BEFORE THE FAIR WORK COMMISSION

Fair Work Act 2009 (Cth)

Title of matter:	4 yearly review of modern awards—*Social, Community, Home Care and Disability Services Industry Award 2010*—Tranche 2 Proceeding
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Lodged by: Australian Federation of Employers and Industries

Address for Service: Australian Federation of Employers and Industries
PO Box A233, Sydney South NSW 1235

Telephone: (02) 9264 2000

Facsimile: (02) 9264 5699

Email: shue.yin.lo@afei.org.au

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Part 1 – Responses to findings sought by other parties

AFEI has endeavoured to respond to all proposed findings by each of the interested parties who press a particular claim. However, where AFEI has not responded to a particular finding by an interested party, this is not an acceptance that such a finding is unchallenged.

A. Travel time (ASU, HSU, UWU claims)

Findings Sought by the ASU

1-1. Findings sought by the ASU in relation to this claim are at [77] – [87] of their 19 November 2019 submissions. AFEI contest the findings sought by the ASU, as follows:

Some disability services employees (employed under the SACS classification stream) do not have base location. They perform their work in a client's home and locations where their client may need to be taken. Employers need, and arrange for, employees to travel between different locations in order for the employer to carry out their business. Disability support workers generally travel directly to their first client from home and back home after their last client. They rarely attend their employer's premises. Disability support workers who provide in-home supports are required to hold a driver's license as condition of employment expected to use their own car for work travel. The commission would find that this travel is work.

1-2. The evidence relied on by the ASU in support of this finding appear to be based solely on the employment contract of Ms Anderson[1] and cannot be relied upon to substantiate this finding, including because:

1-3. ***Firstly***, the contract <u>does not</u> contain express provisions supporting the multiple assertions made in the finding (e.g. the contract does not state 'disability support workers generally travel directly to their first client from home and back home after their last client' nor does the contract include terms about the structure of a work day for disability service workers generally and whether or not they attend their employer's premises). ***Further***, the contract includes provision of a tool of trade vehicle which may be utilised by the employee for personal use.[2]

1-4. ***Secondly***, the single employment contract, covering the employment of one person, is not sufficient to establish the facts and broad assertions by the ASU, or provide a safe basis upon which to determine entitlements for a whole national sector.

1-5. Further, the evidence relied on by the ASU does not establish that travel undertaken by employees between shifts is 'work' as asserted by the ASU at [77] of its submissions. Even if the findings of the ASU were accepted, they do not suggest a conclusion that this travel is work. AFEI relies on its submissions of 17 September 2019.[3]

[1] Court Book "CB" at pages 1398 – 1410.
[2] CB pg1400 at "Item 18".
[3] In particular, paragraphs [10]-[15]

The Commission would also find that employers regularly break shifts so that work travel is done in unpaid breaks

1-6. AFEI challenges this finding.

1-7. The evidence in these proceedings of factors influencing employers in how shifts are structured demonstrates that employers attempt to maximise work time of employees engaged on broken shifts, where this is able to correspond with daily client requirements; and that employers afford private time to employees as breaks between periods of work where in-home care work is not required. For example:

> Ms Mason states[4]:
>
> "*Rostering and scheduling procedures are undertaken with the objective of scheduling home care employees with "blocks" of work wherever possible. These "blocks" will vary from 2 hours to possibly 5 hours depending, amongst other things, on the regional location, the distance to travel between clients, the availability of care staff, and the flexibility or otherwise of clients in setting service times*"

1-8. AFEI also rely on its submissions of 17 September 2019.

Unpaid travel time, in conjunction with the absence of minimum engagements and broken shifts, means that employees can work over lengthy spans (up to 12 hours), but the majority of that time may be unpaid. This unpaid time is still effectively controlled by the employer

1-9. The ASU has provided no basis for the finding that the unpaid time is controlled by the employer. This is contrary to evidence heard before the Full Bench.[5] For example, during a break undertaken by an employee in between a broken shift, the employee may undertake activities not related to work,[6] go home,[7] go to the shops.[8] AFEI also relies on its submissions of 17 September 2019.[9]

1-10. Additionally, in some instances, employee availability and personal circumstances could be taken into account when broken shifts are rostered.[10]

1-11. Consequently, this evidence does not suggest that unpaid time is controlled by the employer.

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 employees for travel to and from shifts, has the capacity to create perverse incentive for employers to operate over greater distances than they otherwise might.

[4] Statement of Mason at [71].
[5] PN 527-532.
[6] PN461; PN525
[7] PN464; PN527
[8] PN529
[9] In particular, at [14]
[10] PN2623.

1-12. The evidence relied upon by the ASU is paragraph 11 of Mr Steiner's statement, which states "*I do most of my work at my clients' homes or out with them in the community. I usually only attend my employer's offices for team meetings*".[11] ASU also support this finding with Annexure A of Mr Steiner's statement which appears to contain copies of Mr Steiner's rosters. In short, this evidence does not support the finding sought.

1-13. This proposed finding does not support the proposed variation. It appears to infer that employers should limit the geographical distance in which they operate in order to limit the incidence of broken shifts. This assertion is inconsistent with the need for modern awards to provide a relevant safety net[12], including by being appropriate to the industry.

Unpaid travel time thus reduced the already low wages of disability workers. As Dr Stanford explains the failure to compensate workers for this often-onerous travel time translates into a substantial reduction in effective compensation.

1-14. Unpaid travel time does not 'reduce' or 'cut' the income or rate paid to employees. This is an unsound conclusion based upon an 'extreme example' used by Dr Stanford.[13] AFEI further relies on its submissions of 17 September 2019.[14]

The submission that it is too difficult to calculate the length of travel time is without basis. As noted above, disability services employers routinely set rosters and make agreements about regular patterns of work that break shifts so that only time spent directly with the client is paid time. Several employer lay witnesses already pay for travel time. For example, Ms Wang explains that CASS pays travel allowance which is calculated based on details entered into a mobile application.

1-15. The above finding is inconsistent with employee evidence. For example, Ms Stewart stated that she could not be certain how long it would take for her to get to clients on any given day, given traffic and sometimes she gets held up.[15]

1-16. To the extent the ASU seeks to infer from the above that all time between client engagements should/could be treated as travel time, this is inconsistent with the evidence that such time is being treated by employees as private time (not work). Evidence heard through cross-examination demonstrate that employees can and do undertake personal errands in the course of their working day when undertaking a broken shift. For example, during the breaks, the employee may:

- undertake activities not related to work[16]
- go home[17]
- go to the shops[18]

[11] Statement of Steiner at [11]
[12] s134(1) *Fair Work Act 2009 (Cth)*
[13] CB page 1467.
[14] In particular at [13] - [15]
[15] PN460.
[16] PN461; PN525
[17] PN464; PN527
[18] PN529

NDIS Providers may claim up to 30 minutes for the time spent travelling to each participant in city areas, and up to 60 minutes in regional areas. There is no probative evidence that our claim for paid travel time cannot be afforded by employers. No employer party has provided any modelling of the cost of our claim or provided any detail about the cost of paying for travel time.

1-17. This finding is not accurate. The NDIS Pricing guide only allows for travel time to be claimed by a provider in certain set conditions, including the type of service item being delivered.[19]

1-18. Further, to the extent some travel time may be claimable in certain circumstances, this is not a proper basis for treating an employee's private time during a break as paid work.

Equal remuneration – Paragraphs 84 – 87 ASU submissions dated 19 November 2019

1-19. The ASU seek a finding that unpaid travel time in disability services offends the principle of equal remuneration for work of equal or comparable value.[20] AFEI challenge this proposed finding.

1-20. ***Firstly***, Social and Community Services employees Level 2 – 8, are paid rates of pay which include an equal remuneration component (that is up to 45% higher than the Modern Award prescribes) to ensure equal pay for work of equal or comparable value. The value assigned to the work takes into account the discharge of specific skills.

1-21. ***Secondly***, the ASU's assertions at paragraphs [84]-[87] of their submission should be disregarded in their entirety given they have either provided no, or admittedly incomplete data, regarding:

a. Their assertion that in male dominated industries work travel is generally paid;

b. The appropriateness of the business equipment industry as a comparator;

c. The composition of the workforce of those in the business equipment industry;

d. The comparison of the method of remuneration for those in the business equipment industry.

