 kilometres to the North and more than 50 kilometres West. She has travelled up to 250 kilometres in a day for 4 or 5 paid hours of work.	**Disagree.**
105.	The evidence before the Commission tends to suggest that, particularly in regional areas, employers operate across large geographical areas.	**Agree.**
106.	The capacity to work short engagements, and unlimited broken shifts, and not pay employees for travel to and from shifts, creates a perverse incentive for employers to operate over greater distances than they otherwise might	**Disagree.**
107.	A further burden for workers travelling in regional areas is the risk of accidents on dangerous (or isolated) stretches of road, including accidents involving collision with kangaroos (or other wildlife). The common requirement to travel in the early morning or as night falls (to provide meals or other domestic assistance at either end of the day) increases that risk.	**Agree generally. See comment in Part B.**
108.	The requirement to travel long distances during the course of the working week is not limited to workers in regional areas.	**Disagree.**
109.	Distance alone is not the only difficulty associated with travel. Geography and traffic flows may compound the demands of travel.	**Disagree.**
110.	The common approach of employers in the industry appears to be that travel by a worker to the first appointment of the day is not regarded as	**Agree.**

Finding		Our clients' position
	work related travel, and is not paid as time worked nor compensated by payment of a kilometre allowance.	
111.	The Commission would be satisfied that working in a face to face contact role with clients with disability or requiring assistance due to their age, is likely to be physically and mentally taxing work.	**Disagree.**
112.	Home Care workers are often required to shower clients, assisting clients in and out of confined spaces in private homes, which have not been specially designed to facilitate personal care and assistance	**Agree.**
113.	They also provide other forms of domestic assistance, which can be more physically demanding, wearing on the body and tiring than many forms of personal care	**Partly agree. See comment in Part B.**
114.	Given the manner in which employers routinely work broken shifts, frequently breaking shifts several times during the course of a day, it is unlikely part-time workers would accrue 10 hours of paid work in the course of a day.	**Agree.**
115.	The employees the subject of the present proceedings are obliged by their roles to take their clients as they find them, and to provide care and assistance to them, by reason of their incapacity to carry out those tasks themselves.	**Agree.**
116.	The Commission would consider that the care work performed by employees in the industry is likely to cause damage to their clothing.	**Disagree.**
117.	The brevity of the notice has the capacity to be disruptive for employees seeking to arrange other responsibilities around work commitments (notice of cancellation)	**Agree generally. See comment in Part B.**
118.	The capacity to cancel set hours of work on such terms undermines significantly the entitlement of part-time workers to regular and guaranteed days and hours of work.	**Disagree.**
119.	A smart phone is an essential 'tool of the trade'. Employees require a telephone in order to contact and be contactable by their employer and in order to contact and be contactable by clients. Employees also need to access email, perform internet searches or use their employer's telephone applications for the purpose of record keeping etc	**Disagree.**
120.	The likelihood of employers communicating with employees via internet based application or requiring them to use such applications in the course of their work is only likely to increase in the coming year	**Do not know and cannot agree or disagree. See comment in Part B.**
United Workers Union		
121.	A significant number of employees covered by the Award are low paid	**Disagree.**
122.	Employees in the sector are predominantly female	**Agree.**
123.	There is a high proportion of part time employment in the sectors covered by the Award	**Agree.**
124.	Funding arrangements are not determinative, and the adequacy of funding (or lack thereof) is a matter for the government.	**Partly agree. See comment in Part B.**
125.	Employees in home care (and certain types of disability services work) have no 'base location' that they start at and finish at each day	**Agree.**

Finding		Our clients' position
126.	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). These workers work in the community	**Agree.**
127.	As a condition of employment, employees are required to have a current driver's licence	**Partly agree. See comment in Part B.**
128.	Employees are routinely expected to use their own car to travel in between work sites	**Agree.**
129.	There are different approaches to the payment of travel time by employers in the industry: (a) some employers will pay for travel time; (b) some employers will pay for travel time in between consecutive client engagements but not in between broken shifts; and (c) some employers do not pay for travel time and such employers classify time spent travelling between client engagements as a "break" in broken shifts, regardless of whether or not those client engagements are consecutive	**Agree.**
130.	Employees covered by the Award can be travelling to and from clients for significant periods of time without payment	**Disagree.**
131.	The non-payment of travel time results in lower wages for already low-paid workers. Home care and disability support workers can be engaged to work broken shifts over a significant span of hours (12 hours maximum) that can includes a majority of 'time' that is unpaid but dedicated to the work of the employer. This contributes to financial distress.	**Disagree.**
132.	The non-payment of travel time creates a disincentive for employees to stay in the sector.	**Do not know and cannot agree or disagree. See comment in Part B.**
133.	The notion that travel time cannot be paid as it is difficult to calculate is counter factual; several of the employer witnesses indicated that they already pay travel time.	**Disagree.**
134.	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.	**Agree.**
135.	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.	**Agree.**
136.	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 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.	**Disagree.**
137.	Employees in the home care and disability services sector perform travel at the direction of their employer in between client locations as a key part of their role. This work could not occur without travel.	**Partly agree. See comment in Part B.**

Finding		Our clients' position
138.	Employees in home care and disability services are regularly rostered for broken shifts. Some employees are rostered to have multiple breaks within a shift.	**Agree**
139.	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.	**Disagree.**
140.	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. This is time in which employees could undertake other paid work	**Disagree.**
141.	The loss of potential earnings contributes to financial distress	**Do not know and cannot agree or disagree. See comment in Part B.**
142.	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. This time is not 'free time.'	**Disagree.**
143.	As noted, the Award permits broken shifts to be worked over a span of 12 hours. 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. When this occurs, it is the employee who bears the cost of the idle time and the unpaid travel time	**Disagree.**
144.	Multiple broken shifts are a disincentive for employees to stay in the sector	**Do not know and cannot agree or disagree. See comment in Part B.**
145.	Continuous patterns of work are consistent with '*the efficient and productive performance of work'* and are an appropriate alternative to multiple broken shifts. 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.	**Disagree.**
146.	Several employer witnesses indicated that it was their preferred practice to roster on the basis that there was only one break between any shift (unexpected client cancellation being the main reason to depart from this practice).	**Agree.**
147.	Care services such as cleaning, medication checks and personal care can be provided in a planned manner. 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	**Agree generally.**

Finding		Our clients' position
148.	The assertion that clients make demands that make the planning of consistent service delivery challenging is exaggerated. Service providers have the ability to set out what services they will provide, including the times at which they will provide services, and the length of such services.	**Disagree.**
149.	Similarly, clients in aged care and disability services are capable of making choices within service constraints, and understanding of those constraints. 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.	**Partly agree.**
150.	Employees may have their rosters changed regularly, sometimes with little or no notice	**Agree.**
151.	Roster changes can be disruptive, and create difficulties for employees: (a) in planning budgets; and (b) undertaking outside of work activities	**Partly agree. See comment in Part B.**
152.	Employees regularly agree to roster changes because there is under-employment in the sector and they require additional income	**Partly agree. See comment in Part B.**
153.	It is uncommon for employees to disagree to roster changes, and where such disagreement occurs, it is for a good reason	**Disagree.**
154.	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.	**Partly agree. See comment in Part B.**
155.	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	**Disagree.**
156.	Employees are expected by their employers to have access to, and utilise a mobile phone, to: (a) take directions from their employer; (b) access work-related apps to maintain records on clients, confirm attendance and input other work-related data; (c) update their employer of issues with clients; (d) access and read client care plans; (e) call clients who may not answer the door to their home; (f) undertake medication checks with clients; (g) advise clients when running late; (h) be advised of roster changes via call or text; (i) check emails relating to roster changes or work related communications; and (j) report workplace hazard/incidents.	**Disagree.**
157.	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; 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	**Agree.**

Finding		Our clients' position
	for work purposes. 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	
158.	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; (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; (c) employees may have to pay for a higher level plan than they otherwise would; and (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	**Disagree.**
159.	No employer evidence was presented that suggested that a mobile phone allowance would be costly or prohibitive.	**Agree, subject to comments in Part B.**
160.	Employees in this sector may be required by their employer to wear a uniform	**Agree.**
161.	Employees may not be provided with an adequate number of uniform items	**Hypothetically agree. See comments in Part B.**
162.	Where an employee is not provided with an adequate number of uniforms, the employee may have to wash their uniforms multiple times per week	**Hypothetically agree. See comments in Part B**
163.	The evidence justifies the inclusion of a definition of what is considered an 'adequate' number of uniforms	**Disagree.**
164.	It is common for employers to cancel rostered shifts of part time employees (without payment) under the provisions of the current clause 25.5(f)	**Agree. See comments in Part B.**
165.	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	**Disagree.**
166.	Changes to NDIS policy that came into effect in July 2019 enable providers to claim back a greater amount with respect to client cancellations	**Agree.**
167.	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	**Agree.**
168.	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	**Agree subject to comments in Part B.**
169.	Home care providers may choose not to charge a client for a cancellation for reasons that may include demonstrating sensitivity to the client and retaining/gaining client business	**Agree.**

Finding		Our clients' position
170.	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 statements are speculative	**Disagree.**
171.	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	**Agree subject to comments in Part B.**
172.	The evidence shows that providers in home care may choose not to charge a client for a cancellation for business reasons. The UWU submits that the provider's decision in this respect should not result in an employee losing out on payment for a rostered shift	**Disagree.**
Australian Services Union		
173.	The Commission would find that work in the disability services is becoming increasingly precarious. This change in the industry has significant adverse effects on employees in the sector, contributing to an extreme turnover rate.	**Disagree.**
174.	Firstly, the rate of casual employment in disability services is increasing. The National Disability Services Australian Disability Workforce Report of July 2018 ('NDS Report') reporting that 46 percent of disability support workers are casuals. Dr Stanford's analysis of this data shows that new employment in the sector is being driven almost entirely by a growth in casual employment. The growth in casual employment in the sector was 26 percent per year, compared to just a 1.3 percent per year increase in permanent employment.	**Agree.**
175.	Further, casualisation is not the only challenge faced by workers in the industry. Dr Stanford stresses that precarious work practices are becoming increasingly common for all disability support workers. Average hours of work are low and highly variable. Some workers work very short hours, and many workers experience regular fluctuations in their hours of work. There is an increase in part-time employment, irregular and discontinuous shift assignments, and the requirement to work in multiple locations. Work is regularly performed in private homes. Workers are also increasingly expected to provide transportation services, usually in their own vehicle	**Disagree.**
176.	The Commission should also find that the increasingly unpredictable nature of the industry has clear adverse impacts on employees.	**Disagree.**
177.	In his original qualitative research, Dr Stanford recorded elevated levels of mental and physical stress being suffered by workers, which the workers attributed to the instability and precariousness of their work. Dr Stanford reports: *Multiple interviewees reported the great difficulties of managing very unstable and unpredictable shift and roster schedules, and balancing the demands of such unpredictable work with their other family and community responsibilities.*	**Disagree.**
178.	The Commission should also find that the findings from Dr Stanford's qualitative research reflect the general scientific consensus about the impact of irregular and unpredictable work	**Disagree.**

