

**IN THE FAIR WORK COMMISSION
AT SYDNEY
AM2018/26**

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

SUBMISSIONS OF HEALTH SERVICES UNION

INTRODUCTION

1. In accordance with the directions issued on 23 October 2019 (**Directions**), the Health Services Union makes the following submissions.

CLAIMS PRESSED OR OPPOSED [Directions 1(i)]

2. The HSU presses the following claims:

Claim No	Nature of Claim
S10	Minimum engagements
S35	Broken shifts
S19	Travel
S50	Overtime for part-time and casual workers beyond rostered hours/8 hours
S19	Telephone allowance
S19	Uniform/Damaged clothing allowance
S22	Recall to work
S29	Cancellation
S38	Sleepover

3. The HSU opposes the following claims:

Filed on behalf of **HEALTH SERVICES UNION**

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Claim No	Party Advancing Claim	Nature of Claim
	ABI & NSWBC	Variation to Hours of Work and Rostering Clause
	ABI & NSWBC	Extension of cancellation clause
	ABI & NSWBC	Variation to Remote Response Work Clause

COURT BOOK, TRANSCRIPT AND EXHIBITS RELEVANT TO THE CLAIMS [Directions 1(ii)]

4. Attached to this Submission as Attachment A is a table identifying the parts of the Court Book, exhibits and transcript which are relevant to each of the claims.

PREVIOUS SUBMISSIONS RELIED ON BY HSU [Directions 1(iii)]

5. The HSU relies on the following previous written submissions in relation to the claims in the Tranche 2 proceedings.
- a. HSU Submissions dated 15 February 2019¹ (re HSU claims in tranche 1 and tranche 2 hearings);
 - b. Submission in Reply dated 16 September 2019² (re ABI and ors claims);
 - c. Supplementary Submission in Reply of Health Services Union dated 2 October 2019³ (re ABI remote response claim);
 - d. Supplementary Submission in Reply of Health Services Union dated 3 October 2019⁴ (re various claims)

EVIDENCE IN THE 15-18 OCTOBER PROCEEDINGS [Directions 1(iv)]

6. The HSU contends that the Commission should make findings in accordance with the following.

THE NATURE AND FEATURES OF THE SOCIAL, COMMUNITY, HOME CARE AND DISABILITY SERVICES INDUSTRIES

Workforce Profile

7. In its decision in [2019] FWCFB 6067 dated 2 September 2019 (**2 September decision**) the Full Bench referred to August 2016 Census data showing that:
- a. there were around 168,000 employees in the social, community, home care and disability services industry (**the SCHCADS industry**) ([25];

¹ CB 2839ff

² CB 2867ff

³ CB 2884ff

⁴ CB 2887ff

- b. of those, some 73.9% are female (well exceeding the all industry average) and 50.3% were part-time (compared with the all industry average of 34.2%) (ibid);
 - c. the age distribution of workers in the industry skews significantly to older age brackets: age 40 is the tipping point age at which the rate of SCHCADS industry workers commences to exceed the all industries average (ibid);
 - d. the hours worked by workers in the industry per weeks skews significantly to the lower end when compared with the all industries average (ibid).
8. The Full Bench also found (at [47] of the 2 September decision) that a proportion of employees covered by the SCHCADSI Award may be regarded as “low paid” within the meaning of s.134(1)(a)⁵.
 9. Accordingly, account must be taken, in the course of the review, to the relative living standards and needs of those low-paid workers.
 10. Although the evidence before the Commission showed that there were a number of enterprise agreements governing the employment of the employees in the industry, the evidence before the Commission was that employees covered by the Award are generally paid at, or minimally above, award rates⁶. In other words, the evidence does not indicate that enterprise bargaining delivers any significant wages increases to the employees in the industry.
 11. 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 their cars between appointments⁷. That impediment may account, in part, for the low wage outcomes achieved even where bargaining occurs.

Precarity and Instability of Work

12. The evidence before the Commission showed 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 casual⁸.

⁵ In the article annexed to her witness statement at CB2913, Dr Macdonald also noted that “*the Australian care workforce is predominantly female and the work of frontline social care workers is low-paid*”.

⁶ Macdonald, CB2916, Elrick [17] CB 2935, Eddington [15] – [17] CB 2972-2973, Lobert [4] CB 2965, Shanahan, XXN, 18.10.19, PN2852-2853.

⁷ Eddington [24] CB 2974.

⁸ 2 September decision [67]

13. A further related feature of the workforce covered by the Award, observed by Dr Macdonald in her report⁹, 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. For example, Scott Quinn, the Tasmanian disability support worker whose evidence was before the Full Bench in the Part-time and Casuals case, is contracted to work 60 hours per fortnight, but usually works an average of 37-40 hours per week¹⁰.

14. The evidence of witnesses called by ABI routinely attested to the expectation of both disability and home care part-time employees, that they perform work additional to their contracted hours.

15. Graham Shanahan, of Coffs Coast Health and Community Care Pty Ltd, stated that:

The Company offers part-time employees work in excess of their minimum contracted hours regularly. This is because of the unpredictable nature of the industry and the clients' demands.

In the month of May 2019 we offered 902 additional extra hours to our part-time workforce.¹¹

16. Scott Harvey, of ConnectAbility Australia Ltd, stated that:

The Company offers part-time employees work in excess of their contracted hours. Part time employees are provided minimum contract hours depending on each person's availability and rostered supports. All part time community support workers and residential support workers are engaged to work above contract hours stated in employment contract.¹²

17. Deb Ryan, of Community Care Options Ltd, stated that:

When engaging part-time employees in service delivery we typically employ them on between 15 and 22 hour per week contracts. Other part time employees are employed as per business requirements. Most part-time employees work above their contracted hours. The reason for this is that we can identify that between 15 and 22 hours per week is sustainable, but cannot commit to any more. If clients get sick and go into hospital for extended periods it can be difficult to fill staff contracts.

Most part-time employees are offered additional hours of work. Employees are not required to accept the additional work, this is mutually agreed. The majority of our part-time employees work above their contract hours, with many working in excess of 30 hours per week. There are times however when we pay staff for their contracted hours, and they have not worked that many hours.

⁹ CB 2916

¹⁰ Quinn #2 [8], CB 3051

¹¹ Shanahan [29]-[30], CB 159

¹² Harvey, [50], CB 169-170

In the past year, part-time employees have worked 95,000 hours above their contracted hours.¹³

18. Ms Ryan also stated that:

We have trialled employing full-time employees in the past but we found that while we were paying them for 38 hours per week, they weren't working for anywhere near that amount of time. This was losing the Company money and therefore we moved away from employing full-time employees.¹⁴

19. The Bench will recall that the evidence of the "trial" showed a modest number of employees, in respect of whom, the expectation was that they would achieve 38 hours of work which was chargeable to clients in the course of a week.

All right, and how was an hour of work calculated for an employee? If we just go to the first example of Mr Rozentool for the - - -?---Yes.

- - - 2012/2013 you say the annual target is 1976 hours?---Yes.

And that equates to 38 hours per week?---Yes.

In 2012/2013 Mr Rozentool is said to have worked 1936.5 hours?---Yes.

Is that hours of attendance on clients as a home care worker?---Yes.

So the hours that are calculated there are the hours that a client could be billed for?---Yes.

So the - - -?---So he was under his contract by 39.5 hours.

For the year?---For the year.

The same follows, does it, for all the other workers - - -?---That's correct.

- - -on that page that they failed in various instances, so in the instance of Ms Gallagher in 2012/13 she failed to acquit the annual target of billed hours by one?---That's correct.¹⁵

20. Joyce Wang, from CASS Care Limited, stated:

The Company offers part-time employees work in excess of their contracted hours on a regular basis. This is done in order to satisfy the client's needs, including client cancellations or change to the service as requested by the client.

¹³ Ryan, [55]-[57], CB 196-197.

¹⁴ Ryan [24], CB 192

¹⁵ Transcript 18 October 2019, PN2969-2978

For our Home Ageing Services, in the last four weeks between 5 June and 2 July, there have been a total of 1,863 hours offered to part-time employees in excess of their contracted hours. If these hours were to be paid in overtime rates, the cost would be around \$42,316 for that four week period.

