IN THE FAIR WORK COMMISSION
AT SYDNEY
Matter No.: AM2018/26

S 156 – Four yearly review of modern awards – Social, Community, Home Care and Disability Services Industry Award 2010

REPLY SUBMISSION OF THE UNIONS

CONTENTS

RESPONSES TO ABI SUBMISSION

1. This part of the Submission concerns the ABI Submission, and responds to particular paragraphs of that submission in the order they appear. Some of ABI's Submission concerns the expert evidence pf Dr Stanford and Dr Muurlink which is relied upon by the unions. ABI and AiG submissions about the weight to be given to that evidence are dealt with separately below.

Appointment Locations [54]

2. The Unions submitted that the Commission should find *'…the locations of their first and last appointments will rarely be the same each day and are not always predictable'.*
3. ABI submits that *'That may be the case for many employees, but for many others they enjoy a more predictable pattern of work'.*
4. ABI points to no evidence to support its assertion that many employees '*enjoy a more predictable pattern of work*'.
5. As with many of ABI's arguments which are addressed herein, it is notable that, despite calling a number of employer witnesses, none of those witnesses set out any detailed analysis of the working patterns of their employees showing the daily hours worked, the extent to which broken shifts were being worked, the "gaps" between periods of paid work, or the patterns of work travel.

Finding 104 – p13, 31 [55], [56]

6. The Unions submitted that *Particularly for workers in regional areas, considerable distances may be required to be travelled…'*
7. ABI submits that: '*We accept the hypothetical proposition that workers in regional areas may be required to travel "considerable distances". However, the evidence does not support any finding that employees are regularly required to travel vast distances*.'
8. The evidence as to this issue was far from hypothetical. Ms Waddell averred how she had travelled up to 250km in a day regularly, but now worked with different clients which did not require such extensive travel (PN1389-1414). That evidence was not contested. Ms Waddell also gave evidence that she has a client in Sussex Inlet, 30-32 kilometres from her home (PN1403-1404), which is still a considerable distance to be travelling to, from and between clients on a regular basis.
9. Mr Steiner works for a service based in Newcastle[1]. His clients live in Maitland and Singleton, about 30 and 80 kilometres respectively, from Newcastle.
10. The ABI's submission is made in circumstances where the ABI's employer witnesses did not provide any detailed or rigorous evidence of the distances required to be travelled by employees, or of efforts by employers to impose any limitations on those distances. All of that evidence was available to the employers. In those circumstances it is a hollow submission, when the evidence points all in one direction (considerable distances), to observe that there is no evidence of more extreme cases (vast distances). That absence does nothing to dilute the force of the evidence before the Commission.

Are employees covered by the Award "low paid" – [74]

11. The finding urged by the Unions reiterated the finding of the Commission in the Tranche 1 Decision[2] at paragraph [160].
12. The ABI response notably excludes home care employees, who are not covered by the Equal Remuneration Order. The Commission uses a threshold of two-thirds of median (adult) full-time ordinary earnings as the benchmark to

[1]CB 1222 [8], [12]
[2] [2019] FWCFB 6067.

identify who is 'low paid' within the meaning of s 134(1)(a).[3] The Commission uses two measures to assess this figure, the ABS Characteristics of Employment Survey (**CoE**) and the ABS Survey of Employee Earnings and Hours (**EEH**). In accordance with the CoE measure in 2018, two-thirds of median earnings were equal to $886.67 per week, or $23.33 per hour.[4] According to the EEH measure for 2018, two thirds of median earnings was equal to $973.33 per week, or $25.61 per week.[5]

13. In accordance with the above measures, a significant number of home care employees covered by the Award can be regarded as low paid. Home care employees levels 1 to 3 (pay point 1) fall below the CoE measure and home care employees level 1-4 fall below the EEH measure.

14. Further to that observation it is important to note the prevalence within the industry of arrangements that are less than guaranteed full time hours (either casual or part-time arrangements), and the evidence indicating the desire of many employees to have *more* hours of work than those currently offered. For example, Dr Macdonald noted:

    The work aspect identified as a serious problem by all 10 workers was the way their working time was structured. Many frequently worked long days, 6 or even 7 days a week to try to earn an adequate income; yet many spoke of their difficulties earning enough to pay their bills[6].

Requirement to have Drivers Licences – [77]

15. ABI quarrels with the proposition that as a condition of employment, employees are required to have a current driver's licence. It suggests the possibility that some workers may walk between clients. The suggestion is curious given ABI objected to the admission of an ASU witness statement from an employee covered by the *Business Equipment Industry Award* 2010 on the basis that the evidence of a 'walking tech' had no relevance to the current proceedings (PN1319).

[3] [2019] FWCFB 3500, paragraph [52].
[4] FWC Statistical report – Annual Wage Review 2018-19, published 23 May 2019, page 41.
[5] As above.
[6] Macdonald, CB2916

16. The submission is made in the absence of evidence about any such walking worker, and in the face of abundant evidence of employees being required to drive between engagements, and to use their own vehicles to do so.
17. Would that there were employees able to walk to and from client appointments. However, if there are such employees, their happy circumstance would not dictate the approach to determining the terms and conditions for what must be the very vast bulk of the home care and disability services workforce. The tail should not wag the dog.

Travelling time between clients - [79] – [80]

18. It is not a hypothetical proposition that employees can be travelling to and from clients for significant periods of time without payment.
19. Deon Fleming lost around 4-5 hours of pay per week when her employer ceased to pay travel time.[7]
20. Trish Stewart gave evidence she had worked about 377 hours of unpaid travel time within a period of just over 6 months[8].
21. Scott Quinn, whose employer does provide some payment for travel time, nevertheless gave an example of a day when he spent one hour and twenty minutes travelling back and forth between clients and home but was only paid for 30 minutes time.[9]
22. Dr Macdonald deals with this issue under the heading 'Unpaid work: Travel between clients' in her paper '*Wage theft, underpayment and unpaid work in marketised social care.*'[10]

Work at the direction of the employer - [97]

23. ABI argues that employee activities and location during the "breaks" in their shifts is a matter outside the employer's control.
24. If the employers had adduced evidence to show that their "breaks" were always substantial, and didn't occur multiple times during the course of the day or weren't for relatively short periods, there may be some force to this argument.