Finding		Our clients' position
179.	Dr Muurlink, in his review of the literature, explains that unpredictable work presents challenges to health and wellbeing. There are structural challenges to health, where employees are less able to engage in positive health behaviours or access health services. There are also physical and psychological challenges to health, which include the adverse effects of change, reduced rhythmicity, or a diminished sense of control. These adverse effects may be compounded by the conjunction of irregular work with a lack of job security and underemployment	**Disagree.**
180.	Dr Muurlink also notes that control and change are the two key psychosocial dimensions of work, which have significant predictive power in determining a wide variety of health outcomes. Control is particularly relevant for staff in relatively junior positions within care settings, and for these staff, I recommend particular care is taken with interfering with the predictability of work, as it is likely to compound existing problems associated with uncontrollability in the workplace	**Disagree.**
181.	The Commission would also be satisfied that disability support work is skilled work, but that the industry is struggling to attract sufficient new staff	**Partly agree. See comments in Part B.**
182.	Dr Stanford explained in his expert report that a common misperception about work in disability services is that it is unskilled and that disability services workers do not need any special qualifications. However, the Productivity Commission found that 89 percent of employers in the disability and personal care field indicated that a certificate-level qualification was essential for the job. He went on to say that: *This stands in contrast to the view of clinicians, social workers, disability specialists and participants themselves: namely, that this work requires sophisticated communications skills, a high level of emotional intelligence, and (depending on the complex and varied needs of the participant) specialist knowledge (for example, in relation to particular medical conditions, dealing with challenging behaviour, or understanding the side-effects of medications). In addition to multiple and complex needs, people with disabilities may also need support in managing multiple and complex interactions with government and non-government agencies in the course of addressing their housing, medical, and educational support needs*	**Disagree.**
183.	The Commission would find on the evidence that disability services requires a large number of skilled, qualified and experienced staff, but is struggling to retain and existing staff and attract sufficient numbers of new employees with the requisite skills	**Do not disagree.**
184.	The rollout of the NDIS is anticipated to ultimately increase employment in the disability services by some 70,000 full-time equivalent positions, or a doubling of the workforce in the sector	**Agree.**
185.	Dr Stanford describes the severe difficulties in recruiting new staff to even maintain existing operations, let alone scale up to the dramatic degree implied by forecasts of fully rolled out NDIS operations. Dr Stanford notes that this means the sector is not recruiting enough staff to meet its needs. The NDS database indicates that four-fifths of all agencies	**Do not disagree.**

Finding		Our clients' position
	attempted to hire new staff during the March 2018 quarter. Of those, nearly one-third were unable to fill all the vacancies they advertised for, and unfilled positions accounted for 25 percent of all advertised positions. Some agencies advertise permanently for new recruits, with no limit on hiring – in essence hiring all the new staff they can find. Many of these vacancies remain unfilled due to a lack of suitable candidates. In the March 2018 quarter, 43% of employers with unfilled vacancies cited an absence of suitable qualified candidates as the main reason for their unsuccessful recruitment effort, a sharp increase from the 29% of employers who answered a similar question the previous year	
186.	Turnover of employment is unusually high. Dr Stanford notes that over one-quarter of workers change jobs in the course of a year. That is approximately three times higher than the average turnover rate in the overall Australian labour force	**Partly agree. See comments in Part B.**
187.	The Commission should also find that the staffing shortage in the industry is caused, in part, by the low conditions of employment and intolerable working conditions common to disability services	**Disagree.**
188.	Dr Stanford's research shows that existing staff report dissatisfaction with conditions of work in the industry, and a growing risk of departure from the sector. Many of the front-line workers interviewed by Dr Stanford and his colleagues were considering leaving the industry altogether in response to intolerable insecurity and deteriorating conditions. Workers are leaving the sector because of the experiencing increased instability and precariousness in their jobs, elevated levels of mental and physical stress, and irregular hours and incomes	**Disagree.**
189.	Dr Stanford notes that skilled workers appear to be unwilling to join the sector due to the intolerable conditions of employment. Dr Stanford believes that it is impossible to imagine that the requisite number of qualified, skilled and motivated workers could be attracted to this industry, given the unappealing or even intolerable conditions and insecurities which they would face in their new jobs. Some new workers joined the sector reluctantly	**Disagree.**
190.	The shortage of skilled staff will have a significant impact on quality of care	**Disagree.**
191.	The shortage of skilled workers will have an impact on the quality of care provided to NDIS participants. As noted above, skilled workers are leaving the industry. New recruits to the industry have considerably less training and qualifications than the existing workforce. The majority of new workers recruited to work in the sector do not possess any formal qualification in disability services work. This challenge has been exacerbated by inadequate conditions of work in the sector: most workers are engaged in casual, part-time, and irregular positions; staff turnover is high; and there has been a consequent reduction in the availability of training, including in-house supervision and support	**Disagree.**
192.	It is likely that the sector's recruitment and training difficulties will become more acute over time, as the demand from NDIS participants grows, as the sector becomes even more casualised, as disability service	**Disagree.**

Finding		Our clients' position
	jobs become even more precarious, and as the existing cadre of more experienced and skilled workers continues to exit the industry. Dr Stanford and his colleagues identified the instability of employment arrangements and the low wages as key barriers inhibiting current and prospective disability support workers from accumulating more formal training. The industry needs to stabilise its workforce and reduce turnover. It can only do this if it makes working in the sector more appealing	
193.	In his oral evidence, Dr Stanford magisterially summarised the challenges faced by the disability services: *In terms of the aggregate data the evidence is very clear that workers do not feel that the current conditions of work, the instability of hours that they face, and the compensation, the effective compensation which they receive, are adequate to maintain this as their career path. So the overall turnover rates in this sector are very high according to the NDS database. One in four workers in the sector changes their job in the course of a year and that's a turnover rate approximately three times as high as for the labour market as a whole. We also see evidence of the departure of senior workers. Our qualitative interviews highlighted that many longstanding employees in the industry as the structure of service delivery changed under the NDIS found the turmoil and instability of their work intolerable and that was contributing to their departure from the career as well. The inability of the industry to attract, first of all, enough workers period but, secondly, workers with the skill level that most experts in the sector think is essential is also clear. We had the data that I mentioned from NDS on the number of vacant positions that can't be filled. We also have data from the NDS about the relatively low levels of formal qualifications of the workers who are attracted. So put all of that together, quantitative and qualitative indicators, we see an industry that needs to grow but isn't able to maintain its current workforce let alone attract in significant numbers the new workers with the skills that are going to be required to live up to the mandate that the NDIS undertook.*	**Disagree.**
194.	The weakness of the SCHDS Award in addressing these problems of instability and unpredictability in working arrangements is clearly facilitating the further fragmentation and destabilisation of work in the sector	**Disagree.**
195.	However, employers in the sector are not adapting their work practices to address this problem. This is because there are few incentives for them to adopt more farsighted work practices. In Dr Stanford's experience in labour economics: *…simply showing employers that they do get some benefits from a more satisfied workforce that feels it's been treated fairly, a workforce that's able to combine its work life with its family life is not always enough to elicit respect or do attention to those goals unless there's also some more tangible profit and loss related considerations that come into play. That's why we have labour regulations and benchmarks and norms because*	**Disagree.**

Finding		Our clients' position
	leaving it up to the voluntary wisdom and willingness of employers to do the right thing has not been reliable	
196.	As Dr Stanford goes on to say: *Right now the pressure, if you like, or the incentive is indirect only from an employer that is enlightened enough to realise that a more satisfied employee is more likely to be a long-term and motivated employee*	**Disagree.**
197.	Employees in the social and community sector are regularly recalled work overtime without returning to a workplace (i.e. their employer's premises or a client's home). This work is carried out by use of electronic means of communication (telephones, lap top computers, etcetera.)	**Generally agree. See comments in Part B.**
198.	These employees tend to be employed in higher classifications (managers and experienced practitioners) that are rostered on call to provide managerial duties or specialist expertise out of hours. Many of these employees work part-time hours.	**Disagree.**
199.	The Award does not clearly regulate how this work should be structured or remunerated. Employers do not take a consistent approach to paying employees for this work. Some employees simply pay for the time worked; other employees pay an allowance, and others pay employees a minimum engagement.	**Agree.**
200.	The incursion of work into personal time, such as on call or ad hoc work from home, has significant negative impacts on an employee's health and well-being	**Do not know and cannot agree or disagree.** **See comments in Part B.**
201.	The negative impact of out of hours work is diminished, but not minimised, if the employee is rostered to be on call. These impacts come in three forms: the need to remain alert and available to work, the interference with work-life balance and the negative impact on sleep	**Disagree.**
202.	In his review of the literature, Dr Muurlink explained that the unique negative impacts of on-call work appear to be related to the requirement to remain alert and available to being called to work, and not surprisingly, this requirement impacts on sleep. On-call work requires the worker to subsume control over lifestyle choices to allow the ability to respond to work requirements, limiting behaviours to activities that would not interfere with their ability to work. This means that employees must often remain in their homes to be ready to respond to a request to work.	**Disagree.**
203.	Deborah Anderson, a disability support worker, explained: 'When I am on call, I cannot leave my home as I need to have phone, internet and computer access. I must also be ready and able to respond to any requests for work. I cannot go anywhere nor do anything else. This is particularly difficult on weekends when doing an on call shift from 9am until 9am. This causes high anxiety for me as I could be called out to any site to handle difficult incidences'	**Disagree.**
204.	Dr Muurlink reports that on-call work has been linked with work-life imbalance, and the impact is particularly strong for women— and thus has particular relevance to the care sector, where there is a significant continuing gender imbalance in favour of women. This is especially relevant to the SCHDS Award, given the gendered nature of the SCHDS Industry.	**Disagree.**

Finding		Our clients' position
205.	Further, being on-call has a negative impact on sleep. Dr Muurlink notes that those on-call were more likely to report sleep related problems. This is confirmed by laboratory evidence that being 'on call' appears to equate to being vigilant: the apprehension of being woken up impacts on quality of sleep. This includes significant increases in irritation and a reduction in mood and social activities, household activities, and low effort activities	**Disagree.**
206.	Ms Flett, stated: 'The following day after a night shift I can't do the things I like to do. I cannot exercise at a high level, my balance is affected, I cannot ride my motorbike or my pushbike. I also find it harder to engage with my partner, friends and family. I find that I don't have the energy to socialise, so I tend to withdraw a little bit and miss out.'	**Disagree.**
207.	Being recalled to work from home does not fully ameliorate the negative impacts of working being recalled to work. Dr Muurlink notes that that being on-call at home could be, if anything worse than being on-call at other locations, possibly because the presence of family interfered with the worker's ability to implement sleep patterns that would conform with on-call requirements	**Disagree.**
208.	Ms Flett explains that she finds working an on-call shift is 'different from working a shift when you are awake through the night'. She states that after a night on call 'you just feel like you are jetlagged as you have only slept in parts and will need to sleep again later in the day once morning duties are finalised and you go off shift'. Further, Emily Flett has deliberately avoided living with her long-term partner because of her working patterns. When she is on-call, they cannot share the same bed, because her working patterns would disrupt his sleep. Sharing a bed, and by inference a home, would be unfair to him because 'he would just be on call with me.'	**Disagree.**
209.	The main reason why employees agree to work on call is to maximise their income. Both Ms Anderson and Ms Flett report that they are a paid a minimum engagement of two hours for each time they are contacted. They both explain that if they were paid less than this, it may mean that they would choose not to work on call. This is a significant concern for the disability service sector, which as Dr Stanford has noted, is having trouble retaining existing skilled and experienced staff.	**Do not know and cannot agree or disagree. See comments in Part B.**
210.	Disability sector employers routinely break the shifts of disability services employees	**Agree.**
211.	The award in its current form does not promote the efficient and productive performance of work	**Disagree.**
212.	Long and irregular hours associated with working broken shifts interfere with employee work/life balance and negatively impact the employees health and well being	**Disagree.**

PART B: REASONS FOR OUR CLIENTS' POSITION

7. The directions require parties to provide submissions on the reasons for agreeing with or contesting the findings sought by parties, by reference to the evidence.

8. As outlined in Part A of this submission above, our clients agree with many of the proposed findings sought by other parties. Where we have agreed with proposed findings, in many cases the reasons for our clients' agreement with the proposition are evident from previous submissions that our clients have made in the proceedings to date. On that basis, where we have agreed with a particular proposed finding, we have not articulated the reasons for doing so in this submission. In a general sense, the reason for our clients' agreement to those proposed findings is that they are factually true and have been established by probative evidence filed in the proceedings.

9. Further, in many cases the party advancing the particular proposed finding has advanced it by reference to specific evidence adduced in the proceedings, which is referenced in their written submissions. Where that has occurred, we refer to that evidence as the rationale for our clients' agreement with the proposed finding.