In the past month, about 88 per cent of our permanent part-time support workers in our Home Ageing Services have worked more than their contracted hours. The number of excess hours ranged from 5 hours to 15 hours.

In the past month in our Disability Service 100 per cent of permanent part-time support workers have been allocated shift hours that exceeded their contracted hours, and the excess hours ranged from 5 hours to 20 hours.¹⁶

21. In his report, Dr Stanford noted that average hours of work are low and highly variable¹⁷.
22. 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 services¹⁸. As well as instability and precarity, Dr Stanford recorded elevated levels of mental and physical stress being suffered by workers¹⁹.
23. In his review of the literature, 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 balance²⁰. 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).
24. 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 conditions²¹. 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 cardiovascular disease and the most powerful predictor of female ischaemic heart

¹⁶ Wang, [45]-[48], CB 207

¹⁷ Stanford, CB 1452

¹⁸ Stanford, CB 1447

¹⁹ Stanford, CB 1455

²⁰ Muurlink, CB1689-1690

²¹ Muurlink, CB1691

disease mortality²². Dr Muurlink notes the same author reports a connection between sense of control and well-being²³. Similar findings appeared in an Australian study of nurses²⁴, a group of workers with obvious parallels to the workers covered by the Award.

25. A further relevant observation in Dr Muurlink's review is the potential for a compounding adverse impact when an absence of job security/underemployment is combined with irregular work²⁵.
26. The above features represent a real problem for the attraction and retention of appropriately skilled workers to the industry.

Provision of a Vehicle

27. 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 appointments²⁶.
28. In New South Wales, most home care employers do not provide their employees with a company vehicle to undertake their duties²⁷.
29. Workers' vehicles are often used to transport clients and clients' wheelchairs, walking frames and the like²⁸.
30. In some cases, the necessity to provide a currently registered and insured vehicle appears in the contract of employment²⁹.

Gendered Nature of the Work

31. 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

²² Muurlink, CB1692

²³ *ibid*

²⁴ Muurlink, CB1693

²⁵ Muurlink, CB1694

²⁶ Wilcock [17], CB 2954

²⁷ Friend [62], CB 2950

²⁸ *Ibid*; Waddell [9], 2956

²⁹ Exhibit HSU7 Wright XXN 17.10.2019, PN2570-2575; Exhibit HSU11 Shanahan XXN 18.10.2019, PN2860-2864; Exhibit HSU17, Mason XXN 18.10.2019, PN3192-3195

- 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.
32. The gendered nature of the work had further consequences, according to Dr Macdonald. In her article, the gendered character of the work as caring work also has an impact at the level of work practices. Of the non-payment of work she observed in the sector, she 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).'*³⁰
33. Dr Macdonald's observations have echoes in the evidence and submissions of employer organisations, some of which emphasised the mission of the organisation, and the rights of clients, as values to be preferred to the interests of the employees.

Industry Funding and Structural Changes

34. At [48] and following of the 2 September decision, the Full Bench described the structural changes in both the disability and home care sectors of the SCHCADS industry as a consequence of the introduction of the National Disability Insurance Scheme and the Consumer Directed Care model in Home Care. Changes to the NDIS had already been the subject of detailed description in the Part Time and Casual Employment Decision³¹.
35. After discussing the evidence and the parties' submissions concerning the rollout of the NDIS and the funding available under that scheme, the Full Bench concluded that it was left in *"the somewhat unsatisfactory position that:*
- *the previous studies on the costs and profitability in the sector are dated and fail to account for the changes introduced on 1 July 2019;*
 - *while the magnitude of the recent budgetary injection was substantial, little detail has been provided on the implementation and impact of the changes; and*
 - *there appear to be some inconsistencies between Mr Farthing's evidence and the Online NDIA material.*

³⁰ Macdonald, CB2912-2913

³¹ (2017) 269 IR 125

36. The Full Bench went on, in any event, to reject, at [136] the submission that that the constraints placed on employers by the NDIS funding arrangements should be given determinative weight.
37. Since the April hearings and the parties' further submissions concerning funding which are set out in the 2 September 2019 decision, there have been further changes to NDIS funding arrangements.
38. 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);
 - 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.
39. Mr Farthing went on to illustrate how, in respect of basic support items, the increases effected in the Price Guide and by the Temporary Transformation Payment outstripped the increases to Award rates over comparable periods by a significant margin.
40. Mr Farthing's evidence was supported by that of Mr Moody, the acting Chief Executive Officer of National Disability Services, who described *a significant raft of recent changes to NDIS pricing for supports, many of which are both substantial and welcome*³². Although Mr Moody referred in his statement to "tighter funding arrangements" (compared with the old state-based block

³² Court Book: 4403 [41]

funding arrangements)³³, he provided no detailed analysis of the financial circumstances of NDS's members. However, he did acknowledge a growing "market" in disability services³⁴, and strong growth in the disability workforce³⁵.

41. The changes effected by the 2019-2020 Price Guide mean that many of the criticisms of the NDIS made in (or relying on³⁶) the "UNSW Report"³⁷ are either no longer apposite, or do not apply with the same force as previously.
42. Notwithstanding the observations of the Full Bench in the 2 September 2019 decision, and Mr Farthing's further statement, no further evidence was called by any of the employer organisations:
 - a. illustrating or substantiating, at an industry level, the claims about the insufficiency of the NDIS funding; or
 - b. demonstrating in a real and practical sense at the level of any particular organisation, the financial impact of the transition to the NDIS, the financial difficulties occasioned by the funding rules, or any inability to meet any cost that would be associated with granting the claims.
43. The circumstances of the Endeavour Foundation illustrate several of the reasons why the limitations in Federal funding (such as they are) would not be treated as weighing against the grant of any of the union claims. That organisation, of which the NDS's witness Mr Miller is the Head of Operations, Service Delivery, derives its income from supported employment services and the running of a lottery, as well as the funding it derives for the provision of individual disability supports³⁸. The Commission would infer that the income it derives from its lottery is at least in part attributable to its reputation as an organisation that performs good works through its provision of disability services.
44. The Endeavour Foundation's Annual Report for 2017-2018³⁹ showed an organisation in good financial health with a record in recent years of producing surpluses.
45. Although ABI called Mr Harvey, the Operations Manager for ConnectAbility (a disability services provider), and his evidence appeared to imply the existence of a continuing cost burden as a consequence of client cancellations⁴⁰ none of

³³ Court Book: 4404 [44]

³⁴ Court Book: 4400 [17] – no doubt the product of the enormous injection of Federal funding into the sector

³⁵ Court Book: 4400 [32]

³⁶ For example, at the ABI Submissions dated 5 April 2019 at 4.11ff, Court Book:22

³⁷ Cortis, Natasha et al, Reasonable, necessary and valued: Pricing disability services for quality support and decent jobs (SPRC Report 10/17, June 2017), Court Book 3129

³⁸ Miller, XXN, 17.10.19 – PN 2016-2017.

³⁹ ASU3

⁴⁰ Court Book: 166ff at [32]ff – Mr Harvey's evidence in this respect should be treated with caution by the Full Bench as he appears to suggest that the 2019-2020 NDIS Price Guide changes (which unmistakably broaden the capacity of providers to charge cancellation fees) introduces a new far more limited scope for charging such amounts.

his evidence placed that alleged burden in context by setting out details of the financial position of the organisation as a whole⁴¹.