[7] Supplementary statement of Deon Fleming (Ex.UV 4), at [6], CB4568
[8] Supplementary statement of Deon Fleming (Ex.UV 4), at Annexure A, CB4709
[9] Supplementary statement of Scott Quinn (Ex.HSU 30), at [26], CB3054
[10] Statement of Fiona Macdonald (Ex.HSU 25), dated 15 February 2019, at Annexure FM2, page 88, CB2917-20

However, the employers elected not to answer the evidence demonstrating the extent of such practice.

25. Travel between client locations is essential for the performance of work (for disability services and home care employees working in the community) and that travel must be factored in when the employer plans and arranges the employee's work day. As such, travel in between broken shifts still occurs at the direction of the employer.

Work at the direction of the employer - [101]

26. ABI queries the basis upon which it is submitted that the worker has to be available for lengthy periods of time to receive a few hours of paid work.
27. The Unions start from the position that it is the usual and ordinary case that a worker working for, say 4 hours, is required to be available for 4 hours, and would ordinary be required to spend some time travelling to the workplace.
28. The evidence as to work patterns in the present matter, shows employees working across long periods of the day, and accumulating considerably less paid hours than the hours required to be set aside in order to perform the work.
29. Employee witnesses have given evidence in these proceedings that in order to obtain a few hours of work, they must be available to work for a long period of time (as referenced in the initial submission). See for example, Statement of Trish Stewart (Ex. UV1), at [16] (CB4604):

    'The way that these appointments are broken up across my day requires me to be available for 12-13 hours during the day, but I will only be paid for 4-5 hours of work.'
30. Mr Quinn's evidence was to similar effect. He stated that a typical day of shifts (as at the time of his first statement in December 2015) involved work from 12 – 1 pm, 3pm to 5 pm, 5.30 pm to 6.30 pm, and 8 pm to 9 pm, that is, a 9 hour span of work with travel in each direction at the end, for 5 hours of paid work[11]. Mr Quinn was typically working across a longer span of hours than a full time worker, but accruing barely half of that in paid time.
31. Ms Waddell gave evidence that she made herself available to her employer for work from 7am to 7pm, five days a week, although she is only engaged to work

[11] Quinn, CB2990 [27]

20 hours per week.[12] Her evidence was that she had worked days where she travelled 250km in a day over a 13 hour period for only 4 to 5 hours work.[13]

Are multiple broken shifts an incentive or disincentive to work in the sector - [111]

32. The unions regard the answer to this question as obvious.
33. The Commission may comfortably rely on the evidence of Dr Macdonald, who was not cross-examined in the present matter by ABI.
34. Dr Macdonald's research and paper examined the phenomenon, already observed in the United Kingdom, of excising work time from paid time, paying workers only for contact time and not paying them for travel and work scheduling techniques that "drain waged time from the working day". Dr Macdonald described the phenomenon in this way: *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 unpaid 'non-work' time (McCann, 2016: 44–45; Rubery et al., 2015). So, workers have long work days for little recompense, contributing to low pay.*
35. At CB2916, Dr Macdonald states:

    Employees' paid work time was primarily spent in direct contact with clients, providing in-home assistance, personal care and/or support for community and social participation. All 10 workers said they enjoyed or even loved many aspects of the work; they valued making a difference in people's lives and enjoyed spending time with clients.

    However, most were unhappy with their pay and conditions and several were seeking other employment. The work aspect identified as a serious problem by all 10 workers was the way their working time was structured. Many frequently worked long days, 6 or even 7 days a week to try to earn an adequate income; yet many spoke of their difficulties earning enough to pay their bills. The women's jobs often left them exhausted and with little time for friends and families (emphasis ours).

[12] Waddell, Ex.HSU4, CB2956 [7]
[13] Waddell, Ex.HSU4, CB 2957 [11]-[12]

36. Dr Macdonald also said[14]: *Over the 30 days, the 10 DSWs worked between one and five separate shifts per day. The shortest recorded shifts of paid work were around 30 minutes and the longest was over 10 hours. Most paid work periods were 2 hours or less. Second, the DSWs' working days (from first departure from home for work to last arrival home from work) were long. Two-thirds of the 30 diarised days were 10 hours or longer. Third, though days were often very long, the proportion of the total working day that was paid work was often small.*

37. Dr Macdonald's study provides a valuable insight into the working conditions of employees covered by this Award. All research methods contain some limitations and these are acknowledged in the paper. Qualitative research is an accepted and common method of social research.

38. There is no evidence from any witness, expert or otherwise, attesting to the attraction of multiple broken shifts. The conclusion that they are not an incentive accords with common sense, and the evidence. There is no basis on which the Commission would reject that view or form a contrary view.

Cancellation - [135]

39. The ABI contests the submission that where an employee has a rostered shift cancelled without payment by their employer, the employee will lose out on expected income and that can cause financial uncertainty and detriment, noting that employers may opt to have the employee perform a "make-up" shift.

40. That observation is no answer to the submission.

41. The Award provides the employer with the *option* of providing make up time, however there is no *obligation* to provide make up time if the client cancels and the employee is notified of the cancellation by 5pm the day before. The evidence demonstrates that employers utilise these provisions and cancel the shifts of employees without payment, as noted in the reference to our finding.

42. ABI has not adduced evidence demonstrating that employers don't avail themselves of that option, or the extent to which they refrain from doing so. There is no basis to submit that the make-up option is the option more frequently utilised, or to make any suggestion about the extent of its utilisation.

[14] At CB 2916/2917

RESPONSES TO NDS SUBMISSION

43. At [15], NDS submits*: 'NDS does, however, dispute the significance attributed at [100] to current NDIS pricing arrangements in relation to travel. HSU note that some funding is available for payment for travel between clients. However, that funding has two main limitations:*

a) The funding is only available where the client agrees to use some of their funding package for this purpose, rather than for time spent delivering a service to themselves; and

b) In regional and remote Australia, the distance that need to be travelled may be considerably greater than covered by the available funding.

44. The Unions rely on the observations of the Full Bench in the 2 September 2019 Tranche 1 decision regarding the relevance of funding arrangements to the Commission's present task.

