DECISION

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

4 yearly review of modern awards—*Social, Community, Home Care and Disability Services Industry Award 2010*—Substantive claims
(AM2018/26)

JUSTICE ROSS, PRESIDENT
DEPUTY PRESIDENT CLANCY
COMMISSIONER LEE

MELBOURNE, 4 MAY 2021

4 yearly review of modern awards – Award stage – Group 4 Awards – substantive issues – Social, Community, Home Care and Disability Services Industry Award 2010 – Tranche 2.

ABBREVIATIONS

ABI	Australian Business Industrial and the New South Wales Business Chamber, Aged and Community Services Australia and Leading Age Services Australia
Act	*Fair Work Act 2009* (Cth)
AFEI	Australian Federation of Employers and Industries
Aged Care Award	*Aged Care Award 2010*
Aged Care Substantive Claims Decision	*4 yearly review of modern awards – Award stage – Group 4 – Aged Care Award 2010 – Substantive claims* [2019] FWCFB 5078
Ai Group	Australian Industry Group
AIRC	Australian Industrial Relations Commission
ASU	Australian Services Union
Award	Unless the context suggests otherwise, the SCHADS Award
Award Modernisation	The process of reviewing and rationalising awards in the national workplace relations system to create a system of modern awards in accordance with the Minister's request.
Background Paper 1	Background Paper, *4 yearly review of modern awards – Award stage – Group 4 – Social, Community Home Care and Disability Services Industry Award 2010 – Substantive claims – Tranche 2*, 6 January 2020
Background Paper 2	Background Paper 2, *4 yearly review of modern awards – Award stage – Group 4 – Social, Community Home Care and Disability Services Industry Award 2010 – Substantive claims – Tranche 2*, 4 March 2020
Background Paper 3	Background Paper 3, *4 yearly review of modern awards – Award stage – Group 4 – Social, Community Home Care and Disability Services Industry Award 2010 – Substantive claims – Tranche 2*, 4 March 2020
Business SA	South Australian Chamber of Commerce and Industry T/A Business SA

Commission	Fair Work Commission
ERO	Equal Remuneration Order
HSU	Health Services Union
Joint Union	ASU, HSU and UWU
NDIA	National Disability Insurance Authority
NDIS	National Disability Insurance Scheme
NDS	National Disability Services
NSW	New South Wales
Part-time and Casual Employment	*4 yearly review of modern awards – Casual employment and Part-time employment* [2017] FWCFB 3541
Part-time and Casual Employment Full Bench	*The presiding Full Bench on 4 yearly review of modern awards – Casual employment and Part-time employment* [2017] FWCFB 3541
Part-time and Casual Employment Common Issue Proceedings	AM2014/196 and AM2014/197
Penalty Rates Case	*4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001
Report	Each of: The May 2020 Cortis Report (see section 3.1) The Muurlink Report (see section 3.2) The Stanford Report (see section 3.3) The Macdonald Article (see section 3.4)
Review	4 yearly review of modern awards
SACS	Social and community services
SCHADS Award	*Social, Community, Home Care and Disability Services Industry Award 2010*
September 2019 Decision	*4 yearly review of modern awards–Group 4–Social, Community, Home Care and Disability Services Industry Award 2010–Substantive claims* [2019] FWCFB 6067

Transitional Review	Review of all modern awards conducted by the Commission in accordance with the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth).
Union	ASU, HSU and UWU
UWU	United Workers Union (formerly known as United Voice)

1. BACKGROUND

[1] The substantive claims in the Review in respect of the SCHADS Award have been dealt with in 2 groups: Tranche 1 and Tranche 2. This decision deals with the Tranche 2 claims.

[2] The following organisations have made or responded to claims in these proceedings:

- Australian Business Industrial, the New South Wales Business Chamber, Aged and Community Services Australia and Leading Age Services Australia (ABI)
- Australian Federation of Employers and Industries (AFEI)
- Australian Industry Group (Ai Group)
- Australian Services Union (ASU)
- South Australian Chamber of Commerce and Industry T/A Business SA (Business SA)
- National Disability Services (NDS)
- Health Services Union (HSU)
- United Workers Union (UWU).

[3] This decision is structured into the following chapters:

- Chapter 1 explains the background to the claims before us
- Chapter 2 sets out the legislative framework within which we must make our decision
- Chapter 3 deals with the expert reports that were filed in the proceedings
- Chapter 4 sets out the common findings we have made based on the evidence that is before us
- Chapters 5 to 11 deal with each of the claims before us which relate to:
    - minimum engagement
    - broken shifts
    - travel time
    - variations to rosters
    - remote response/recall to work

- client cancellations
- clothing and equipment
- overtime for part-time and casual workers
- 24-hour-care
- sleepover
- mobile phone allowance, and
- community language allowance

- Chapter 12 deals with the Equal Remuneration Order (ERO) and the *provisional* view expressed in matter AM2020/100, and

- Chapter 13 sets out the next steps in this matter.

[4] The SCHADS Award covers employers (and their employees in the classifications listed in Schedules B to E of the SCHADS Award) in the following sectors:

- crisis assistance and supported housing

- social and community services (including social work, recreational work, welfare work, youth work or community development work (including organisations which primarily engage in policy advocacy or representation on behalf of organisations carrying out such work) (SACS) and the provision of disability services including the provision of personal care and domestic and lifestyle support to a person with a disability in a community and/or residential setting including respite centre and day services)

- home care (the provision of personal care, domestic assistance or home maintenance to an aged person or a person with a disability in a private residence), and

- family day care (the operation of a family day care scheme for the provision of family day care services).

[5] The SCHADS Award includes 3 different minimum rates clauses for the different sectors:

- Clause 15 applies to employees working in the social and community services and the crisis assistance and supported housing sectors

- Clause 16 applies to employees working in the family day care sector, and

- Clause 17 applies to employees working in the home care sector.

[6] In this decision we refer to the social and community services sector as the SACS sector and employees in this sector as SACS employees.

1.1 THE TRANCHE 1 CLAIMS

[7] As mentioned above, this decision deals with the Tranche 2 claims but we begin with a short summary of the claims in Tranche 1. On 12 April 2019 a summary document was published in relation to Tranche 1 outlining the relevant procedural history, the claims being pursued and a summary of the submissions received.

[8] The following claims were dealt with in Tranche 1:

UWU claims:

- S44A – deletion of or variation to 24-hour-care clause
- S40 – consequential variation to the sleepover clause (arising from the deletion of the 24-hour-care clause (S44A))
- S47 – variation to excursions clause
- S51 – variation to overtime clause
- S57 – variation to public holidays clause.

ASU claims:

- S6 – provision of a Community language skills allowance.

HSU claims:

- S19 – first aid certificate renewal
- S43 – deletion of the 24-hour-care clause
- S48 – Saturday and Sunday work (casual employees receiving casual loading in addition to Saturday and Sunday rates).

[9] The Tranche 1 claims were heard on 15 – 17 April 2019.

[10] On 2 September 2019 we issued the *September 2019 Decision* which dealt with the nature of the Review, the SCHADS Award, the SCHADS sector, the National Disability Insurance Scheme (NDIS) and the Tranche 1 claims. In dealing with the Tranche 1 claims, we decided to:

- vary the rates of pay of casual employees who work overtime and on weekends and public holidays (subject to the views expressed therein about transitional arrangements)
- reject the first aid certificate renewal claim
- reject the UWU's claim to vary the public holiday clause
- defer consideration of the ASU's claim for a community language skills allowance
- set out a process for addressing the lack of clarity and other deficiencies in the 24-hour-care clause.

[11] On 18 October 2019 we issued a decision[1] (the *October 2019 Decision*) resolving the transitional arrangements in respect of the decision to vary the rates of pay for casuals working overtime and working on weekends and public holidays. We decided that the increases in overtime, weekend and public holiday rates for casuals would come into operation, in full, from 1 July 2020. A determination[2] was issued on 21 October 2019 giving effect to the *October 2019 Decision*.

[12] In relation to the claim for a community language skills allowance, Deputy President Clancy published Background Document 1 on 4 December 2019 and directions were issued for the hearing of this claim with the Tranche 2 proceedings.

[13] In relation to the 24-hour-care clause a Report was published by Commissioner Lee on 14 November 2019 and this claim was the subject of submissions in the Tranche 2 proceedings.

1.2 THE TRANCHE 2 CLAIMS

[14] The Tranche 2 claims being pressed are:

ABI claims:[3]

- Variation to the client cancellation provision
- Remote response work
- Variations to rosters.[4]

ASU claims:

- Broken shift penalty rate
- Paid travel time
- Recall to work overtime away from the workplace.

HSU claims:

- Broken shifts
- Minimum engagements
- Travel
- Telephone allowance
- Uniform/damaged clothing allowance
- Cancellation

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[1] [2019] FWCFB 7096.

[2] PR713525.

[3] In their submissions of 19 November 2019 ABI advised of only 2 claims being advanced by their clients. In its submissions of 10 February 2020, ABI confirmed it also wished to press the variations to rosters claim (see p 54).

[4] See Background Paper 2 at [4] – [5].

- Sleepover
- Overtime for part-time and casual workers beyond rostered hours/8 hours.

UWU claims:

- Broken shifts
- Travel time
- Variation to clothing and equipment allowance (uniforms)
- Variations to rosters clause
- Mobile phone allowance claim.

[15] On 26 September 2019 a Statement[5] was issued directing the parties to file a Court Book, by Friday 4 October 2019. The Court Book included draft determinations which were filed by:

- ABI on 2 April 2019
- ASU on 7 November 2018 and 2 July 2019
- HSU on 15 February 2019
- UWU on 3 October 2019.

[16] Following the filing of the Court Book, ABI filed an amended draft determination on 15 October 2019.

[17] The hearing of the evidence in respect of the Tranche 2 substantive claims took place in the period 14 – 18 October 2019. The following Transcripts of proceedings have been published:

- Monday 14 October 2019
- Tuesday 15 October 2019
- Wednesday 16 October 2019
- Thursday 17 October 2019
- Friday 18 October 2019.

[18] The exhibits tendered at the Tranche 2 Full Bench hearings are listed at **Attachment A**.

[19] Directions issued on 23 October 2019 required the parties to file submissions:

(i) setting out the claims they are pressing or opposing in the Tranche 2 proceedings;

(ii) identifying the parts of the Court Book, the exhibits and transcripts which are relevant to each claim;

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[5] [2019] FWCFB 6685.

(iii) identifying the submissions filed (and which parts of those submissions) they rely on in relation to the claims being considered in the Tranche 2 proceedings;

(iv) dealing with the evidence adduced during the proceedings on 15 – 18 October 2019, including by identifying the findings that they say should be made in light of the evidence and referring to the aspects of the evidence which is said to support those findings (by reference to particular paragraphs in exhibits and the Transcript);

(v) responding to the amended claims filed by ABI on 15 October 2019; and

(vi) responding to the 'remote response' claim filed by the ASU on 19 September 2019 and any written submissions filed in support of it.

[20] The following submissions were filed:

- UWU on 18 November 2019
- Ai Group on 18 November 2019[6]
- HSU on 18 November 2019
- ABI on 19 November 2019
- NDS on 19 November 2019
- AFEI on 19 November 2019 and in reply to ASU and ABI on 19 November 2019
- ASU on 19 November 2019.