46. Similarly, ABI called evidence from Ms Ryan, the Chief Executive Officer of Community Care Options Ltd, an organisation which provides services funded under the NDIS⁴². Although Ms Ryan's evidence lamented that the NDIS caused the organisation "increased work pattern inconsistency and a higher rate of turnover"⁴³, no detail was provided to substantiate that assertion, nor was any evidence given as to the financial health of the organisation. Far from militating against the union claims, the evidence in fact illustrated the workforce retention difficulties which weigh in favour of improvements to working conditions.
47. The evidence of Ms Wang from CASS Care Limited⁴⁴, although highlighting the *process shift* resulting from the introduction of the NDIS⁴⁵ did not attempt to illustrate any existing financial difficulties, nor to quantify any financial impact of the grant of any of the union claims. That organisation, like the Endeavour Foundation, derived its income from a range of services, including aged care services, child care and day programs which were funded partly privately by the clients and partly by the organisation⁴⁶.
48. 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 care⁴⁷, based in part on its diversified service offering and integrated range of services⁴⁸ (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 year⁴⁹. 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 base⁵⁰. It also established new offices throughout New South Wales and the ACT⁵¹.
49. One aspect of HammondCare's practice is worthy of note. It charges for appointments of half an hour at a rate greater than half the hourly rate⁵², and for appointments outside regular hours, and at weekends and on public

⁴¹ Ibid

⁴² Court Book: 191 [14]

⁴³ Court Book: 195 [41]

⁴⁴ Court Book: 200

⁴⁵ Court Book: 203 [25]

⁴⁶ Wang XXN, 18.10.19, PN 3463 to 3479

⁴⁷ Ex HSU9

⁴⁸ Wright XXN, 18.10.19, PN 2671-2672

⁴⁹ Wright XXN, 18.10.19, PN 2678

⁵⁰ Ex HSU9, Ex HSU10

⁵¹ Wright XXN, 18.10.19, PN2542

⁵² Wright XXN, 18.10.19, PN 2552, Ex HSU7

holidays at increased rates⁵³. The imposition of such penalties is likely to encourage clients to organise longer, rather than shorter appointments, and appointments on weekdays during regular hours rather than outside those times. A similar approach is taken to service pricing by Baptist Care⁵⁴. The adoption of that approach to costing belies one of the themes of the employer submissions: that organisations providing Home Care and disability services are subject entirely to the beck and call of clients and unable to take any positive steps to shape or regulate client demand.

50. When all of that further evidence before the Commission is considered, there is even less warrant (than there was on the evidence before the Full Bench when it gave its decision on 2 September 2019) for any of the funding arrangements for services covered under this Award to be regarded as weighing against granting any of the union claims.

Other Industry Changes

51. 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 sector⁵⁵. 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.
52. 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 otherwise⁵⁶. Evidence of that trend was also observed by Dr Stanford in his interviews, with experienced workers reporting they were considering leaving the industry in response to intolerable work security and deteriorating work conditions⁵⁷.
53. Dr Stanford notes that a common misperception about work in disability services is that it is unskilled and that workers in the industry do not need any special qualifications to work there. That view stands in contrast to the view of clinicians, social workers, disability specialists and participants themselves that the work requires sophisticated communication 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 needs⁵⁸.

⁵³ Ex HSU 7

⁵⁴ Mason XXN, 18.10.19, PN3281-3289; Ex HSU21

⁵⁵ Stanford, CB1448

⁵⁶ Stanford, CB 1452

⁵⁷ Stanford, CB 1448

⁵⁸ Stanford, CB 1459

54. He also observes that, despite the existing disability workforce containing a high proportion of tertiary qualified persons, and despite employers reporting that certificate level qualifications are required for roles, employers report regularly hiring workers with no formal qualifications, and most new workers in the industry possess no formal qualification⁵⁹.
55. 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 industry⁶⁰. Those risks are already being realised, with substantial numbers of new advertised positions remaining unfilled⁶¹. 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 workforce⁶².
56. These trends in the industry are relevant to the Commission's consideration of s.134(1)(d) of the FW Act – *the need to promote flexible modern work practices and the efficient and productive performance of work*. The current award conditions facilitate and incentivise the extremely inefficient and unproductive use of labour; with hours of potentially productive time systematically wasted. Given the demand for the services that has been created (by the NDIS and an ageing population), and the shortage of skilled labour available to perform the services, continuation of that inefficient deployment of labour is insupportable in the Modern Award.

BROKEN SHIFTS AND MINIMUM ENGAGEMENTS

57. The capacity for individualised and marketized care arrangements, which shift the location of care work from public organisational settings to private settings, to lead to underpayment of social care workers, has been observed in the United Kingdom by the Low Pay Commission⁶³. By defining “work” time as only the contact time between the worker and the client, minimum wage obligations are avoided. Comparable structural changes, practices and economic forces are at play in the Australian context, and the Award as currently drafted, facilitates the practices which give rise to underpayments.
58. Dr Macdonald described the phenomenon, which is common to both the United Kingdom and Australia thus:

work scheduling techniques that ‘drain waged-time from the working day’ and the devolution to workers of the risks of variable client demand result in fragmented, often varying and unpredictable work schedules: short periods of paid time (invariably face-to-face contact time with care recipients) are interspersed with other also fragmented, variable and unpredictable periods of

⁵⁹ Stanford, CB 1460

⁶⁰ Stanford, CB 1459

⁶¹ Stanford, CB 1470

⁶² Stanford, CB 1459, CB 1471

⁶³ Macdonald, CB 2910-2912

unpaid 'non-work' time (McCann, 2016: 44–45; Rubery et al., 2015). So, workers have long work days for little recompense, contributing to low pay⁶⁴.

59. Dr Macdonald also observed that:

workers are often expected to travel long distances from home for very short shifts and can have their work scheduled so that they experience long periods of 'dead' time between shifts⁶⁵.

60. It is a fundamental premise of the HSU's case, that the absence of a minimum engagement period for part-time employees (whether in disability or home care) combined with an unregulated capacity to work broken shifts (clause 25.6), creates a situation which is open to abuse. The Award imposes no limit on the number of breaks within a shift, does not regulate the length of the break, and does not regulate the duration of shifts that may be broken. Employers are at liberty, then, to schedule an unlimited number of engagements coinciding with the periods of face-to-face care for clients, and, by placing breaks between those engagements, eliminate from what is regarded as work time, the time spent travelling to, from, and between clients, writing up notes on clients, or waiting on the next client.

61. As a consequence, the circumstances described in the *Casual and Part-Time Employment Case* case as verging on exploitative⁶⁶, that is, shifts of such brevity that the income they generate barely compensates for the time and cost of attendance, can thus be replicated again and again; even during the course of the same day.

62. Mr Elrick, a Victorian organiser for the HSU, gave evidence of "shifts" as short as 15 minutes (although the worker was paid for 45 minutes in that instance)⁶⁷. Mr Eddington, a Tasmanian legal and industrial officer employed by the HSU, was aware of shift lengths of as little as 15 minutes, and a common practice of engaging workers for shifts of one hour (the current minimum for a casual employee)⁶⁸.

63. Ms Thames, a home care worker employed by Uniting, has worked shifts of half an hour in duration⁶⁹.

64. In his evidence to the *Casuals and Part-Time Case Full Bench*, Mr Quinn recounted performing shifts of as short as half an hour⁷⁰.

65. Deb Ryan, a witness called by ABI, gave evidence that *Community Care Options* rosters shift lengths as short as 15 minutes.⁷¹

⁶⁴ Macdonald, CB 2912

⁶⁵ Macdonald, CB 2915

⁶⁶ (2017) 269 IR 125 at 306 [399] & 312 [406]

⁶⁷ Elrick [19], CB 2935

⁶⁸ Eddington [22], CB 2973

⁶⁹ Thames [12], CB 2963

⁷⁰ Quinn [20], CB 2989

⁷¹ Ryan [64], CB 198

66. It is difficult to imagine new workers entering the industry (of which there are currently many, but of which many have few skills), being in a position to resist a requirement to perform such short shifts. Mr Lobert, a disability support worker, described generally working shorter shifts (of two hours and one hour) when he commenced working in the industry in 2012. One such two hour shift involved 45 minutes driving each way to perform⁷².
67. Even where enterprise agreements establish minimum engagements, these may be broken into smaller parts⁷³, thereby significantly counteracting the benefit of the minimum engagement required. It is difficult to imagine that such an approach could have been envisaged when the Award was being made; the practice that appears to be observed departs radically from the common understanding of the operation of such shifts.⁷⁴
68. The Commission would be satisfied on the evidence that the breaking of shifts is routine and widespread for homecare and disability workers. Mr Steiner, an ASU member and disability support worker recounted:
- I am sometimes rostered to work a broken shift. If I work multiple shifts in one day it is most likely because I am working at multiple locations. My employer does not pay me for the time I spend travelling between work locations⁷⁵.*
69. Mr Steiner set out in detail in his statement how his shifts were frequently broken⁷⁶. The inconsistency of those arrangements is striking.
70. Mr Sheehy, a HSU organiser responsible for workers in the aged care and disability sectors, observed:
- Broken shifts are a very common occurrence in the home care sector. It is very common to have at least one split to the shift during the course of the work day, but I know of instances where workers have had two splits to their shifts in a day. That is, the workers have had 3 separate periods of work during the course of the day, with breaks between each period.*
- The periods of work often occur with the same client, with the member providing assistance at different times of the day. I am aware of one member who was rostered to work three separate periods of one or one and a half hours over the course of a day with the same client⁷⁷.*
71. A consequence of the capacity to break shifts at will (without any quid pro quo of a minimum period of work) is that a large part of the day may be taken up accumulating disproportionately few hours of paid work. Mr Quinn described one of his working days thus:

⁷² Lobert [12] – [13]; CB 2966

⁷³ Friend [46] – [47], CB 2949

⁷⁴ *Four yearly review of Modern Awards – Aged Care Award*, [2019] FWCFB 5078, [160]-[195].