45. In any event, both providers and clients enter into service agreements and providers are at liberty to offer or decline a particular service to clients, or (subject to the limitations on funding) to offer such service on particular terms (including the client's agreement for funding to be deployed to travel). The fact that *"the funding is only available where the client agrees to use some of their funding package for this purpose, rather than for time spent delivering a service to themselves"* is an observation that only highlights the imperative for service providers to offer services on those terms. It does not warrant the continuation of terms and conditions of employment which do not provide a fair and relevant minimum standard.

46. In any event, the NDIA is currently reviewing the adequacy of regional and remote pricing arrangements, and the current circumstance may change.

47. The HSU contends that travel for the purpose of performing work at the direction of the employer is properly regarded as work. Whether it is funded or not, it is travel undertaken for the employer's purposes, not those of the worker. The fact that such travel is required, and is almost invariably unpaid is a matter that is relevant to the Commission's consideration of the current terms of the Award.

48. At [18], NDS contends:

'*The witness evidence of Mr Quinn that is referred to at [112] regarding a working day of over 16 hours is unclear. He states that the shift in question was not a split shift and yet he worked 9 hours and 53 minutes in a span of over 16 hours. If it actually was a broken shift, then clause 25.6 (c) of the award already provides that overtime at double time is payable in that circumstance.*'

49. Mr Quinn says here that he does not work a split shift on this day because his employer defines a split shift as a break of an hour or more [CB3053, [19]. Only for breaks of this minimum length is the split shift allowance paid. All of his breaks listed in his diary are of less than one hour in length. (Incidentally, NDS's witness, Steven Miller, also stated that his organisation defines split shifts as breaks of one hour or more).
50. NDS did not cross-examine Mr Quinn as to this issue.
51. The evidence illustrates the capacity of the broken shift provisions to facilitate exploitation. Mr Quinn's shift was broken seven times on the day in question.
52. At [22] – [23], NDS submits:

    The existing 10 hour daily threshold for overtime for employees (clause 28.1 (b) (ii)) simply mirrors the maximum span available to fulltime employees (clause 25.1 (b)).

    Where part-time employees accept additional hours within a 10 hour span they do not suffer any greater disutility than a fulltime worker working the same hours.'
53. It is incorrect to state that clause 28.1(b)(ii) mirrors clause 25.1(b). The latter enables full-time employees to work up to 10 hours per shift *by agreement*. The former provides a unilateral right for the employer to roster a part-time or casual employee up to 10 hours per day without agreement.
54. Additionally, full-time employees under the Award are entitled to overtime payment for work done in addition to their rostered ordinary hours as per clause 28.1.
55. Part-time and casual employees do not have the same right. Clause 28.1(b)(ii) means work done in addition to part-time and casual employees' rostered hours will generally be paid at ordinary rates.
56. At 46, regarding 24 hour care, NDS submits:

    NDS opposes the union proposal regarding clause 31.2 as it is out of kilter with the requirement for shiftworkers to work 10 weekends in order to be entitled to

additional leave. If the ABI draft at Annexure A needs to be amended to clarify the meaning of "regular" NDS would propose the amendment read …. 31.2 (b) "an employee who works 24 hour care shifts in accordance with clause 25.8 on 10 or more weekends during the yearly period in respect of which their annual leave accrues."….

57. 24 hour shifts are, and should be, an extremely rare practice. A 24-hour shift is significantly more onerous on an employee than a normal shift of shift work. The two may not be equated.
58. Restricting the availability of an extra weeks' annual leave in the way NDS contends would make the entitlement inequitable as between groups of 24-hour care shift workers. Applying NDS' proposed clause would mean employees working 24 hour care shifts on weekdays would not be entitled to the additional leave, but employees working weekends would be.

RESPONSES TO AIG SUBMISSION

Travel as "work", obligation to undertake travel - [8], [9]

59. AiG makes the curious contention that whilst employees must, as a matter of practicality, undertake some travel to attend a second site after visiting a different client earlier in the day, they are not required by virtue of either express obligation or necessity to undertake the travel at the direction of their employer.
60. AiG contends time spent travelling to and between clients will not always constitute 'work' for the purposes of the Award or other relevant industrial regulation, as it will not always occur in the course of employment and as such rightly does not, and should not, attract a payment as though it is work.
61. The former contention flies in the face of reality. Absent the employment obligation, there is no occasion for the workers to be travelling to the locations they do, at the times they do. It is essential, in order to perform the work required of them, that they go to the location of the client. There is no evidence from any of the employers that employees have the option of having the clients who require services attend at a central single location or a location of an employees' choice.

62. Travel to and from client homes or community sites is fundamental to the work of disability service workers and home care workers. Without such travel the work could not be carried out.

63. The position of home care and disability support workers is no different to that of an employed tradesman required to attend a series of locations during the course of a working day. The difference between such a worker and home care and disability support workers is that the employment of the latter is regulated by an award that affords the unlimited ability to break shifts.

Travel during "breaks" – [11]

64. AiG contends:

Moreover, where travel to or between clients occurs in the context of a break, various practical difficulties or issues potentially arise that undermine the proposition that an employer should or could be expected to pay for such travel in the manner proposed by the UWU. Relevantly, the evidence reveals the following interconnected issues……

65. The Unions dispute that the factors referred to by AiG are a barrier to an Award clause specifying payment for travel time.

66. The employer has the ability to roster shifts in a manner that limits the breaking of shifts. A limit to one break in a broken shift would reduce the amount of non-consecutive travel required.

67. It is correct that employers may not control traffic or other factors that may impact the time it takes to travel to any location. That is fundamental to the circumstance of any employer requiring an employee to undertake travel in relation to their work. The Unions contend that the travelling time between locations would in most cases be predictable within a reasonable range. Employers are able to schedule and allocate workers to perform appointments across different locations, which task must necessarily involve some assessment of the travel time required between the locations. Where travel to and between particular locations is carried out regularly, the Commission would think employers would have a very good idea of those travel times, and the capacity to manage the variation in times. The Commission would also expect that in an industry involving the provision of services of a personal care nature in the home, a degree of variability in arrival time might not be unexpected. In

Mr Quinn's case, the employer appears to have (sensibly) calculated the necessary travel time by reference to Google Maps and adopted a strategy of scheduling appointments within "time bands".