[21] On 3 December 2019 we published a Statement[7] vacating the hearing scheduled for the Tranche 2 claims on 5 and 6 December 2019, noting that:

> 'Having considered the submissions filed we have formed the view that further written submissions are required. In particular we will be seeking final written submissions from each interested party addressing:
>
> - the findings sought by other parties;
> - whether they agree or contest those findings;
> - their reasons (by reference to the evidence) for agreeing or contesting those findings; and
> - any submissions in reply to the written submissions referred to at [4] above.
>
> Provision will also need to be made for submissions in reply.'[8]

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[6] Attachment A to Ai Group Submission,18 November 2019 identifies the claims advanced by other parties that are opposed by Ai Group and the specific parts of the written submissions filed by Ai Group to date upon which it relies in respect of each claim.

[7] [2019] FWCFB 8177.

[8] [2019] FWCFB 8177 at [6] - [7].

[22] Revised Directions (the *December 2019 directions*) were issued on 5 December 2019 as follows:

> 'Interested parties are to file written submissions in respect of the following matters by **4:00 pm on Friday 7 February 2020**:
>
> (a) whether they agree with or contest the findings sought by other interested parties in the written submissions listed at paragraph [4] of the *December 2019 Statement*;
>
> (b) in respect of any submissions made in accordance with paragraph (a) above; the reasons for agreeing with or contesting the findings sought, by reference to the evidence;
>
> (c) any submissions in reply to the written submissions listed at paragraph [4] of the *December 2019 Statement*;
>
> (d) responses to the questions posed in the Background Paper; and
>
> (e) submissions in support of the parties preferred position on changes to the 24 hour clause as set out in the Report issued by Commissioner Lee on 14 November 2019 (Note: At [2019] FWCFB 6067, [104] we expressed the *provisional* view that a 24 hour clause be retained but that the existing clause does not provide a fair and relevant minimum safety net and required amendment).
>
> Interested parties are to file any submissions in reply by **4:00 pm on Monday 24 February 2020**.
>
> Submissions are to be filed in Word format via email to amod@fwc.gov.au.
>
> The matter will be listed for hearing on **Wednesday 11 March 2020 at 9:30 am**.
>
> Interested parties are granted liberty to apply to vary these directions.'

[23] On 6 January 2020, the Fair Work Commission (Commission) published Background Paper 1 to assist the parties in the preparation of the submissions for Tranche 2.

[24] Background Paper 1 set out the procedural history of the Tranche 2 proceedings, the claims being pressed in Tranche 2 as well as the submissions[9] and the findings sought by the parties in respect of those claims. Background Paper 1 also identified the general findings of the evidence sought by the parties.

[25] Background Paper 1 posed a series of questions to parties with an interest in these proceedings. The answers to the questions (and any identified errors in the document) were to be filed according to the timetable set out in the *December 2019 d*irections.

[26] Submissions in response to the *December 2019 directions* were received from:

- ASU (7 February 2020)

[9] See [2019] FWCFB 8177 at [4].

- NDS (7 February 2020)
- Ai Group (10 February 2020)
- ABI (10 February 2020)
- Joint Union (10 February 2020)
- AFEI (11 February 2020).

[27] Submissions in reply were received from:

- Ai Group (26 February 2020)
- NDS (26 February 2020)
- AFEI (26 February 2020)
- ABI (26 February 2020)
- Joint Union (26 February 2020).

[28] The submissions received in response to the questions posed in Background Paper 1 are set out in Background Paper 2.

[29] The following submissions were received in response to Background Paper 2:

- ABI (11 March 2020)
- AFEI (11 March 2020)
- Joint Union (10 March 2020)
- Ai Group (11 March 2020)
- NDS (10 March 2020).

[30] Background Paper 3 dealt with the following claims:

- travel time claims from the ASU, HSU and UWU
- overtime for part-time and casual workers from the HSU
- the minimum engagements claim from the HSU
- community language skills allowance from the ASU, and
- the 24-hour-care clause matter.

[31] **Attachment B** sets out the list of submissions received in relation to the Tranche 2 proceedings.

2. LEGISLATIVE FRAMEWORK

[32] The *September 2019 Decision* deals with the nature of the Review at [7] to [21]. We adopt and apply those principles to this decision.

[33] We note here that the Commission may make a determination varying a modern award if the Commission is satisfied the determination is necessary to achieve the modern awards objective. The modern awards objective is in s.134 of the *Fair Work Act 2009* (Cth) (the Act).

[34] It is not necessary to make a finding that the award fails to satisfy one or more of the s.134 considerations as a prerequisite to the variation of a modern award.[10] Generally speaking, the s.134 considerations do not set a particular standard against which a modern award can be evaluated; many of them may be characterised as broad social objectives.[11] In giving effect to the modern awards objective the Commission is performing an evaluative function taking into account the matters in s.134(1)(a)–(h) and assessing the qualities of the safety net by reference to the statutory criteria of fairness and relevance.

[35] What is 'necessary' to achieve the modern awards objective in a particular case is a value judgment, considering the s.134 considerations to the extent that they are relevant having regard to the context, including the circumstances pertaining to the particular modern award, the terms of any proposed variation and the submissions and evidence.[12]

[36] Where an interested party applies for a variation to a modern award as part of the Review, the proper approach to the assessment of that application was described by a Full Court of the Federal Court in *CFMEU v Anglo American Metallurgical Coal Pty Ltd (Anglo American)* as follows:[13]

> '[28] The terms of s 156(2)(a) require the Commission to review all modern awards every four years. That is the task upon which the Commission was engaged. The statutory task is, in this context, not limited to focusing upon any posited variation as necessary to achieve the modern awards objective, as it is under s 157(1)(a). Rather, it is a review of the modern award as a whole. The review is at large, to ensure that the modern awards objective is being met: that the award, together with the National Employment Standards, provides a fair and relevant minimum safety net of terms and conditions. This is to be achieved by s 138 – terms may and must be included only to the extent necessary to achieve such an objective.
>
> [29] Viewing the statutory task in this way reveals that it is not necessary for the Commission to conclude that the award, or a term of it as it currently stands, does not meet the modern award objective. Rather, it is necessary for the Commission to review the award and, by reference to the matters in s 134(1) and any other consideration consistent with the purpose of the objective, come to an evaluative judgment about the objective and what terms should be included only to the extent necessary to achieve the objective of a fair and relevant minimum safety net.'

[37] In the same decision the Full Court also said: '...the task was not to address a jurisdictional fact about the need for change, but to review the award and evaluate whether the posited terms with a variation met the objective.'[14]

3. THE REPORTS

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[10] *National Retail Association v Fair Work Commission* (2014) 225 FCR 154 at [105]-[106].

[11] See *National Retail Association v Fair Work Commission* (2014) 225 FCR 154 at [109]-[110]; albeit the Court was considering a different statutory context, this observation is applicable to the Commission's task in the Review.

[12] See generally: *Shop, Distributive and Allied Employees Association v National Retail Association (No.2)* (2012) 205 FCR 227.

[13] *CFMEU v Anglo American Metallurgical Coal Pty Ltd* [2017] FCAFC 123.

[14] Ibid at [46].

3.1 THE MAY 2020 CORTIS REPORT

[38] On 15 June 2020 the HSU, on behalf the Unions, filed correspondence[15] which attached a report by Dr Natasha Cortis and Dr Georgia van Toorn titled '*Working in new disability markets: A survey of Australia's disability workforce*' (the May 2020 Cortis Report). The Report is an updated version of the June 2017 report, '*Working under the NDIS: Insights from a survey of employees in disability services*' which was set out at pages 3080-3128 of the Court Book.

[39] The admission of the May 2020 Cortis Report was opposed, as it was published *after* the oral hearing. We issued a Statement[16] referencing the HSU's correspondence and listed the matter for mention. A mention was held on 9 July 2020 and the following parties attended:

- ABI
- AFEI
- Ai Group
- ASU
- HSU
- NDS.

[40] The transcript of the mention is available here.

[41] We subsequently decided to admit the May 2020 Cortis Report into evidence and issued Directions:[17]

> '1. By **4pm Monday, 20 July 2020**, the union parties are to file submissions setting out:
>
> **(i)** the parts of the May 2020 Report on which they rely;
>
> **(ii)** the findings sought on the basis of the parts of the May 2020 Report on which they rely; and
>
> **(iii)** the claims to which the findings sought relate.
>
> 2. By **4pm Monday, 10 August 2020**, the employer parties are to file:
>
> **(i)** submissions and any evidentiary material in response to the submissions made by the unions pursuant to Direction 1;
>
> **(ii)** any additional reports, data or other material by way of updating material already filed; and
>
> **(iii)** a notification of whether they wish to cross-examine the authors of the May 2020 Report.

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[15] HSU correspondence, 15 June 2020.

[16] [2020] FWCFB 3557.

[17] [2020] FWCFB 3634.

3. By **4pm Monday, 24 August 2020**, the union parties are to file submissions in reply to the material filed by the employers pursuant to Direction 2.'

[42] The following submissions were filed in relation to the May 2020 Cortis Report:

- Joint Union (20 July 2020)
- AFEI (10 August 2020)
- Ai Group (13 August 2020)
- ABI (10 August 2020)
- NDS (10 August 2020).

[43] We begin by briefly summarising the May 2020 Cortis Report before turning to the submissions concerning the report.

[44] The May 2020 Cortis Report provides information about the workforce delivering services in the context of the NDIS. The information is based on a national online survey of 2,341 disability workers conducted during March 2020. The survey was co-designed by a research team in partnership with the HSU, ASU and UWU and was intended to capture disability workers' perspectives about their work and working conditions and their experiences of delivering services and supports to people with a disability.

[45] Data on the survey respondents is set out in Chapter 2 of the May 2020 Cortis Report and in Tables A.2 to A.6 in Appendix A. In brief:

- 66% were female and that proportion was similar across disability service settings
- 39% were aged 55 or older (only 14% were aged 34 or under)
- 96% worked in roles involving direct work with disability service users or clients (direct work was commonly with people with intellectual or cognitive disabilities (87%), while 57% worked with people with physical or sensory disabilities and 49% worked with people with psychosocial or mental health disabilities)
- respondents commonly worked in shared supported accommodation, group home or respite facilities (75%), while 29% worked in community access/community participation settings, 20% worked in home care settings and 14% worked in day programs
- about two-thirds of those in supported accommodation settings said they 'always' worked with the same clients and 27% said they 'mostly' did. This differed across disability settings – in co-ordinated case management employment and advocacy settings only 26% said they 'always' worked with the same clients; for disability workers in home-based care and support settings and those in community and day program settings, 37% said they 'always' worked with the same clients and a further 53-54% said they 'mostly' did

- 17% 'always' worked on their own with clients, with no other worker present and a further 27% 'mostly' worked alone. This was higher among those in home-based care and support settings, and in co-ordinated and mental/allied health

- a large proportion were very experienced disability workers – a quarter had worked in disability services for 20 years or more and a further 29% had done so for 10-20 years

- most respondents (63%) worked for a charity or not-for-profit organisation, while 17% worked for a private, for-profit business and 12% for a government organisation.