⁷⁵ Steiner [15], CB 1223

⁷⁶ Steiner [16], CB1223ff

⁷⁷ Sheehy [7] – [8], CB 2941 - 2942

*For example, on 17 July 2019, I worked from 8am-9am, 11am-12pm, 2pm to 5pm and 6:30pm to 7:30pm. So over an 11.5 hour day I worked 6 hours, with two breaks of two hours and one break of 1.5 hours.*⁷⁸

72. This approach of employers shifts the burden and risk of delay and downtime onto employees. In the case of Ms Thames' employer, Uniting, which is covered by an enterprise agreement which provides for a "broken shift allowance" of \$10.74 per break, periods between clients of longer than 10 minutes, but shorter than an hour, are characterised as "gaps" (not "breaks") and are unpaid⁷⁹. No challenge was made to that evidence.
73. 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. This is dealt with in further detail below.
74. In Mr Quinn's case, work allocation and payment arrangements left him either with periods of dead unpaid time waiting out "in the field" and/or driving back home for a short break, before heading back out again to his next appointment. His employer similarly only pays a split shift allowance for breaks longer than an hour, not including travel time. Breaks from anywhere between 5 minutes to an hour are unpaid.⁸⁰ He described his working days as follows:

At the end of my first appointment, I will then either drive back home for a short gap, or drive on to my next appointment;

Unless the time between the end of the appointment and the start of the next appointment coincides with the Google Maps estimate of time taken to travel between the two locations, my shift will break, and I will have unpaid time prior to the next appointment. That period can be between 5 minutes and 5 hours, but normally my breaks are not longer than 2 hours...;

*I continue with that process each day until my final appointment*⁸¹;

*...[the employer] pays for travel time and a travel allowance per kilometre. [The employer] calculates travel time using Google Maps. For example, in the second entry in my diary, dated 4 June 2019, I have a 15 minute gap between my first and second client, and my second and third client, and a 45 minute gap between my third and fourth client. I am not paid for all this time, only the time it takes to travel between clients according to Google Maps. So, if [the employer] have calculated on Google Maps that it only takes 10 minutes to travel between those clients, that extra 5 or 35 minutes is unpaid, it is dead time*⁸².

⁷⁸ Quinn #2 [24], CB 3054

⁷⁹ Thames [13], CB 2963

⁸⁰ Quinn #2 [15], CB 3053

⁸¹ Quinn #2 [10], CB 3052

⁸² Quinn #2 [14] – [15], CB 3053

If the break is one hour, but including travel time, then the split shift allowance is not paid. For example, my roster on 12 July 2019 has a one hour break between my first and second clients. I would be paid the time it takes to travel between these clients, according to Google Maps, and the kilometre allowance, but no split shift allowance for that day. In that case, my first two client appointments were each around 10 minutes drive from my home. In the hour gap between the first two appointments I travelled 10 minutes home, and had about 25 minutes at home, before having to leave to travel to the next client⁸³.

During breaks like these, if the kids are home, I might muck around with them. I am working on renovations on my home, which I can sometimes do on my breaks, but 25 minutes isn't long enough to start a task. Often I will just sit down and do nothing⁸⁴.

75. Mr Quinn also gave evidence of seeing the same client more than once in a day, having the shift broken between such attendances, and not being paid for travel time during the "break" notwithstanding his inevitable return home. Mr Quinn described this situation as follows:

If I have a split shift but am not required to travel, then I am not paid any travel time or kilometres for that client. For example, I have one client out in Berriedale whom I see for a 12pm-1pm lunch shift, and then a 3pm-5pm tea shift. The time between 1pm and 3pm is a split shift. Berriedale from home is about 5 to 6 kilometres and a 10 minute drive from home. There's never anything I need to do out in Berriedale so I just go back home during that time. I am paid the \$7.50 split shift allowance for this time, but no more, even though practically there is nothing else for me to do but to drive home and drive back in that time.

76. Thelma Thames, a home care worker employed in the Sydney metropolitan region, described waiting in her car during "breaks" in the shift.

When I have a gap or broken shift, I usually sit and wait in my car for my next client. Sometimes, if I have the time and I'm close to home, I will go home in this break. But often I will be waiting for an hour in my car for the next client, sometimes longer. It's been extremely hot in Sydney over summer, so sitting in your car can be very uncomfortable⁸⁵.

77. Reports of similar practice were made to Mr Friend, a Bargaining Officer for the Health Services Union NSW Branch, who stated:

Members commonly report having 1 or 2 hour breaks within broken shifts, which do not give them sufficient time to undertake other constructive activities in between periods of work, particularly when travel between clients is factored in. Members also regularly report having to wait in their car or a public space, for their next period of work to commence⁸⁶.

⁸³ Quinn #2 [20], CB 3054

⁸⁴ Quinn #2 [21], CB 3054

⁸⁵ Thames [15], CB 2963

⁸⁶ Friend [54] – [55], CB 2949

78. The vice of having the capacity to schedule “broken shifts”, with no limit on the length of the break, or the component parts of the shift, was illustrated in the evidence of Heather Waddell, who stated:

I have been required to travel 50 kilometres to my first client, perhaps attend other clients in the area, then have a long break after having only performed a few hours of work, attend to other clients then travel 50km home. On days like that, I would have to weigh up whether I should wait for hours in my car to save money on travel, or drive home during my breaks. Even though going home involves a long drive it is often the case that there is very little else useful I can do with my time in the areas around client homes. Driving 50 kilometres back home and then back out for the next part of your shift doesn't work out to be economical. But the other option is to be away from home for 13 hours for only 4 or 5 hours work which is emotionally uneconomical.⁸⁷

79. It is clear from the above evidence that the absence of any minimum engagement period for disability support workers and home care workers, or structured requirements for the breaking of shifts has enabled practices which are exploitative in the sense discussed by the Casuals and Part-Time Employment Full Bench. A fair and relevant minimum safety net would include a term establishing a minimum engagement, in which the wages payable are sufficient to compensate employees for the cost of attending the shift. Given the evidence as to the distances regularly required to be travelled by disability support workers in order to perform any shift of work, it is appropriate to set that minimum at three hours, and for that minimum to apply to any engagement. That is, the minimum engagement is not itself breakable, and if a shift is to be broken, each part of the shift should be at least three hours. The evidence of the employers (such as it is) about the demand for disability services shows there are definite peaks of demand of about that length (if not more) at the start and finish of the day.⁸⁸
80. The establishment of such a minimum, and the elimination of the capacity to break such period is likely to promote the efficient and productive performance of work - it will create a clear, and *direct* financial incentive⁸⁹ for employers to manage work allocation in a way which will attract and retain appropriately skilled workers.
81. In addition to the evidence referred to above, the HSU also relies upon the evidence in respect of broken shifts which is referred to in the Submission of the United Workers Union, which the HSU has read in draft. That evidence also supports the conclusions and findings contended for by the HSU.