1-22. They have also failed to provide any consideration or analysis of the method of remuneration, award conditions, market conditions or nature of the industries being compared, or the effect of the current Equal Remuneration Order in the SACS industry on this comparison.

1-23. The ASU also seek a comparison and finding on one discrete entitlement between the two industries. This is inconsistent with the principles of equal remuneration which require a comparison of the remuneration for performing work, not an individual, discrete part of the work required to be performed, and what is paid for that individual component. Previous Full Bench decisions confirm that this is a broad consideration of the work performed, and that when considering the remuneration paid this is not confined to wages or salary and 'includes all other monetary and non-monetary compensation paid as consideration for service under an employment contract'.[21] In our submission this does not permit the comparison suggested by the ASU.

[19] NDIS Price Guide 2019-20, CB 2796, 12.

[20] ASU 19 November 2019 Submissions at [84]

[21] *Equal Remuneration Decision* [2015] FWCFB 8200, 86.

1-24. The 2011 Equal Remuneration Decision the ASU have referred to and quoted also states that the idea that the work performed in the SACS industry is 'caring work' and as such is undervalued. The ASU has provided no explanation as to why travel time, including an employee's private time during a break, should be also viewed as being 'caring work', and subject to the same findings.

Findings Sought by the UWU

1-25. Findings sought by the UWU (previously United Voice) in relation to this claim appear to be at [12] – [30] of their 18 November 2019 submissions. AFEI contests the findings sought by the UWU as follows:

Employees in home care (and certain types of disability services work) have no 'base location' that they start at and finish at each day

1-26. The finding sought by the UWU at [13] are too broad based upon the evidence. The oral evidence given by the referenced witnesses only relate to home care workers and only addresses the work arrangements of two employers. The UWU have not pointed to any evidence that this is what occurs on a wider basis in the industry, how common a work arrangement it is, the frequency at which it occurs in the industry or to which streams of employees under the Award it applies.

There are different approaches to the payment of travel time by employers in the industry – 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

1-27. We refer to our written submissions dated 17 September 2019[22].

The combination of employers' not paying travel time, broken shifts and a lack of minimum engagement (for part-time employees can result in a significant amount of dead time for employees, that is time spent travelling without payment or time spent waiting between broken shifts. When this occurs, it is the employee who bears the cost of the idle time and the unpaid travel

1-28. We do not agree with the characterisation in paragraph 20 of the submissions as being 'dead time'. There is evidence that employees use that time for non-work related activities and are able to return home for such time.[23] We also refer to our written submissions dated 17 September 2019.

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 that can include a majority of 'time' that is unpaid but dedicated to the work of the employer. This contributes to financial distress

[22] In particular at [10-15]

[23] See eg PN464

1-29. As stated above:

- unpaid travel time does not 'reduce' or 'cut' the income or rate paid to employees;
- employees can and do undertake personal errands during breaks in a broken shift;
- AFEI also refer to written submissions dated 17 September 2019.

Findings Sought by the HSU

1-30. The HSU's submissions in relation to this claim are set out at [82] to [104] of its submission of 18 November 2019.[24] It is unclear what specific findings are being sought by the HSU in respect of this claim, although the HSU submits a number of conclusions including the following:

- Particularly for workers in regional areas, considerable distances may be required for travel [paragraph 88];
- 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. The common requirement to travel early in the morning or as night falls increases that risk [paragraph 96]

1-31. AFEI responds as follows:

- In respect of paragraph 88, the HSU rely on witness statement evidence of Ms Waddell. AFEI refers to paragraph G of its submissions dated 19 November 2019.
- In respect of paragraph 96, the HSU's submission lack a proper evidentiary basis for the conclusion. Ms Waddell's statement provides no evidence to suggest that there is any increase in risk relating to travel at a particular time of the day. It is further unclear why this should have any impact on the HSU's claim. Travel during the morning or evening is also a common feature of employment in any sector.

B. Overtime for part-time employees and casuals (HSU claim)

1-32. Findings sought by the HSU in relation to this claim appear to be at paragraphs [105] – [113] of their submissions dated 16 November 2019. Unless stated otherwise, a reference to the HSU submissions in respect to this claim, are a reference to its 16 November 2019 submissions.

1-33. As part of this claim, the HSU seeks to vary the Award in three respects, these include:

a. Varying the overtime provisions to require all time worked by part-time employees which exceed hours agreed in Clause 10.3(c) to be treated as overtime and paid at the rate of time and a half for the first two hours, and double time thereafter; and

b. Varying the overtime provisions so that all time worked by part-time employees which exceeds 8 hours per day will be paid at the rate of time and a half for the first two hours and double time thereafter; and

[24] The HSU is seeking a number of findings that overlap with those of the UWU in relation to travel-time. Where they do so we rely upon our responses to findings sought by the UWU above.

c. Varying the overtime provisions so that all time worked by casual employees which exceed 8 hours per day will be paid at the rate of time and a half for the first two hours and double time thereafter.

1-34. AFEI's response to the findings sought in relation to (a) and (b) above, are addressed below.

a. Overtime for part-time employees working additional hours

1-35. In [105] of the HSU submissions, it contends that its claim in respect of overtime is '*designed to address the inconsistency in the Award as between full-time and part-time employees'* and at [106] that '*there is no warrant for a different approach towards the payment of overtime to part-time workers.'* AFEI responds as follows:

a. Currently, the Award allows for both full-time and part-time employees to work up to 38 ordinary hours per week. This ensures the same hours are treated as having the same value for full-time and part-time employees. Accordingly, the HSU's submissions at [105]-[106] should be treated as irrelevant to this claim.

b. AFEI refers to its submissions of 23 July 2019 at [53], that if the HSU's claim is granted, it would have the effect of full-time employee and a part-time employee being entitled to substantially different pay without any difference in the quantity, quality or value of the work. For example:

   i. A part-time employee with 20 agreed hours per week, would receive the equivalent of 55 x the ordinary hourly rate for working 38 hours, whereas a full-time employee would only receive the equivalent of 38 x the ordinary hourly rate.

   ii. It could even result in a part-time employee being entitled to a higher weekly pay than a full time employee for working less hours than a full-time employee.

   The HSU's proposed variation is thus inconsistent with the modern awards objective to promote the efficient and productive performance of work.[25]

1-36. Paragraphs [107] to [112] of the HSU's submissions appear to be proposed factual findings to support the submission in [106] that '*there is no warrant for a different approach towards the payment of overtime to part-time workers*.' In the circumstances this underlying submission does not support the proposed variation (for the reasons identified in our submissions above), there is no need for the Commission to consider (or reach determination on) the associated proposed factual findings.

Overtime for part-time employees working in addition to 8 hours per day

1-37. The HSU refer to the proportion of part-time workers performing care work.[26] In response, AFEI relies on paragraphs [55] – [58] of its 23 July 2019 submissions.

[25] S134(1)(d) *Fair Work Act 2009* (Cth)

[26] At [106] of its 16 November 2019 submissions

1-38. The HSU appear to contend in support of this claim that "*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*.[27]" The HSU has however also proposed that this abovementioned flexibility in the Award be abolished. The existence of the abovementioned flexibility (which is reasonable)[28] should therefore not be afforded any weight in relation to the HSU's proposal for all time worked by part-time employees which exceeds 8 hours per day to be paid at the rate of time and a half for the first two hours and double time thereafter.

1-39. The HSU seek a finding that '*working in a face to face contact role with clients with disability is likely to be physically and mentally taxing work*.' In support of that finding, the HSU rely on the evidence of Ms Waddell that she described once working a nine hour shift with a client during which she had no lunch or tea break, and the evidence of Mr Lobert of shifts up to 7hrs in length, where Mr Lobert claims '*you can't have a break, you can't get away and you can't switch off*.' That one person had one shift exceeding 8hrs in which they did not take a lunch break or receive their tea break entitlements, is not sufficient evidence for the Commission to be satisfied of the experience of any other disability support worker working more than 8hrs, or disability support workers at large. Further:

a. To the extent that working through a lunch break in a shift could possibly contribute to the physical or mental demands of the work, that is already addressed and compensated in the Award,[29] and is not a finding that supports the HSU's claim.

b. To the extent the failure to take breaks during a shift could be relevant to the total physical or mental demands of the work, that is already addressed by the requirement in the Award for employees (including part-time employees) working more than 8-hours to have 2 x 10 minute paid tea breaks.[30]

c. There is no evidence that if part-time employees are paid a higher rate for the 9th and 10th hour of a shift, this would make the work any less demanding. To the extent the HSU's claim is directed at a concern for WHS of disability support workers, this is directly addressed by the rest break provisions already included in the Award.