[46] The survey was distributed via the Unions, with online survey links distributed to members working in disability services. Some 97% of respondents were union members. The authors acknowledge the limitations of engaging workers via their trade unions:

> 'However, while engaging workers in research via their trade unions enables researchers to capture perspectives of staff who are dispersed across a range of organisations and workplaces, there are some limitations. In general, younger workers are less likely to be union members than older workers, as are those in smaller workplaces (Gilfillan and McGann, 2018). As such, union-based research samples may underrepresent workers who are newer to the industry and who are employed casually, and may over-represent those in larger, more established workplaces. Further, responses are likely to reflect conditions where union-negotiated enterprise agreements are in place, where better working conditions and safety protocols could be expected to result from a stronger union presence. Results should therefore be interpreted primarily as representations of the experiences and conditions of unionised workers and unionised workplaces, which tend to be better for workers than across the industry as a whole.
>
> A further sampling issue to note is that workers who provide services in private homes and in the community are generally more difficult to engage in research compared with those in 'fixed' workplaces such as offices or residential facilities, as the former are with clients or moving between them and have limited time to spend participating in research or other non-client focused activities. As such, there are large numbers of workers in group home / supported accommodation settings among survey respondents, while home and community-based care and support workers, along with casual workers are underrepresented. To address these issues, responses for sub-groups of respondents have been examined through the report – including for disability support workers delivering services in supported accommodation settings, in home-based care and support settings, community-based or day program settings, and other settings. In addition, data is broken down for casual workers; workers who were newer to the industry or more experienced, among other subgroups. These breakdowns are reported where they help understand important differences among respondents.'[18]

[47] The survey findings are presented thematically, covering the following topics:

- working time[19]

- staffing levels and service quality[20]

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[18] May 2020 Cortis Report, pp 13 - 14.

[19] Ibid, Chapter 3, pp 22 - 34.

[20] Ibid, Chapter 4, pp 35 - 37.

- perceptions of the NDIS[21]
- remuneration[22]
- measures of job quality[23]
- supervision and support[24]
- skills qualification and training[25]
- online platforms[26]
- safety and reporting.[27]

[48] The 'key findings' are set out in the Executive Summary to the May 2020 Cortis Report, some of which are reproduced below:

> 'Unpaid work was common among full and part time workers and was considered essential for completing core service delivery tasks.
>
> Workers in the sample worked an average of 33.8 paid hours and 2.6 unpaid hours in the previous week, across all their disability jobs. High proportions of workers in home-based care and support settings performed unpaid work, as did those in co-ordination, case management, employment and advocacy settings.
>
> - Overall, two in five disability workers (41%) worked at least one unpaid hour in the last week.
> - For every paid hour, disability workers donated an additional 4.6 minutes of unpaid time (equivalent to 36.8 minutes for an 8-hour day).
> - Unpaid time constituted around 7% of total time worked in the previous week (36.4 hours, paid and unpaid)…
>
> Many workers also reported instability in their paid work hours, including changes in shift times which workers were advised of at short notice. Half of respondents (50%) said they worry about rosters, 45% said their shifts change unexpectedly, and 29% said they were often called in to work at inconvenient times. Unstable working arrangements undermined the reliability of disability workers' incomes, and their ability to plan their work and organise other aspects of their lives…
>
> Many workers report they are not paid for travel costs or travel time between clients or to attend team meetings. In addition, workers incur costs in the course of doing disability work, including paying for things for clients with their own money, or paying for things they

[21] Ibid, Chapter 5, pp 38 - 48.

[22] Ibid, Chapter 6, pp.49 - 55.

[23] Ibid, Chapter 7, pp 56 - 61.

[24] Ibid, Chapter 8, pp 62 - 70.

[25] Ibid, Chapter 9, pp 71 - 79.

[26] Ibid, Chapter 10, pp 80 - 84.

[27] Ibid, Chapter 11, pp 85 - 93.

wouldn't otherwise buy. Only 29% agreed that they are reimbursed fairly for expenses incurred on the job.'[28]

[49] No party sought to cross-examine the authors of the May 2020 Cortis Report.

[50] Ai Group contended that little, if any, weight should be attributed to the May 2020 Cortis Report for the reasons set out at paragraphs 4 to 14 of its submission.[29] In brief:

- the survey respondents are not a representative sample of employees covered by the Award and the responses do not permit conclusions to be reached about the workforce or sectors covered by the SCHADS Award. Further, it is not clear if the SCHADS Award applies to any of the respondents and if so, how many. Some survey respondents may be covered by enterprise agreements

- the survey results reflect no more than the *perceptions* of a group of employees. They do not establish, as a question of fact, that the arrangements, conditions or practices referred to are in fact in place or that the issues referred to in fact arise from their employment. Such perceptions are of limited if any probative value to the Commission's assessment of whether the provisions proposed for inclusion in the Award by the Unions are *necessary* to ensure that the Award achieves the modern awards objective

- the survey respondents are not identified and they have not been called to give evidence. Similarly, their employers have not been identified. Accordingly, the respondent parties are unable to test the veracity of the survey respondents' responses because they have not been called to give evidence. The survey responses are essentially in the nature of hearsay from unidentified employees that cannot be tested

- the extent to which the survey respondents' responses relate to the operation of the SCHADS Award, if at all, cannot be discerned. Given that employees may have been covered by enterprise agreements, the terms and conditions applying to them by virtue of those enterprise agreements may have affected their responses, and

- the survey respondents were almost exclusively union members, and the Unions have for some time been advancing a sustained campaign for enhanced terms and conditions in the sectors covered by the SCHADS Award. The survey responses may have been coloured by such propaganda.

[51] AFEI made a submission in similar terms.[30] In addition, AFEI submitted that the survey respondents are not representative of the state distribution of the NDIS workforce.[31] AFEI contended that no weight should be given to the May 2020 Cortis Report.

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[28] Ibid, pp 7 - 8.

[29] Ai Group Submission, 13 August 2020.

[30] AFEI Submission, 10 August 2020.

[31] AFEI Submission, 10 August 2020, p 2.

[52] Unlike Ai Group and AFEI, ABI did not advance a general submission to the effect that little weight should be attributed to the May 2020 Cortis Report but did challenge some of the specific findings advanced by the Unions based on the May 2020 Cortis Report.[32]

[53] Similarly, as a general proposition, NDS did not take issue with the May 2020 Cortis Report 'as a piece of research which provides insights into the experiences of the disability support workforce, and which should help to inform workforce strategy for disability service providers operating in the NDIS environment'.[33] But NDS did challenge the relevance of some of the specific findings sought by the Unions.

[54] In particular, NDS notes that some aspects of the May 2020 Cortis Report point to issues of award compliance and the Act already provides an enforcement mechanism. NDS also points to 'a difficulty with relying on the report in support of proposals for variations to the modern award, because it is not possible to tell from the data which comments come from award or agreement covered employees'.[34] NDS provides an illustration of this difficulty by pointing to a survey respondent who refers to their sleepover allowance of $77 which is higher than the award allowance of $48.45 at the time the survey was conducted. NDS submits that the higher amount:

> 'may reflect the allowance commonly payable in Victoria under enterprise agreements, but which operate on a different basis to the award. We have no way of knowing for certain what conditions apply to that respondent.'[35]

[55] There is considerable force in the general criticisms advanced by Ai Group, AFEI and NDS as to the representativeness of the survey upon which the May 2020 Cortis Report is based.

[56] The authors of the May 2020 Cortis Report respond to this criticism in the following terms:

> 'As the survey was distributed primarily to HSU, ASU and UWU members, 97% of respondents were union members. While random sampling would be most representative, this is rarely practical in social care research. Recruiting a representative random sample is not realistic for disability workers, as there is no central dataset containing lists of all community service or disability workers, from which a random sample could be drawn. Recruiting workers via employers, while acceptable as a practical research strategy, would mean research participants would be drawn from a relatively narrow range of organisational contexts. While every approach has strengths and limitations, recruiting workers via their representative organisations is a common means of engaging workers as research participants, used in multiple studies to gather insight into the ways care work is performed and experienced (e.g. Baines and Armstrong, 2019; Trydegard, 2012; Meagher et al, 2019).'[36]

[57] We acknowledge that there are practical barriers to conducting a stratified random sample of disability workers. The absence of a central data set containing a list of all disability

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[32] ABI Submission, 10 August 2020.

[33] NDS Submission, 10 August 2020 at para 5.

[34] NDS Submission, 10 August 2020 at para 8.

[35] NDS Submission, 10 August 2020 at para 9.

[36] May 2020 Cortis Report, p 13.

workers means that such an approach is virtually impossible. However, as the survey sample is not a stratified random sample of disability workers covered by the SCHADS Award in our view it is not appropriate to extrapolate the results to the workforce generally.

[58] Contrary to the submissions of Ai Group and AFEI we are *not* persuaded that the May 2020 Cortis Report should be given no weight. That said, we acknowledge the significant limitations in the data. The survey responses present the untested *perceptions* of a group of disability workers about a range of matters and it is unclear which of the respondents have their terms and conditions set by the SCHADS Award, as opposed to an enterprise agreement. As a collection of essentially anecdotal perceptions by a significant number of disability workers, the May 2020 Cortis Report has some, albeit limited, value.

[59] We now turn to the Joint Unions' submissions. The findings sought by the Unions are grouped by claim.

Minimum engagement, broken shifts and travel time claims

[60] The findings sought from the May 2020 Cortis Report in relation to the HSU's minimum engagement claim, and the Unions' broken shift and travel claims are:

1. Disability service employees work a significant amount of unpaid hours.[37]

2. Common unpaid tasks performed include completing case notes and other forms of reporting, co-ordination and communication functions, and driving and travelling for work (not including travel to and from the first and last clients of the day).[38]

3. Disability service employees are frequently not paid for travel between clients.[39]

4. Disability service employees feel that they are not adequately compensated for travel and use of their own vehicle for work.[40]

5. Disability service employees are under pressure to perform unpaid work in order to meet the needs of their clients.[41]

6. A significant number of disability service employees, particularly home-based support workers, feel that they spend too long waiting between paid shifts.[42]

7. The scheduling of discontinuous or broken shifts puts strain on disability service employees.[43]

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[37] Joint Union Submission, 20 July 2020 at para 9 citing May 2020 Cortis Report, pp 22 - 26.

[38] Ibid, pp 25 - 26.

[39] Ibid, p 53.

[40] Ibid, pp 48; 53.

[41] Ibid, pp 24 - 25; 27 - 34.

[42] Ibid, p 31.

[43] Ibid, pp 32 - 33.

8. The capacity of employers to require employees to work broken shifts, and the lack of a minimum engagement, facilitates the use of unpaid hours and fragmentation of work schedules.[44]

9. These practices undermine the quality and sustainability of work in the sector, and the optimism of workers over their careers.[45]

10. The current SCHADS Award provisions in relation to minimum engagements, broken shifts and travel are not adequate to meet the challenges facing disability workers in maintaining healthy work-life balance.[46]

[61] The Joint Unions' submission identifies the following 8 parts of the May 2020 Cortis Report which are said to support the proposed findings.

(i) Section 3.1 and Table 3.1 – Paid and unpaid work hours (pages 22-23)

[62] The findings in relation to this topic are set out at page 22 and Table 3.1 on page 23 of the May 2020 Cortis Report, in particular:

- overall, workers in the sample worked an average of 33.8 paid hours and 2.6 unpaid hours
- for every paid hour of work, the disability workers donated an additional 4.6 minutes of unpaid time (equivalent to 36.8 minutes for an 8-hour day)
- unpaid work constituted around 7% of total time worked in the last week (36.4 hours, paid and unpaid).

(ii) Section 3.3 – Unpaid work time (pages 24-5)

[63] Section 3.3 of the May 2020 Cortis Report sets out several comments from survey participants describing how it is necessary for employees to work additional unpaid hours to ensure their clients were supported.