10. For the reasons outlined above, where our clients agree with a particular proposed finding:

    (a) we have not specifically articulated the reason or reasons for our clients' agreement with the proposed finding; and

    (b) we have not made specific reference to the evidence underpinning the proposed finding.

11. This section of our submission addresses the proposed findings advanced by other parties which our clients do not agree with, and outlines the reasons for our clients contesting those proposed findings, by reference to the evidence.

Proposed findings advanced by Ai Group

12. **Finding 3:** Our clients disagree with the proposition that enterprise bargaining between employers and employees covered by the Award is not common. This has been a proposition that has been advanced by various parties throughout the course of these proceedings, and whilst it may be true in a general sense compared to other industries, we do not necessarily agree that it is.

13. Our clients' experience is that while enterprise bargaining across the SCHCDS industry is certainly not widespread, it is not rare. The evidence discloses that a number of employers have enterprise agreements and have therefore engaged in enterprise bargaining.[3]

14. **Finding 4**: Our clients do not necessarily agree that where an enterprise agreement applies, the terms and conditions are not "significantly more beneficial" to employees than those provided by the Award. We make this comment particularly by reference to the home care sector rather than in the disability services sector. For example, a number of enterprise agreements in the home care sector provide for paid travel time and other allowances.[4]

15. **Finding 15**: While our clients agree that the NDIS cost model provides for a profit margin of 2%, we note for completeness that it is referred to in the guidance material as a "margin as a share of other costs".[5]

Proposed findings advanced by NDS

16. We agree with all proposed findings advanced by the NDS. Those findings can be made having regard to the evidence referred to in the submission of the NDS dated 19 November 2019.[6]

17. We also note that many of their proposed findings are similar to the findings sought by our clients.[7]

Proposed findings advanced by AFEI

18. **Finding 61**: We generally agree with the proposition that "Part-time employees want to work additional hours", with the qualification that the more accurate finding would be that "many" part-time employees want to work additional hours. This finding is open to be made having regard to the evidence of the various employee, employer and academic witnesses adduced during the proceedings.[8]

19. **Finding 67**: While we accept at a general level that "Existing arrangements for broken shifts in the Award are appropriate to the industry", our clients consider that the existing arrangements

[3] ABI1, HSU18 and PN3644 JOYCE WANG.
[4] See for example Exhibit ABI1, HSU18.
[5] Court Book p.499
[6] See [7]-[44] of that submission for references to specific evidence underpinning the findings sought to be made.
[7] See for example, ABI's proposed findings in Submission dated 19 November 2019 in relation to the NDIS at [2.11]-[2.20] of, client cancellation at [3.1]-[3.13] and mobile phones at [8.11].
[8] PN675 BELINDA JANE SINCLAIR, Statement of Thelma Thames at [9], Statement of Deon Fleming at [17], Statement of Trish Stewart at [11], PN2657, PN2663 JEFFREY SIDNEY WRIGHT, NDIS Costs Productivity Commission Position Paper 2017 (Court Book p.1932)

could benefit from variation to make them *more* appropriate. In this context, we refer to the position outlined by our clients in our submission dated 12 July 2019.[9]

20. **Finding 73**: While we agree generally with the proposition that "Employees in this sector already own a mobile phone", the more accurate finding would be that that "the vast majority of employees in this sector already own a mobile phone".

21. We also agree that many employees "already use" their mobile phones for work purposes, although it is most likely the case that not all employees use their personal phones for work purposes.

22. Where employees use their personal mobile phones for work purposes, in many cases this will be done "at no additional cost to the employee" given that many employees will have 'bundled' phone plans.

Proposed findings advanced by HSU

23. Before addressing the specific findings proposed by the HSU which our clients contest, we make some general submissions in relation to:

    (a) the expert report of Dr Stanford (the **Stanford Report**); and

    (b) the report by Dr Olav Muurlink (the **Muurlink Report**).

24. The ASU filed the expert report of Dr Stanford, which contains the expert opinion of Dr Stanford. Dr Stanford states at [3] of his Report that:

> My expert opinion is based primarily on original research which I conducted as a co-investigator of two significant research projects…

25. The first research project related to qualitative interviews of 19 disability support workers.[10] The second research project related to an investigation into skills and training requirements of disability support workers.[11]

26. Our clients and Ai Group jointly objected to various aspects of the Stanford Report.[12] One category of objection related to hearsay evidence whereby Dr Stanford referred to various responses provided by one or more of the 19 interviewees. Dr Stanford then bases much of his expert opinion on the interview responses of those 19 interviewees.

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[9] See [5.11].
[10] Stanford Report at [4]
[11] Stanford Report at [5]
[12] See Transcript, 17 October 2019 at PN2145

27. During the hearing, there was then a discussion about whether the ASU sought to rely upon various representations made by the interviewees to prove the existence of certain facts, or whether it was relied on for a non-hearsay purpose.[13] In response, the ASU representative clarified that the evidence was not being relied on to prove the truthfulness of the factual assertions of those interviewees.[14] On that basis, the objection was not pressed.

28. The effect of the ASU not relying on the hearsay evidence to prove the truthfulness of the factual assertions of those interviewees is that the bulk of Dr Stanford's opinion as set out in the Stanford Report cannot be given any material weight.

29. Dr Stanford has expressed opinions based on unknown representations made to him by unidentified people, which the ASU are not advancing as truthful representations. The opinions of Dr Stanford that are made based on that project must therefore be given no weight.

30. The ASU also filed a report of Dr Olav Muurlink[15], although Dr Muurlink did not provide a witness statement and was not advanced as a witness. The Muurlink Report is in the form of a literature review report rather than an expert opinion report.

31. Given that Dr Muurlink was cross-examined on this same report in the casual and part-time employment full bench proceedings (AM2014/196 and AM2014/197), the transcript of that cross-examination was tendered. A number of observations can be made of the Muurlink Report:

    (a) First, the Report is generic in nature rather than involving any specific analysis of the SCHCDS industry;

    (b) Second, most of the Report related to studies and data from jurisdictions outside of Australia; and

    (c) Third, the transcript of cross-examination demonstrates that the Report mischaracterised or exaggerated the findings of certain studies or data. Notably, Dr Muurlink also seemed to 'cherry pick' certain studies that seemed to 'fit his thesis', while overlooking or paying scant regard to better, larger, more statistically sound studies where the findings of such studies did not fit his narrative.

[13] See Transcript, 17 October 2019 at PN2159 – PN2185
[14] See Transcript, 17 October 2019 at PN2186
[15] See Court Book p. 1686.

32. In circumstances where Dr Muurlink was not a witness in the proceedings, the Commission should not readily make findings based solely on his literature review.

33. We now turn to the findings proposed by the HSU which our clients contest.

34. **Finding 80**: Our clients are not in a position to agree or disagree with this proposed finding, save to comment that there is limited evidence (and no probative evidence) before the Commission to support such a finding.[16]

35. **Finding 82**: While we agree that it is a feature of the industry that many part-time employees regularly work additional hours, we disagree that there is an "expectation" by employers that employees will perform such additional hours.

36. **Finding 83**: Our clients disagree with the proposition that "The expectation of both disability and home care part-time employees is that they perform work additional to their contracted hours". There is no evidence before the Commission to suggest that employers expect employees to take on additional hours or get annoyed if employees refuse offers of additional hours.

37. **Finding 84:** Our clients contest this proposed finding. For the reasons set out in paragraphs 24-29 above, the Stanford Report cannot be relied upon to make such a finding.

38. **Finding 85**: We do not consider that any such broad-ranging findings can be made about the health impacts of 'unpredictable' work solely on the basis of the Muurlink Report. As stated at paragraphs 30-32 above, the literature review has limitations and its currency and application to the SCHCDS industry has not been robustly tested in these proceedings.

39. **Finding 86**: Our clients are not in a position to agree with this proposed finding. We do not consider that there is a sufficient evidentiary basis for such a finding.

40. **Finding 87**: Our clients are not in a position to comment on whether the stated features have an impact on attraction and retention and, if so, the extent of such impact.

41. **Finding 88**: Our clients agree that the issue was considered in the Equal Remuneration Case[17] and that the passage of that decision (at [253]) has been correctly extracted.

42. **Finding 89**: We are not in a position to agree or disagree with this proposed finding, other than to state that any gendered undervaluation of the work was addressed by the Equal

[16] The evidence relied upon to support this finding is one paragraph of opinion evidence from a union official from Tasmania.
[17] [2011] FWAFB 2700

Remuneration Case of 2011, and so it is difficult to understand the relevance of this proposed finding.

43. **Finding 91**: Our clients generally agree that the changes effected by the NDIS Price Guide 2019-2020 have alleviate or resolved some of the criticisms of the NDIS. However, significant issues with funding arrangements remain, notwithstanding those improvements.

44. **Finding 92**: We disagree with this proposed finding. The HSU have selectively referred to one or two very large providers to make good the proposition that the industry's financial position is rosy. The Commission should not make general findings based on evidence about the financial position of one or two providers, particularly where that evidence is now out of date and incomplete. It is also the case that for large providers, their financial performance is often influenced by a range of factors not such as increases in the value of its portfolio of assets such as landholdings.

45. **Finding 93:** We acknowledge that the Productivity Commission in its 2017 Report reported that it was anticipated that the NDIS would increase employment in the disability sector by some 70, 000 positions.

46. However, it is not clear whether that forecast will prove accurate. While our clients accept that the disability sector workforce will likely increase, any specific forecast of the quantum of the increase will naturally be speculative.

47. **Finding 94**: We agree that staff turnover in the SCHCDS industry is high compared to certain other industries. The industry has experienced a turnover rate in the vicinity of 25% for a number of years and so the turnover rate has not increased in recent years. Our clients dispute that the turnover rate is "three times that in the Australian labour force otherwise". While it may not be in evidence before the Commission, we understand that the average turnover rate across all industries was 18% in 2018.[18]

48. **Finding 95:** Our clients are not in a position to agree or disagree with this proposed finding, save that we question the characterisation of the issue as an "obvious" risk and do not consider that there is sufficient evidence before the Commission to make a finding in such terms.

49. **Finding 96**: Our clients agree that a feature of the work of both disability support workers and home care workers is that many workers are frequently required to use their own vehicle. However, we do not necessarily agree this is a "striking feature" of the work.

[18] 'Turnover and Retention Research Report', *Australian HR Institute* (online), August 2018, 5.

50. **Finding 100**: We accept the hypothetical proposition that in the context of enterprise bargaining, enterprise agreements may establish minimum engagements that can be broken into smaller parts. We also accept that such a term may counteract the benefit of the minimum engagement in the EA.

51. However, in the absence of referring to a specific enterprise agreement or agreements, we cannot make any further comment in relation to this proposed finding other than to note that it is very generic and does not appear to be particularly relevant to the issues in the proceedings.

52. Further, the evidence relied upon to support this finding is confined to two paragraphs of the Friend statement which does not appear to actually make good the proposition. The finding should not be made.

53. **Finding 101**: We do not understand this proposed finding. It is not clear how the purported "capacity to break shifts at will" relates to transforming travel into the first and last trip. There is no evidence to support a finding that employers somehow arrange broken shifts in a manner so as to have the employee's first or last client visit at a location that is far away from their home (if that is what is suggested).

54. **Finding 103**: While we agree that clients can and do change from day to day, we do not agree that the locations of their first and last appointments will "rarely be the same each day". That may be the case for many employees, but for many others they enjoy a more predictable pattern of work.

55. **Finding 104**: We accept the hypothetical proposition that workers in regional areas *may* be required to travel "considerable distances". However, the evidence does not support any finding that employees are regularly required to travel vast distances.