1-40. In support of its proposition that '*it is unlikely part-time workers would accrue 10 hours of paid work in the course of the day*' the HSU appear to rely on the evidence of Mr Steiner and Mr Quinn. Both being employees who gave evidence of performing broken/split shifts. [31] The evidence:

a. Is incapable of substantiating any findings in relation to part-time employees who do not perform broken shifts (which are peculiar to employees performing disability services work and home care employees)[32]

b. Is insufficient to substantiate findings about the hours worked by all part-time employees nationally, who perform broken/split shifts.

[27] At [113] of its 16 November 2019 submission
[28] See AFEI's 23 July 2019 submissions at [48]-[49]
[29] Cl 27.1 of the Award
[30] Cl. 27.2 of the Award
[31] Mr Steiner CB1223; Mr Quinn CB2991
[32] Cl. 25.6 of the Award

C. Minimum engagements (HSU claim)

1-41. The HSU's submissions in relation to this claim are set out at [57] – [81] of its submission of 18 November 2019. These submissions are intertwined with the HSU's claim for broken shifts. AFEI notes the Commission has asked the HSU to clearly set out the findings it seeks in respect of broken shifts and the evidence in support of those findings. In the light of this, AFEI intends to respond upon the HSU's further clarification in respect of this claim.

Part 2 – Responses to Questions in Background Paper

Background

Q1 (pg6) – Is the list set out above an accurate list of the Tranche 2 claims that are being pressed?

2-1. This is a question for the other interested parties to respond to.

Q2 (pg7) – Is Attachment A an accurate list of all exhibits tendered in the Tranche 2 proceedings?

2-2. This is a question for the other interested parties to respond to.

Q3 (pg7)– Is Attachment B an accurate list of all the submissions and submissions in reply relied upon in relation to the claims being considered in the Tranche 2 proceedings?

2-3. To the extent that this question relates to AFEI, AFEI confirms it relies on the submissions listed in Attachment B of the Background paper. Further:

a. In relation to the 24-hour care clause, AFEI also rely on submissions dated 8 April 2019.
b. In responding to findings sought by other parties as 'general findings on the evidence,' particularly in relation to the 19 September 2019 Decision, AFEI also rely on the joint submission of AFEI, ASU and NDS regarding the ERO. This is included in the Court Book at pages 4374 – 4379.

General findings on the evidence

Q4 (pg10) – Are any of the findings made in the Tranche 1 'September 2019' Decision challenged (and if so, which findings are challenged and why)?

2-4. The UWU claims that 'relevant findings' in the September 2019 decision include that 'A significant number of employees covered by the Award are 'low paid[33]' and rely on paragraph [47] and [160] of that Decision. The ASU also appear to rely on paragraph [47] of that Decision.[34] In reply, AFEI submits as follows:

2-5. ***Firstly,*** the Commission in the September 2019 Decision did not make the finding asserted by the UWU. The Commission at both [47] and [160] commented that a proportion of employees covered by the Award *'may be'* '*regarded as'* low paid. The Commission's comments were circumspect, equivocal, and did not express any position concerning whether employees covered by the Award are in fact low paid within the meaning of ss.134(1)(a).

[33] 6 January 2020 Background Paper ("Background Paper") at [21]
[34] [22] Background Paper

2-6. ***Further,*** any proposition that 'a significant number of employees covered by the Award are 'low paid' should be rejected for the following reasons:

a. Firstly, as identified by the Commission at paragraph [44] of the September 2019 Decision, there is no single accepted measure of two-thirds of median ordinary time earnings.

b. Secondly, the Commission's comments at [47] were in reference to base rates payable in accordance with the Award and the ERO[35]. In these proceedings it has become evident that only a portion of employees covered by the Award are Award-reliant.[36]

c. Thirdly, the Commission identified that two-thirds of median ordinary time earnings using CoE survey data was $886.67, and using EEH survey data was $973. Whereas the base rate payable under the ERO for a Level 2.1 SACS employee was $987.20 per week.[37] This rate would be higher in States where the pre-modern award was higher than the Award as at 1 January 2010, such as in NSW.[38]

d. Fourthly, base rates on their own do not provide a reliable source of information about the 'earnings' payable even to Award-reliant employees – particularly where penalties and loadings apply in this Award for shift work, weekend work, public holiday work, and overtime, as well as allowances, including for first aid.

2-7. The UWU relies on the Commission's observation at [26] of the September 2019 Decision as a finding that '*there is a high proportion of part-time employment in the sectors covered by the Award*[39].' The ASU claim that the Census data at [25] shows *'SCHDS industry workers are more likely to be part-time employees than the all industry average (50.3 percent compared to 34.2 percent).*' These are however not findings of the Commission on the September 2019 Decision. Nor are these findings which are available on the Census data included in the Decision, because:

a. Paragraph [25] of the Decision includes a table with August 2016 Census data on the 'other residential care' and 'other social services industry' classes (using the ANZSIC structure), and a breakdown of that data into either 'full time employment' or 'part-time employment.' A note following the table, which is cited to the ABS, includes the following:

> *"Note: part-time work is defined as employed persons who worked less than 35 hours in all jobs during the week prior to Census night…. For full-time/part-time status and hours worked, data on employees that were currently away from work (that reported working zero hours), where not presented."*

b. The breakdown of Census data at [25] showed 50.3% part-time or casual, compared to 49.7% full-time. This breakdown does not provide any basis for determining the proportion of part-time employment in the industry (as distinct from casual employment). The ASU's proposition therefore cannot be accepted.

c. At paragraph [26] of the Decision, the Commission describes the profile as having around half (50.3 per cent) of employees employed on a part-time or casual basis (i.e. less than 35 hours per week). The Commission does not make any finding about the fraction of those employees which are employed on a part-time basis. Conclusions/findings about the fraction of part-time employment in the industry (that is, part-time employment as defined in the

[35] September 2019 Decision at [46]

[36] 6 out of 14 employee witness statements filed by the ASU and HSU were covered by enterprise agreements.

[37] Joint submission of AFEI, ASU and NDS on 21 May 2019

[38] Where the rate as at 1 December 2018 was $995.93.

[39] Background Paper at [21]

Award) is not available on the Census data extracted in the September 2019 Decision. The UWU's proposition therefore cannot be accepted.

2-8. The UWU refers to comments in the September 2019 Decision that '*It is not the Commission's function to make any determination as to the adequacy (or otherwise) of the funding models operating in the sectors covered by the SCHADS Award. The level of funding provided and any consequent impact on service delivery is a product of the political process; not the arbitral task upon which we are engaged*.' Such disengagement from the costs associated with wage-related increases is not consistent with the requirements of the Act. This is for a number of reasons, including:

a. ***Firstly,*** as the Full Bench in the 2011 Equal Remuneration Decision found: *'…because of the pervasive influence of funding models any significant increase in remuneration which is not met by increased funding would cause serious difficulties for employers, with potential negative effects of employment and service provision*.'[40]

b. ***Secondly,*** reliance on government funding remains a key feature of the industry, with 87.2% of respondents to the 2019 Survey of SCHADS Employers identifying that they received a significant proportion of income from Commonwealth, State or Local Government.[41]

c. ***Further,*** the extent to which increases in wage-related costs in Awards are borne by government funding is directly relevant to s134(h) of the modern awards objective.

Q14 (pg23) – What do the other parties say in response to AI Group's general observations regarding the evidence?

2-9. AFEI concur with the general observations of AI Group in relation to weight that should be attributed to the union evidence.

Q15 (p23) – What do the other parties say about AI Group's submission that Dr Stanford's opinion should not be afforded any weight?

2-10. AFEI concurs with AI Group in that the opinion evidence of Dr Stanford that employers have '*free-reign to organise work in such a fragmented, inefficient and unfair manner' and 'from the employer's perspective there is little if any incentive to avoid scheduling work in small, discontinuous blocks…nor to geographically plan the assignment of appointments to minimise travel*' should not be afforded weight as it ignores the fact that the NDIS Providers (like any business) require productivity in order to maximise output. In the case of NDIS Providers, not only for financial reasons, but also to comply with objectives linked to funding, and to achieve business objectives.