[64] The authors of the May 2020 Cortis Report observe that, 'feeling unable to fit in all the tasks required by clients was a significant source of strain for workers, who felt conflict between their own need to be paid for their work and the need to ensure client needs were met'.[47]

(iii) Section 3.4 and Figure 3.1 – Tasks performed during unpaid time (pages 25-26)

[65] Section 3.4 sets out which tasks survey participants reported they performed during unpaid time.

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[44] Ibid, pp 22 - 26.

[45] Ibid, pp 22 - 34; 59.

[46] Ibid, pp 27 - 34; 100 - 101.

[47] May 2020 Cortis Report, p 25.

[66] In relation to the Unions' travel time claim, as well as broken shifts and minimum engagement claims, Figure 3.1 shows that 43% of participants spent at least 1 hour of unpaid time driving or travelling for work, not including the first and last trip between home and work each day.

[67] The tasks the survey participants reported performing during unpaid time are summarised as follows:

- the most common task, reported by two thirds (67%) of the 960 workers who reported unpaid work time, was completing case notes, paper or online forms or other reporting, and

- the next most common tasks related to co-ordination and communication functions: communicating with colleagues or other service providers (reported by 58%), handover tasks (53%) and communicating with a supervisor (48%)[48]

(iv) Section 3.5, especially 3.5.3 and Appendix Table A.10 – Perceptions of working time arrangements (pages 27-34 and 100-101)

[68] Sections 3.5.1 to 3.5.4 are concerned with issues of stability of working hours, unexpected changes in working hours, the structure and organisation of shifts, including its impacts on clients, anxiety about rosters and work-life balance.

[69] Section 3.5.3 is said to be relevant to the Unions' broken shifts and travel time claims. One comment highlighted on page 31 reads:

> 'The only thing I don't like is split shifts. Especially when working at a group home. I feel I waste a lot of money on petrol on those days, as I commute to work, then drive home for the split, then drive back to work to start my afternoon split and then drive back home that night.'

[70] According to Figure 3.5 on page 31, 15% of all survey participants and 31% of home-based support workers agreed that they spend too long waiting between paid shifts.

(v) Section 5.5 – Further comments on the NDIS (page 48)

[71] Section 5.5 collates some comments from survey participants in relation to compensation for travel and costs of vehicle maintenance, depreciation and fuel:

> 'Community-based support workers consistently raised the issue of having to use their own vehicle to transport clients, and not being compensated for the costs of maintenance, depreciation and fuel, under NDIS arrangements.
>
> > *Staff uses their own cars to transport client must receive a higher amount of compensation because after 4 to 5 years we need to purchase another car due to the high number of kilometres.*

[48] Ibid.

> *I have to use my personal car to transport clients on a daily basis and are not adequately compensated for it.*
>
> Workers commented that they were required to use their own vehicle due to restrictions on funding for client travel. They noted that because clients are funded only for a specified number of kilometres, the costs incurred by additional (unfunded) travel are borne by staff.
>
> *I have sustained damage to my car, my petrol cost is out of control and my clients barely have enough funding to get by*[49]

(vi) Section 6.4 and Figure 6.5 – Payment for travel

[72] Section 6.4 discusses responses to specific questions in relation to work-related travel. Figure 6.5 shows that, of the survey participants who responded to the questions, less than a quarter agreed with the statements 'I get paid for travel time between clients' and 'I get paid for my travel costs (e.g. vehicle allowance, petrol, insurance, tolls)'.[50]

(vii) Section 6.1 and Figure 6.6 – Payment for team meetings

[73] Section 6.1 and Figure 6.6 observe that many disability workers reported not being paid to attend team meetings.[51]

(viii) Section 7.3 – Career Prospects

[74] At page 59 the Report states:

> 'a particularly interesting finding is how quickly new workers' optimism dissipates through their careers. Indeed, the proportion of workers who agreed their prospects for advancement were good was 56% among those in their first year, however this slips to 38% among those with 1-2 years' worth of experience, and falls further to 30% or less, among those with over 10 years of experience. This underlines potential retention difficulties, as the industry does not appear to be sustaining the optimism held by workers early in their careers.'[52]

[75] In response to the findings sought by the Unions, ABI submits:

> 'Putting aside whether such findings can be made based on the material contained in the Report, we note that our clients have advanced alternate proposals in respect of minimum engagements, broken shifts and travel time. These alternate proposals are designed to address the concerns raised in the Report.'[53]

[76] We agree with ABI's observation that the alternate proposals advanced in respect of minimum engagements, broken shifts and travel time are intended to address the concerns raised in the May 2020 Cortis Report. We return to these proposals later in our decision.

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[49] Ibid, p 48.

[50] Ibid, p 53.

[51] Ibid, p 53.

[52] Ibid, p 59.

[53] ABI Submission, 10 August 2020 at para 4.

[77] Ai Group submits that the findings sought by the Unions at paragraphs 9(a), (d), (e), (f), (g), (h), (i) and (j) of the Joint Unions' submission should not be made.[54]

[78] Two things may be said about Ai Group's submission. The first is that the objections to the proposed findings are not particularised; rather they are based on Ai Group's general submission that the survey results should be accorded little weight. The second observation is that Ai Group does *not* oppose proposed findings (b) and (c), that is:

- paragraph 9(b): Common unpaid tasks performed include completing case notes and other forms of reporting, co-ordination and communication functions, and driving and travelling for work (not including travel to and from the first and last clients of the day), and

- paragraph 9(c): Disability service employees are frequently not paid for travel between clients.

[79] We are prepared to make the findings set out at paragraph 9(b) and (c) of the Joint Union submission. The finding that disability services workers are frequently not paid for travel between clients is relevant to our consideration of the travelling time claim.

[80] We are not persuaded that the May 2020 Cortis Report provides a sufficient evidentiary basis for the other findings sought. The concerns expressed by the survey respondents relied on in support of the findings proposed are often vague and general in character.

HSU's overtime claims

[81] The findings sought in relation the HSU's overtime claims are:

1. disability service employees, particularly those in home-based and community and day program settings, have high incidences of short working hours, such as 20 hours or less paid work per week.[55]

2. for many employees, arrangement of hours of work in disability services are unpredictable, unstable and uncertain.[56]

3. employees are regularly required to work additional hours above their contracted weekly or fortnightly hours. Some employees do not want to work additional hours but feel like they cannot say no.[57]

4. a significant number of part-time as well as casual employees in disability services do not feel secure in their working arrangements.[58]

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[54] Ai Group Submission, 13 August 2020 at para 15.

[55] Joint Union Submission, 20 July 2020 at para 25 citing May 2020 Cortis Report, p 23.

[56] Ibid, p 28.

[57] Ibid, p 34.

[58] Ibid, p 58.

5. under current award provisions there is little incentive for employers to review employees' guaranteed hours.

[82] The Joint Unions' submission identifies the following 3 parts of the May 2020 Cortis Report relevant to the above findings.

(i) Section 3.2 and Table 3.2 – Workers with few paid work hours (pages 23-24)

[83] Section 3.2 observes that: '[m]any survey respondents reported working substantially fewer paid hours than indicated in the mean and median hours shown above… Among all respondents, 11 per cent worked 20 hours or less (across all their jobs in disability)'.[59]

[84] Table 3.2 shows that the settings with the highest incidences of short working hours are home-based settings and community and day program settings. For each of these, 18% of survey respondents said they worked 20 hours or less paid work per week.

[85] Comments from survey participants highlighted in this section include:

'[I] need to be available for twice the amount of hours I actually work.

Due to inconsistency of hours, I work two jobs just to reach full time hours. Problem is both demand 25+ hours a week. One job is not enough, two jobs is too much.'[60]

(ii) Section 3.5, particularly 3.5.1, Figure 3.2 and Appendix Table A.10 and Table 3.2 – Stability of working hours (pages 27-34 and 100-101)

[86] Section 3.5.1 focuses on the prevalence of 'unstable and uncertain hours' in disability work. One comment from a survey participant highlighted in the report was: 'My hours can vary from 7 to 45 hours per week'.[61] Other comments included:

'I am a casual so until fairly recently I had no idea how many hours I would be working in the next week.

Inconsistent, sometimes not enough hours, sometimes too many hours, heavy workload during holidays times, expected to work non-stop, favouritism.'[62]

[87] Figure 3.2 shows that unpredictable hours are a feature of home-based care and support setting, as 46% of survey participants disagreed with the statement 'I work the same number of hours each week'.[63]

[88] Sections 3.5.2 and 3.5.4 are also said to be relevant:

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[59] May 2020 Cortis Report, p 23.

[60] Ibid, p 24.

[61] Ibid, p 28.

[62] Ibid.

[63] Ibid.

> 'While some workers were worried about receiving too few paid hours, others were asked to work more hours than they wanted, and felt guilty about letting down team members and clients when they needed to say no.
>
> > *Constantly being asked to do extra shifts does not help my mental health, as you feel you are letting down the team and the people you support.* '[64]

(iii) Section 7.2 – Security of work and working arrangements (pages 58 – 59)

[89] The May 2020 Cortis Report found that a 'substantial minority' of permanent workers surveyed disagreed with the statement 'My working arrangements feel secure'.[65]

[90] Ai Group opposes all the Joint Unions' proposed findings but does not explain the basis of its objection.

[91] ABI does not object to the proposed findings at (a) and (b) of [81] above.

[92] In relation to the proposed finding at paragraph 25(c) of the Joint Unions' submission, ABI submits that this finding appears to be advanced based on a single comment made by 1 survey respondent recorded at page 34 of the May 2020 Cortis Report, to the effect that 'being asked to do extra shifts does not help [their] mental health'. ABI notes that it has been unable to find any reference in the May 2020 Cortis Report to employees being 'required' to work additional hours, or that employees 'feel like they cannot say no'. On that basis it is submitted that there does not appear to be anything in the Report that would support this proposed finding.[66] We agree with ABI and do not propose to make the finding sought.

[93] We are prepared to make the findings proposed at paragraphs 25(a), (b) and (c) of the Joint Unions' submission (see [81] above). In relation to the finding at paragraph 25(c) we agree with Ai Group's observation that the SCHADS Award requires that agreement must be reached on engagement between an employer and part-time employee on a regular pattern of work[67] and that there is no award-derived obligation on part-time employees to work additional hours. Further, there is also no award-derived obligation on casual employees to work any hours of work offered to them. But the existence of these legal protections does not negate the validity of the *perception* of some survey respondents that they 'feel like they cannot say no'.