68. Employers in many cases would already monitor travel between different locations in kilometres for the purposes of the payment of the travel allowance (clause 20.5(a)). Similarly, travel time could be logged in a time sheet or app.

69. Providers operating under the NDIS may claim up to 30 minutes at the relevant rate for time spent travelling participants in city areas and up to 60 minutes in regional areas.[15] Significantly, claiming those funds is not excluded where the attendance occurs after a break in the shift.

Calculation of Travel Time [13] – [15]

70. AiG accuses the unions of "guilding the lily" on the evidence that travel time is calculable.

71. The finding that the UWU sought in paragraph [23] is that it is possible to *calculate* travel time and that some of the employer witnesses already do so.

72. AiG misconstrues the finding sought; the finding sought was *not* that the employers referenced pay travel time on *all* occasions. Paragraph [18] of the UWU submission identifies there are various practices regarding the payment of travel time by employers in the sector. Mr Wright and Ms Ryan are identified as being in the category of employers who '*will pay for travel time in between consecutive client engagements but not in between broken shifts*.' Payment of travel time between consecutive client engagements requires calculation of the time that the employee will spend travelling, just as travel time between non-consecutive client engagements requires calculation. This finding is relevant, as the UWU's claim would apply to travel in between consecutive and non-consecutive shifts.

Non-Payment of Travel Time results in Lower Wages [27]

73. AiG contests the contention that the non-payment of travel time results in lower wages for already low-paid workers.

[15] NDIS Price Guide 2019-20, page 12, CB 2807.

74. It is the contention of the Unions that time spent travelling to perform the employer's work is work and should be paid as such. When it is not, an underpayment occurs.
75. This observation also relies upon the research of Dr Macdonald about how the fragmentation of the working day through the limitation of "work" time to contact time with clients operates to diminish the effective pay of workers.

Macdonald article should be given negligible weight [30] – [32]

76. AiG contends the weight to be given to Dr Macdonald's article is "negligible", because it was based on hearsay.
77. AiG's contention in that regard is misconceived.
78. The Commission is not bound by the rules of evidence and may inform itself in such way as it thinks fit. It is commonplace in the Commission, in award matters and wage fixation matters, to have regard to expert social and economic research.
79. The complaint misunderstands the nature of expert social research, by complaining that the material upon which Dr Macdonald relied was hearsay. Most expert opinion is based substantially upon hearsay because it is based on the expert's study of a specialised field of knowledge, much of which will not be firsthand. It is commonplace for social research to employ tools such as surveys, focus groups, interviews and statistical data. It is not necessary for such research to be given weight that every single primary source of the information on which the opinion is based be called to give evidence.
80. The appropriate way to challenge the conclusions drawn by such a researcher is to test their methodology by reference to accepted standards in their field for the conduct of research.
81. AiG declined to cross-examine Dr Macdonald, and made no challenge to her methodology, the cohort she chose to examine, the period of time over which she conducted her research, her collection and recording of the source information, or her interpretation of the source data. In the case of Dr Stanford, by way of contrast, AiG attempted such challenge. It queried the sample size (and was swiftly rebutted).
82. The Commission would reject this submission.

NDIS Travel Time Payment – [33]

83. AiG suggests that the submission that travel time is "claimable" under the NDIS is misleading, because claiming the money is subject to the client's agreement.
84. AiG's criticism is semantic at best, and misses the greater point that it is possible for that funding to be deployed to the cost of travel.
85. The NDIS Price Guide 2019-20, pg.12 (CB 2807), contains the full details on claims.
86. Travel time can only be claimed if the client agrees. The employer is the party best placed to seek, and secure that agreement. Where a service provider is unwilling to require the client's agreement to the deployment of their funding to travel, the employer should not assume that such cost should fall onto the employee. AiG effectively suggests that employers should be authorised to negotiate for their own benefit with their employees' time.

Costs of Travel – [37]

87. AiG claims the unions have provided insufficient evidence of the costs of the claim.
88. This argument would not be accepted by the Commission.
89. First, the evidence of the unions went in detail to demonstrate that existing employers already pay for some amount of employee travel. In those instances, amendment of the award to establish an award entitlement to such payment will either add no further cost to the employer, or will be an incremental increase to an existing type of cost.
90. That evidence, taken together with the evidence that travel is recoverable under both home care and NDIS funding would leave the Commission in a state of comfortable satisfaction that employers will be in a position to meet the costs of the claim.

Employer Planning – [38]

91. The UWU contended that:
92. '*Care services such as cleaning, medication checks and personal care can be provided in a planned manner…*'
93. AiG submitted the proposed finding is plainly incorrect in the context of disability services funded by the NDIS and was not supported by the material

before the Commission, and that the UWU evidence did not refer to any instances under the NDIS.

94. Given the view of the Full Bench about the relevance of funding issues, this submission is of limited force, at best.

95. In any event, it remains the case, as submitted repeatedly throughout these submissions, that services under the NDIS are provided pursuant to an agreement with clients. It involves no great stretch of the imagination to suggest that in the negotiation of those arrangements, employers are in a position to offer their services on terms that facilitate their workload planning. The "time bands" utilised by Scott Quinn's employer are one example.

96. For evidence regarding work patterns within disability services, and the viability of continuous work, see the ASU submission on findings dated 19 November 2019, at paragraphs [45]-[64].

Broken Shifts - [42]-[43]

97. AIG contends that to say that the period between broken shifts is effectively controlled by the employer is misleading. AIG's focus on the legal rights of employers ignores the practical reality of the broken shift arrangements. The time spent travelling or waiting in the breaks between broken shifts is under the control of the employer because they have organised the employee's work in that way. The evidence before the Commission shows that the breaks between shifts are not organised to benefit the employee (or clients) but to benefit the employer. Employees may try to salvage the dead time between working broken shifts by using it for private purposes, but the range of things that they may do it severely limited.

Travel time - [43]

98. The submission that unpaid travel time creates a perverse incentive to operate over longer distances than might otherwise be the case does not rely on speculation about an employer's motivations, but on simple logic that if something has no price an economic decision-maker (such as an employer) may use more of it than they would do if it had a price. This submission is consistent with the evidence of Dr Stanford about economic decision-making.