56. By way of example, the HSU refer to the evidence of Ms Waddell.[19] We disagree with the HSU's characterisation of Ms Waddell's evidence. Although Ms Waddell may have travelled to the extremities of her employer's geographical field of operations in her region at some point during the course of her 10 years' employment with them, during cross-examination Ms Waddell was asked about the examples contained in her statement and she acknowledged that:

    (a) she travels to Ulladulla "infrequently";

    (b) she no longer travels to Kiola/Bawley Point;

[19] HSU submission of 18 November 2019 at [88].

(c) she no longer travels to Gerringong; and

(d) she travels to Kangaroo Valley and Budgong "not often".[20]

57. She then accepted during cross-examination that the furthest distance she currently travels is 32km from her home, and that 90% of her last clients for the day live in the same suburb as her. The reality of her work practices was significantly better than what was portrayed in her statement.

58. **Finding 106**: Our clients disagree with this proposition that the Award incentivises or encourages employers to operate over greater distances than they otherwise might. There is simply no evidence to support such a finding. The only evidence referred to by the HSU in support of that contention is the evidence of Scott Quinn, Ms Waddell and union officials Mr Friend and Mr Eddington. That evidence consists of the following:

(a) Mr Quinn's work locations vary between 1 and 20 kilometres from his home;[21]

(b) Ms Waddell's work arrangements are summarised in paragraphs 56-57 above;

(c) Mr Friend gave hearsay evidence of reports of members in regional areas travelling between 30-40kms to visit a client, although he then states that "our members are ordinarily paid for travel time";[22] and

(d) Mr Eddington gave evidence of being aware of employees travelling between 30-50km to visit clients, although provided no specific examples.

59. **Finding 107**: This proposition is correct for any person travelling in regional areas on dangerous (or isolated) stretches of road, including at night. It is unclear how this is relevant to the variations being pursued in these proceedings.

60. **Finding 108**: We disagree with this proposed finding. It is incredibly vague, and it is unclear what is meant by "long distances". It is also not supported by the evidence. Mr Lobert is somewhat of an anomaly given that he has three jobs.[23] The fact that Mr Quinn might travel home about 30 times per week is testament to the fact that he works with clients in very close proximity to his home.

61. **Finding 109**: This finding is incredibly vague. It is unclear what is meant by the terms "difficulty", "geography" and "demands".

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[20] Transcript, 16 October 2019 at PN1388 - PN1395.
[21] Court Book at p.3052 at [10].
[22] Court Book p.2950-2951.
[23] Court Book p.2965.

62. **Finding 111**: This finding is vague and lacks precision. While we generally agree that such work *can* be taxing, the degree of exertion will depend on a range of factors that are peculiar to the particular work, the clients and the predispositions of employees. The finding is not supported by sufficient probative evidence. The HSU refer solely to the evidence of Ms Waddell and a single shift worked by her.

63. **Finding 113**: Our clients agree that employees provide "other forms of domestic assistance". However, the proposed finding is vague and lacks precision. It is not clear what duties are said to be "physically demanding", "wearing on the body" and/or "tiring". Reliance is placed on the evidence of one or two employees who gave evidence that they perceived or experienced certain work to be more demanding than other work. It is also not clear whether this proposed finding refers to 'perceived' exertion or actual exertion, and such factors will naturally vary depending on the particular employee.

64. **Finding 116**: We disagree that care work performed by employees in the industry is "likely to cause damage to their clothing". The limited evidence in the proceedings suggested that employers provide protective clothing and other products for use when engaging in work that may expose them to a risk of having their clothes damaged.

65. **Finding 117**: We accept at a hypothetical level that short notice of cancelled shifts "has the capacity to be disruptive for employees" seeking to arrange other responsibilities around work commitments. Of course, the level of disruption (if any) will vary from situation to situation.

66. **Finding 118**: This is more in the nature of a submission rather than a proposed factual finding. In any event, we disagree that an employer's capacity to cancel shifts in certain circumstances "undermines significantly the entitlement of part-time workers to regular and guaranteed days and hours of work". The existing provision has the capacity for make up pay arrangements to be utilised.

67. Further, the assertion is curious given that the HSU have previously asserted in these proceedings that the protection under clause 10.3(c) of the Award "appears to have little relevance, with the requirement either not being observed, or honoured, or not operating due to the existence of enterprise agreements with contrary provision".[24]

68. **Finding 119**: We disagree that a smart phone is an essential "tool of the trade". It is unclear what is meant by "tool of the trade", and it is not clear whether that term has any particular legal, industrial or other specialised meaning.

[24] HSU submission of 15 February 2019 at [26]

69. **Finding 120**: There is no evidence to support this finding. It is nothing more than a speculative assertion.

Proposed findings advanced by UWU

70. **Finding 121**: We do not accept the proposition that "A significant number of employees covered by the Award are low paid".

71. The phrase "low-paid" must be given the established meaning adopted by the Commission, namely a threshold of two-thirds of median full-time wages. [25] We note that the Commission published an Information Note in these proceedings on 12 April 2019 which summarises the most recent data on wages in the SCHCDS industry by reference to two data sets. That data demonstrates that:

    (a) very few employees in the crisis accommodation sector are "low-paid" within the proper meaning of that phrase;

    (b) very few employees in the family day care sector are "low-paid" within the proper meaning of that phrase; and

    (c) only Level 1 and 2 employees (and potentially Level 3 employees) in the SACS stream are "low-paid" within the proper meaning of that phrase.

72. It is unclear whether the Information Note takes account of the increased minimum wages by reason of the operation of the Equal Remuneration Order.

73. We also refer to and agree with the finding of the Full Bench from the Tranche 1 decision that "a proportion of employees covered by the SCHADS Award may be regarded as 'low paid' within the meaning of s.134(1)(a)".[26]

74. We consider the Commission's finding to be a more appropriate finding than that proposed by the UWU.

75. **Finding 124**: We accept that funding arrangements are not "determinative". We also accept that the adequacy of funding (or lack thereof) is primarily a matter for the government, in the sense that the Commission does not have control over funding arrangements. However, we do not accept that funding issues are not a matter for the Commission to take into account. The inadequacy of funding is a relevant consideration in these proceedings. Further, it is

[25] See [2017] FWCFB 1001 at [166]
[26] [2019] FWCFB 6067 [44]-[47]

appropriate that the Commission take funding issues into account in exercising their functions under Part 2-3 of the FW Act.

76. Please refer to our more detailed response to Question 6 of the Background Paper, which is set out in **Attachment A** to this submission.

77. **Finding 127**: We generally accept the proposition that it is, or will be, a condition of employment for *many* employees in the SCHCDS industry that they are required to have a current driver's licence. However, we do not accept that every employer imposes a condition precedent on employees that they have a valid driver's license in order to obtain or continue employment in the industry. For example, it is entirely possible that in very high density areas, there may be cases where employees are not required to drive in order to perform their duties (for example, employees may be able to walk to and from clients' homes.

78. The evidence does not support a finding in such absolute and widespread terms.

79. **Finding 130**: We do not disagree with the hypothetical proposition that some "Employees covered by the Award *can* be travelling to and from clients for significant periods of time without payment". However, the evidence does not support a finding that such practices are common.

80. The proposed finding is also incredibly vague and so, in that sense, does not assist the Commission in determining the matter. For example, it is unclear what is meant by the phrase "significant periods of time". Such a phrase is open to different interpretations.

81. **Finding 131**: The proposed finding is very broad and imprecise in a number of respects. It is correct that the Award allows for broken shifts to be worked by certain categories of employees across a maximum span of 12 hours. It is also <u>partly</u> correct that there is no requirement as to how many working hours must be provided within that maximum time span.[27] We also accept that the Award permits broken shifts to be worked in such a way where the majority of the overall span of time is not work time. For example, where 2 hours' work is performed in the morning and a further 2 hours' work is performed in the evening, it is likely that the majority of the time encompassed by the overall span is not work time.

82. However, we disagree that such unpaid time is "dedicated" to the work of the employer, and in many cases it will not be. We also disagree that "The non-payment of travel time results in lower wages for already low-paid workers". Conceptually, it is difficult to understand how non-payment of non-work time 'reduces' an employee's wage. It is simply unpaid time.

[27] Full-time employees have the protection of clause 10.2 which guarantees them 38 hours per week (or an average of 38 hours per week). Casual employees also have the protection of a minimum engagement under clause 10.4 of the Award.

83. Lastly, we are not in a position to comment on whether certain broken shift arrangements "contributes to financial distress". In our view there was limited probative evidence about such issues.

84. In any event, we note that our clients have advanced an alternate proposal to address the issue of unpaid travel time. Please refer to our submissions of 13 September 2019.[28]

85. **Finding 132**: Our clients are not in a position to comment on whether the non-payment of travel time creates a "disincentive" for employees to stay in the sector. At a general level, we anticipate that individual employees will be incentivised and disincentivised in different ways to stay in the sector, depending on their particular circumstances. Of course, we also accept the broad proposition that paying employees more money generally incentivises certain employees to remain in a particular job or sector.

86. **Finding 133**: This is more in the nature of a submission rather than a proposed finding. Further, the proposition appears to mischaracterise the employer parties' position or submissions.

87. Our clients have not asserted that "travel time cannot be paid as it is difficult to calculate". Rather, our clients have raised concerns about the terms of the variation sought by the UWU, which involves a proposed clause in the following terms:

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

88. Our clients' concerns were outlined in a submission dated 13 September 2019.[29] By way of summary, these concerns included that the phrase 'reasonable time of travel' is unclear and ambiguous, and it is not clear whether that would require employers to pay employees for the *actual time* spent travelling, or whether it requires payment of some *nominated* or *agreed* period of time.

89. In that sense, our clients have asserted that travel time will be difficult to lawfully pay as it is entirely unclear how the time is intended to be determined under the UWU proposal.

90. Additionally, the fact that "several of the employer witnesses indicated that they already pay travel time" is largely irrelevant to the proposition the UWU seek to make good. The fact that certain employers have implemented employer-specific arrangements (either on an over-award basis or

[28] See Section 9.
[29] See Sections 8 and 9 of that submission.

under an enterprise agreement) does not diminish the weight or legitimacy of the genuine concerns that our clients have outlined in their previous written submissions (and for which have not been engaged with in any meaningful way or resolved in any satisfactory way).

91. **Finding 136**: This does not appear to be a proposed factual finding.

92. That said, we agree that "There was no probative employer evidence that modelled the cost of our travel time claim". Given the way in which the proposed variation has been framed and the fact that we do not understand how the proposed variation is intended to operate (see our comments at paragraphs 88-90 above), it was not possible to accurately model the potential cost of the claim. It was also not practical to model the cost implications given that many employers do not (or presumably would not) keep records of non-work time under the Award.

93. Given the difficulties described above, our clients were not (and are not) in a position to comment on whether the cost of the claim would be "prohibitive".

94. Our clients disagree with the colourful submission that "travel time is rightfully payable as ordinary hours of work under the current Award". Our clients do, however, agree generally with the proposition that travel time is in most cases a necessary aspect of the delivery of home care and disability support services in the community.

95. In any event, our clients have advanced an alternate proposal in relation to travel time.

96. **Finding 137**: Our clients agree that most home care and disability support work in the community cannot occur without employees travelling to clients' homes or other locations. We also agree that some of this travel involves employees travelling between clients' homes or locations. We accept that such travel is a feature of many roles in these sectors although do not necessarily accept that such travel is a "key part" of their role.

97. Our clients accept at a broad level that employees in the home care and disability services sector perform travel "at the direction of their employer", in the sense that it is the employers who ultimately organise and allocate work and rosters. However, in the case of broken shifts (and particularly where there is an extended gap between portions of work in a broken shift), employers do not necessarily direct an employee as to when or how they must travel to a particular client's location. Given that this is non-work time, employers do not regulate employees' conduct during this time.

98. **Finding 139**: We disagree that "Broken shifts are used <u>as a device</u> by some employers to avoid the payment of travel time". This proposed finding requires knowledge of the intention of employers or evidence of their *purpose* for using broken shifts (e.g. they use broken shifts in order to avoid paying travel time). There is no such evidence before the Commission to support such a finding.