[94] As to the proposed finding (at paragraph 25(d) of the Joint Unions' submission) that 'a significant number of part-time as well as casual employees in disability services do not feel secure in their working arrangements', it seems to us that the finding proposed is not supported by the May 2020 Cortis Report. In support of the proposed finding the Unions refer to page 58 of the May 2020 Cortis Report and Figure 7.3. Figure 7.3 is reproduced below:

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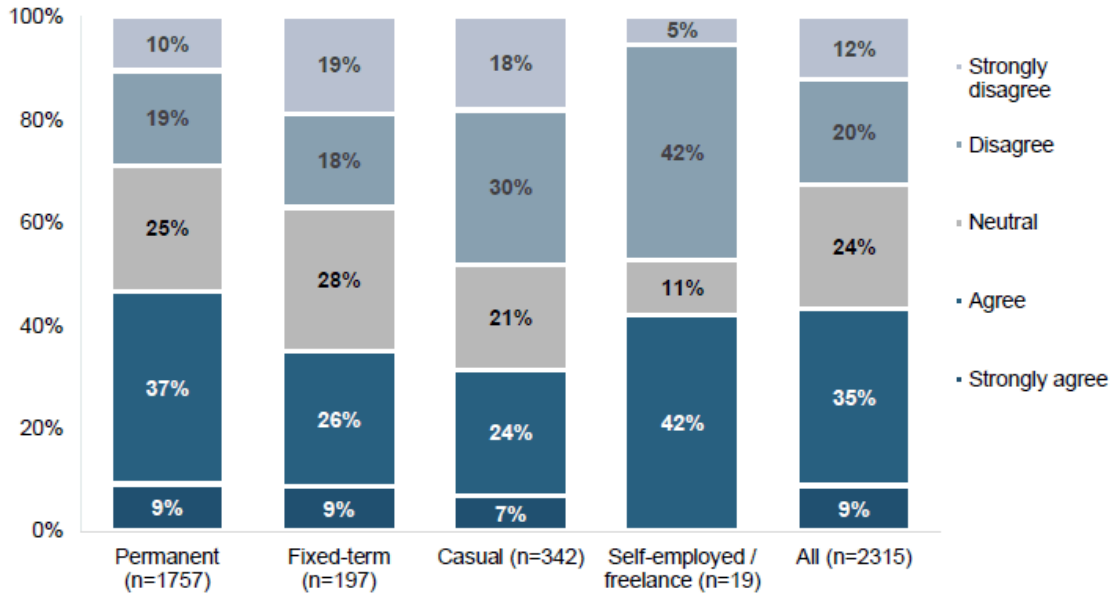
[64] Joint Union Submission, 20 July 2020 at para 33 citing May 2020 Cortis Report, p 34.

[65] Joint Union Submission, 20 July 2020 at para 34 citing May 2020 Cortis Report, p 58.

[66] ABI Submission, 10 August 2020 at para 7.

[67] SCHADS Award, clause 10.3(c).

Figure 7.3 Agreement with the statement 'My working arrangements feel secure', by employment status in main job



[95] We note that Figure 7.3 says nothing about part-time employees and, further, while 48% of casual employees disagreed (or strongly disagreed) with the proposition 'My working arrangements feel secure', most casual employees either agreed with the proposition, strongly agreed or were neutral. In any event it would not be unusual that a significant proportion of any group of casual employees may not feel secure in their working arrangements – such is the nature of casual employment. We do not propose to make the finding sought.

[96] In relation to proposed finding at paragraph (e) in [81] above, ABI notes that it has advanced a proposal to address the issue which is the subject of the complaint.[68] We agree and would also observe that the finding sought is more in the form of a submission and that the part of the May 2020 Cortis Report said to support the proposed finding is not identified. We do not propose to make the finding sought.

HSU's sleepover claim

[97] The findings sought in relation the HSU's sleepover claim are as follows:

1. Sleepover shifts can be a source of anxiety and burn out for disability service workers, who can find themselves unable to sleep during the shift.[69]

2. The current clause does not provide sufficient protections to ensure employees have access to the basic requirements for a night's sleep during a sleepover shift.[70]

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[68] Ibid at para 8.

[69] Joint Union Submission, 20 July 2020 at para 35 citing May 2020 Cortis Report, pp 32, 52.

[70] Joint Union Submission, 20 July 2020 at para 35.

[98] The Joint Unions' submission identifies the following 2 aspects of the May 2020 Cortis Report in support of the above findings.

(i) Section 3.5.3 – Organisation of working hours (page 32)

[99] On page 32, the May 2020 Cortis Report observes that:

> 'A strong theme in the comments related to sleepover shifts. These were a particular challenge and matter of concern for workers in supported accommodation settings, with some workers pointing out that these shifts contributed to long hours for little pay, poor wellbeing and safety risks:
>
> > *Sleepover shifts create extreme anxiety. I am unable to sleep due to anxiety and client behaviours. I then have to administer medication whilst tired. I then have to drive home after being awake for 24 hours. I have asked management if I can permanently drop my sleepover shifts. They have not allowed this and expect me to swap shifts or use my leave.*
> > *…*
> >
> > *'Not enough days off between shifts. E.g., work 10 days straight, 1 day off, back for 5 days straight. Burn out. Count sleep overs, when finish at 8am from this time on they count this as day off. When finishing night duty/active shift at 7am, from this time they count this as day off. Back for morning shift next day'*[71]

(ii) Section 6.3 – Comments on pay

[100] It is submitted that further relevant observations and survey responses about sleepover shifts are found in section 6.3, such as the following:

> 'The award needs to be changed for sleepover shifts. As it stands, we get a small allowance for being at work for 8 hrs, on call, usually limited sleep, always broken and disturbed sleep. I don't believe there are any other healthcare sector workers that are expected to be at work for 8hrs for $77. I think if the general public knew this they would be shocked.'[72]

[101] Ai Group opposed proposed finding (b) on the basis that the May 2020 Cortis Report does not support the finding proposed.

[102] ABI submits that neither of the two proposed findings can be made based on the material contained in the Report:

> 'The Report deals with the issue of sleepovers in only a cursory way. There does not appear to have been any specific question in the survey about sleepovers put to survey respondents. Rather, the Report appears to extract a small number of free-text comments from survey respondents at pages 32 and 52 of the Report, which appear to have arisen from survey questions about working hours and pay generally. There are brief comments from eight respondents extracted in the Report, from a sample size of more than 2000. This is hardly a sufficient basis for making generalised findings in industry-wide proceedings.

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[71] May 2020 Cortis Report, p 32.

[72] Joint Union Submission, 20 July 2020 at para 38 citing May 2020 Cortis Report, p 52.

> Further, when the eight comments are considered, the main thrust of the concerns articulated appear to be about inadequate rest between shifts, and pay. Only two of the eight comments appear to deal with the issue of anxiety or burn out. Another two deal with the issue of quality of sleep.
>
> The first finding advanced (at paragraph 35(a) of the Unions' submission) is based on a very small number of brief and generalised comments. We do not consider that the Report provides a proper basis for such a finding to be made.
>
> The second proposed finding (at paragraph 35(b) of the Unions' submission) is advanced without any reference to any part of the Report at all. There is simply no material in the Report at all for such a finding to be made'[73]

[103] We agree with ABI. In our view the May 2020 Cortis Report does not provide a sufficient basis for any findings relevant to the sleepover claim.

ASU's recall to work overtime claim

[104] The findings sought in relation to the ASU's recall to work overtime claim are:

1. Disability service employees work a significant amount of unpaid hours.[74]

2. Common unpaid tasks performed include completing case notes and other forms of reporting, co-ordination and communication functions.[75]

3. Short-staffing creates additional duties for supervisory and managerial staff who must respond to short notice requests for casual or on-call labour out of hours.[76]

[105] The Joint Unions' submission identifies the following 3 parts of the May 2020 Cortis Report in support of the findings sought.

[106] First, the tasks the survey participants reported performing during unpaid time are summarised on page 25 of the May 2020 Cortis Report as follows:

(i) the most common task, reported by two thirds (67%) of the 960 workers who reported unpaid work time, was completing case notes, paper or online forms or other reporting; and

(ii) the next most common task related to co-ordination and communication functions: communicating with colleagues or other service providers (reported by 58%), handover tasks (53%) and communicating with a supervisor (48%).

[107] Second, the May 2020 Cortis Report highlights the following observation about workloads:

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[73] ABI Submission, 10 August 2020 at paras 12 - 15.

[74] Joint Union Submission, 20 July 2020 at para 39 citing May 2020 Cortis Report, p 22 - 26.

[75] Ibid, pp 25 - 26.

[76] Ibid, pp 35 - 36.

> 'Something needs to be seriously done about House Supervisor and Operations managers workload. There is a silent expectation of working long hours and from home after you have completed your full days work.'[77]

[108] Third, the reliance by some services on-call or casual staff is said to create a burden on supervisory and managerial staff. The Report observes that:

> 'Another survey participant pointed out that while on-call or agency staff were engaged to fill gaps, this was not necessarily effective in alleviating workloads for other team members:
>
> > *We are dramatically understaffed (5 vacant lines) and shifts are filled mostly by on-call staff. These staff usually come in, do the minimum and leave. Often important paperwork is not done (meds etc) which requires chasing up."*[78]

[109] Ai Group challenges proposed finding (a), but beyond its general submission does not particularise the basis of its objection.

[110] ABI challenges the findings sought based on relevance, submitting:

> 'It is difficult to understand how such findings would militate towards granting the ASU claim. There are competing claims before the Commission seeking to address the issue of employees being required to remotely perform work outside of their normal working hours. The findings advanced do not support the ASU claim any more than they support our clients' claim in respect of a remote response payment regime.'[79]

[111] It seems to us that the proposed findings seek to advance the propositions that disability services employees work a significant number of unpaid hours, and that short-staffing creates challenges for supervisory and managerial staff. We are not persuaded that a sufficient link has been established between the proposed findings and the claims before us.

UWU's roster claims

[112] The findings sought in relation UWU's roster claims are:

1. Many workers reported instability in their paid work hours, including changes in shift times which workers were advised of at short notice.[80]

2. Unstable working arrangements undermined the reliability of disability workers' incomes, and their ability to plan their work and organise other aspects of their lives.[81]

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[77] Joint Union Submission, 20 July 2020 at para 41 citing May 2020 Cortis Report, p 36.

[78] Joint Union Submission, 20 July 2020 at para 22 citing May 2020 Cortis Report, p 36.

[79] ABI Submission, 10 August 2020 at para 19.

[80] Joint Union Submission, 20 July 2020 at para 43 citing May 2020 Cortis Report, p 7.

[81] Ibid.

[113] The Joint Unions' submission identifies the following 2 parts of the May 2020 Cortis Report in support of the above findings.

> *(i) Section 3.5.2 and Figures 3.3 and 3.4 – Unexpected changes in working hours (pages 29-30)*

[114] Section 3.5.2 observes that 45% of respondents agreed or strongly agreed with the statement 'My shifts can change unexpectedly'. Higher proportions of workers in home-based care settings and community and day program settings agreed with the statement (65% and 58% respectively), compared with 41% of those in group homes or other supported accommodation settings.[82] These unexpected changes in shifts underpinned substantial financial insecurity.[83]

[115] Comments from survey participants highlighted in this section are as follows:

> 'Our rosters are a nightmare – changed, swapped, taken off, added on, without asking us.
>
> I am unable to plan my free time. I get very stressed when my roster changes overnight without consultation.'[84]

> *(ii) Section 3.5, particularly section 3.5.4, Figure 3.6 and Appendix Table A.10– Stability of working hours (pages 27-34 and 100-101)*

[116] Section 3.5.4 focuses on the impacts of 'working time arrangements' in disability work. One comment from a survey participant highlighted in the report was:

> 'Rosters are a huge problem. We receive our 'rosters' the day before (on the Sunday). However, these are highly subject to change throughout the week. This means that participants are put in groups together who should not be in groups together (i.e. participants who trigger each others' sensitivities). It also leads to miscommunication and confusion among staff, which in turn negatively impacts clients.'[85]

[117] Figure 3.6 shows, 50% of respondents agreed or strongly agreed with the statement 'I worry about rosters'.[86] Figure 3.6 is set out below:

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[82] May 2020 Cortis Report, p 29.