TRAVEL TIME AND TRAVEL ALLOWANCE

82. The HSU has had an opportunity to review the Submission of the United Workers Union (**the UWU**) in draft form. That Submission includes the findings the UWU urges on the Commission in respect of the travel required of workers

⁸⁷ Waddell [11] – [12], CB 2957

⁸⁸ Miller [23], [26], CB 4410, 4411; Moody [53], [58], CB 4405, 4406

⁸⁹ Stanford XX, 17.10.19, PN 2272 – PN 2277

within the SCHCADS industry, and identifies the evidence upon which those findings are based. The HSU adopts, but does not repeat that part of the UWU Submission.

83. As set out above, possession of a functioning motor vehicle is all but a pre-condition for the work of disability support and home care workers.
84. 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.
85. 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.⁹⁰
86. In the case of the workers who were the subject of Ms Macdonald's report, only two of the ten disability support workers were paid for the time spent travelling between clients, although most of the workers received a travel allowance based on the kilometres travelled⁹¹.
87. Mr Quinn described his work schedule thus:

On a work day, my schedule is as follows:

- a. *Leaving my home in Glenorchy, which is about 10km from Hobart, and driving to the home of my first client. Occasionally I will call into the office in Hobart on the way past if there is something I need to pick up, but normally I will go straight to my first client.*
 - b. *My work locations vary between 1 and 20 kilometres from my home. Normally I see clients anywhere between Tarooma in the South (approximately 20km from home) Bridgewater in the North (approximately 15km from home). On the odd occasion I will travel further than 20 kilometres. Travel to for my first appointment varies between 5 minutes and 45 minutes;*
 - c. *I am not paid travel time or a kilometre allowance for the travel to my first appointment⁹²;*
88. 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.⁹³

⁹⁰ Thames [16], CB 2963

⁹¹ Macdonald CB 2916

⁹² Quinn #2 [10], CB 3052

⁹³ Waddell [10] – [11], CB 2957

89. Mr Friend's uncontradicted evidence about the travel required of HSU members in New South Wales was that they:

regularly travel significant distances in order to meet the requirements of role.

In regional areas, this can include regular travel of 30km-40km, in order to make a single home care visit to a client.

Some members report being asked to in excess of 70km in order to make a home care visit.

While our members are ordinarily paid for travel between consecutive clients, they usually receive no allowance to use their vehicle in order to get to or from a client, if it is their first or last client of the day.

In some cases, it may be their only client for the day⁹⁴.

90. Mr Eddington, whose evidence was also not challenged, stated:

Often home carers in Tasmanian are required to travel significant distances to work for clients. I am aware of employees having to travel between 30 and 50 kilometres to client homes⁹⁵.

91. Mr Eddington also observed that employers in home care in Tasmania took the approach that travel between engagements more than an hour apart, was not travel in the course of duties, and thus employees were required to bear those costs⁹⁶.

92. Mr Friend reported a similar approach in the industry in New South Wales of not paying any allowance in respect of travel on either side of a "broken shift"⁹⁷.

93. Mr Sheehy, a HSU organiser in New South Wales was aware of members being required to travel up to 50 kilometres to the client's home before their "shift" of paid work commenced⁹⁸.

94. Mr Steiner, the disability worker, can be required to travel up to 84 kilometres from Newcastle to Singleton, which involves a drive of in excess of one hour⁹⁹. For Mr Steiner, a full-time worker, travel adds a considerable amount of time to work days already lengthy as a consequence of broken shifts¹⁰⁰.

95. The evidence before the Commission tends to suggest that, particularly in regional areas, employers operate across large geographical areas. The capacity to work short engagements, and unlimited broken shifts, and not pay

⁹⁴ Friend [65] – [69], CB 2950 - 2951

⁹⁵ Eddington [21], CB 2973

⁹⁶ Eddington [20], CB 2973

⁹⁷ Friend [70] – [72], CB 2951

⁹⁸ Sheehy [9], CB 2942

⁹⁹ Steiner [11], CB 1223

¹⁰⁰ Steiner [18], CB 1225

employees for travel to and from shifts, creates a perverse incentive for employers to operate over greater distances than they otherwise might.

96. 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 kangaroos¹⁰¹ (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.
97. The requirement to travel long distances during the course of the working week is not limited to workers in regional areas. Mr Lobert, who works in the east and south-east Melbourne metropolitan area attends clients in locations as far apart as Frankston and Lilydale. He travels about 1000 kilometres in the course of a week¹⁰², a significant impost, both in terms of time, and the immediate and ongoing costs.
98. In Mr Quinn's case, the combined effect of broken shifts and work travel means that he travels between home and work about 30 times a week, as there are 2 or three occasions each day when he returns home during a break in the shift during the course of a day¹⁰³.
99. Distance alone is not the only difficulty associated with travel. Geography and traffic flows may compound the demands of travel. For Ms Thames it is commonplace to be required to travel between 12 to 15 kilometres to attend the first client of the day, a distance which on its face doesn't appear extraordinary. However, this involves travelling through traffic from the Eastern suburbs, where she lives, to locations in the inner West, such as Lilyfield, Newtown, Balmain and Petersham¹⁰⁴.
100. 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 work related travel, and is not paid as time worked nor compensated by payment of a kilometre allowance. This approach has some attraction at first blush because for many other sorts of workers the journey to and from their workplace is not ordinarily regarded as work travel. However, the comparison is inapposite for a range of reasons:
 - a. First, many workers now aren't based at their employer's premises. Given the nature of this work and the way it is structured, it is unclear why such a comparison should be regarded as appropriate;
 - b. Second, there is the compulsion, in almost all cases, for the worker to use their own vehicle to perform the travel, in many cases in order for the vehicle to be employed for (what is accepted to constitute) work-related travel later in the course of the shift, including travel transporting clients and their equipment;

¹⁰¹ Waddell [14], 2957-2958

¹⁰² Lobert [5] – [6], CB 2966

¹⁰³ Quinn [27] – [30], CB 2990

¹⁰⁴ Thames [14], [16] – [19]; CB 2963

- c. Third, for most workers, their workplace is the same location every day, meaning that they are able to establish patterns of travel along a familiar route, often utilising public transport which operates according to known timetables. That is not the case for the workers the subject of the present proceeding. Whilst most employees may choose whether or not to accept an offer of employment from an employer with a known location (taking into account ease of access and transport options); employees in this industry don't have a choice about the locations of the employer's clients;
 - d. Fourth, the distances required to be travelled by these workers are variable, not a matter of the worker's choice, and in many cases exceed those ordinarily travelled by workers to and from work.
 - e. Fifth, it cannot be assumed that departure for the work location from the worker's home involves any saving of time, or other advantage for the worker, when compared with a notional departure for the same location from the employer's premises with the trip being regarded as work travel.
101. There is little economic justification for taking this approach. The evidence before the Commission showed that under the NDIS, providers can now claim for up to 30 minutes in travel time in city areas and up to 60 minutes in travel time in regional areas¹⁰⁵ and home care providers may charge clients for travel¹⁰⁶. In short, employees are required to absorb a cost of their employer's business to facilitate the employer offering its services at a rate below that which it is entitled to charge under a common regulatory scheme; in other words workers are subsidising the employers' race to the bottom.
102. The approach whereby the first and last trip of the day are not regarded as work travel involves an incentive for employers to break shifts to maximise the number of first and last trips, and to roster clients located the furthest distance away at the start and end of shifts. Such a practice currently occurs¹⁰⁷. If that approach is to be maintained or endorsed, the benefits to the employer should be recognised and weighed when considering the Commission's approach to the Award as an entire document.
103. The HSU contends that as a matter of principle the time spent travelling to, from, and between clients, whether or not carried out during a break in a shift, is work, just as much as contact time with clients is regarded as work. It is carried out at the behest of the employer in order to perform the work of the employer, as the employer has arranged it. It should therefore be paid for as work time, and the cost of undertaking all such travel should attract an allowance at the appropriate rate per kilometre. The award should be varied to make those entitlements clear, having regard to the evidence before the Commission.

¹⁰⁵ Farthing Supplementary, [10(d)], CB 2982

¹⁰⁶ UV9; the evidence showed some of the employers included such travel in their price guides.