99. The evidence relied upon by the UWU to support this finding[30] does not support any such finding. Rather, that evidence simply evidences occasions where employers have lawfully utilised broken shifts in accordance with the terms of the Award.

100. **Finding 140**: It is not clear what is meant by "multiple broken shifts". For present purposes, however, we have assumed that this is a reference to "a broken shift with multiple breaks". Our clients agree in a hypothetical sense that broken shifts with multiple breaks "reduce the earning capacity" of employees, in the sense that the allocation of work may involve periods of non-work time for which, in certain circumstances, the employee is not realistically capable of converting into income-earning time (for example, through a second job). However, there will be other occasions where an employee is able to, and does, undertake other paid work during the non-work time portion of a broken shift.

101. Lastly, it is unclear upon what basis the UWU assert that the worker "has to be available for lengthy periods of time".

102. **Finding 141**: Our clients do not know and cannot agree or disagree with the generalised proposition that "The loss of potential earnings contributes to financial distress". We note that the evidence relied upon to support this proposition consists of evidence from one employee witness. That generalised evidence does not provide a sufficient basis to make this finding.

103. **Finding 142**: Our clients disagree with the generic characterisation of all non-work time between portions of work in a broken shift as time where "the worker is engaged in the work of the employer". We also disagree with the characterisation of all such time as "not 'free time'".

104. That said, our clients accept that there may be a disutility associated with working broken shifts for some employees due to the way in which the work might be structured. Equally, in some cases the structuring of broken shifts may be convenient for certain employees.

105. The disutility associated with broken shifts is addressed by the Award providing penalty rates and shift allowances in accordance with clause 29 of the Award.[31]

106. **Finding 143**: We agree generally with the description of how the Award terms currently operate, save that the characterisation of the time variously as "dead time" or "idle time" is colourful and in many cases not an accurate description of the time. It is also not clear what is meant by employees bearing the "cost of the "idle time". We therefore disagree with the proposed factual finding.

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[30] See [33] of the UWU submission of 18 November 2019 and the footnote therein.
[31] See clause 25.6(b) of the Award.

107. **Finding 144**: Our clients do not consider that there is sufficient probative evidence to make a finding that "Multiple broken shifts are a disincentive for employees to stay in the sector".

108. Firstly, it is unclear what is meant by "multiple broken shifts".[32]

109. Secondly, while we accept the broad hypothetical proposition that broken shifts *may* disincentivise certain employees from staying in the sector, we anticipate that individual employees will be incentivised and disincentivised in a variety of ways, depending on their particular circumstances.

110. There was evidence from one employee to the effect that one of the reasons for her leaving her employment with LiveBetter was broken shifts.[33] However, evidence from one employee does not provide a sufficient basis to make any generalised or widespread finding about features of the industry generally.

111. Lastly, we note that the UWU have relied on a report from Dr Fiona MacDonald in support of this proposed finding.[34] However, we cannot identify any specific passage from that report that supports the contention that "multiple broken shifts are a disincentive for employees to stay in the sector". Further, to the extent that such an assertion is made by Dr MacDonald, we note the following deficiencies with the qualitative data:

    (a) the sample size is confined to 10 employees;

    (b) the 10 employees were all employed in the disability services sector;

    (c) the qualitative research is from 2016 and is limited to one geographical area;

    (d) any such conclusion was based on analysis of working diaries of only 30 days (3 diarised days for each of the 10 employees);

    (e) Dr MacDonald acknowledges that "The 10 DSWs cannot be seen as representative of all DSWs working under the NDIS";[35] and

    (f) Dr MacDonald acknowledges that the data "is indicative only and our findings warrant further investigation through a larger study".[36]

112. **Finding 145**: This is in the nature of a submission and is not a factual finding. That said, we agree that the evidence of some employers was that they attempt, wherever practicable, to

[32] See our comment at 100.
[33] See Further Statement of Trish Stewart at [5].
[34] The UWU cite page 87 of the Report appearing at annexure FM-2 to the MacDonald statement, appearing at Court Book p.2916.
[35] Court Book p. 2914.
[36] Court Book p. 2915.

bundle a series of discrete client engagements together in order to build a shift of continuous work for employees. We further accept that such practices promote the efficient and productive performance of work. However, we do not agree that "continuous patterns of work" will in all cases be consistent with "the efficient and productive performance of work". Nor do our clients accept that continuous patterns of work are an "appropriate" alternative to broken shifts. The reality is that employers:

(a) do not have full control over when and where client services take place; and

(b) do not always have sufficient volume of work to build a continuous pattern of work.

113. In certain cases, the use of broken shifts promotes the efficient and productive performance of work.

114. **Finding 148**: We accept that service providers have the ability to set out what services they will provide, including the times at which they will provide services, and the length of such services. However, the reality is that many service providers are not-for-profit, mission-driven organisations that are committed to delivering services that meet the needs of vulnerable members of the community. We also disagree with the suggestion that the reality of client demands and the associated challenges to the planning of consistent service delivery is exaggerated. At best, the evidence of employers was clarified in cross-examination that they were referring to their organisational beliefs around their moral obligations rather than any legal obligation to meet the demands of customers.

115. **Finding 151**: We agree in the hypothetical sense that roster changes *can* be disruptive and create difficulties for employees:

(a) in planning budgets; and

(b) undertaking outside of work activities.

116. However, the degree of disruption will differ from employee to employee and from circumstance to circumstance. In some cases, there will be little or no disruption while in others the change may actually be beneficial to the employee.

117. **Finding 152**: We agree that employees often agree to changes to their rosters. However, we do not consider that any generalised finding can be made as to why employees may agree to roster changes. We anticipate that there are a range of reasons for employees to agree to roster changes. We accept, however, that one reason would be that employees are seeking additional hours and additional income.

118. **Finding 153**: We do not agree that a finding can be made to the effect that "It is uncommon for employees to disagree to roster changes, and where such disagreement occurs, it is for a good reason".

119. An employee's propensity to agree to roster changes will vary from employee to employee and across different workplaces. Equally, reasons for disagreeing with proposed roster changes will differ from employee to employee.

120. Further, the evidence relied upon by the UWU simply does not support such a finding being made. The UWU rely on the evidence of three witnesses[37]; however, for at least two of those witnesses, the parts of their statements relied upon by the UWU do not relate to roster changes at all. For example:

    (a) the statement of Ms Stewart refers to accepting offers of additional shifts due to a desire or need to maximise her income;[38] and

    (b) the statement of Mr Fleming refers to taking on extra shifts.[39]

121. An employer offering additional shifts to employees and employees accepting those shifts is not the same as an employer changing an employee's roster. The notion of changing an employee's roster connotes a circumstance where an employee is rostered to work a particular shift which is then changed.

122. **Finding 154**: Our clients agree that there was no employer evidence suggesting that employees regularly refuse roster changes without good reason.

123. However, we do not understand what is meant by the purported lack of evidence of employers having **"**issues with excessive overtime payments".

124. **Finding 155**: It is not clear what is meant by "required" in the context of the proposed finding that "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". For example, is it suggested that access to a phone is a practical requirement? Or is it suggested that the employer imposes a contractual requirement?

125. While some employers might specifically require as a condition of employment that employees have a mobile phone, we do not agree that all employers impose such a requirement.

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[37] See footnote 56 of UWU submission of 18 November 2019.
[38] Statement of Trish Stewart at [11].
[39] Statement of Deon Fleming at [17].

126. We also disagree that all employees require a mobile phone as a practical matter. In some cases, it will not be necessary for an employee to have a mobile phone in order to perform their duties.

127. **Finding 156**: We disagree with this proposed finding. While many employers have an expectation that employees have a mobile phone for various purposes, we do not agree that all employers have such an expectation.

128. The evidence does not support a finding that every employee in the industry is expected to possess and utilise a mobile phone.

129. **Finding 158**: We disagree with this proposed finding for the following reasons:

(a) In relation to (a), while that may be correct that not all employees in the industry have a smartphone or a phone with the capabilities to access the relevant apps as required by their employer, the evidence overwhelmingly suggested that the vast majority of employees have a smartphone with the appropriate capabilities;

(b) In relation to (b), we disagree as an industry-wide proposition that 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

(c) In relation to (c), while it may be hypothetically correct that some employees may have to pay for a higher level plan than they otherwise would, the evidence does not support this finding; and

(d) In relation to (d), we disagree that the evidence supports a finding that the work-related cost of an appropriate mobile phone can be a significant portion of the overall cost. To the contrary, the evidence suggested otherwise.[40]

130. **Finding 159**: While it may be correct that no employer evidence suggested that a mobile phone allowance would be costly or prohibitive, it is self-evident that the imposition of such a requirement would be "costly". Any Award-mandated monetary allowance will impose a cost on employers. We have already made submissions about the difficulties associated with modelling the cost impact on employers given the challenges with calculating or apportioning the costs in circumstances where an employee is on a 'plan'.[41]

131. **Finding 161**: Our clients agree that it is hypothetically possible that "Employees may not be provided with an adequate number of uniform items". However, such conduct would amount

[40] PN440-PN452 TRISH STEWART,
[41] [2019] FWCFB 5078 at 65; Submission dated 20 March 2019 at paras [3.14] – [3.21].

to a breach of the existing Award. There is also insufficient evidence to make good the proposition that employees are regularly not provided with an adequate number of uniforms. By way of example, the evidence suggested that employees would typically ask for additional uniforms and that employers agree to such requests.[42]

132. **Finding 162**: It is hypothetically accepted that where an employee is not provided with an adequate number of uniforms, the employee *may* have to wash their uniforms multiple times per week. However, again, the evidence suggested that employees would typically ask for additional uniforms and that employers agree to such requests.[43]

133. **Finding 163**: We disagree that "The evidence justifies the inclusion of a definition of what is considered an 'adequate' number of uniforms". There was minimal evidence of employees not being provided with an adequate number of uniforms, and/or having disputes with employers about the issue. Again, the evidence suggested that employees would typically ask for additional uniforms and that employers agree to such requests.[44]

134. **Finding 164**: We agree that clause 25.5(f) is used regularly due to the incidence of clients cancelling or changing their rostered home care service.

135. **Finding 165**: We disagree with this finding. Where an employee has a rostered shift cancelled without payment by their employer, the employee will in many cases not "lose out" on income that the employee expected for the week, as the employer will provide make up time in accordance with clause 25.5(f)(ii).

136. **Finding 168**: While we agree that "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", the evidence was that employers do not always enforce this contractual right for a range of reasons.[45]

137. **Finding 170**: We disagree. This is in the nature of a submission rather than a proposed finding.

138. **Finding 171**: We agree hypothetically that in very limited circumstances where a client cancels scheduled 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. However, the overwhelming evidence supports a finding that employers do not engage in such practices.[46]

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[42] Statement of Belinda Sinclair at [19]-[20]
[43] Ibid
[44] Ibid
[45] Statement of Graham Shanahan at [27]; PN2651 JEFFREY SIDNEY WRIGHT; PN3321 WENDY MASON.
[46] Ibid.

139. **Finding 172**: This is in the nature of a submission and is not a proposed finding.

Proposed findings advanced by ASU

140. **Finding 173:** We disagree. It is unclear what is meant by "precarious" and we therefore cannot agree or disagree. There is no evidence to suggest that there are "significant" adverse effects nor that the turnover can be characterised as "extreme". To the extent that the ASU rely on the evidence of Dr Stanford, we refer to paragraphs 24-29 above.

141. **Finding 175:** Our clients contest this proposed finding. For the reasons set out in paragraphs 24-29 above, the Stanford Report cannot be relied upon to make such a finding.

142. **Finding 176:** We disagree on the basis that this is a vague proposition that is unsupported by evidence. The assertion that the industry is increasingly unpredictable sits in contrast to other assertions made by the unions that the work is planned and predictable.[47]

143. **Finding 177:** Our clients contest this proposed finding. For the reasons set out in paragraphs 24-29 above, the Stanford Report cannot be relied upon to make such a finding. The hearsay evidence cannot be used to prove the truthfulness of the representations made by the unidentified interviewees.