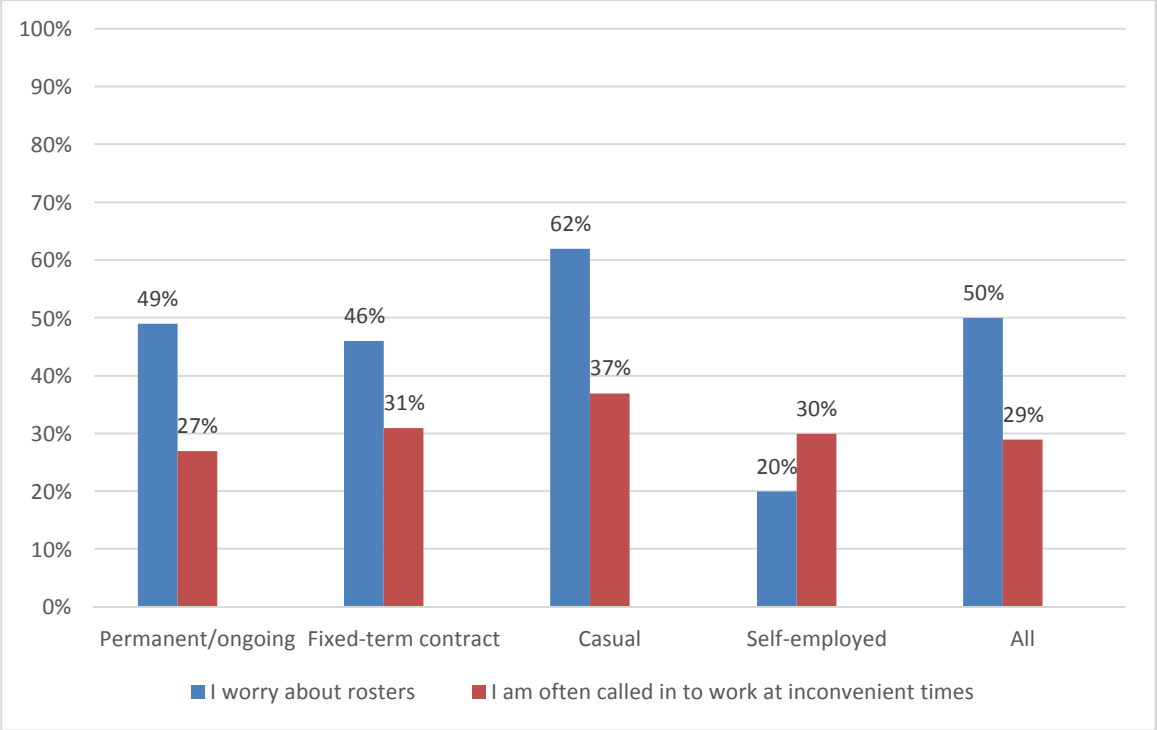
[83] Ibid, p 30.

[84] Joint Union Submission, 20 July 2020 at para 43 citing May 2020 Cortis Report, p 30.

[85] May 2020 Cortis Report, p 32.

[86] Ibid, p 33.

Figure 3.6 Proportion who agreed or strongly agreed 'I worry about rosters' and 'I am often called in to work at inconvenient times'^



^Note: Full data, including the proportions who disagreed or were neutral, and the number of respondents on each item, is in Appendix Table A.

[118] Some of the comments in Section 3.5.4 are:

> 'It is put up less than a week in advance and only one week at a time. I would prefer a fortnightly roster and at least 2 weeks in advance. Sometimes shifts change and it is impossible to make plans.
>
> My roster affects me by having to continuously monitor changes to an agreed permanent roster by my organisation, thus causing anxiety and stress as management do not honour their agreement with me.'[87]

[119] Ai Group challenges proposed finding (b) but beyond its general submission does not particularise the basis of its objection.

[120] ABI submits that the findings proposed are:

> 'rather general in nature, and there appears to be limited material in the Report upon which findings can be made about how much notice is given to workers where shift changes occur. For example, there does not appear to have been any specific question in the survey about shifts changing at short notice, or on less than 7 days' notice. Rather, the relevant statement upon which comment was sought appeared to be 'My shifts can change unexpectedly'.[88]

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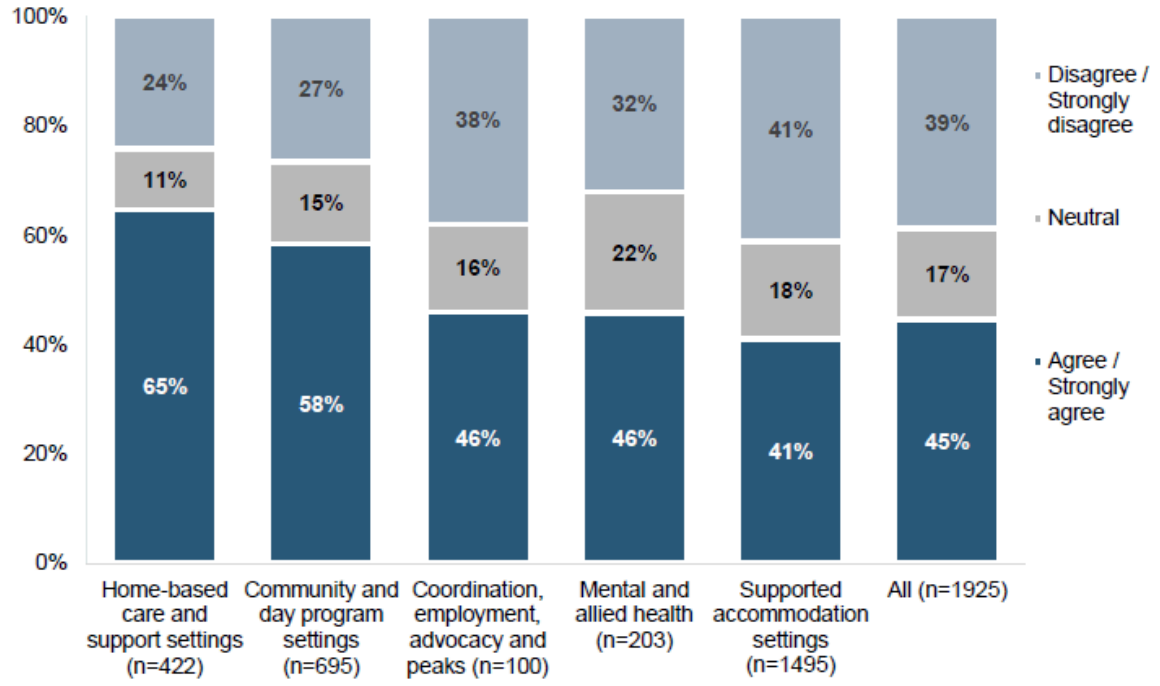
[87] Ibid.

[88] ABI Submission, 10 August 2020 at para 21.

[121] We acknowledge that proposed finding (b) is a direct quote from the Executive Summary in the May 2020 Cortis Report (at page 7). But this proposition appears to be based on an observation by 1 worker in a community setting (see page 30 of the May 2020 Cortis Report). This does not provide a reasonable foundation for the finding sought.

[122] Figure 3.3 summarises the survey responses to the proposition that 'My shifts can change unexpectedly'. Figure 3.3 is reproduced below.

Figure 3.3 Agreement with the statement 'My shifts can change unexpectedly', by setting



[123] Based on the data set out in Figure 3.3 we are prepared to find that many of the workers surveyed reported instability in their paid work hours, including changes in shift times which workers were advised of at short notice.

Additional Employer material

[124] In accordance with item 2(ii) of the Directions issued on 10 July 2020 (see [41]above), the employer parties filed the following additional material, which are said to be updated versions of material already filed in the proceedings:

- ABI (StewartBrown – Aged Care Financial Performance Survey, Aged Care Sector Report, Six Months ended 31 December 2019; and StewartBrown – Aged Care Financial Performance Survey, Sector Report, Nine months ended 31 March 2020) (the StewartBrown December 2019 and 31 March 2020 Reports)

- NDS (NDS Workforce Census – Summary of the December 2019 results (NDS Workforce Census).

[125] No party objected to the reports filed by ABI and NDS being admitted into evidence.

[126] AFEI filed a report entitled 'COAG Disability Reform Council NDIS Quarterly Report, 31 March 2020'. AFEI did not contend the report was an update of material previously filed. No party opposed the report being filed and admitted into evidence.

[127] The Unions made no submissions in reply to the material filed by the employers pursuant to item 2 of the Direction issued on 10 July 2020. We will admit the additional material into evidence, and we have taken it into account.

[128] In relation to the report filed by AFEI – 'COAG Disability Reform Council NDS Quarterly Report 31 March 2020' – AFEI relied on that report to make good its submission that the survey respondents in the May 2020 Cortis Report are not representative of the NDIS workforce. No specific findings were sought by AFEI based on the 31 March 2020 COAG Report.

[129] We propose to make some brief observations about the ABI and NDS material.

[130] In relation to the StewartBrown 31 December 2019 and 31 March 2020 Reports, ABI notes:

> 'We are aware that these reports were filed in separate proceedings in the Commission relating to Pandemic Leave and that a statement of Mr Grant Corderoy, of StewartBrown was filed in those proceedings. That statement can be found here. We consider that the statement may be useful in these proceedings and also note that Mr Corderoy was cross-examined in relation to that statement in those proceedings which similarly could be of use to the Commission in these proceedings.'[89]

[131] The Transcript of Mr Corderoy's cross-examination in the Pandemic Leave proceedings is available here. As we have mentioned the Unions did not file reply submissions and no objection was taken to the proposition that we consider Mr Corderoy's statement[90] and cross-examination; and we propose to do so.

[132] Mr Corderoy is the lead manager in relation to the StewartBrown survey. The survey is subscription based and designed for each participant organisation to compare and benchmark their operating performance at residential aged care homes and home care programs through a number of financial and non-financial measures.[91]

[133] In the *Paid Pandemic Leave decision*[92] the Full Bench noted that the response rate to the survey is 'above 43% of all residential aged care homes nationally and above 40% of all home care package programs'.[93] In the course of his cross-examination in the *Paid Pandemic Leave* proceedings Mr Corderoy stated that 85% of survey providers are not-for-profit providers and 15% are for-profit providers.[94]

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[89] ABI Submission, 10 August 2020.

[90] See Exhibits 34 and 35 in AM2020/13.

[91] Exhibit 34 in AM2020/13.

[92] [2020] FWCFB 3561.

[93] Ibid at [100].

[94] AM2020/13, Transcript, 26 June 2020 at PN1444-PN1447.

[134] ABI did not seek any specific findings based on the StewartBrown December 2019 and 31 March 2020 Reports but did seek the following finding in respect of the home care sector, based on the earlier 2018 StewartBrown Report:

> 'Reports show that while revenue has been increasing in the sector, the revenue levels of HCP providers are so low that they border on being unsustainable (taking into account the money providers are required to spend in relation to technology, staff recruitment, retention and growth).'[95]

[135] The finding sought by ABI is broadly expressed (e.g. the proposition that the revenue levels 'border on being unsustainable') and ABI has not identified the aspects of the StewartBrown survey results which are said to support the finding sought. Indeed, our review of the most recent report – the StewartBrown 31 March 2020 Report – reveals a more nuanced picture in respect of the in-home care sector and does *not* support the finding sought by ABI.