Equal remuneration considerations - [56]-[57]

99. The ASU's submission that unpaid travel time offends the principle of equal remuneration for work of equal or comparable value relies on the simple conclusion that travel at the direction of the employer (whether express or implied) is work. Employers are obliged to pay for this work under the terms of male dominated modern awards. The SCHDS Award (which is female dominated) does not oblige employers to do so. Travelling is travelling, there can be no reasonable argument there is any difference in travelling between work locations in one industry and another.

100. The choice of the business equipment industry is apt, because like the SCHDS industry it is a service industry, *and*, like the SCHDS industry work is performed at the client's premises. The difference being that the industrial arrangements in the SCHDS Award permits employers to structure their work so that travel time is often unpaid, while the *Business Equipment Award* 2010 does not.

Travel time - [59], [635]

101. Contrary to AI Group's assertions, the HSU has not introduced a new claim. In any event, the Commission is not a court of formal pleadings.

102. The HSU's draft determination of 15 February 2019 included an amendment to clause 20.5(a) to ensure that disability support workers and home care workers are paid a travel allowance on a per kilometre basis for travel from, to and between clients.

103. The current clause 20.5(a) provides that '*[w]here an employee is required and authorised by their employer to use their motor vehicle in the course of their duties, the employee is entitled to be reimbursed at the rate of $0.78 per kilometre.*'

104. The HSU's view is that travel to, from and between clients should be captured by 20.5(a), as an employee is required and authorised to perform this travel. Nevertheless, the HSU's proposed amendment sought to make it clear that this allowance is payable to home care and disability support workers for travel to, from and between clients.

105. The HSU has not advanced a proposed 'travel time' clause. Its view is that time spent travelling for work is properly understood as work and should be paid as such. At the very least, the requirement to travel in order to perform

every client appointment, and the practice of not paying for that time as work, is a matter that informs the Commission in addressing the issues of minimum engagement and capacity to break shifts, which allow employers to treat travel time as a 'break' and therefore unpaid, non-working time. Our submissions have been consistent in this respect. We refer to the relevant sections of our submissions below.

106. The HSU's submissions of 15 February 2019 included the following at paragraph [41]:

'The evidence suggests employers regard the travel to the first client and from the final client of the day as not travel which occurs in the course of the employee's duties. If that were correct, there would be a perverse incentive for employers to schedule the furthermost clients at the start and finish of each day. The evidence indicates this approach is already being taken by some employers. Such travel is a fundamental part of the duties performed by those workers. It is necessary in order to perform the principal caring duties, and well exceeds the usual travel engaged in by employees to and from their workplaces.'

107. The HSU submissions of 3 October 2019 stated at paragraph [43]:

As we have stated above, the HSU rejects the assumptions inherent in the submissions of the employer parties that travel to, from and between client appointments, and that time between appointments is not work.

108. There is therefore no basis for AI Group to now say that the HSU is seeking to '*broaden'* its claim. It has been consistent, and persistent, as to this issue throughout these proceedings.

Travel time – [72] – [75]

109. AIG contends, in effect, that the travel they undertake to the homes of their clients is a function, not of the operation of their employers' business, but of their choice to be in locations other than the work location (such as their homes) at the start of whatever broken shift they are commencing. AIG's contention also contains the hint of criticism of these low paid workers for the locations in which they *choose* to live.

110. The travel undertaken by home care and disability workers is fundamentally different to that required in ordinary employment contexts, and should be

recognised as such. For the vast bulk of workers, where they are required to commence work each day is known, and is consistent.

111. Union witnesses gave evidence that they often did not know until the night before or the morning of their shift, who their first client would be. [See, eg, Waddell, CB2957 [13], CB2958 [15]-[16]).

112. As a matter of course, in most cases, employers do not pay for time spent travelling to and from clients. This was confirmed by witnesses for ABI. [See, eg, PN2866, XXN of Shanahan, PN3053, XXN of Ryan]. It was also readily apparent from the evidence that many employers do not pay for time spent travelling between clients.

Travel Time – [76]

113. At paragraphs [56]-[57] of the Unions joint submission, the Unions conceded that travel time does not fall into the categories described in section 139, in response to ABI's claim that travel time should be paid as an allowance. As stated at [57] of that submission, the only proper way travel time should be treated is as time worked:

114. Travel time does not fall under the categories described in section 139 (i) or (ii). It is not apparent how travel time could fit into the category described in section 139(iii). Travel time is not a disability associated with work in particular conditions or locations but is a core part of the performance of duties for employees who work in client residences or within the community. The most appropriate form of compensation for travel time is payment for the time worked. The Commission should find that an allowance paid to compensate employees for time worked would not be consistent with a 'fair and relevant minimum safety net terms and conditions'.

Travel Time – [77] – [78]

115. The Unions acknowledge that the NDIS does not fund travel to the first and from the last client of the day. However, the lack of NDIS funding is not determinative. NDIS is not the employer of these workers.

Travel Time – [80]

116. If by its submission at [80], AIG means to contend that the Commission, the body empowered by statute to make awards in respect of all national system

employees across virtually all industry, is in no position to know that the travel required of home care and disability workers is different and greater than that required of other classes of worker, the Unions reject that submission.

Travel Time – [85] – [86]

117. Ai Group's argument that '*employers, in the provision of disability services, have very little if any control*' is simply untrue.

118. Both providers and clients enter into service agreements. Choice and control works both ways under the NDIS and a provider can choose not to deliver services to a client which refuses to allow their NDIS package to be used to cover the actual cost of service delivery. It is a business' prerogative to ensure that they enter into service agreements which are commercially sound and enable them to capture their legally required costs including minimum wages and conditions prescribed in the Award.

Minimum Engagement – [88]

119. The evidence of Bernie Lobert was that after he had established himself in the industry, he refused to perform shifts less than three hours, as this was the minimum for which the effort of getting ready for work and travelling to an appointment was worth.

Response to Question 12 - [114]-[115]

120. AIG's response to this question betrays an astounding ignorance of the social and community sector for an employer association purporting to represent the industry.

121. At paragraph [114] AIG asserts that any employee who performs disability support work as a 'disability support worker', could be covered by another modern award, and that a social worker could be described as disability support worker. The Commission would not accept this submission. The term 'disability support worker' does not simply refer to any employee who works with people with a disability. It describes a person who provides disability supports. A social worker performs social work, a related, but different social and community service. Further, a social worker employed in the disability sector would be covered by the SCHDS Award and classified under the SACS stream.