Q16 (p27) – Are the findings proposed by the ASU challenged (and if so, which findings are challenged and why)?

2-11. The findings sought by the ASU are summarised at [29] of the Background Paper, numbered 1-24.

[40] [2011] FWAFB 2700 at [272]

[41] June 2019 Fair Work Commission Survey analysis of the *Social, Community Home Care and Disability Services Industry Award 2010*.

2-12. Many of the findings sought by the ASU rely on (and repeat) the report by Dr Stanford. AFEI concurs with the AI Group that little weight should be attributed to the evidence of Dr Stanford, including due to Dr Stanford's predominant reliance on interviews with a limited number of disability support workers in a single region of NSW only[42], and where the reports of those support workers could not be verified or tested in cross-examination.

2-13. The ASU appears to seek findings that the '*rate of casual employment in disability services is increasing*,' and as a result '*work in the disability services is becoming increasingly precarious'*.[43] This submission appears to rely solely on the part of Dr Stanford's report where he expresses 'key conclusions derived from the NDS data' from the 2018 NDS Workforce Report. The same 2018 NDS Workforce Report relied on by Dr Stanford however clarifies that the rate of growth in casual employment is not universal in the sector, and that the trend towards casualisation is absent in large organisations.[44] This was also referred to in the September 2019 Decision.[45]

2-14. The ASU appear to also seek a finding that 'average hours of work are low and highly variable, that some workers work very short hours and many workers experience regular fluctuations in their hours of work and as a result '*precarious work practices are becoming <u>increasingly</u> common for <u>all</u> disability support workers*[46]' on the basis of Dr Stanford's report at pages 11 and 6. This finding is also not available on the evidence. for reasons which include the following:

a. Page 6 of Dr Stanford's report does not cite particular sources for the opinions included in it. In cross examination Dr Stanford confirmed 'we've relied a lot on the NDS Workforce Wizard database.'[47] Dr Stanford's report at page 11 includes his 'key conclusions derived from the NDS data' from the 2018 NDS Workforce Report. Dr Stanford does not however present/cite any evidence in relation to the rate of growth/decline for all Disability Support Workers in low average hours, or variability in hours.

b. Further, '*the average hours worked by a disability support worker increased for the March 2018 quarter to 22 hours/week. This compares to 21 hours/week in the preceding two quarters*.[48]'

2-15. The ASU seek a finding of 'clear adverse impacts on employees' as a result of 'the increasingly unpredictable nature of the industry.' For reasons including those outlined above in response to the findings sought by the ASU, the evidence does not support a finding that the nature of the industry is '*<u>increasingly</u> unpredictable.*'

2-16. The findings sought by the ASU about '*elevated levels of mental and physical stress being suffered by workers'*[49] rely on Dr Stanford's report on interviews with disability support workers in the Newcastle, NSW Region. For the same reasons as outlined above, such evidence should not be attributed any weight by the Commission. There is thus no proper basis for these findings sought

[42] See p4 of Dr Stanford's Report – CourtBook 1448 – For Dr Stanford's reliance on interviews with 19 Disability Support Workers in the Hunger region of NSW.
[43] [29] Background Paper, pt1-2
[44] [1828 – 1883] CB
[45] [67] September 2019 Decision
[46] [29] Background Paper, pt3
[47] PN2258
[48] p10 of the 2018 NDS Workforce Report
[49] [29] Background Paper, pt5

by the ASU, nor to draw any correlations between Dr Stanford's Report and the Report of Dr Muurlink.[50]

2-17. In response to the findings sought by the ASU in relation to "labour skills shortage in the SCHDS Industry"[51], the ASU rely largely on the evidence of Dr Stanford. Dr Stanford's report was however prepared in response to a request for an opinion in relation to 'disability services employees.' In the circumstances the SCHADSI Award covers a much broader array of social and community services sectors, as well as other sectors, the evidence of Dr Stanford is not a satisfactory basis on which to draw conclusions in relation to all industries covered by the Award. Further, AFEI rejects any assertion that it is the role of the Commission or modern awards to address matters pertaining to labour supply and demand.

2-18. Further, assertions by Dr Stanford in relation to turnover in the industry[52] are not reflective of direct witness evidence in the proceedings.[53] For example, there is evidence of good retention of part-time employees.[54]

Remote Response

Q18 (pg34)- Are the findings proposed by ABI challenged (and if so, which findings are challenged and why)?

2-19. AFEI's position in relation to the findings sought by the ABI are addressed in our submissions dated 19 November 2019.

2-20. AFEI's position in relation to the ABI proposed variation is accurately summarised at [51] of the Background Paper.

Q22 (pg36) – Are the findings proposed by the Ai Group challenged (and if so, which findings are challenged and why)?

2-21. The findings proposed by the Ai Group as outlined at [55] - [59] of the Background Paper are not challenged by AFEI.

Q24 (pg41) – Are the findings proposed by the ASU challenged (and if so, which findings are challenged and why)?

2-22. The following includes AFEI's responses to the findings proposed by the ASU as listed at [68] of the Background Paper.

[50] In reply to pt 6-8 of [29] in the Background Paper
[51] At pts 9-24 of [29] in the Background Paper
[52] Particularly at [29-9] in the Background Paper
[53] Background Paper
[54] PN3068, Ms Ryan

2-23. The ASU seek a finding that (1) '*Employees in the sector…are regularly recalled to work overtime without returning to a workplace…'* To the extent that the ASU rely on work performed without being required to return to the workplace, AFEI objects to the characterisation of such incidents as involving being 'recalled to work.' AFEI rely to its submissions of 23 July 2019.[55]

2-24. AFEI further objects to the finding sought by the ASU about the incidence of work performed remotely. The evidence (Ms Anderson and Ms Flett relied upon by the ASU in support of this claim), is not representative of all social and community sector employees. AFEI concurs with AI Group's conclusion that such evidence falls short of justifying the entitlements proposed by the ASU.

2-25. The ASU seek a finding that (2) '*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.'* AFEI does not oppose finding concerning higher classified employees, although challenges a finding about the incidence of part-time employment, as there is insufficient evidence to support this.

2-26. The ASU seek a finding that (3) *The Award does not clearly regulate how this work should be structured or renumerated…employers do not take a consistent approach…:* The examples provided by the ASU do not support this proposition. The examples rather indicate that some employers simply pay for time worked, and others provide above-award arrangements.

2-27. The ASU seek a finding that (4) *The incursion of work into personal time, such as on call or adhoc work from home, has significant negative impacts on an employee's health or well being:* In respect of this finding, AFEI note the ASU relies on evidence from Dr Muurlink. AFEI observe that the direct witness evidence in these proceedings do not reflect the finding sought. None of the direct witnesses in the proceedings provided medical evidence of an impact to their health as a result of being able to perform work remotely. Further, in the circumstances that the alternative to allowing remote work would be a requirement that all work be performed at the workplace – this alternative involves a greater incursion of work into personal time.

2-28. The ASU seek further findings at (5)-(11) about purported *'negative impact of out of hours work.'* The inference of the 'negative impact' of out of hours remote work is challenged on the basis that the evidence of Ms Anderson and Ms Flett (relied upon by the ASU in support of this claim) is not representative of <u>all</u> social and community sector employees. AFEI also refer to its submissions in response to (4) above, and support AI Group's conclusion that such evidence falls short of justifying the entitlements proposed by the ASU. On cross-examination, Ms Anderson confirms that she is able to leave her home whilst on-call in certain circumstances, such as when internet could be accessed[56], which does not support the finding sought by the ASU. Further, in respect of Ms Flett's evidence, in what appears to be a special arrangement, compensated by 'above award conditions' cannot be assumed to be reflective of employees in the sector more broadly.[57]

[55] Particularly at [128]
[56] PN1019
[57] Statement of Flett at [16]

Broken Shift claims

Broken Shift claims – general observations

Q25 (pg41) – 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)?

2-29. We agree that the list of 18 awards include provisions for broken or split shift.

Q27 (pg44) – Are the findings proposed by ABI challenged (and if so, which findings are challenged and why)?