[136] In respect of home care packages, the StewartBrown 31 March 2020 Report reveals a *decrease* in revenue per client per day (the average for survey participants decreased by 5.69%); but average operating profit per client *increased* due to reduced costs, particularly staff costs and resulting staffing hours.[96]

[137] The StewartBrown 31 March 2020 Report highlights the issues associated with unspent funds as the most significant issue facing the sector:

> 'The biggest single issue in relation to Home Care Packages remains in relation to the level of Unspent Funds. This level has kept rising each quarter, and now averages $8,250 per client (care recipient). In aggregate, this represents in excess of $1 million of funding that is not being utilised.
>
> This continued growth in Unspent Funds, and many probable instances of their use for capital-related expenditure for care recipients (probably for a short-term benefit in many instances) is not sustainable. The recently announce changes to the subsidy payment arrangements (being in arrears rather than in advance) and the potential further reforms for providers to be reimbursed for actual services provided rather than for the funding package by care recipient will largely address the unspent funds concerns in this regard.
>
> The cash flow implications to providers of the proposed reforms need to be considered and monitored. We understand that it is proposed that the current unspent funds will only be remitted back to the Government over a reasonable time period, and this should ease much of the initial cash flow concerns.
>
> In-home care requires the redistribution of unused funds which are not being fully utilised in addition to the ongoing issue of more funding packages to meet consumer need. Service revenue must improve (driven by unit price increases) to ensure that staffing hours per care recipient also increase to meet the ongoing care needs.'[97]

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[95] ABI Submission, 19 November 2019 at para 2.25, citing StewartBrown – Aged Care Financial Performance Survey – Sector Report – December 2018.

[96] See StewartBrown – Aged Care Financial Performance Survey, Sector Report Nine Months ending 31 March 2020, pp 4, 6, 28, Table 8 and Figure 24, p 29.

[97] Ibid, p 6.

[138] It seems to us that the StewartBrown 31 March 2020 Report supports a finding that the issue of unspent funds and the externally imposed unit prices are the most significant challenges facing the in-home care sector.

[139] As to the NDS Workforce Census, the updated data confirms the general characteristics of the workforce in relation to the significant incidence of casual and part-time employment:

> 'There appears to be a small but significant trend towards permanent employment and away from casual employment, particularly in the states where NDIS has had the longest history and is relatively mature.
>
> > There has been a clear shift towards permanent employment in this six-month period. At 60% engaged permanently overall, the permanently engaged workforce is at its highest level since data collection started in 2015.
> >
> > The shift was particularly noticeable in workforces in New South Wales and Victoria, where the early roll out of the NDIS means that demand for services has had time to settle. By contrast the proportion of permanent roles fell in Queensland, Tasmania and Western Australia.
>
> There is also an increase in average hours of work per week per worker, although the trend is not consistent across states.'[98]

[140] We accept NDS' characterisation of the NDS Workforce Census document.

3.2 THE MUURLINK REPORT

[141] The ASU sought to rely on a report prepared by Dr Olav Muurlink, titled '*Predictability and control in working schedules*' (the Muurlink Report).[99] The circumstances in which the Muurlink Report is before us are a little unusual. No witness statement was filed and Dr Muurlink did not give evidence in these proceedings.

[142] Dr Muurlink's report was filed in the *Part-time and Casual Employment Common Issue Proceedings* on 14 July 2016. The ASU relies on it in these proceedings pursuant to Item 4 of an Aide Memoire dated 22 December 2015. The Aide Memoire permitted the parties to the review of the SCHADS Award to rely on any material filed in the *Part-time and Casual Employment Common Issue Proceedings* that is relevant to the SCHADS Award in support of variations to be pursued in the SCHADS Award proceedings.

[143] ABI tendered and relied on the cross-examination of Dr Muurlink on 15 July 2016 in the *Part-time and Casual Employment Common Issue Proceedings*.[100]

[144] The Muurlink Report is essentially a literature review of scholarly work on 'unpredictable patterns of work and the effect of a roster on workers' well-being' and 'on the

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[98] NDS Workforce Census – Summary of the December 2019 Results, pp 1 - 2.

[99] CB1686-1724.

[100] Exhibit ABI10.

impact of lack of control over patterns of work on workers' well-being' with an emphasis on material that is specific to the types of workers covered by several health care sector Awards, including the SCHADS Award.[101]

[145] In his evidence in chief in the *Part-time and Casual Employment Common Issue Proceedings* Dr Muurlink summarised his conclusions:

> 'Unpredictable and variable work conditions probably impact on human health with a psychological or physical in two ways which are connected but can be distinguished experimentally. So these two characteristics are the issue of control, sense of control and actual control, and the issue of change and variability. You can have control with low change in variability and these two can – they're generally co-variant but they can be separated out. They have very significant impacts on human health, both psychological and physical.'[102]

[146] The ASU relies on the Muurlink Report in respect of its claims for a broken shift penalty rate, paid travel time, and recall to work away from the workplace/remote response.[103]

[147] The ASU also sought to rely on the Muurlink Report in respect of its responses to the ABI claims[104] in relation to roster variations,[105] and client cancellation.[106]

[148] The ASU submitted we should make the following findings based on, among other things, the Muurlink Report:

1. Work in disability services is becoming increasingly precarious.[107]

2. Breaking shifts causes significant negative impacts on employees' health and well-being.[108]

3. Employees in the social and community sector are regularly recalled to work overtime without returning to a workplace (i.e. their employer's premises or a client's home). This work is conducted by use of electronic means of communication (telephones, laptop computers, etc.).[109]

[149] Similarly, the HSU submitted:

> 'In his review of the literature, Dr Muurlink explains how the unpredictable nature of work (a reality for both casual and part-time workers under this Award) has clear implications for the ability of workers to maintain work-life balance[110]. Where work has a regular and predictable "beat", the worker may synchronise their health behaviours with work; for example, establish

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[101] Muurlink Report, at para 1.0.

[102] AM2014/196 and AM2014/197, Transcript, 15 July 2016 at PN6345.

[103] ASU Submission, 23 March 2020.

[104] ASU Submission, 23 March 2020.

[105] ASU Submission, 19 November 2019 at paras 103 - 112.

[106] ASU Submission, 19 November 2019 at paras 113 - 121.

[107] ASU Submission, 19 November 2019 at paras 9 - 16.

[108] ASU Submission, 19 November 2019 at paras 65 - 74.

[109] ASU Submission, 19 November 2019 at paras 90 - 102.

[110] Muurlink Report, CB1689-1690.

regular family meal times or exercise routines and schedule doctors' appointments or other self-care activities. Unpredictability of work presents challenges to health, both:

a. *structural challenges* (the reduced ability to engage in positive health behaviours or reduced access to services); and

b. *physical and psychological challenges* (the reduced sense of control, and reduced rhythmicity/increased change).

The latter category of challenges, whilst less tangible, are no less significant. A worker's *sense* of control is one of the most critical psychological variables in determining health responses to stressors such as work conditions.[111] In a study of a large Hungarian dataset, a perceived absence of control at work was the second strongest work-related predictor of premature death from cardio-vascular disease and the most powerful predictor of female ischaemic heart disease mortality. Dr Muurlink notes the same author reports a connection between sense of control and well-being.[112] Similar findings appeared in an Australian study of nurses,[113] a group of workers with obvious parallels to the workers covered by the Award.

A further relevant observation in Dr Muurlink's review is the potential for a compounding adverse impact when an absence of job security/underemployment is combined with irregular work.[114]

The above features represent a real problem for the attraction and retention of appropriately skilled workers to the industry.'[115]

[150] ABI submits that in circumstances where Dr Muurlink was not a witness in the proceedings, the Commission should not readily make findings based solely on his literature review.[116] ABI made the following observations about the Muurlink Report:[117]

1. The Report is generic in nature rather than involving any specific analysis of the SCHADS industry.

2. Most of the Report relates to studies and data from jurisdictions outside of Australia.

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

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[111] Muurlink Report, CB1691.

[112] Muurlink Report, CB1692.

[113] Muurlink Report, CB1693.

[114] Muurlink Report, CB1694.

[115] HSU Submission, 18 November 2019 at paras 23 - 26.

[116] ABI Submission, 10 February 2020 at para 32.

[117] ABI Submission, 10 February 2020 at para 31.

[151] Similarly, Ai Group submit the Muurlink Report can be afforded little weight because it is a review of scholarly work that concerns workforces in a range of nations across several industries and regulatory schemes.[118] Ai Group submits that Dr Muurlink made the following concessions during his cross-examination in the *Part-time and Casual Employment Common Issue Proceedings*:[119]

1. The Report does not include any consideration of the *reasons* for the asserted trend towards 'greater variety' in working patterns. To that extent, it does not consider countervailing considerations such as operational requirements that cause employers to schedule work in a way that results in greater variety in working patterns.[120]

2. The Report does not include a consideration of the industrial context in which the claims being considered were advanced, including the Award.[121]

3. Several of the studies relied upon relate to other industries.[122]

4. Some of the studies relied upon concerned specific circumstances such as work performed on weekends,[123] fathers working more than 40 hours a week[124] and shiftwork.[125]

5. The vast majority of the studies relied upon are international studies; particularly concerning Scandinavia.[126]

6. The industrial conditions prevailing in those countries are 'potentially' and relevantly different.[127]

7. The unemployment rate in those countries may affect an employee's sense or perception of their control in a workplace.[128]

[152] Ai Group submits the above concessions undermine the relevance of the Muurlink Report and further, it is unclear if the Muurlink Report concerns the work covered by the SCHADS Award or the regulatory scheme that it operates under.[129]

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[118] Ai Group Submission, 10 February 2020 at paras 122 - 123.

[119] Ai Group Submission, 10 February 2020 at para 123.

[120] AM2014/196 and AM2014/197, Transcript, 15 July 2016 at PN6363.

[121] Ibid at PN648 – PN6452.

[122] Ibid at PN6370.

[123] Ibid at PN6391, PN6400.

[124] Ibid at PN6420.

[125] Ibid at PN6428.

[126] Ibid at PN6374.

[127] Ibid at PN6379.

[128] Ibid at PN6386.

[129] Ai Group Submission, 10 February 2020 at para 124.

[153] In a joint submission dated 26 February 2020, the Unions submit the Muurlink Report is probative and should be given 'significant weight' by the Commission.[130]

[154] There is considerable force in the ABI and Ai Group critique of the Muurlink Report. In the Report, Dr Muurlink proffers several opinions based on a review of the relevant literature. In the course of his cross-examination in the *Part-time and Casual Employment Common Issue Proceedings* Dr Muurlink acknowledged that of the 120 or so papers and studies reviewed, the 'vast bulk' were international, particularly Scandinavian, studies and that there was a disproportionate focus on the health and care sector, biased heavily towards the top end of the sector (e.g. doctors, surgeons etc).[131] Dr Muurlink also acknowledged that he didn't know much about the NDIS,[132] had not looked at the SCHADS Award[133] and did not consider the relevant industrial relations context in his review of the literature.[134] However, contrary to ABI's submission, we would not go so far as to suggest that Dr Muurlink had 'cherry picked' the studies to 'fit his thesis'.

[155] While the direct relevance of the Muurlink Report to the claims before us is somewhat limited, we accept the general proposition that working irregular or unsystematic hours can have a negative effect on physical and psychological health. We also accept, again as a general proposition, that a worker's sense of control at work is connected to worker well-being.

[156] Beyond these general propositions we are not persuaded that the Muurlink Report provides a sufficiently cogent base for the various other findings proposed by the ASU and HSU. Two examples illustrate this point. Two of the findings sought by the ASU, based on the Muurlink Report, are:

1. Breaking shifts causes significant negative impacts on employees' health and well-being.

2. Employees in the social and community sector are regularly recalled to work overtime without returning to a workplace (i.e. their employer's premises or a client's home). This work is carried out by use of electronic means of communication (telephones, laptop computers, etc.).