144. **Finding 178:** Our clients contest this finding. For the reasons set out in paragraphs 24-32 above, neither the Stanford Report nor the Muurlink Report can be relied upon to make such findings. Certainly, a proper analysis of the literature reviewed by Dr Muurlink does not disclose a "scientific consensus".

145. **Finding 179:** Our clients contest this finding. For the reasons set out in paragraphs 30-32 above, the Muurlink Report should not be relied upon to make such findings.

146. **Finding 180:** For the reasons set out in paragraphs 30-32 above, the Muurlink Report should not be relied upon to make such findings.

147. **Finding 181:** Our clients generally agree that disability support work is skilled work and that the industry may be struggling to attract sufficient new staff. However, there is insufficient probative evidence to make such a finding.

148. **Finding 182:** Our clients contest this finding. No such finding can be made from the Stanford Report for the reasons set out in paragraphs 24-29 above. The Stanford Report cannot be used to prove the truthfulness of what the 19 respondents stated.

[47] For example, finding 147 sought by the UWU.

149. **Finding 186:** See paragraph 45 above in respect of turnover in the industry. Further, we cavil with the use of the phrase "unusually" high.

150. **Finding 187:** Our clients do not agree with the proposition that any staffing shortage in the industry is caused by low conditions of employment or intolerable working conditions. This is not supported by the evidence. For the reasons set out in paragraphs 24-29 above, the Stanford Report cannot be relied upon to make such a finding.

151. **Finding 188:** Our clients contest this finding. No such finding can be made from the Stanford Report for the reasons set out in paragraphs 24-29 above. The Stanford Report cannot be used to prove the truthfulness of what the 19 respondents stated.

152. **Finding 189:** Our clients contest this finding. No such finding can be made from the Stanford Report for the reasons set out in paragraphs 24-29 above. The Stanford Report cannot be used to prove the truthfulness of what the 19 respondents stated.

153. **Finding 190:** Our clients disagree that this finding can be made. At a hypothetical level, any shortage of skilled staff *may* of course impact the quality of case, but there is insufficient evidence to find that it *will*.

154. **Finding 191:** See preceding paragraph.

155. **Finding 192**: There is insufficient evidence to make this finding. It is incredibly speculative and general.

156. **Finding 193:** Our clients contest this finding. No such finding can be made from the Stanford Report for the reasons set out in paragraphs 24-29 above. The Stanford Report cannot be used to prove the truthfulness of what the 19 respondents stated.

157. **Finding 194:** Our clients disagree with the colourful and generalised assertion that there is a "weakness" of the Award and that the alleged weakness is contributing to any fragmentation and destabilisation of work in the sector. This is in the nature of a submission rather than a proposed finding.

158. **Finding 195:** Our clients contest this finding. No such finding can be made from the Stanford Report for the reasons set out in paragraphs 24-29 above. Additionally, no weight should be placed on Dr Stanford's philosophical views about the wisdom and willingness of employers to "do the right thing".

159. **Finding 196:** See preceding paragraph.

160. **Finding 197:** Our clients agree generally that employees are requested to perform remote response duties from time to time. Our clients also agree that remote response duties are

typically carried out by use of electronic means of communication. However, the precise numbers of employees and the incidence of such practices will vary from workplace to workplace and the specific sector.

161. **Finding 198:** Our clients disagree that a finding can be made that these employees tend to be employer in higher classifications. With respect to the two witnesses called by the ASU to give evidence in relation to remote response, Ms Flett is employed as a Level 6 but it is not clear what classification Ms Anderson is engaged as under the Award. There is also insufficient evidence before the Commission to make any finding about classification levels generally.

162. Our clients also disagree that "many" of these employees work part-time hours. Of the relevant witnesses, one was a full-time employee and the other a part-time employee.[48] This does not support the assertion that "many" employees undertaking remote response duties work part-time hours.

163. **Finding 200:** For the reasons set out in paragraphs 30-32 above, the Muurlink Report should not be relied upon to make such a finding. The other employee evidence on point is also insufficient to support this finding.

164. **Finding 201:** For the reasons set out in paragraphs 30-32 above, the Muurlink Report should not be relied upon to make such a finding. The other employee evidence on point is also insufficient to support this finding.

165. **Finding 202:** For the reasons set out in paragraphs 30-32 above, the Muurlink Report should not be relied upon to make such a finding. The other employee evidence on point is also insufficient to support this finding.

166. **Finding 203:** This is not a proposed finding. It is opinion evidence from one employee.

167. **Finding 204:** For the reasons set out in paragraphs 30-32 above, the Muurlink Report should not be relied upon to make such a finding.

168. **Finding 205:** See preceding paragraph.

169. **Finding 206:** This is not a proposed finding. It is opinion evidence from one employee.

170. **Finding 207:** For the reasons set out in paragraphs 30-32 above, the Muurlink Report should not be relied upon to make such a finding.

[48] Statement of Deborah Lee Anderson at[9] and Statement of Emily Flett at [7].

171. **Finding 208:** This is not a proposed finding. It is opinion evidence from one employee in some cases about her perceptions.

172. **Finding 209**: We do not consider that there is sufficient evidence to make a finding as to the reasons of employees generally for working on-call. The evidence was limited to a very small number of employees. Further, the fact that two employees gave evidence that they “may" choose not to do something under a particular scenario is hardly compelling.

173. **Finding 211**: We disagree with the very generic submission that the Award in its current form does not promote the efficient and productive performance of work.

174. **Finding 212:** Our clients do not accept that working broken shifts involves working “long” or “irregular” hours, although it is possible that it may. Our clients do not know and cannot agree or disagree as to the asserted impact on employees, save for noting that some of the employee witnesses expressed opinion evidence in relation to their experiences. We do not consider that there is sufficient evidence to make this finding.

PART C: RESPONSES TO THE QUESTIONS POSED IN THE BACKGROUND PAPER

175. Responses to each of the questions posed in the Background Paper are set out in **Attachment A**, with responses marked by reference to the question number.

PART D: THE 24-HOUR CARE CLAUSE

176. In the Full Bench's decision of 2 September 2019[49], a provisional view was expressed that the 24-hour care clause should be retained, but that the existing clause should be amended to ensure that it provides a fair and relevant minimum safety net.

177. Following that decision, our clients participated in conferences with interested parties on 28 October and 7 November 2019 to discuss how the 24-hour care clause should be amended. The outcome of that conferencing process is summarised in the Report issued by Commissioner Lee on 3 December 2019 (the **Lee Report**).

178. The Lee Report accurately outlines our clients' position in relation to the issue.

179. In light of the Full Bench decision, our clients have advanced a proposed variation to clauses 25.8 and 31.2 of the Award. For convenience, the proposed variations are extracted as follows:

25.8 24 hour care

This clause only applies to home care employees.

(a) A 24 hour care shift requires an employee to be available for duty in a client's home for a 24 hour period. During this period, the employee is required to provide the client with the services specified in the care plan. The employee is required to provide a total of no more than eight hours of care during this period.

(b) An employer may only require an employee to work a 24 hour care shift by agreement.

(c) The employee will normally have the opportunity to sleep during a 24 hour care shift and, employees will be provided with a separate room with a bed, use of appropriate facilities (including staff facilities where these exist), and free board and lodging for each night when the employee sleeps over.

(d) The employee engaged will be paid eight hours work at 155% of their appropriate rate for each 24 hour period.

(e) If the employee is required to perform more than eight hours' work during a 24 hour care shift, that work shall be treated as overtime and paid in accordance with the overtime provisions at clause 28.1. An employer and employee may utilise the TOIL arrangement in accordance with clause 28.2.

[49] [2019] FWCFB 6067 at [101]-[105].

(f) An employee may refuse to work more than 8 hours' work during a 24 hour care shift in circumstances where the requirement to work those additional hours is unreasonable.

31.2 Quantum of leave

For the purpose of the NES, a shiftworker is:

(a) an employee who works for more than four ordinary hours on 10 or more weekends during the yearly period in respect of which their annual leave accrues; or

(b) an employee who regularly works 24 hour care shifts in accordance with clause 25.8;

and is entitled to an additional week's annual leave on the same terms and conditions.

Submissions in support of our clients' position

180. In the tranche 1 proceedings, the Full Bench concluded that the 24 hour care clause was deficient, and that it "lacks clarity and fails to address some important matters regarding the practical operation of the clause".[50] The Full Bench acknowledged the following issues with the clause[51]:

(a) the clause is unclear regarding aspects relating to sleeping and does not expressly provide that employees will be provided with "a safe and clean space to sleep";

(b) the clause is silent as to what happens when an employee is required to perform more than 8 hours' work during a 24 hour care shift;

(c) there is a lack of certainty about the hours of work of an employee;

(d) it is unclear whether the overtime provisions apply in the event of an employee performing more than 8 hours' work; and

(e) the mechanism whereby an employee may refuse to work more than 8 hours when on a 24 hour care shift is unclear.

181. In response to that finding, our clients have advanced a proposal which aims to rectify the identified deficiencies. The key aspects of our clients' proposal are summarised as follows.

<u>*Requirement for employee agreement*</u>

182. First, we propose the inclusion of a requirement that employers may only require an employee to work a 24 hour care shift by agreement. This will have the effect of prohibiting an employer

[50] [2019] FWCFB 6067 at [103].
[51] Ibid.

from rostering an employee for a 24 hour care shift unless that employee has specifically agreed to work 24 hour care shifts. It is acknowledged that 24 hour care shifts are a non-standard type of shift, and so it is appropriate that employees have the ability to opt-out of working such shifts.

Sleeping arrangements and facilities

183. Second, we propose an amendment to cause 25.8(b) to remove the words "where appropriate", and to bolster the type of facilities that are required to be provided to employees when working 24 hour care shifts. It is proposed that the wording from clause 25.7(c) be adopted so that employers are required to provide employees with:

> "a separate room with a bed, use of appropriate facilities (including staff facilities where these exist) and free board and lodging for each night when the employee sleeps over".

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

185. We also consider that the facilities outlined in our proposal are an appropriate minimum standard. While it will often be the case that employee will be provided with additional facilities, we do not consider that a more formulaic or prescriptive entitlement is appropriate in the context of a minimum legislated standard applying across the industry nationally.

Overtime for additional hours

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

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

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

(a) the rate of time and a half for the first two hours and double time thereafter for all authorised overtime on Monday to Saturday;

(b) the rate of double time for all authorised overtime on a Sunday; and

(c) the rate of double time and a half for all authorised overtime on a public holiday.

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

(a) in excess of 38 hours per week or 76 hours per fortnight; or

(b) in excess of 10 hours per day.

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

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

TOIL

192. Fourth, we propose the inclusion of a mechanism for an employer and employee to agree to utilise the existing TOIL arrangements under clause 28.2 where an employee works in excess of 8 hours during a 24 hour care shift. We consider this to be an appropriate inclusion given that the existing Award allows for TOIL arrangements to be entered into where overtime entitlements are triggered.

Right of refusal to work additional hours

193. Fifth, we have inserted a new proposed clause 25.8(f) to provide that an employee may refuse to perform more than 8 hours' work where the requirement to do so is unreasonable.

194. We have taken account of the formulation that exists at subsection 62(2) of the FW Act. Given the circumstances appear to be analogous, we consider this to be an appropriate formulation.

Conclusion

195. In the tranche 1 decision, the Commission found that 24 hour care shifts are used in the industry and, further, while only a minority of employers used the 24 hour care clause, those who do utilise the clause "do so regularly".[52]

196. Accordingly, the Commission expressed the view that, given the "history and the current utilisation of the 24 hour care clause", it is "appropriate to adopt a cautious approach".[53]

197. Our clients' proposal reflects a cautious approach. It rectifies the deficiencies identified by the Commission in relation to the existing 24 hour care clause, but does not propose any further significant alteration to the existing clause.