2-30. AFEI does not challenge the findings sought by ABI as outlined at [81]-[85] of the Background Paper, save for the following:

1. AFEI does not agree that the SCHADS Award requires amendment[58] nor that the unions have substantiated a case for 'rectification'.[59] AFEI relies on its submissions of 23 July 2019 and 19 November in relation to the union evidence.
2. In response to the ABI submission that its clients do not oppose 'introduction of a requirement that broken shifts only be worked where there is mutual agreement between the employer and individual employee,'[60] AFEI oppose any such variation. Findings sought by employers and unions include that broken shifts are common/routine/regular/of very high incidence in home care and disability services.[61] A provision in the Award requiring mutual agreement with an individual in order for that person to work a standard arrangement in the industry is inappropriate.
3. In response to the ABI submission that its clients do not oppose varying the payment under Clause 25.6(b) to refer to the starting time or finishing time, whichever is greater[62], AFEI has opposed such a variation, and relies on its submissions of 23 July 2019.[63]
4. AFEI challenge the proposed finding that most broken shifts involve two portions of work and one break, or that it is only on occasion that it is necessary for broken shifts to involve more than one break.[64] The balance of evidence does not support this finding, rather that the number of breaks in a broken shift vary.[65]

[58] [81] Background Paper
[59] [82] Background Paper
[60] [83] Background Paper
[61] See for example ABI at [85 - 2] of the Background Paper, AI Group at [86- 1] of the Background Paper, ASU at [106-1] of the Background Paper, UWU at [118-1] of the Background Paper
[62] [83] Background Paper
[63] At [116] – [120].
[64] [85 – 5] Background Paper
[65] In this respect, AFEI agree with the finding sought by the AI Group as extracted at [86 – 5] of the Background Paper.

Q28 (pg47) – Are the findings proposed by Ai Group challenged (and if so, which findings are challenged and why)?

2-31. AFEI does not challenge the findings proposed by Ai Group as outlined at [86] of the Background Paper, with one exception. The AI Group seek a finding that broken shifts are commonly utilised by employers covered by the Award, however broken shifts may only be a feature of work for social and community employees when undertaking disability services work and home care employees. There are however the family day care scheme sector, and many other social and community services/sectors covered by the Award, which are not privy to the broken shifts provisions at all. This is evident by the definition of the Social and Community Services Sector in the Award.[66]

Q29 (p48) – Is NDS's characterisation of the evidence challenged (and if so, which aspects are challenged and why)?

2-32. AFEI does not challenge the NDS characterisation of the evidence as extracted in the background paper at [88] – [92].

Broken Shift claims – the HSU Claim

Q33 (p50) – What is said in response to the NDS proposition that consideration be given to a minimum engagement of 2 hours for part time employees?

2-33. AFEI oppose the NDS proposition that consideration be given to a minimum engagement of 2 hours for part time employees.

2-34. ***Firstly***, the evidence does not support a work-based/industry need for minimum engagement period of 2 hours for part time employees. Rather, employees' evidence is that a scheduled service (i.e. time taken at a client's residence) takes less than 2 hours in length. For example, Ms Sinclair stated that she would be at a client's residence for one hour and this involved showering a client.[67] Ms Waddell states that "a lot of the shifts we get are just half an hour".[68]

2-35. ***Secondly***, there is therefore the prospect of the minimum engagement period requiring payment to employees of an hourly rate of pay where no active care services are being provided to clients.

2-36. ***Thirdly***, payment for hours not worked is not efficient or productive.

2-37. ***Fourthly***, AFEI relies on its submissions of 23 July 2019 in response to union claims for a minimum engagement period for part-time employees.[69]

2-38. ***Finally***, AFEI is unable to respond further to the proposition in the circumstances the proposed scope of the proposition is unclear (including which industries/sectors/classifications/types of work pattern) it would apply to.

[66] Clause 3 of the Award
[67] PN739
[68] Statement of Waddell at [22]
[69] Including at [70]-[78].

Broken shift claims – the ASU Claim (p51)

Q35 (p52) – Are there findings proposed by the ASU challenged (and if so, why)?

2-39. AFEI does not agree with the ASU's characterisation of clause 25.6 at [104] of the Background Paper.

2-40. The following includes AFEI's responses to the findings proposed by the ASU as listed at [106] of the Background Paper.

Disability sector employers routinely break the shifts of disability services employees

2-41. It is not in dispute that broken shifts are commonly utilised by employers providing in-home care to whom Clause 25.6 applies.

The award in its current form does not promote the efficient and productive performance of work

2-42. This finding is challenged. Evidence demonstrates that, on the contrary, employees tend to work with the same clients and as such, there are benefits to those client that flow from consistent client care (such as the ability to build a rapport with the clients) that allow employees to work more effectively and efficiently in their role.[70] Further, the ASU appear to rely on in support of this finding that 'continuous patterns of work are consistent with the efficient and productive performance of work' – however such a concept is irrelevant for an industry where the evidence has shown that for employers to provide effective service to meet individualised client requirements, efficient and productive work arrangements involve utilisation of broken shifts.[71]

Long and irregular hours associated with working broken shifts interfere with employee work/life balance and negatively impact the employees' health and well being

2-43. This finding is challenged. Witness evidence appears inconsistent with evidence by Dr Muurlink and Dr Stanford as relied upon by the ASU in respect of this finding at paragraphs 66 – 69 of its submissions dated 19 November 2019. Evidence heard through cross-examination demonstrate that employees can and do undertake personal errands in the course of their working day when undertaking a broken shift. For example, during the breaks, the employee may:

- undertake activities not related to work[72]
- go home[73]
- go to the shops[74]

2-44. Consequently, the evidence does not suggest that working broken shifts interfere with an employee's work/life balance nor does it suggest that it negatively impacts on the employee's health and wellbeing.

[70] PN469-PN473; PN518-PN524.
[71] AFEI submissions 19 November 2019
[72] PN461; PN525
[73] PN464; PN527
[74] PN529

2-45. Additionally, in some instances, employee availability and personal circumstances could be taken into account when broken shifts are rostered.[75]

Q38 (p56) – Are the findings proposed by the UWU challenged (and if so, why)?

2-46. The following includes AFEI's responses to the findings proposed by the UWU as listed at [118] of the Background Paper.

Employees in home care and disability services are regularly rostered for broken shifts. Some employees are rostered to have multiple breaks within a shift.

2-47. This finding is not challenged, insofar as 'disability services' relates to the provision of 'in home' disability services.

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

2-48. This finding is not available on the evidence. The evidence rather demonstrates that employers attempt to maximise work time of employees engaged on broken shifts, where this is able to correspond with daily client requirements, and afford time to employees as breaks between periods of work where in-home care work is not required. For example:

> Ms Mason states[76]:
>
> "*Rostering and scheduling procedures are undertaken with the objective of scheduling home care employees with "blocks" of work wherever possible. These "blocks" will vary from 2 hours to possibly 5 hours depending, amongst other things, on the regional location, the distance to travel between clients, the availability of care staff, and the flexibility or otherwise of clients in setting service times*"

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 the employees could undertake other paid work.

2-49. This finding is challenged. ***Firstly***, where possible, endeavours are made by employers to roster employees on longer shifts (or "runs").[77] Mr Harvey states "*this…creates a 6-8 hour working day for support workers making it an attractive engagement for staff*".[78] ***Secondly***, Ms Sinclair is a part-time home care worker. She sometimes undertakes broken shifts.[79] Ms Sinclair gave evidence that she holds a second job working for a chemist casually 'some afternoons a week'[80], hours total around '10 to 11 hours a week'.[81] Given that Ms Sinclair works for her employer, Wesley Mission, Mondays thorough to Fridays, Ms Sinclair's evidence demonstrates that working broken shifts does not prevent employees undertaking other paid work. Ms Stewart confirmed that she also obtained a second job with Edmen Group as a disability support worker whilst working for Live Better.[82]

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[75] PN2623.
[76] Statement of Mason at [71].
[77] PN2070; Statement of Harvey at [57-58]; Statement of Mason at [60-61]; Statement of Ryan at [65].
[78] Statement of Harvey at [57]
[79] Statement of Sinclair at [12].
[80] PN711.
[81] PN713.
[82] Further Statement of Ms Stewart at [7].