¹⁰⁷ Thames [16], CB 2963, Sheehy [9], CB 2942

104. At the least, where shifts may be broken, the reasonable time of travel in the worker's own vehicle between the last client before the shift breaks and the first client upon the recommencement of the shift should be paid for as worked time and attract payment of the per kilometre travel allowance in clause 20.5(a). In the HSU's submission, that approach would strike an appropriate balance in those circumstances, and establish a fair and relevant minimum standard.

OVERTIME

105. The HSU's claim in respect of overtime is designed to address the inconsistency in the Award as between full-time and part-time employees. The former are paid overtime for work in excess of rostered ordinary hours (i.e. 8 hrs); the latter aren't entitled to overtime until they have worked 10 hours in the course of a day.
106. Given:
- a. the proportion of part-time workers performing care work¹⁰⁸;
 - b. the demands of that work; and
 - c. the capacity to minimise paid hours of work by the use of broken shifts,
- there is no warrant for a different approach towards the payment of overtime to part-time workers.
107. 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. Ms Waddell described once working a nine hour shift with the single client, during which period she had no lunch or tea break, and only the opportunity to quickly eat her lunch while continuing to provide care to the client¹⁰⁹.
108. Mr Lobert describes the demands of the work as follows:
- It can be difficult working one on one with someone with a disability for 7 hours or more. Because the work is one on one, you can't have a break, you can't get away and you can't switch off.*¹¹⁰
109. 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.¹¹¹ 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.¹¹²
110. 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.

¹⁰⁸ See above

¹⁰⁹ Waddell [27], CB 2959

¹¹⁰ Lobert [21], CB 2968

¹¹¹ Wilcock [10], CB 2953

¹¹² Thames [6] – [7], CB 2962

111. In Mr Steiner's case, he is routinely on duty for much longer than the time he paid for; often working for more than 10 hours in a day, but not being paid for all of that time¹¹³.
112. In Mr Quinn's case, as set out above, even on a day where his work commenced at 7.30 a.m. and concluded just after midnight, he did not accrue 10 hours of work in total¹¹⁴.
113. The Award already provides considerable flexibility for employers by providing for all hours of part-time employees up to 38 hours in the course of a week or 76 hours in the course of a fortnight to be paid at single time. This allows employers to utilise part-time care workers on additional days to those they are contracted or rostered. However, where hours extend on any particular day, the rates of pay applicable to such hours should compensate for their unsociable, unpredictable and irregular nature with an overtime loading.

TELEPHONE ALLOWANCE

114. There is considerable similarity between the HSU's claim and the claim of the United Workers Union for a mobile phone allowance.
115. The HSU has reviewed the Submission of the United Workers Union in respect of this issue, and relies upon, but does not repeat, the evidence and findings which are set out therein.
116. The HSU urges the following findings on the Commission.
117. In addition to a vehicle, a smart telephone is an essential tool of the trade. Workers require a telephone in order to contact and be contactable by the employer, and in order to contact and be contactable by clients. They also may need to access email, perform searches using the internet, or use the employer's own telephone applications for the purpose of record keeping and the like. For example, Hammond Care provides its workers with a smartphone, by which its workers can access rosters and the like, and uses a software system called CommCare which provides a connection between managers, schedulers and care workers¹¹⁵. Graham Shanahan gave evidence that Coffs Coast Health and Community Care Pty Ltd uses "an internal messaging system on our rostering platform" to communicate with its employees.¹¹⁶
118. Mr Elrick observed, based on his experience in Victoria, that:

Generally speaking, most workers will only use their personal phone for the purposes of being contacted for shifts, and not during work. However, there is a growing trend amongst employers in the industry to have 'bring your own device' practices or policies that require employees to complete notes and other work-related duties using on-line apps on their personal phones. This is a

¹¹³ Steiner [17], CB 1225

¹¹⁴ Quinn #1 [43], CB 2991

¹¹⁵ Wright XXN, 18.10.19, PN2584-2588

¹¹⁶ Shanahan XXN, 18.10.19, PN2865-2870.

problem because it isn't uncommon for workers in this sector not to have "smart" phones. HACSU Victoria has recently prosecuted a dispute in the Fair Work Commission about the employer PALS ('Providing All Living Supports') requiring employees to use their personal phone for work duties. The employer had intended to compensate their employees with just \$5 per month, without any extra money for those who needed to upgrade their phones to a smart phone. Part of supporting people with disabilities requires research for social activities, making reservations, and sending emails to stakeholders. In group home settings, many houses only have one computer that is primarily for the group home managers. Some employers such as Scope do not let their workers access the computer at all. As computers are often inaccessible, many workers will use their personal phones to carry out the necessary research and communications¹¹⁷.

119. Mr Sheehy had a similar observation based on his experience in New South Wales:

It is very common amongst our members working in home care to be required to have a mobile or smart phone, to be able to be contactable out of hours and when they are on the job, to log in to rostering or work allocation schedules, for use in writing reports on their clients, or to otherwise carry out their work functions.

Nearly all our home care worker members either have been provided with a phone or are required to have their own phone. A smart phone in particular is required and is required because rosters, change in rosters and all work related communication is done through the phone, including email and texts, often utilizing an app.

Many of the aged care employers are now providing phones to employees. But there are still some who don't, yet require employees to have a smart phone to communicate and log onto their company's app¹¹⁸.

120. Mr Eddington stated, of his Tasmanian experience, as follows:

I am aware employees in the SCHCDS sector require a telephone to be contactable regarding direction to work shifts or fill shortfalls due to alterations in the roster. In home care particularly there is high degree of fluidity regarding employees being or making themselves available for certain shifts and thus are very regularly contacted on their personal phone in their own time by their employer. If there is an issue with certain clients employers will also contact employees on their personal phone in their personal time.

121. Their evidence about the necessity for workers to have a personal mobile telephone was supported by the rank and file workers.

¹¹⁷ Elrick [30] – [33], CB 2937

¹¹⁸ Sheehy [11] – [13], CB

122. In Ms Waddell's case, she was supplied with a phone by her employer, which was used to record starting and finishing times with a client via an app. Her employer requested her to keep her telephone on her at all times, and she was conscious that she was working on her own. She used the telephone for emails, taking photos (for example of client wounds) and for use of the employer's app, which was used for rostering, emails, communication with schedulers and the like¹¹⁹.
123. Mr Lobert's employer also used a similar system, employing an internet portal for employees to sign on and off, which must be done within half an hour of start and finish time. Employees could not safely count on being able to do this within the required time from a computer at their home. His employer communicates about shifts and client details via text message, and provides a link for workers to register their acceptance of an appointment. He also used a smart phone to, for example, check movie times or other information, maintain a calendar to keep track of appointments, keep track of client expenses and to make emergency calls on behalf of the client¹²⁰.
124. Mr Quinn used his telephone to check the employer's roster system and receive text messages about changes to appointments¹²¹.
125. The Commission would think that 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 years.
126. On the evidence before the Commission there is a real risk that the cost of maintaining contactability and connectivity for work purposes, like the cost of travel, and the cost of idle time, will be absorbed by employees to the advantage of the employer, and rendered invisible. Fairness dictates that the employer meet those costs, or a fair proportion of those costs.

UNIFORM/DAMAGED CLOTHING ALLOWANCE

127. 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. The Commission would consider that the care work performed by employees in the industry is likely to cause damage to their clothing.
128. Ms Wilcock described having to use whatever cleaning products are available in the client's home to perform the cleaning involved in the provision of domestic assistance. Such cleaning often involved dealing with bodily fluids or urine. Workers are also sometimes required to deal with the client's pets, as well as the client¹²².

¹¹⁹ Waddell [31] – [32], CB 2959

¹²⁰ Lobert [18] – [20], CB

¹²¹ Quinn [23], [35], CB

¹²² Wilcock [13] – [14], CB 2953

129. Heather Waddell also gave evidence as to the wear and tear on clothing from the use of the client's cleaning products, including bleach, and the exposure to bodily fluids involved in performing the work¹²³.
130. Mr Sheehy observed that the tasks of caring roles place a greater than usual burden on clothing, including personal care, getting the client dressed, showering them, preparing food and feeding clients, dealing with bodily fluids and cleaning up after pets¹²⁴.
131. A fair and relevant condition for such workers is to compensate them for damage to clothing suffered as a consequence of their performance of such roles.