Classifications of employees working on call - [132]

122. We refer to our submissions in reply to ABI above.

Employees must remain alert while on call – [132]

123. AIG asserts that employees do not need to remain alert whilst on call. They identify no evidence in support of this proposition. The evidence of Ms Flett and Ms Anderson is that while they are on call, they must maintain themselves in a state of readiness to respond to a request to work.

Response to Question 24 – [132]

124. The correct analysis of the Attachment D is that while the treatment of broken shifts differs to some extent from modern award to modern award, the regulation of broken shifts in the SCHDS Award offers less protection to employees than in the majority of modern awards.

Meaning of 'precarious work' - [140]

125. The meaning of the 'precarious' work is clear from the context in which it is used.

126. Dr Stanford describes precarious work as follows at paragraph [8] of his report as:

including: casualisation, increased part-time employment, irregular and discontinuous shift assignments, requirements that DSWs work in multiple locations (often in the course of a single day, and often working inside clients' private residences), and the expectation that DSWs provide private or informal transportation services in the course of their work (including transporting clients, in some cases without compensation).

127. The evidence in support of this proposition is found at paragraphs [10]-[32] of the ASU 19 November Submission.

Increasing unpredictability of employment in the disability sector [142]

128. This finding is neither vague nor unsupported by the evidence as ABI contends. The evidence in support of this finding is discussed in detail at paragraphs [13] to [16] of the ASU's 19 November submissions.

129. The Commission would not agree with ABI's assertion that the ASU's finding is contradicted by any other union material. The sole finding referred to by ABI provides as follows:

130. *Care services such as cleaning, medication checks and personal care can be provided in a planned manner. The nature of these services mean that they are largely performed in a routine manner, are low acuity and capable of being planned. The provider and the client must negotiate mutually acceptable times for the service to be provided in advance.*

131. The ASU's finding concerns the industrial regulation of employment in the industry and the effect that has on working patterns. UWU's finding concerns the needs of clients. This supports the general Union submission that work in the sector is increasingly precarious, but this is because the SCHDS Award does not provided a fair and relevant safety net of terms and conditions. It is not driven by the needs of clients.

132. The finding proposed by the ASU is not contradicted by the finding proposed by UWU.

Client Choice-Making Capacity - [145]

133. The UWU submitted: '*Similarly, clients in aged care and disability services are capable of making choices within service constraints, and understanding of those constraints*.'

134. In response, AiG submitted that the proposed finding was *plainly incorrect* in the context of disability services funded by the NDIS and wad not supported by the material before the Commission in this regard. AiG submitted that the evidence plainly demonstrated that client demands created a great deal of uncertainty as to if, where and when services are to be provided and that employers required a flexible operational environment in order to provide them with sufficient agility to respond to such changes.

135. The evidence of Jeffrey Owen Smith, CEO of People with a Disability Australia, dated 11 September 2019 (CB4780-4782), at [10]-[12] deals with this issue. By reason of his role and his experience, the Commission would think he was well placed to comment about the ability of people with disability to understand service constraints and to make choices within those constraints. He stated (without any challenge from the employer representatives):

[10] Spontaneity of needs may be addressed by existing casual support worker provisions, and it is important that these casual staff are properly remunerated for the insecure nature of their work. However, people with disability must not be characterised as unreasonable, unpredictable or irrational

people who expect to have their preferred staff 'on call' to respond to their whims. People with disability are aware of the constraints that workers operate under and in some instances are also disability support workers themselves.

[11] It is also critical to note that for the majority of people requiring disability supports their needs are regular and predictable. For example, a person requiring personal care every morning before work will be likely to require it at the same time, every working day, for every working week of the year. In our experience people with disability value continuity of support and are likely to seek to retain ''good'' staff on a regular basis. They frequently express immense frustration with having to repeatedly 'train' new support workers in how to provide person-centred services to them as a result of a highly casualised and transient workforce. To our knowledge, the majority of NDIS participants want to employ staff regularly and over the long-term.

[12] NDIS Support Plans are also drawn up and pre-agreed in advance, with spending justified at regular intervals. It is erroneous to characterise the NDIS as a system that provides for people with disability to change their support preferences on an ongoing and erratic basis. The emphasis is on encouraging regimes of support that work well, when these patterns are achieved there should be little need for significant alteration to plans and service provision. Again, the key to meeting the expectations of people with disability and enabling service providers to operate with predictability and consistency is reliable, content, quality staff.

Disability sector is struggling to attract sufficient new staff - [147]-[153]

136. The ASU sets out the evidence in support of this proposition at paragraphs [18]-[25] of the ASU's 19 November submission. In particular, paragraph [21] refers to the relevant passages of Dr Stanford's report where he sets out the statistical information that supports his opinion. We note that ABI does not disagree with those facts (See ABI Finding 185).

Meaning of 'unusual' - [149]

137. The description of a turnover rate three times higher than the all-industries average as 'unusual' is apt. The Macquarie Dictionary defines 'unusual' as meaning: *'not usual, common, or ordinary; uncommon in amount or degree; of an exceptional kind'.* The Commission would find that a turnover three times greater than the national average was unusually high.

138. Dr Stanford was not cross-examined on this part of his evidence.

Dr Stanford's "philosophical" views – [158]

139. ABI mischaracterise Dr Stanford's evidence. Dr Stanford's views are not 'philosophical' in nature: they are the expert opinion of a highly qualified and

experienced labour economist, which was not effectively displaced in cross-examination. Moreover, Dr Stanford's evidence is simple common sense: the purpose of industrial regulation is to shape decision-making to provide better outcomes for employees (and employers) than would exist if no industrial regulation existed.

140. ABI have not presented any evidence that would contradict Dr Stanford's evidence about the interaction of employer decision-making and industrial regulation.

Cancellation of Services [154]

141. The UWU contended for a finding that: '*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*.'

142. AiG disputes the finding so far as it is said to be relevant to all sectors covered by the award and refers to the extract from the NDIS Price Guide: that providers may only charge for a short notice cancellation (or no show) if they have not found alternative billable work for the relevant worker and are required to pay the worker for the time that would have been spent providing the support.