The loss of potential earnings contributes to financial distress,

2-50. The UWU rely on the statement of Trish Stewart in support of this finding sought. Ms Stewart was employed by Excel Care in April 2014. Excel Care was sub subsequently taken over by Live Better in August 2018.[83] In this statement, Ms Stewart states that she is employed as a permanent part-time support worker at level 2 of the Award.[84] Ms Stewart confirms that her contract guarantees a minimum of 10 hours per week and attaches, at annexure A, a copy of her terms and conditions of employment. Pursuant to clause 10.3(c) of the award, the employee's hours of work had been agreed. This agreement is reflected in the employee's signed contract with Live Better. Notwithstanding, Ms Stewart confirms that some weeks Live Better would roster her on for 30 hours per week.[85] AFEI submits that there is insufficient evidence to support the substantive variation to clause 25.6 of the award based on one witness evidence alone.

Proposition that there is a significant disutility for employees undertaking broken shifts as the time not worked during a broken shift is 'not free time,' that the absence of minimum engagement provision can result in 'a significant amount of dead time' and that the employee bears the cost of idle time.

2-51. The evidence demonstrate that, on the contrary, employees can and do undertake personal errands in the course of their working day which include broken shifts. For example, during breaks, the employee may:

- undertake activities not related to work[86]
- go home[87]
- go to the shops[88]

2-52. Consequently, the evidence does not demonstrate that any significant time between periods of work in a broken shift, is not able to be used by the employee to their advantage.

The proposition that rostering patterns that include multiple broken shifts within a span of hours up to 12 hours are inconsistent with the 'efficient and productive performance of work', and the proposition that continuous patterns of work are appropriate.

2-53. Employees covered by the award provide services which are unique to this sector; services are dictated by client needs and AFEI refer to paragraph B-2 of its submissions dated 19 November 2019. As such, broken shifts in the Award are appropriate to the industry and AFEI refer to paragraph B-5 of its submissions dated 19 November 2019.

2-54. Evidence also demonstrate that, on the contrary, employees tend to work with the same clients and as such, there are benefits to the client that flow from consistent client care (such as the ability to build a rapport with the clients) that allow employees to work more effectively and efficiently in their role.[89] To this end, AFEI refer to paragraph B-3 of its submissions dated 19 November 2019.

[83] Statement of Stewart at [6].
[84] Statement of Stewart at [7].
[85] Statement of Stewart at [9].
[86] PN461; PN525
[87] PN464; PN527
[88] PN529
[89] PN469-PN473; PN518-PN524.

2-55. ***Further***, the evidence relied on by UWU to support its proposed finding instead demonstrates that employers will attempt to maximise work time for its employees where this is able to correspond with daily client requirements.[90]

Several employer witnesses indicated that it was their preferred practice to roster on the basis that there was only one break any shift (unexpected client cancellation being the main reason to depart from this practice)

2-56. The evidence relied on by the UWU does not provide any basis for a finding about any preferred number of portions of work by employers. The evidence rather demonstrates that the number of proportions of work in a broken shift is determined by daily individual client needs, client numbers, and client locations.

The propositions that work in this sector can be organised to fit a pattern of continuous work, or if not, into a pattern of a broken shift with only one break; and 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.

2-57. In relation to this proposition, the UWU appear to seek findings that 'care services such as cleaning, medication checks and personal care can be provided in a planned manner.' UWU relies on one witness statement evidence of Ms Coad dated 16 September 2019. This finding is disputed. There is significant evidence from employers in this industry to demonstrate that work in this sector is based on client demands and that rostering takes place around preferred times of clients,[91] which would make 'planned services' unworkable. For example, Mr Wright states "as clients have choice and control over their visit times, visits typically follow peak patterns. 55 per cent of visits take place between 7:00am and 12:00pm and the other 45 per cent span a nine hour period to 9:00pm."[92] ***Furthermore***, Ms Wang states "Under NDIS, one of the elements regarding a provider's code of conduct when delivering services to client states "To support people with disability to make decisions", which means people with a disability have the right to make choices and should always be assumed to have the capacity to make these choices, as this is central to their individual rights to freedom of expression and self-determination. Depending on the service nature, the Company will need to make arrangements as per the client's request."[93]

2-58. The evidence also show that the consequence of not being able to provide services in the requested time period could be detrimental to organisations including loss of business.[94] Given the focus on client flexibility and client choice, services provided in a "planned manner" would be inconsistent with the nature of services provided in this industry.

2-59. Further, evidence demonstrate that a continuous pattern of work in this sector would not be sustainable on the basis that the nature of this industry, based on complex client based changes, means that employee rosters are susceptible to change[95] and thus does not support UWU's finding that "work in this sector can be organised to fit a pattern of continuous work" or "a pattern of a broken shift with only one break".

[90] For example, see Statement of Mason at [71].

[91] Statement of Shanahan at [33]; Statement of Harvey at [53]; Statement of Collins at [44]; Statement of Ryan at [60]; Statement of Wang at [51]

[92] Statement of Wright at [18]

[93] Statement of Wang at [53]

[94] Statement of Shanahan at [34]; Statement of Collins at [45]

[95] Statement of Ryan at [62]

The proposition that clients in aged care and disability services are capable of making choices within service constraints, and understanding of those constraints.

2-60. This proposition appears to infer that clients should be prepared to limit the services they receive, and/or how and when they receive the services. This proposition reflects an outdated approach to client care, being inconsistent with the National Disability and Insurance Scheme Act 2013,[96] and the principle of consumer-directed care.[97] AFEI also refers to its submissions dated 19 November 2019 at paragraph D.

Clothing and Equipment Claims (p57)

Clothing and Equipment – HSU Claim (p58)

Q39 (p59) – Do you challenge the findings sought by the HSU (and if so, which findings are challenged and why?)

2-61. The following includes AFEI's response to the 'grounds advanced by the HSU in support of its claims' as outlined at [134] of the Background Paper.

An assertion that many employees, particularly support workers in home care and disability services, wear their own clothes to work and not provided with a uniform:

2-62. The evidence adduced during the proceedings does not support such a finding. For example, Mr Elrick, although not a support worker himself, observes that uniforms are common in the home care sector[98], Ms Sinclair, a home care worker, is provided with shirts to wear by her employer[99] and also paid a uniform allowance, [100] and Mr Sheehy, who is not a support worker, concedes that some employers in the home care sector provide uniforms whilst others do not.[101]

A submission that employees' clothes are at risk of being soiled or damaged in the course of their duties:

2-63. AFEI observe that the available witness evidence from employees actually working in this sector is the evidence of Ms Waddell and Ms Wilcock, who both work for the same employer. This evidence does not support the variation proposed by the HSU, as both Ms Waddell and Ms Wilcock confirm that they are provided with protective clothing by their employer.[102]

An assertion that employees' clothes "frequently become damaged, soiled or worn" given the nature of the work they do:

2-64. The available witness evidence (see above) is of employees from a single employer, and does not support such a generalised finding.

[96] s3(1)(e)
[97] Statement of Matthewson at [48], and Statement of Coad [16].
[98] Statement of Elrick at [39]
[99] Statement of Sinclair at [18]
[100] PN628
[101] Statement of Sheehy at [14]
[102] Statement of Wilcock at [90]; Statement of Waddell at [34]

Q42 (p63) – 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?)

2-65. The question refers to Clause 32.3(d) of the Manufacturing Award. AFEI submits that there is insufficient evidentiary basis for inserting any such provision in the Award. The Manufacturing Award provision, moreover, is very specific in detail and relates to (a) specifically foreseeable damage in the industry, and (b) the kind of damage that would foreseeably result in the item being destroyed/no longer functional, and (c) reduces the ambit for dispute about the application of the provisions.

Q43 (p65) Are the findings proposed by the UWU challenged (and if so, which findings are challenged and why)?

2-66. The union's proposed findings appear to rely on the sole statement of Ms Sinclair as evidence for their findings. The evidence of a single individual, is not a sufficient basis upon which the Full Bench should be satisfied that a change of the Award is necessary. Ms Sinclair's evidence, moreover, appears to state that her employer provides her with what she considers an "adequate number of uniforms". Ms Sinclair is also paid a uniform and laundry allowance.[103]

Client Cancellation (p69)

Client Cancellation – general observations (p69)

2-67. Paragraph [178] of the Background paper makes an observation that 'Clause 25.2(f) of the SCHADS Award deals with client cancellations'. AFEI comment that the correct clause reference to client cancellations in the Award is Clause 25.5(f).