198. We do not consider that there is any evidentiary or merit basis for any further material amendment to the provision.

199. The Commission should vary the existing 24 hour care clause in the manner proposed by our clients.

AUSTRALIAN BUSINESS LAWYERS & ADVISORS
10 February 2020

[52] Ibid at [101].
[53] Ibid at [102].

ATTACHMENT: RESPONSES TO QUESTIONS IN BACKGROUND PAPER

1. Is the list set out above an accurate list of the Tranche 2 claims that are being pressed?

No. Our clients also press the variation to clause 25.5(d)(ii) relating to roster changes, as set out in our Amended Draft Determination filed on 15 October 2019.

In that respect, we note the submissions of Ai Group dated 26 September 2019, which identifies an unintended consequence of our proposed draft.[54] We accept and agree with the submissions of Ai Group. We submit that the phrase "personal/carer's leave" in our Amended Draft Determination should be replaced with the phrase "illness".

We otherwise press this variation.

Due to an oversight, we did not address this claim in our submission of 19 November 2019. This was primarily due to the fact that we do not seek any factual findings to be made in respect of the variation. In our submission, the claim is obvious as a matter of industrial merit. In accordance with the *4 Yearly Review of Modern Awards - Penalty Rates (Hospitality and Retail Sectors) decision*, in such circumstances it is unnecessary to advance probative evidence in support of the proposed variation.[55]

2. Is Attachment A an accurate list of all exhibits tendered in in the Tranche 2 proceedings?

In respect of ABI's exhibits we confirm that Attachment A is an accurate list.

3. Is Attachment B an accurate list of all of the submissions and submissions in reply relied upon in relation to the claims being considered in the Tranche 2 proceedings?

The list at Attachment B contains all submissions and submissions in reply relied on by ABI in the Tranche 2 proceedings.

4. Are any of the findings made in the Tranche 1 September 2019 Decision challenged (and if so, which findings are challenged and why)?

We note that the Full Bench found at [75] that: "No employer participant in the NDIS gave evidence in the proceedings regarding the financial impact of the claims before us".

Whilst that is correct, our clients note that there was evidence adduced during the Tranche 2 hearing from a number of employer witnesses regarding the financial impacts of the proposed claims.

[54] Court Book at p.949-953.
[55] [2017] FWCFB 1001.

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

Not applicable.

6. Question for ABI: How do these proposed general findings relate to the specific claims before the Full Bench?

The discretion in s.156(2)(b)(i) to make determinations varying modern awards in this Review is expressed in general terms. However, in discharging its functions, s.134(1) requires the Commission to ensure that the Award, together with the NES, provides 'a fair and relevant minimum safety net of terms and conditions' taking into account prescribed factors.

Fairness in this context is to be assessed from the perspective of the employees and employers covered by the Award.[56]

Further, the obligation to take into account the s.134 considerations means that each of these matters, insofar as they are relevant, must be treated as a matter of significance in the decision-making process.[57]

The general findings advanced by our clients are relevant to a number of the s.134(1) considerations, including:

(a) the need to encourage collective bargaining;

(b) the need to promote flexible modern work practices and the efficient and productive performance of work;

(c) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden;

(d) the need to ensure a simple, easy to understand, stable and sustainable modern award system; and

(e) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

Our proposed general findings are relevant in terms of the above considerations.

[56] [2018] FWCFB 3500 at [21]-[24]

[57] *Edwards v Giudice* (1999) 94 FCR 561 at [5]; *Australian Competition and Consumer Commission v Leelee Pty Ltd* [1999] FCA 1121 at [81]-[84]; *National Retail Association v Fair Work Commission* (2014) 225 FCR 154 at [56]

Turning to specific claims before the Full Bench, our proposed general findings around the fragmentation of work, volatility in demand, reduced levels of control, rostering challenges and continuity of care are relevant to the claims about:

(a) minimum engagements;

(b) broken shifts;

(c) client cancellations;

(d) and travel time.[58]

Other proposed general findings around the inadequacy of funding and the financial challenges of employers in the industry are relevant to all claims which result in an increase in employment costs for employers. Whilst it is important that appropriate weight be placed on these issues, we accept that funding arrangements should be given determinative weight.

We also accept that such matters can be ameliorated to some extent by appropriate transitional arrangements.

7. Are the findings proposed by the NDS challenged (and if so, which findings are challenged and why)?

No.

8. Question for NDS: How do these proposed general findings relate to the specific claims before the Full Bench?

Not applicable.

9. Are these aspects of AFEI's submission challenged (and if so, which findings are challenged and why)?

No.

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

Our clients agree with the findings proposed by Ai Group save for the findings referred to at paragraphs 12-15 above.

[58] See Background Paper at [24], finding number 4.

11. Question for Ai Group: How do these proposed findings relate to the specific claims before the Full Bench?

Not applicable.

12. Question for Ai Group: The interviewees were disability support workers, why wouldn't they be covered by the award?

Not applicable.

13. Question for Ai Group: Was Dr Stanford cross examined in respect of this aspect of his evidence?

Not applicable.

14. What do other parties say in response to Ai Group's general observations regarding the evidence?

Our clients agree with the general observations advanced by Ai Group.[59] We also refer to our submissions in paragraphs 23-32 of this submission in relation to the evidence of Dr Stanford and the Muurlink Report.

15. What do other parties say about Ai Group's submission that Dr Stanford's opinion should not be afforded any weight?

Our clients agree with the Ai Group's submissions regarding the evidence of Dr Stanford. We refer to paragraphs 24-29 of this submission in which we address this issue.

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

Our clients challenge or make comment on the findings 173, 175, 176, 177, 178, 179, 180, 181, 182, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196 for the reasons set out at paragraphs 140-159 of Part B of this submission.

17. Question for the ASU: How do these proposed findings relate to the specific claims before the Full Bench?

Not applicable.

[59] See Ai Group submission of 18 November 2019 at [48]-[60]

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

Not applicable.

19. What does ABI say in relation to the amendments sought by AFEI?

We acknowledge the concern expressed by AFEI in relation to the wording proposed by our clients for triggering the operation of the clause (that is, where an employee is "requested or required to perform work by the employer via telephone or other electronic communication away from the workplace"). AFEI submit that such a formulation is capable of capturing circumstances where the employee is performing work that is not in the nature of "response" duties.

AFEI draw a distinction between "response" duties (i.e. an employee responding to a specific request) and employees working under a "general instruction/requirement to undertake work from home" or performing "routine overtime work".

While we accept that concern, our clients do not consider that the specific variation proposed by AFEI is sufficiently clear so as to alleviate this concern.

If the Commission is minded to introduce more precision as to the notion of "remote response work", our clients consider that the better approach to achieving this objective would be to include a definition of "remote response work" or "remote response duties".

20. Questions for ABI: Does ABI agree with Ai Group's characterisation of the intention of its proposal? ABI is invited to provide a definition of 'remote response duties'.

Yes, our clients agree with Ai Group's characterisation of the intention of our proposal.

If the Commission is minded to introduce more precision as to the notion of "remote response work" or "remote response duties", our clients propose the insertion of a definition in the following terms:

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

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

21. Question for AiGroup: What reliance is placed on the Government funding?

Not applicable.

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

No.

23. Question for the HSU: How does the proposed clause operate in the event that an employee responds to, say, three phone calls within the same one hour period?

Not applicable.

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

Yes, our clients challenge or make comment on the findings 197, 198, 200, 201, 202, 203, 204, 205, 206, 207, 208, and 209 for the reasons set out at paragraphs 160-172 of Part B of this submission.

25. Is Attachment D an accurate summary of the modern award provisions that allow employers to engage employees on 'broken' or 'split' shifts (and if not accurate, which findings are challenged and why)?

Attachment D is an accurate summary of the modern award provisions that allow employers to engage employees on broken or split shifts, save for the following minor points:

(a) Clause 22.8 of the Aged Care Award now includes a subsection (f) which provides that each portion of the shift must meet the minimum engagement requirements.

(b) Children's Services Award – reference to ordinary hours clause should read 21.2.

(c) Mining Industry Award – Clause 14.3(c)(ii) for allowance.

(d) Animal Care and Veterinary Services Award 2010 – broken shift allowance is clause 16.2(b).

26. Given the view taken by the Full Bench in the Tranche 1 decision, does ABI press its contention that the unions are simply seeking to relitigate a matter which had previously been advanced and rejected?

Not in those terms.

We accept that the unions are free to reagitate a previously agitated matter that was considered during the transitional review process. We further accept that decisions made during the transitional review do not prevent the Commission from reconsidering the matter in these proceedings and reaching a different conclusion based on the evidence and submissions before it. The question is whether the Commission should place weight on the transitional decision and, if so, how much weight should be given to it.

We accept that it is open to the Commission to place limited weight on the transitional review decision.

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

Not applicable.

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

No.

29. Question for all other parties: Is NDS's characterisation of the evidence challenged (and if so, which aspects are challenged and why)?

No.

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

Our clients challenge finding 67 for the reasons set out at paragraph 19 of Part B of this submission.

31. Question for the HSU: The HSU is asked to clearly set out the findings it seeks in respect of broken shifts and the evidence in support of those findings.

Not applicable.

32. Question for the HSU: In accordance with its supplementary reply submissions of 3 October 2019 should the words be deleted from its draft variation determination? As to the HSU's submission at [41] of its supplementary reply submission of 3 October 2019, does that mean that full time and casual employees are to be treated differently to part time employees?

Not applicable.

33. What is said in response to the NDS proposition that consideration be given to a minimum engagement of 2 hours for part-time employees?

In accordance with our submissions of 12 July 2019, our clients are not opposed to the introduction of minimum engagements for part-time employees, provided that:

(a) They are consistent with the existing minimum engagement periods for casual employees; and

(b) Attendances for the purpose of staff meetings and training/professional development are subject to a minimum engagement of one hour.[60]

Given that casual employees undertaking disability services work currently have a minimum engagement period of two hours, our clients do not oppose the NDS proposition that consideration be given to a minimum engagement of two hours for part-time disability services employees.

34. Question for Business SA: What is the evidentiary basis for the submission set out above?

Not applicable.

35. Are the findings proposed by the ASU challenged (and if so, why)?

Our clients challenge or make comment on the findings 211 and 212 on the bases set out at paragraphs 173-174 at Part B of this submission.

36. Question for the ASU: Does the ASU agree with ABI's characterisation of its claim? (and if it disagrees, why)?

Not applicable.

37. Question for the ASU: Does the ASU accept that the casual loading compensates casual employees for working irregular hours? If so, why should casual employees receive the proposed 15% loading?

Not applicable.

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

Our clients challenge or make comment on the findings 139, 140, 141, 142, 143, 144, 145 and 148 for the reasons set out at paragraphs 98-114 of Part B of this submission.

[60] See Court Book at p.91.

39. Question for all other parties: Do you challenge the findings sought by the HSU (and if so, which findings are challenged and why)?

Yes, we challenge the finding 116 for the reasons set out at paragraph 64 of Part B this submission.

40. Question for all other parties: Is ABI's characterisation of the evidence in respect of this claim, and the findings sought by ABI in respect of that evidence, challenged by any other party (and if so, which characterisation of the evidence or findings are challenged and why)?

Not applicable.

41. Is the finding proposed by Ai Group challenged (and if so, which evidence or findings are challenged and why)?

No.

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

We do not consider that a sufficient evidentiary case has been advanced that would justify the insertion of a clause of this type. The Manufacturing Award regulates very different industries and occupations to the SCHCDS Award, and so in that sense it is not an appropriate 'benchmark' in relation to an issue such as damage to clothing, etc.

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

There are also particular peculiarities to the clause in question. For example, it is unclear how subclauses (i) and (ii) interrelate and operate, given that sub-clause (i) appears to be quite broad and so would capture most circumstances that might arise under sub-clause (ii).

As a general proposition, we do not consider that the Manufacturing Award clause is an appropriate clause to borrow from.