RECALL TO WORK

132. This claim, as initially articulated, has been overtaken by subsequent events. It is now dealt with below, under the heading "Response to ASU Remote Response Claims".

CANCELLATION

133. The Award enables home care workers to have their shifts cancelled provided they are given notice of such change prior to 5.00 p.m. the day before a rostered shift. In that event, the employee is not entitled to payment for such shift.
134. If such notice is not given, the employee will only be paid for their "minimum specified hours", not actual planned hours of work, and may be required to perform make-up work in that or the following fortnight.
135. The brevity of the notice has the capacity to be disruptive for employees seeking to arrange other responsibilities around work commitments. For Ms Waddell, the capacity for such change meant that she found herself on one occasion, with a change which required her to attend an appointment 50 kilometres away, without sufficient fuel in her car to undertake the trip¹²⁵. Other examples of possible inconvenience, related to caring responsibilities, spring readily to mind.
136. 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.
137. The HSU's principal position is that there should be no such clause in the Award.
138. Although the clause appears to have been justified for financial reasons, given the discussion by the Full Bench in the 2 September 2019 decision of questions of funding, that consideration would not be given priority in the context of the

¹²³ Waddell [33] – [34], CB 2959

¹²⁴ Sheehy [14] – [16]; CB 2942 - 2943

¹²⁵ Waddell [15] – [16], CB 2958

present review. In any event, the Commission would **not** be satisfied, on the evidence before it, that cancellation of a home care appointment at short notice would leave the employer without a source of funding to meet employee wages. First, wages are modest. Second, it is far from the case that employers in the home care industry are suffering through any financial hardship. Third, on the evidence before the Commission, it would not be satisfied that organisations providing home care services are not able to make arrangements whereby they charge when clients cancel scheduled services.

139. The latter proposition is true, both for the smaller providers and the larger providers.
140. Mr Shanahan, from Coffs Coast Health and Community Care, accepted¹²⁶ that his organisation was not limited under the Home Care Package Programs from charging a cancellation fee, but that the organisation normally waived such fees, because that was a business strategy that succeeded in winning them clients. The cost of that strategy should not be billed to low paid employees.
141. When Ms Ryan, from Community Care Options, was taken through her organisation's "cancellation log"¹²⁷, a record of cancelled home care services over a period of about a fortnight in late 2018, she conceded that the *vast bulk* of the cancellations fell into the category of being chargeable. Cancellation fees charged by the organisation were clearly disclosed in the company's schedule of rates¹²⁸.
142. Baptist Care, one of the larger providers, included a provision for liability for payment for scheduled services cancelled without notice by 10 a.m. the day prior to the service in their pro forma Commonwealth Home Support Program agreement¹²⁹. That clause covered some 6000 of their 9000 clients¹³⁰. The pro forma agreement for Home Care Package clients included a clause providing for payment in the absence of 24 hours notice of cancellation of a service¹³¹. The quantum of fees able to be charged in that event would well and truly cover the wage costs of the employee scheduled to perform the service.
143. In summary, the existing cancellation clause in the Award operates to shift the financial risk (which on the evidence above is minimal) of variable client demand onto the employee, and to require the employee to forego wages to build up the employer's goodwill. The clause is not a fair and relevant minimum condition.
144. Having regard to all of the evidence before the Commission, including the evidence that workers are low-paid, that they are often required to work very

¹²⁶ Shanahan XX, 18.10.19, PN 2897

¹²⁷ Ex HSU 15

¹²⁸ Ex HSU 14

¹²⁹ Ex HSU 19; Mason XX, 18.10.19, PN 3226 - 3240

¹³⁰ Mason XX, 18.10.19, PN 3228

¹³¹ Ex HSU 20; Mason XX, 18.10.19, PN 3249

short shifts, that they are often required to undertake a considerable amount of work-related travel without recompense, there is no warrant for the clause.

145. The clause should be deleted.
146. The Commission would be more comfortably satisfied in taking such course having regard to the absence of clear and cogent evidence from the employer parties about the operation of the existing clause, or about the financial impact upon them of cancellations.
147. Alternatively, the clause should be amended to ensure that employees receive payment for all of their rostered hours if they are not given at least 48 hours notice of cancellation.

SLEEPOVER

148. The clause should be amended to ensure appropriate facilities are provided when employees are required to perform a sleepover shift.
149. Currently, the facilities to be afforded to an employee performing a sleepover shift are defined only vaguely. Clause 25.7(c) provides:

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.

150. Mr Elrick, who worked in the sector before commencing in his role with the HSU gave some (unchallenged) evidence about how that provision can operate in practice in the industry:

the sleepover arrangements in many workplaces aren't conducive to a good sleep. For a period while I was undertaking sleepovers the bed was located in the office. The head of the bed was coming out of the cupboard that had the doors removed, the office had hums from the computer and fax, along with a bright light from the handset of the house phone. I have had reports from other members who have had to sleep over with the sleepover door open, having to deal with uncomfortable beds, and various other issues that result in poor sleep¹³².

151. The circumstances described by Mr Elrick involve a risk to personal security and safety and are unlikely to provide an environment for proper rest and repose.

RESPONSE TO ABI AMENDED CLAIMS [Directions 1(v)]

Cancellation

¹³² Elrick [27], CB 2937

152. As set out above, there is no warrant, financial or otherwise, for extending the existing cancellation arrangements to disability workers. The capacity of employers of disability workers to charge for cancelled services under the NDIS improved dramatically as a consequence of changes to the Price Guide 2019-2020 which were announced in July 2019.
153. The updated cancellation rules provide for the following:
- a. a provider can charge an NDIS participant for a “short-notice” cancellation up to 90% of the fee associated with the scheduled activity/service. Such fee well exceeds the total labour costs of the service;
 - b. a “short-notice” cancellation is defined as such if the participant:
 - i. 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
 - ii. has given less than 2 clear business days’ notice for a support that meets both of the following conditions:
 1. the support is less than 8 hours continuous duration; AND
 2. the agreed total price for the support is less than \$1,000;or
 - iii. has given less than 5 clear business days’ notice for any other support.
 - c. There is no limit on the number of short notice cancellations (or no shows) that a provider can claim in respect of a participant.

Remote Response

154. This claim is dealt with below.

RESPONSE TO ASU REMOTE RESPONSE CLAIMS [Directions 1(vi)]

155. The HSU relies on its Submissions dated 2 October 2019.

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18 November 2019

ATTACHMENT A

MINIMUM ENGAGEMENTS AND BROKEN SHIFTS		
Parts of the Court Book, exhibits, and transcripts relevant to this claim	Exhibit no.	Reference
Draft determination		CB 2835 - 2836
Statement of Mark Farthing dated 15 February 2019	HSU1	CB 2926-2932
Statement of William Elrick dated 15 February 2019	HSU3	CB 2935
Statement of Heather Waddell dated 15 February 2019	HSU4	CB 2956-2960
Statement of Christopher Friend dated 15 February 2019	HSU5	CB 2945-2951
Statement of Fiona Macdonald dated 15 February 2019	HSU25	CB 2910-2915
Statement of Robert Sheehy dated 15 February 2019	HSU26	CB 2941-2944
Statement of Pamela Wilcock dated 15 February 2019	HSU27 ¹³³	CB 2952-2955
Statement of Thelma Thames dated 15 February 2019	HSU28 ¹³⁴	CB 2961-2964
Statement of Bernie Lobert dated 15 February 2019	HSU29 ¹³⁵	CB 2965-2968
Statement of James Eddington dated 15 February 2019	HSU30 ¹³⁶	CB 2973

¹³³ We note that the statements of Pamela Wilcock, Thelma Thames, Bernie Lobert, James Eddington and the two statements of Scott Quinn appear to have been incorrectly numbered in the list of exhibits at Attachment A to the Directions dated 23 October 2019. Both Pamela Wilcock and Bernie Lobert's Statements were numbered as HSU27; both Thelma Thames and James Eddington's Statements were numbered as HSU28. The subsequent statements were therefore misnumbered. We have attempted to correct the numbering here.

¹³⁴ As above.

¹³⁵ As above.