Q47 (p70) - Does any party take issue with Ai Group's contention as to how clause 25.2(f) [clause 25.5(f)] operates (and if so, why)?

2-68. AFEI does not challenge Ai Group's contention as to how clause 25.5(f) operates.

Client Cancellation – ABI claim (p70)

Q48 (p74) are the findings proposed by ABI challenged (and if so which findings are challenged and why)?

2-69. AFEI does not challenge ABI's proposed findings as outlined at [193] of the Background Paper.

[103] Statement of Sinclair – Annexure B.

Q49 (p75) do you agree with the above statement (and, if not, why not)?

2-70. The 'statement' referred to is a submission of the UWU that '*in disability services, due to changes made in July 2019 in the NDIS Price Guide 2019 – 20, an unlimited amount of client cancellations are now claimable*.' The UWU cites CourtBook reference 2796, pg12-13. AFEI submit that the statement is not accurate. The NDIS price guide provide that fees associated with short notice cancellations[104] may be recoverable subject to the terms of the service agreement between the provider and participant. As identified by ABI, some service providers have adopted cancellation policies and practices whereby they do not always charge cancellation fees even though they are permitted to under the applicable regulatory system.[105]

Q51 (p77)– Are the findings proposed by the UWU challenged (and if so, which findings are challenged why)?

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):

2-71. In relation to the incidence of shift cancellation for part-time employees, the findings proposed by ABI at [193] of the Background Paper are more precise.

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:

2-72. AFEI refer to the finding sought by ABI at [193] of the Background Paper. In particular, while employers endeavour to redeploy employees to other productive work where cancellation events occur, it is not always possible to do so for a range of reasons.[106] AFEI also refer to the finding sought in its submissions dated 19 November 2019 that employers do not benefit financially from a cancelled service, supported by the evidence of Ms Wang who states "when the client cancels a service, we don't have an income".

Changes to NDIS policy that came into effect in July 2019 enable providers to claim back a greater amount with respect to client cancellations.

2-73. There is no evidence to support a finding that providers are able to claim back a greater "amount" with respect to client cancellations. Mr Farthing states that "In 2015-16, 2016-17, 2017-18 Price Guides, the NDIA allowed providers to charge a participant the full amount of a scheduled personal care or community support…when there was a short-notice cancellation or a "no show" by a participant".[107] Mr Farthing also states "in the 2018-2019 Price Guide, the NDIA revised its cancellation rules…it reduced the amount that a provider could charge from 100%...to 90%".[108] AFEI note that the recovery of 90% is consistent with the amount that could be charged from a provider to a participant in the 2019/20 Price Guide. Mr Fathing's evidence does not support the UWU's finding that providers are able to claim back a 'greater amount' with respect to client cancellations.

[104] NDIS price guide provide that a short notice cancellation is if the participant has given less than 2 clear business days' notice for a support that is less than 8 hours continuous duration and worth less than $1000; and less than 5 clear business days' notice for any other support.

[105] Background Paper at page 74.

[106] Shanahan Statement at [23]; Harvey Statement at [39-43]; Wright Statement at [38]

[107] Further Statement of Mr Farthing at [24]

[108] Further Statement of Mr Farthing at [25]

Mr Harvey confirms that, in the light of the changes to NDIS, there is a greater "scope" (not greater amount) to claim moneys through the NDIS in respect of cancellations.[109]

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 service:

2-74. AFEI challenges this finding. *E*vidence provided by Mr Wright clarifies that in packages such as the Commonwealth Home Support Program, there is no cancellation provision in those package funds due to block funding.[110]

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:

2-75. AFEI refer to paragraph E-3 of its submissions dated 19 November 2019.

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:

2-76. This finding is inconsistent with witness evidence of Ms Wang who confirmed that "if a client cancelled the service we don't have the income".[111]

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:

2-77. This is a submission rather than a proposed finding supported by evidence.

Q53 (p77) do you agree with the ASU's submission as to the effect of the NDIS client cancellation arrangements (and, if not, why not)?

2-78. The NDIS price guide provide that fees associated with short notice cancellations[112] may be recoverable subject to the terms of the service agreement between the provider and participant. As identified by ABI, some service providers have adopted cancellation policies and practices whereby they do not always charge cancellation fees even though they are permitted to under the applicable regulatory system.[113]

Q56 – Is NDS' characterisation of the modified funding arrangements in the event of client cancellation accurate (and if not, why not?)

2-79. AFEI notes the evidence the evidence (see PN3119 - PN3127) of Mr Harvey that while there may be some scope to make a claim for some cost of some cancellations, it is unclear whether service providers actually do so.

[109] PN3127

[110] PN2646-PN2651

[111] PN3612

[112] NDIS price guide provide that a short notice cancellation is if the participant has given less than 2 clear business days' notice for a support that is less than 8 hours continuous duration and worth less than $1000; and less than 5 clear business days' notice for any other support.

[113] Background Paper at page 74.

Q59 (p81) AFEI is asked to expand on this submission in light of ABI's amended draft determination filed on 15 October 2019.

2-80. In respect of client cancellations and or changes to service request, the Award provision clarifying that no payment is made to the employee where the cancellation occurs with notice to the employee, should be retained. This is consistent with the principle that a person's entitlement to wages arises when work is actually performed.

Mobile Phone Allowance Claims (p86)

Mobile Phone Allowance – UWU claim (p87)

Q63 (p91) – Are the findings proposed by the UWU challenged (and if so, which findings are challenged and why?)

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:

2-81. AFEI refer to and support the finding sought by the ABI. The evidence adduced during the proceedings does not support such a broad finding. Mr Elrick, for example, stated "generally speaking, most workers will only use their personal phone for the purposes of being contacted for shifts, and not during work."[114]

Employees are expected by their employers to have access to, and to utilise a mobile phone for a variety of different purposes including taking directions from their employer, access work related apps etc.

2-82. AFEI refer to the response above.

Not all employees in this industry have a smartphone, and not all employees have a phone with the capabilities to access the relevant apps.

2-83. The witness evidence relied upon by the UWU (Ms Fleming, Ms Sinclair and Ms Stewart, the totality of the employee witness evidence of the UWU) was that each employee owned a mobile phone, [115] Ms Fleming a smart phone with access to apps and unclear whether Ms Sinclair's and Ms Stewart's were smartphones.

Employees are in effect directed by their employer to upgrade to a smartphone, or upgrade their smart phone, in order to be able to access apps required by the employer.

2-84. Insufficient evidence has been advanced by the UWU to support a finding that it is the usual practice for employers to direct employees to upgrade an existing smart phone owned by an employee to another smart phone; or to a smart phone in general.

Employees may have to pay for a higher-level plan than they otherwise would and *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.*

2-85. The proposed findings are not supported by the evidence.

[114] Statement of Elrick at [30]

[115] Statement of Fleming at [27]; Statement of Sinclair at [15]; Statement of Stewart at [21]

Mobile Phone Allowance – HSU claim (p91)

Q64 (p93) – Do you challenge the findings sought by the HSU (and if so, which findings are challenged and why)?

A smart phone is an essential 'tool of trade'. Employees require a telephone in order to contact and be contactable by their employer and in order to contact and to 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.

2-86. AFEI refers to its comments above concerning similar findings sought by the UWU. There is no evidence to support such a broad finding, including that employees require a smart phone to be contactable by clients.

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.

2-87. This is not a finding based on evidence but simply an observation/opinion.

Q66 (p93) – 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?

2-88. AFEI submit that the evidence before the Commission does not support awarding a mobile phone allowance to any particular class of employees. AFEI also refer to paragraph 145 of its submissions dated 23 July 2019.

Q69 (p97) – Are the findings proposed by ABI challenged (and if so, which findings are challenged and why)?

2-89. AFEI do not challenge the findings proposed by ABI.

Q71 (p101)– Are the findings proposed by Ai Group challenged (and if so, which findings are challenged and why)?

2-90. AFEI do not challenge the findings proposed by Ai Group.

Q72 (p101) – Are the findings proposed by NDS challenged (and if so, which findings are challenged and why)?