143. AiG's understanding is that an employer will be unable to cancel a shift due to a client cancellation and claim NDIS funding where the employer is not required to pay the employee.

144. The proposed finding was advanced in the context of a submission about the client cancellation clause in the Award (clause 25.5(f)) which does *not* apply to the disability services sector.

145. AiG's submission highlights a reason why it is not in employers' interests to extend the cancellation provisions into the area of disability services.

Classifications of employees working on call – [162]

146. The ASU's evidence is sufficient to make the findings sought. Ms Anderson is a SACS Level 5 employee.

147. Further, ABI's position is directly contradicted by the evidence of ABI's own witnesses.

148. Mr Harvey's evidence is that on call work is performed by 'Team leaders and rostering staff' in 'community supports service provision'; and in independent living on call work is performed by 'accommodation coordinators and managers'.[16]

149. *The on-call process is implemented to ensure Direct Support -staff members have access to emergency support and advice after hours. The on call role is to provide advice to minimise any risk, ensure compliance with legislative requirements and policy and procedure and to provide support to staff experiencing critical issues.*

150. These are senior roles. That would be classified at Level 4 or higher, depending on the employee's duties and responsibilities.

151. Ms Ryan appears to allocate on call work to all of her employees. Employee's working on call apparently work without supervision, and are delegated the power to arrange client services and amend the rosters of other employees[17].

152. Ms Ryan's organisation pays those employees $450.00 per week to perform this work[18]. This is a significant sum of money. For example, a full-time SACS Level 2.3 disability support worker is entitled to be paid $1,080.57 per week or $28.44 per hour. The sum of the employee's weekly pay and the allowance amounts to $1530 or roughly equivalent to the rate of pay of a SACS Level 5.3 employee.

153. The Commission would draw the inference that the significant increase in the rate of pay reflects the significant duties allocated to employees working on call. Even if they are allocated to an employee in a lower classification, they are remunerated at a rate that reflects their significance.

RESPONSES TO AFEI SUBMISSION

Travel Time - [1.1]-[1.5]

154. AFEI submits that there is no evidence to demonstrate that some employees perform their work in a client's home and travel between work locations. We do not believe that the Commission would believe that there is any genuine controversy as to whether some disability services perform work in their client's homes.

[16] Statement of Scott Harvey, [61]-[62].
[17] Statement of Deborah Ryan, [78].
[18] Statement of Deborah Ryan, [75].

155. The paragraph cited by AFEI is an introductory statement; the finding is supported by the evidence referred to in the table at paragraph [76], and discussed in paragraphs [77]-[87].

156. AFEI appear to believe that the ASU relies solely on the contract attached to Dr Stanford's Expert Report as the basis of this finding. The ASU relies on Ms Anderson's contract as evidence that some employees are required to hold a driver's license. Ms Anderson works at a group home and does not travel between different work locations to provide services in client's home. However, she is still required to hold a driver's license. Other evidence in the proceeding demonstrated both the requirement to hold a drivers licence, and the prevalence of driving by the worker in their own vehicle as the means of transport to and from engagements.

Work travel during unpaid breaks - [1.6]- [1.7]

157. AFEI submits that the evidence in the proceeding shows employers attempt to maximise work time of employees engaged on broken shifts, where this is able to correspond with daily client requirements. Some employers no doubt structure their shifts in the way that AFEI describes. Indeed, Ms Mason's evidence supports the Union position that the current broken shift term is more flexible than necessary. However, there is substantial lay and expert evidence (Dr Stanford) that many, if not most, employers in the sector do not organise work in the manner described. More importantly, the Award does not operate to create any incentive, or reinforce any existing incentive, to do so.

Is unpaid time controlled by the employer? - [1.9] - [1.18]

158. AFEI's focus on the legal rights of employers ignores the practical reality of the broken shift arrangements. The employer has imposed these breaks on the employee, and takes control of that time without paying for it. Employees may try to salvage the dead time between working broken shifts by using it for private purposes, but the range of things that they may do is severely limited.

Overtime for part-time employees working additional hours [1-35] – [1-36]

159. AFEI is incorrect to suggest that granting the HSU's overtime claim would lead to a discrepancy between the pay entitlements of full-time and part-time employees. The Award *currently* treats full-time and part-time employees

differently. Full-time employees receive overtime when they work beyond their rostered hours on any day (clause 28.1(a)). Part-time employees do not.

Overtime for part-time employees working in addition to 8 hours per day [1-39]

160. AFEI state that: '*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*'. AFEI cite clause 27.1 in support of this.

161. However, clause 27.1(c) differentiates the meal breaks clause in the SCHCDS Award from other Awards, providing that employees will be paid at ordinary time during the lunch period where they are required to have a meal with a client: '*Where an employee is required by the employer to have a meal with a client or clients as part of the normal work routine or client program, they will be paid for the duration of the meal period at the ordinary rate of pay, and clause 27.1(a) does not apply. This paid meal period is to be counted as time worked.*'

Broken Shifts [2 – 48]

162. The UWU contended: '*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*.'

163. AFEI contends 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.

164. The Unions refer to the evidence of Jared Marks[19], as follows:

> *The pattern of work (determined by LiveBetter) is for home care workers to attend the residences of clients at non-consecutive times throughout the work day.*
>
> *LiveBetter characterises the pattern of work as a series of broken shifts and concedes that travel time is payable except for travel to and from a broken shift.*

[19] Ex UV8, [21] – [23], CB4722

By LiveBetter's reasoning, a broken shift commences when a support worker arrives at a client's home and ends when the home careworker departs from the client's home.'

Cancellations [2–70]

165. AFEI disputes the claim that *due to changes made in July 2019 in the NDIS Price Guide 2019-20, an unlimited amount of client cancellations are now claimable*.'

166. AFEI submit that the statement is not accurate because the NDIS price guide provides that fees associated with short notice cancellations may be recoverable subject to the terms of the service agreement between the provider and participant, and 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.

167. The Unions acknowledge that claiming for cancellations under the NDIS is subject to terms as found in the NDIS Price Guide 2019-20[20].

168. If employers are not claiming the funds to which they could be entitled, and are not taking steps to maximise the funds that are claimable, that is not a matter that tells against any of the union claims.