43. Are the findings proposed by the UWU challenged (and if so, which findings are challenged and why)?

Our clients challenge in part findings 161 and 162 for the reasons set out at paragraphs 131-132 of Part B of this submission.

44. Question for all other parties: Is ABI's characterisation of the evidence in respect of this claim, and the findings sought by ABI in respect of that evidence, challenged by any other party (and if so, which characterisation of the evidence or findings is challenged and why)?

Not applicable.

45. Question for the UWU: Is the union aware of any instance where the adequacy of the number of uniforms provided to an employee has been the subject of a dispute under the dispute mechanism in the award?

Not applicable.

46. Is the finding proposed by Ai Group challenged by any other party (and if so, why)?

No.

47. Does any party take issue with Ai Group's contention as to how clause 25.2(f) operates (and if so, why)?

No.

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

Not applicable.

49. Do you agree with the above statement (and, if not, why not)?

No.

It is not correct that the NDIS Price Guide 2019-20 allows employers to claim "an unlimited amount of client cancellations", for three reasons.

Firstly, under the current *NDIS Price Guide 2019-20* valid from 1 December 2019,[61] employers are only able to claim for cancellations where they are "short notice cancellations". Employers cannot charge for cancellations that do not meet that definition.

The Price Guide defines a "short notice cancellation" as being where the participant:

[61] Version 2.0 – Publication Date: 1/12/2019.

(a) does not show up for a scheduled support within a reasonable time, or is not present at the agreed place and within a reasonable time when the provider is travelling to deliver the support (i.e. a "no show"); or

(b) for supports that are less than 8 hours continuous duration and the agreed total price for the support is less than $1000, has given less than two (2) clear business days' notice; or

(c) has given less than five (5) clear business days' notice for any other support.[62]

Secondly, providers are only permitted to claim 90% of the fee associated with the activity for short notice cancellations.[63]

Thirdly, providers are only permitted to charge for a short notice cancellation (or no show) if they have "not found alternative billable work for the relevant worker and are required to pay the worker for the time that would have been spent providing the support".[64]

50. Question for UWU: Were the relevant employer witnesses cross-examined in respect of this aspect of their evidence?

Not applicable.

51. Are the findings proposed by the UWU challenged (and if so which findings are challenged and why)?

Our clients challenge or partly challenge the findings 165, 168, 170, 171, and 172 for the reasons set out at paragraphs 135-139 of Part B of our submission.

52. Question for the ASU: Were the relevant employer witnesses cross-examined in respect of this aspect of their evidence?

Not applicable.

53. Do you agree with the ASU's submission as to the effect of the NDIS client cancellation arrangements (and if not, why not)?

Yes. Refer to our response to Question 49 above.

54. Question for NDS: NDS is asked to clarify the submission that the current provision 'would appear onerous'; onerous for whom and why?

[62] Ibid, page 18.
[63] Ibid.
[64] Ibid.

Not applicable.

55. Does ABI agree with NDS' characterisation of its proposal?

Yes.

56. Is NDS' characterisation of the modified funding arrangements in the event of client cancellation accurate (and if not, why not)?

Yes, subject to our comments in response to Question 49 above.

57. Does ABI agree with Ai Group's submissions as to how ABI's proposed clause would operate (and if not, why not)?

Yes.

58. ABI is asked to respond to the above example and to Ai Group's submission that ABI's proposal will 'exacerbate or further any existing disconnect between the two in some respects'.

We agree that the example is accurate as to the operation of our clients' proposed clause.

We refer to paragraphs [2.28]-[2.32] of our reply submissions dated 12 October 2019 in which we address the concerns of Ai Group.

We respectfully disagree with the proposition that submission that the proposal will "exacerbate or further any existing disconnect between the two in some respects". We accept that our proposed clause does not operate in perfect harmony with the NDIS funding arrangements. We also accept that it operates detrimentally to employers in certain circumstances. However, the proposed variation strikes the right balance for employers and employees.

59. Question for AFEI: In its submission of 3 July 2019 AFEI states (at [12]) that it 'reserves its position in respect to the proposed introduction of clauses 25.5(f)(iii)-(vi) in the ABI draft determination'. AFEI is asked to expand on this submission in light of ABI's amended draft determination filed on 15 October 2019.

Not applicable.

60. Are the findings proposed by AFEI challenged (and if so, which findings are challenged and why)?

No.

61. ABI is asked to file an amended draft variation determination addressing the drafting issues raised in its reply submission.

See attached to this submission a 'Further Amended Draft Determination'.

62. Question for Ai Group: What is Ai Group's response to the HSU's claim?

Not applicable.

63. Are the findings proposed by the UWU challenged (and if so, which findings are challenged and why)?

Our clients challenge or comment on findings 155, 156, 158 and 159 for the reasons set out at paragraphs 124-130 of Part B of this submission.

64. Do you challenge the findings sought by the HSU (and if so, which findings are challenged and why)?

Yes, our clients challenge or make comment on findings 119 and 120 for the reasons set out at paragraphs 68-69 of Part B of this submission.

65. Question for UWU and HSU: Do you take issue with the above submission (and if so, point to the relevant evidence)?

Not applicable.

66. The evidence led by the unions in support of these claims is confined to particular categories of employees. If the Commission was minded to vary the SCHADS Award to provide a mobile phone allowance then should the application of that allowance be restricted to the class of employees which have been the subject of evidence in the proceeding? How should that class be defined?

If the Commission is minded to vary the Award to provide a mobile phone allowance, there is merit in confining the application of any such allowance to employees who work as direct support workers providing care services in the community. By this, we mean employees performing:

(a) home care work in circumstances where the client's home is not based in a residential aged care facility; and

(b) disability services work in the community (i.e. not in a group home or other residential or fixed place).

67. Question for HSU: What does the HSU say in response to the issues raised by ABI?

Not applicable.

68. Question for the UWU and HSU: If a smart phone is to be characterised as a 'tool of trade' are the costs associated with work-related use tax deductible?

Not applicable.

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

Not applicable.

70. Question for the unions: What do you say in response to the above submission?

Not applicable.

71. Are the findings proposed by Ai Group challenged (and if so, which findings are challenged and why)?

No.

72. Are the findings proposed by NDS challenged (and if so which findings are challenged and why)?

No.

73. Are the findings proposed by AFEI challenged (and if so, which findings are challenged and why)?

Our clients make comment in relation to finding 73 at paragraphs 20-22 of Part B of this submission.

74. Question for the HSU: What does the HSU say in response to the findings sought by ABI?

Not applicable.

75. Question for Ai Group: What does Ai Group say about the current provisions, which speaks of 'appropriate facilities'?

Not applicable.

76. Question for the HSU: What is the source of the power to vary the award in the manner sought?

Not applicable.

77. Are the findings proposed by Ai Group challenged (and if so, which findings are challenged and why)?

No.

78. Question for AFEI: What was the basis stated by the AIRC for the removal of the provision referred to by the AFEI?

Not applicable.

79. Question for the UWU: As to the consequence for an employer who does not provide the requisite 7 days' notice, is it not simply a breach of the award and amenable to an order for contravention of a civil remedy provision (see ss 45 and 539)? What is the argument in support of what is said to be the 'logical interpretation' that overtime is payable in such circumstances?

Not applicable.

80. Are any of the findings proposed by the UWU challenged (and if so, which findings are challenged and why)?

Yes, our clients challenge or make comment on findings 151, 152, 153 and 154 for the reasons set out at paragraphs 115-123 of Part B of this submission.

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

Not applicable.

82. Question for the UWU: What does the UWU say in response to the above submission?

Not applicable.

83. Are the findings proposed by Ai Group challenged (and if so, which findings are challenged and why)?

No.

FURTHER AMENDED DRAFT DETERMINATION

Fair Work Act 2009
s.156 - 4 yearly review of modern awards

4 YEARLY REVIEW OF MODERN AWARDS – SOCIAL, COMMUNITY, HOME CARE AND DISABILITY SERVICES INDUSTRY AWARD 2010

(AM2018/26)

XXXX
XXXX
XXXX

XXXX, XX XXXX 2020

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

A. Further to the decision issued on XXX in AM2018/26 ([2020] FWCFB XXXX), the above award is varied as follows:

1. By deleting clause 25.5(d)(ii) and inserting in lieu thereof:

(ii) However, a roster may be altered at any time:

A. by agreement between the employer and relevant employee, provided the agreement is recorded in writing;

B. to enable the service of the organisation to be carried out where another employee is absent from work on account of personal/carer's leave, compassionate leave, community service leave, ceremonial leave, leave to deal with family and domestic violence, or in an emergency; or

C. where the change involves the mutually agreed addition of hours for a part-time employee to be worked in such a way that the part-time employee still has four rostered days off in that fortnight or eight rostered days off in a 28 day roster cycle.

2. By deleting clause 25.5(f) and inserting in lieu thereof:

(f) Client cancellation

(i) ~~This c~~Clause 25.5(f) applies where a client cancels or changes a scheduled home care or disability service, within seven days of the scheduled service, which a full-time or part-time employee was rostered to provide.

(ii) Where a service is cancelled by a client under clause 25.5(f)(i), the employer may either:

A. direct the employee to perform other work during those hours in which they were rostered; or

B. cancel the rostered shift.

(iii) Where clause 25.5(f)(ii)(A) applies, the employee will be paid the amount payable had the employee performed the cancelled service or the amount payable in respect of the work actually performed, whichever is the greater.

(iv) Where clause 25.5(f)(ii)(B) applies, the employer must either:

A. pay the employee the amount they would have received had the shift not been cancelled; or

B. subject to clause 25.5(f)(v) and (vi), provide the employee with make up time in accordance with clause 25.5(f)(vi).

(v) The make up time arrangement cannot be utilised where the employee was notified of the cancelled shift after arriving at the relevant place of work to perform the shift. In these cases, clause 25.5(f)(iv)(A) applies.

(vi) The make up time arrangement cannot be utilised where the employer is permitted to charge the client in respect of the cancelled service. In these cases, clause 25.5(f)(iv)(A) applies.

(vii) Where the employer elects to provide make up time:

A. the make up time must be rostered in accordance with clause 25.5(a);

B. the make up time must be rostered to be performed within 3 months of the date of the cancelled shift;

C. the employer must consult with the employee in accordance with clause 8A regarding when the make up time is to be worked prior to rostering the make up time; and

D. the make up shift can include work with other clients or in other areas of the employer's business provided the employee has the skill and competence to perform the work.

(viii) ~~This c~~Clause 25.5(f) is intended to operate in conjunction with clause 25.5(d)~~(ii)~~, and does not prevent an employer from changing a roster under clause 25.5(d)(i) or (ii).~~.~~

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

20.9 On call allowance

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

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

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

4. By inserting at clause 3.1:

3.1 In this Award, unless the contrary intention appears:

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

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

28.4 Recall to work

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

6. By inserting ~~a~~ new clause~~s~~ 28.5 and 28.6:

28.5 Remote response when not on call

(a) An employee who is not required to be on call and who is requested to perform work by the employer via telephone or other electronic communication away from the workplace (a remote response request) will be paid at the appropriate

rate for a minimum of one hour's work on each occasion a remote response request is made, provided that multiple remote response requests made and concluded within the same hour shall be compensated within the same one hour's payment. Any time worked continuously beyond one hour will be rounded to the nearest 15 minutes and paid accordingly.

(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 c~~Clause 28.5(d) does not apply if the employer has not informed the employee of the reporting requirements.

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

28.6 Remote response when on call

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

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

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

exceed 15 minutes, only one minimum payment is payable. Time worked past 15 minutes will be rounded up to the nearest 15 minutes.

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

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

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

B. This determination comes into operation from XX XXXX ~~201X~~2020. In accordance with s.165(3) of the *Fair Work Act 2009* these items do not take effect until the start of the first full pay period that starts on or after XX XXXX ~~201X~~2020.

[Insert the Seal of the Fair Work Commission]

XXXX