Disability support workers who are required to work in client homes and in the community are commonly required to own a mobile phone:

2-91. AFEI refer to and support the finding proposed by the ABI, and note also the evidence of Mr Elrick that "generally speaking, most workers will only use their personal phone for the purposes of being

contacted for shifts, and not during work."[116] To the extent that an employee may be required to have a mobile phone in order that the employee can be contacted concerning their shifts is not an unreasonable condition of employment, or one that justifies award related compensation.

Disability support workers use their mobile phones for a combination of work and personal purposes, and may be on plans with unlimited data:

2-92. AFEI refers to paragraph F-2 of its submissions dated 19 November 2019 where it also seeks the finding that "employees in this sector already own a mobile phone and already use them for work purposes at no additional cost to the employee". This finding is supported by witness evidence of Ms Stewart and Ms Fleming. Ms Stewart has, as part of her phone plan, unlimited standard calls and SMS messages and up to 10 gigabytes usage without additional charges.[117] Ms Fleming has, as part of her phone plan, unlimited standard national calls and texts with 20 gigabytes of data and she doesn't get separately charged for any data used for accessing her roster.[118]

Sleepover claim (pg 104)

Q77 – Are the findings proposed by Ai Group challenged (and if so, which findings are challenged and why)?

2-93. AFEI notes that the findings listed are in relation to mobile phones.

Q78 (p109)– What was the basis stated by the AIRC for the removal of the provision referred to by the AFEI?

2-94. The provision was removed by the AIRC on the basis that it was not an allowable matter pursuant to s89A(2) of the *Workplace Relations Act 1996* (Cth).

2-95. The *Fair Work Act 2009 (Cth)* ('The FW Act') also limits terms which can be included in Modern Awards at s136, such that Modern Awards must only include terms permitted or required by Subdivision B or C of the FW Act. The FW Act imposes the further limitation that 'allowable' or 'permissible' terms may only be included in Modern Awards 'to the extent necessary to achieve the modern awards objective and (to the extent applicable) the minimum wages objective.[119]

2-96. The requirement for Modern Award terms to be 'necessary' inevitably excludes any terms which are matters of detail that are more appropriately dealt with by agreement at the workplace or enterprise level.

2-97. It is logical that this be the case, as Item 49(7)(a) of the *Workplace Relations and Other Legislation Amendment Act 1996* and the AIRC's Award Simplification process required the removal of unnecessary detail from federal awards. If it was intended that unnecessary detail should be included into Modern Awards (as the most recent iteration of federal awards), then it is expected that such a reversal would have been expressly prescribed into the legislation.

[116] Statement of Elrick at [30]
[117] PN448; PN452
[118] PN547-PN549
[119] s138 *Fair Work Act 2009* (Cth)

2-98. The varied sleepover provisions sought by the HSU have not been determined to be permissible terms pursuant to Subdivision B or C of the FW Act. It is AFEI's position that the varied sleepover provisions sought by the HSU are not permissible terms under the FW Act. Further, even if the provisions were permissible, they are not necessary, and are thus not eligible for inclusion in the Award.

2-99. AFEI does not dispute the need for a PCBU (including a SCHADSI Award employer) to ensure, so far as reasonably practicable, the safety of its employees while at work, and that there may be circumstances in which this WHS obligation may require the employer to address facilities at the location in which work is performed. The detail of facilities required will however be on a case by case basis. The HSU have not established on the evidence that the specific facilities sought in the proposed variation are universally necessary.

2-100. The HSU rely on the evidence of Mr Elrick about an occasion in which he slept in a bed with the head coming out of the cupboard, heard hums from the computer and fax, and with a bright light from the handset of the house phone.[120] None of the specific facilities sought in the variations proposed by the HSU (including a separate room with a peephole, telephone connection, lamp, and clean linen) would address the criticisms of Mr Elrick. This further illustrates that the variation proposed by the HSU is not necessary and that the determination of appropriate facilities a matter which is best addressed at the workplace level.

2-101. AFEI further relies on its submissions of 23 July 2019.

Variation to Rosters Claim (p109)

Q80 (p111) – Are any of the findings proposed by the UWU challenged (and if so, which findings are challenged and why)?

2-102. There is insufficient evidence to support the finding that *employees may have their rosters changed regularly, sometimes with little or no notice*. For example, the evidence of Ms Stewart and Ms Fleming contains no information about how much notice they are given of any change. AFEI observe from the evidence that the main reason for changes to roster include employee sickness/client cancellation.[121] The Award already contain provisions addressing these scenarios at clause 25.5(d)(ii) (employee absent from duty on account of illness) and clause 25.5(f) (client cancellation). To this end, AFEI refer to paragraphs 96 to 104 of its submissions dated 23 July 2019.

2-103. There is insufficient evidence to support the finding that *roster changes can be disruptive, and create difficulties for employees a) in planning budgets and b) undertaking outside work activities'*. The income for full time and part time employees is effectively regulated by the Award (either 38 ordinary hours per week, or a regular pattern of hours for the week). Moreover, the evidence of Ms Sinclair was that she exercised a degree of control over her availability for work, including Tuesday afternoon off, and attending a second job on Monday, Wednesday and Fridays.[122]

[120] Background Paper at [304]
[121] Statement of Trish Stewart at [10]; Statement of Deon Fleming at [15]; Statement of Belinda Sinclair at [22].
[122] PN717-PN725.

2-104. There is insufficient evidence to support the findings that *employees regularly agree to roster changes because there is under-employment in the sector and they require additional income*) and that *it is uncommon for employees to disagree to roster changes, and where such disagreement occurs, it is for a good reason.* The evidence of Ms Stewart and Ms Fleming provide no reasons as to why they could not or would not accept additional shifts, and the evidence of Ms Sinclair was that she would not accept a shift if it was outside of her 'availability',[123] including that she does not wish to work on Tuesday afternoons.[124]

2-105. In relation to the finding that *'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 has issues with excessive overtime payment',* AFEI questions the relevance of this proposed finding. Any evidence in relation to how employees may currently respond to requests for roster variations would only be relevant within the context of the current Award provisions. They would not support any findings about how roster variations would be responded to by employees if the Award were varied as sought by the union.

2-106. In relation to the summarised conclusion of the UWU at [322] of the Background paper, AFEI refers to paragraphs 96 to 104 of our submissions dated 23 July 2019.

[123] PN606.

[124] PN725.

Part 3 – Submissions in support of AFEI's preferred position on changes to the 24-hour care clause

3-1. The 4 yearly review has established that, despite earlier assertions by unions to the contrary, that the 24 hour care provision in the Award is utilised by a substantial proportion of the home care sector. This is noted at paragraphs 33-39 of the Commission's Decision of 2 September 2019[125].

3-1. AFEI relies on its submissions of 8 April 2019 concerning the importance of the 24 hour care provision to the sector.

3-2. Home care sector provides valuable community services, including assistance for elderly and/or infirm persons who have discharged from hospital and require assistance to remain in the comfort of their own homes, in preference to institutional care.

3-3. While the Commission noted concerns with the current 24 hour care provision, there no evidentiary basis on which such wholesale changes of the nature proposed by the unions could be justified.

3-4. The unions' claims[126] would undermine the operation of the provision to the point where it would be unworkable, through the unjustifiable and exorbitant additional costs associated with clauses f, g, h, I, j and k. The claims would also impose unnecessary and unwarranted restrictions on the manner in which the care is provided, to the detriment of the care recipient, such as in clauses e, and potentially unjustifiable hardship for the care recipient in clause d.

3-5. For the reasons outlined above AFEI strongly opposes the unions' claims.

3-6. AFEI has submitted a draft clause concerning the 24 hour provision as part of the proceedings convened by Commissioner Lee, as did ABI as shown in Annexure A to Commissioner Lee's Report[127]. The differences between the two draft clauses were also noted in the Commissioner's Report.

3-7. While AFEI withdraws its objections to Clause (f) of the ABI draft, concerning working 'additional hours'; it remains opposed to ABI's proposal to extend the additional annual leave entitlement to employees who regularly work 24 hour shifts, where such employees would not otherwise meet the relatively low threshold set out in clause 31.2 (a).

[125] [2019] FWCFB 6067

[126] Annexure B: Unions' preferred draft – annexure to the Report by Commissioner Lee dated 3 December 2019.

[127] Annexure A: ABI Preferred Draft – annexure to the Report by Commissioner Lee dated 3 December 2019