Cancellations [2-73]

169. AFEI submits that there is no evidence to support a finding that providers are able to claim back a greater amount with respect to client cancellations.

170. The evidence shows the capacity to claim for client cancellations under the NDIS changed from *limited* as to the number of cancellations that could be charged to *unlimited*. The Unions contend the latter arrangement affords the greater capacity to recover funds.

Cancellations [2-74 – 2-75]

171. *Home care providers can charge a client for a cancelled service provided this is in accordance with the service agreement in place between the provider and the client*.

172. AFEI challenges this proposed finding in reliance on the evidence of Mr Wright that in packages such as the Commonwealth Home Support Program, there is no cancellation provision in those package funds due to block funding.

[20] CB 2807-2808

173. AFEI also relies on the evidence of Ms Wang that "if a client cancelled the service we don't have the income".
174. Mr Wright provided evidence that cancellation fees cannot be charged under the CHSP however later admitted that this understanding was based on what he had heard from "operations people who are in that space within the organisation" (see transcript (17/10/19) PN2645-2651, and PN2702-2706). His evidence on this issue should not be preferred, as it is hearsay evidence that directly contradicts other evidence in this matter including that of Mr Shanahan (PN2894), Ms Mason (PN3239) and the terms of the Baptist Care Commonwealth Home Support Programme (CHSP) pro-forma Service Agreement (EX.HSU19). Similarly, Ms Wang provided evidence that if a client cancelled the service, CASS would not be able to recover income as the clients held the funding, but this evidence is also hearsay, and should not be preferred as she admitted funding arrangements were not her responsibility, and her evidence was based on "*what I have heard from*" work colleagues (PN3611-PN3616).

RESPONSES REGARDING SUBMISSIONS ABOUT EXPERT WITNESSES

Evidence of Dr Stanford

175. AIG and ABI maintain their submission that the Commission cannot rely on the evidence of Dr James Stanford. The apparent basis for this is that Dr Stanford bases his expert opinion on original research of a qualitative nature. They assert that Dr Stanford's evidence is consequently hearsay, and should not be given any weight. Our response to this submission is found at [162] through [173] of the Unions submissions of 10 February. We rely on those submissions. Dr Stanford's evidence is probative and would be given significant weight by the Commission.
176. We add, however, that the standard asserted by ABI and AIG is so high that it would exclude almost any expert evidence or any evidence based on surveys. Even the Australian census would be given little weight, because it consists of the anonymised results of representations made to the ABS employees conducting the survey.
177. The ASU agrees with NDS's submission regarding the value of Dr Stanford's research at Q15(a), namely:

An underlying concern for Ai Group appears to relate to the qualitative nature of Dr Stanford's research. In our view the approach taken in the research is valid and well supported in academic literature. The issues raised by Ai Group regarding the anonymity of interviewees in Dr Stanford's research raises the bar required too high for determining whether the results of such research are reliable. Furthermore, the general findings align with other witness and documentary evidence in these proceedings.

178. In its response to Q15, However, NDS misrepresents Dr Stanford's evidence in its submission. At paragraph [56], Dr Stanford is clearly referring to the industrial regulation provided by the SCHDS Award of his report. Dr Stanford does not state that employers ignore efficiency in organising work, but that in the absence of effective industrial regulation many costs associated with work in the disability sector (such as the time an employee spends travelling) will be shifted to the employee. This may be cost effective from the perspective of the employer, but is not an efficient use of labour. His evidence is that there are a multiple factors influencing employer decision-making, some stronger than others. In the disability sector, it is apparent that the pressure on employers to organise work efficiently, is not sufficiently strong to compel employers to do so.[21] The issues raised by NDS are dealt with in detail at paragraphs [164]-[173] of the Union's 10 February Submission.
179. NDS asserts that the employer witness evidence in these proceedings is in conflict with Dr Stanford's evidence. However, the organisation of work by each employer cited by NDS reflects Dr Stanford's characterisation of employer behaviour in the disability sector.

Evidence of Dr Muurlink

180. Dr Muurlink's report was filed in filed in the Part-time Work Common Issue on 14 July 2016. The ASU relies on it in these proceedings pursuant to Item 4 of the Aide Memoire dated 22 December 2015. The Aide Memoire permitted the parties to the review of the SCHDS Award to rely on any material filed in the Part-time and Casual Common Claim Proceedings (AM2014/196 and AM2014/197) that is relevant to the SCHCDS Award in support of variations to be pursued in the SCHDS Award proceedings.[22]

[21] Transcript, PN 2278-2279.
[22] Aide Memoire dated 22 December 2015.

181. Dr Muurlink's evidence is probative and would be given significant weight by the Commission. The objections of AIG and ABI can be summarised as that Dr Muurlink's report was generic in nature and did not specifically analyse the industry covered by the SCHDS Award. This argument fails to grasp the concept that general principles have broad application. A human being is a human being, regardless of what industry they work in and there is no evidence that the consequences of unpredictable work are experienced differently according to the occupation of the worker. Further, when challenged on the inclusion of studies from other industries during cross-examination, Dr Muurlink agreed that there were studies that did not relate to the SCHDS Award industries but added "that there's possibly a bit of a disproportionate focus on the health and care sector in the literature".[23] On re-examination, Dr Muurlink noted that the studies in this sector disproportionately concern higher status workers such as doctors and nurses, but that the variables of unpredictability will be amplified amongst lower income workers.[24] Dr Muurlink's findings are supported by the lay evidence called by the Unions.

182. Further, Dr Muurlink was not seriously challenged on the substance of his evidence in the Part-time Common matter. Dr Muurlink was cross-examined at length on the choice of studies cited in his report,[25] but his evidence has withstood cross-examination. ABI argues that Dr Muurlink tended to 'cherry pick' studies that support his thesis, while ignoring the better studies which did not support his contentions. However, ABI does not cite any study that should be preferred to the studies noted by Dr Muurlink in his report nor do they give any specific example of a study relied upon by Dr Muurlink that was lacking in any way.

183. Neither AIG nor ABI requested Dr Muurlink for cross-examination in these proceedings.

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[23] Transcript, AM2014/196, PN6370.
[24] Transcript, AM2014/196, PN6461.
[25] Transcript, AM2014/196, PN674-PN6447.