¹³⁶ As above.

Statement of Scott Quinn dated 16 December 2015	HSU31 ¹³⁷	CB 2988-3050
Supplementary statement of Scott Quinn dated 3 October 2019	HSU32 ¹³⁸	CB 3051-3079
Statement of Dr James Stanford	ASU4	CB 1459 - 1471
Statement of Robert Steiner	ASU2	CB 1223
Statement of Steven Miller	NDS2	CB 4410-4411
Statement of David Moody	NDS1	CB 4405-4406
Oral evidence of Dr James Stanford, 17.10.19		PN 2272 – PN 2277
Parts of submissions relevant to this claim		
Submission dated 15 February 2019		CB 2839 - 2856
Supplementary submission in reply dated 3 October 2019		CB 2887 - 2901

TRAVEL TIME AND TRAVEL ALLOWANCE		
Parts of the Court Book, exhibits, and transcripts relevant to this claim	Exhibit no.	Reference
Draft determination		CB 2835-2838
Statement of Mark Farthing dated 15 February 2019	HSU1	CB 2926-2932
Further Statement of Mark Farthing dated 16 September	HSU2	CB 2982
NDIS Price Guide 2019-20		CB 4321 - 4368
Statement of William Elrick dated 15 February 2019	HSU3	CB 2933-2940
Statement of Heather Waddell dated 15 February 2019	HSU4	CB 2956-2960

¹³⁷ As above.

¹³⁸ As above.

Statement of Christopher Friend dated 15 February 2019	HSU5	CB 2945-2951
Statement of Fiona Macdonald dated 15 February 2019	HSU25	CB 2909-2923
Statement of Robert Sheehy dated 15 February 2019	HSU26	CB 2941-2944
Statement of Pamela Wilcock dated 15 February 2019	HSU27	CB 2952-2955
Statement of Thelma Thames dated 15 February 2019	HSU28	CB 2961-2964
Statement of Bernie Lobert dated 15 February 2019	HSU29	CB 2965-2968
Statement of James Eddington dated 15 February 2019	HSU30	CB 2969-2980
Statement of Scott Quinn dated 16 December 2015	HSU31	CB 2988-3050
Supplementary statement of Scott Quinn dated 3 October 2019	HSU32	CB 3051-3079
Statement of Robert Steiner	ASU2	CB 1223
Bundle of Home Care Price Guide materials	UV9	
Parts of submissions relevant to this claim		
Submission dated 15 February 2019		CB 2839 - 2856
Further submission in reply dated 3 October 2019		CB 2887 - 2901

OVERTIME		
Parts of the Court Book, exhibits, and transcripts relevant to this claim	Exhibit no.	Reference
Draft determination		CB 2835-2838
Statement of William Elrick dated 15 February 2019	HSU3	CB 2933-2940

Statement of Heather Waddell dated 15 February 2019	HSU4	CB 2956-2960
Statement of Christopher Friend dated 15 February 2019	HSU5	CB 2945-2951
Statement of Fiona Macdonald dated 15 February 2019	HSU25	CB 2909-2923
Statement of Robert Sheehy dated 15 February 2019	HSU26	CB 2941-2944
Statement of Pamela Wilcock dated 15 February 2019	HSU27	CB 2952-2955
Statement of Thelma Thames dated 15 February 2019	HSU28	CB 2961-2964
Statement of Bernie Lobert dated 15 February 2019	HSU29	CB 2965-2968
Statement of James Eddington dated 15 February 2019	HSU30	CB 2969-2980
Statement of Scott Quinn dated 16 December 2015	HSU31	CB 2988-3050
Supplementary statement of Scott Quinn dated 3 October 2019	HSU32	CB 3051-3079
Statement of Robert Steiner	ASU2	CB 1225
Parts of submissions relevant to this claim		
Submission dated 15 February 2019		CB 2839 - 2856
Further submission in reply dated 3 October 2019		CB 2887 - 2901

TELEPHONE ALLOWANCE		
Parts of the Court Book, exhibits, and transcripts relevant to this claim	Exhibit no.	Reference
Draft determination		CB 2835-2838
Statement of William Elrick dated 15 February 2019	HSU3	CB 2933-2940

Statement of Heather Waddell dated 15 February 2019	HSU4	CB 2956-2960
Statement of Christopher Friend dated 15 February 2019	HSU5	CB 2945-2951
Statement of Robert Sheehy dated 15 February 2019	HSU26	CB 2941-2944
Statement of Pamela Wilcock dated 15 February 2019	HSU27	CB 2952-2955
Statement of Thelma Thames dated 15 February 2019	HSU28	CB 2961-2964
Statement of Bernie Lobert dated 15 February 2019	HSU29	CB 2965-2968
Statement of James Eddington dated 15 February 2019	HSU30	CB 2969-2980
Supplementary statement of Scott Quinn dated 3 October 2019	HSU32	CB 3051-3079
Statement of Robert Steiner	ASU2	CB 1225
Oral evidence of Jefferey Wright, 17.10.2019		PN2584-2588
Oral evidence of Graham Shanahan, 18.10.2019		PN2865-2870
Parts of submissions relevant to this claim		
Submission dated 15 February 2019		CB 2839 - 2856
Further submission in reply dated 3 October 2019		CB 2887 - 2901

UNIFORM/DAMAGED CLOTHING ALLOWANCE		
Parts of the Court Book, exhibits, and transcripts relevant to this claim	Exhibit no.	Reference
Draft determination		CB 2835-2838
Statement of William Elrick dated 15 February 2019	HSU3	CB 2933-2940

Statement of Heather Waddell dated 15 February 2019	HSU4	CB 2956-2960
Statement of Robert Sheehy dated 15 February 2019	HSU26	CB 2941-2944
Statement of Pamela Wilcock dated 15 February 2019	HSU27	CB 2952-2955
Statement of Thelma Thames dated 15 February 2019	HSU28	CB 2961-2964
Parts of submissions relevant to this claim		
Submission dated 15 February 2019		CB 2839 - 2856
Further submission in reply dated 3 October 2019		CB 2887 - 2901

CLIENT CANCELLATION		
Parts of the Court Book, exhibits, and transcripts relevant to this claim	Exhibit no.	Reference
Draft determination		CB 2835-2838
Statement of Mark Farthing dated 15 February 2019	HSU1	CB 2926-2932
Further Statement of Mark Farthing dated 16 September	HSU2	CB 2981-2987
NDIS Price Guide 2019-20		CB 4321 - 4368
Statement of William Elrick dated 15 February 2019	HSU3	CB 2933-2940
Statement of Heather Waddell dated 15 February 2019	HSU4	CB 2956-2960
Statement of Christopher Friend dated 15 February 2019	HSU5	CB 2945-2951
Statement of Fiona Macdonald dated 15 February 2019	HSU25	CB 2909-2923
Statement of Robert Sheehy dated 15 February 2019	HSU26	CB 2941-2944

Statement of Thelma Thames dated 15 February 2019	HSU28	CB 2961-2964
Supplementary statement of Scott Quinn dated 3 October 2019	HSU32	CB 3051-3079
Cross examination of Deb Ryan: CCO Schedule of rates	HSU14	
Cross examination of Deb Ryan: Same Day Cancellation Log	HSU15	
Baptist Care Pro forma Service Agreement	HSU19	
Baptist Care Home Care Agreement	HSU20	
Oral evidence of Graham Shanahan 18.10.19		PN 2897
Oral evidence of Wendy Mason 18.10.19		PN 3226 - 3240
Parts of submissions relevant to this claim		
Submission dated 15 February 2019		CB 2839 - 2856
Submission in Reply dated 16 September 2019 (re ABI and ors claims)		CB 2867 - 2883
Further submission in reply dated 3 October 2019		CB 2887 - 2901

SLEEPOVERS		
Parts of the Court Book, exhibits, and transcripts relevant to this claim	Exhibit no.	Reference
Draft determination		CB 2835-2838
Statement of William Elrick dated 15 February 2019	HSU3	CB 2933-2940
Parts of submissions relevant to this claim		
Submission dated 15 February 2019		CB 2839 - 2856
Further submission in reply dated 3 October 2019		CB 2887 - 2901