[157] In our view these proposed findings draw little or no support from the Muurlink Report. The Muurlink Report makes no mention of broken shifts, nor does it canvass the extent to which employees in the social and community sector are recalled to work overtime without returning to the workplace.

3.3 THE STANFORD REPORT

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[130] Joint Union Submission, 26 February 2020 at para 181.

[131] AM2014/196 and AM2014/197, Transcript, 15 July 2016 at PN6461, PN6374.

[132] Ibid at PN6367.

[133] Ibid at PN6452.

[134] Ibid at PN6386.

[158] The ASU tendered an expert report by Dr James Stanford[135] (the Stanford Report), the purpose of which was to provide an expert opinion concerning 4 questions:

1. What training, skills and qualifications are required in the disability sector?

2. What is the connection between the terms and conditions of the SCHADS Award, including broken shifts and unpaid travel time and the disability sectors' ability to attract a sufficient number of appropriately skilled workers?

3. Is the disability sector able to attract a sufficient number of appropriately skilled workers?

4. Are there any implications for quality of care?

[159] The opinions expressed in the Stanford Report are said to be 'based primarily' on 2 research projects. The first research project involved qualitative interviews with 19 'frontline' disability support workers working in the Hunter region of New South Wales (NSW), and the second was an investigation into 'the intensifying skills and training requirements faced by the disability services workforce as the sector increases its overall activity to meet the operational targets of the NDIS'.[136] Dr Stanford's opinions are also said to be based on his 'own further exploration of the prescribed literature, official statistical data and government policy documents', which are listed in the bibliography at pages 35 – 39 of the Stanford Report.[137]

[160] On 16 October 2019 Ai Group filed objections to aspects of Dr Stanford's evidence. These objections were the subject of oral argument on 17 October 2019, shortly before Dr Stanford's oral evidence.[138] Arising from discussions between Ai Group and the ASU, various parts of the Stanford Report were 'not read', namely:

- the final sentence of [12]
- the second and final sentences of [55]
- the first sentence of [59]
- [72](c), and
- the first and second sentences of [77].[139]

[161] In its final submission of 18 November 2019, Ai Group identified 10 specific objections to aspects of the Stanford Report.[140] The submissions in support of those objections are set out at [52] – [60] of the Ai Group submission. In addition to the matters identified in

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[135] Exhibit ASU4 – Stanford Report, September 2019.

[136] Exhibit ASU4 – Stanford Report, September 2019, p 5.

[137] Exhibit ASU4 – Stanford Report, September 2019 at para 6, p 5.

[138] See Transcript, 17 October 2019 at PN2084-PN2209.

[139] Ibid at PN2148-PN2151.

[140] Ai Group Submission, 18 November 2019, Attachment B, p 6.

Attachment B to its final submission, Ai Group objected to [56] – [57] of the Stanford Report, which states:

> '56. Finally, and perhaps most importantly, the Award presently does not specify minimum standards of practice regarding compensation for workers in work-related travel. … Allowing employers free-reign to organise work in such a fragmented, inefficient and unfair manner will only further degrade effective conditions and compensation in the sector, and clearly exacerbate the challenges of recruitment and retention.
>
> 57. … From the employer's perspective, there is little if any incentive to avoid scheduling work in small, discontinuous blocks (motivated, presumably, by the fragmented and unpredictable nature of demand from clients), nor to geographically plan the assignment of appointments to minimise travel…' (emphasis added)

[162] As to the above extract, Ai Group contends that any assertion that employers have 'free reign' to organise work ignores the various constraints imposed by the SCHADS Award on an employer's discretion to roster employees' hours of work and ignores the client-focused operation of the NDIS. Ai Group submits that the various limitations make self-evident that an employer does not have 'free reign' over the way they roster work. It further submits that Dr Stanford's opinion in this regard should not be given any weight and that it is directly inconsistent with evidence by certain employers that they endeavour to prepare rosters in a way that maximises their employees' working time and/or minimises the time their employees spend travelling to and from their clients.[141]

[163] We note that there is some inconsistency between the position advanced by Ai Group during oral argument on 17 October 2019 and its submission of 18 November 2019. Specifically, during oral argument Ai Group did not press its objection to paragraph 69 of the Stanford Report,[142] but later advanced the same objection in its final written submissions.[143]

[164] ABI and AFEI agreed with Ai Group's submissions regarding Dr Stanford's evidence.

[165] NDS submit that Ai Group's submission regarding Dr Stanford's opinion is, in part, overstated:

> '(a) 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.
>
> (b) However, NDS agrees with Ai Group's criticism at (10) and (11) of Dr Stanford's conclusions that employers have "free reign" or that employers ignore efficiency in

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[141] Transcript, 17 October 2019 at PN2039, PN2057–PN2059, PN2070, PN2616 and PN2619; Transcript, 18 October 2019 at PN2879, PN2885, PN3141–PN3142 and PN3534.

[142] Transcript, 17 October 2019 at PN2143.

[143] Ai Group Submission, 18 November 2019, Attachment B, Item 9, p 6.

> organising work as that part of his evidence overstates the situation and is in conflict with employer witness evidence in these proceedings.'[144] (footnotes omitted)

[166] In Background Paper 1, several questions were posed in relation to Ai Group's objections to Dr Stanford's evidence. We have had regard to those answers and the Joint Union Submission of 10 February 2020 which responds to Ai Group's submissions.

[167] Ai Group largely objects to Dr Stanford's evidence because it is primarily based on the first research report, which involved qualitative interviews with 19 disability support workers working in the Hunter region in NSW. As Ai Group put it:

> 'The identity of the employees who were interviewed and their employers is not known…
>
> Even if the transcripts of the interviews had been produced, the 19 employees were not called to give evidence in these proceedings and as a result, respondent parties did not have an opportunity to test the veracity or relevance of the information they provided during the course of the interviews relied upon…
>
> In circumstances where the ASU does not assert the truthfulness of what the interviewees put during the interviews and its truthfulness has not, as a matter of fact, been established, the very basis for Dr Stanford's opinion is substantially undermined.'[145]

[168] We agree with NDS' response to the submission advanced by Ai Group. NDS submits that Ai Group overstates the deficiencies in the Stanford Report. As NDS observes, the validity of qualitative research of the type upon which Dr Stanford based his opinion, is widely accepted. The Commission had regard to evidence of this nature in the *Penalty Rates Case*,[146] in which the Full Bench observed:

> 'Despite the limitations of qualitative research it can provide more detail and context to assist in gaining a deeper understanding about a particular issue.'[147]

[169] Qualitative research based on selected focus groups or interviews cannot usually be said to be representative of the views or experiences of *all* employees in the cohort from which the interviewees are drawn.

[170] Contrary to Ai Group's submission, the failure to call the individuals who participate in focus groups or interviews as part of a qualitative research project is not fatal to the validity of the resultant report. Qualitative research often attempts to identify themes emerging from interviews with participants. The validity of the conclusions expressed in such research can be challenged by calling for the records of the interviews in question. This was done in the *Penalty Rates Case* in respect of Dr Macdonald's qualitative study.[148] Ai Group could have taken this course of action in respect of Dr Stanford's evidence, but chose not to do so.

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[144] NDS Submission, 7 February 2020, p 8.

[145] Ai Group Submission, 18 November 2019 at paras 53 – 55.

[146] *Penalty Rates Case* at [589] – [595], [609] and [1617].

[147] Ibid at [1617].

[148] Ibid at [595] – [609].

[171] While Ai Group's critique of the Stanford Report is somewhat overstated, it is evident to us that the Report has serious deficiencies. As we have mentioned, the opinions expressed in the Stanford Report are said to be 'based primarily' on 2 research projects and the documents listed in the bibliography. The basis of the opinions expressed in the Stanford Report appear unclear because of the conflation of the reference sources. In a number of instances the opinions Dr Stanford expressed are not referenced to any source and the Report is silent as to the basis of a number of the expressed opinions.

[172] A bare expression of opinion, absent any sufficient explanation of the basis of that opinion, is normally given little weight. As observed in *Davie v The Lord Provost, Magistrates and Councillors of the City of Edinburgh*:[149]

> 'the bare *ipse dixit* of a scientist, however eminent, upon the issue in controversy, will normally carry little weight, for it cannot be tested by cross-examination nor independently appraised, and the parties have invoked the decision of a judicial tribunal and not an oracular pronouncement by an expert.'[150]

[173] To the extent that the basis of a particular opinion in the Stanford Report is not made clear we propose to give the opinion very little weight. We note that we took a similar approach in dealing with Union objections to aspects of the employer evidence.[151]

[174] Further, Dr Stanford's reliance on the qualitative interviews of 19 disability support workers is problematic for 2 reasons.

[175] First, the Stanford Report is silent as to the methodology employed in this study. The qualitative study upon which Dr Stanford's opinion is based is the subject of a report set out at Attachment E to the Stanford Report – 'Precarity and Job Instability on the Frontlines of NDIS Support Work' by Baines et al, September 2019, Centre for Future Work at the Australia Institute (the Baines Report). The Baines Report provides some, albeit limited, insight into the approach adopted. Research participants were apparently asked broad questions drawing on an 'interview guide'. The guide was not produced.

[176] The Baines Report says nothing about how the 19 participants were recruited. It appears that the ASU had a role in selecting the interviewees, a point conceded by Dr Stanford during cross-examination:

> 'Mr Ferguson: And those 19 workers that were interviewed they were referred to the interviewers by the ASU, weren't they?
>
> Dr Stanford: In part. We made some initial contacts with the ASU people and then we used what the qualitative research community calls a snowball sampling methodology where we use an initial group of contacts to try and identify other potential informants in the project.'[152]

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[149] [1953] SC 34 at [40] per Lord President Cooper.

[150] Also see *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705; 729-30[59]; [2001] NSWCA 305 at [59].

[151] Transcript, 17 October 2019 at PN1974.

[152] Transcript, 17 October 2019 at PN2228.

[177] Second, the Stanford Report fails to link the opinions expressed with answers given by the research participants. We accept that it will not always be possible to link an opinion derived from qualitative research to answers given by interviewees as such research can involve an iterative conversation and attempts to identify emerging themes. But in this instance, there was simply no attempt to link any of the expressed opinions back to statements by interviewees.

[178] For example, at [29] of his report Dr Stanford expresses the opinion:

> 'The time spent in traveling to and from work under these split or broken shifts, and the often wasted time between these short periods of work, has the effect of greatly reducing the effective hourly income associated with this work…'

[179] Earlier in the same paragraph Dr Stanford observes that the issue concerning time spent traveling to and from work under split or broken shifts was one 'of the most commonly-expressed problems encountered in our qualitative research'. But no reference is made to the number of interviewees who raised this issue nor to the concerns they expressed.

[180] The Baines Report sets out the themes which emerged 'most strongly from the qualitative data collected through the interviews'. The views expressed by interviewees regarding transportation (set out at pages 22 – 26 of the Baines Report) provide little support for the opinion expressed at [29] of the Stanford Report. Most of the comments cited relate to clients not being provided with sufficient funds to cover transportation needs associated with activities and the use of workers' private vehicles to transport clients. There is no reference to 'wasted time' between short periods of work, which Dr Stanford refers to in his report (at [29]). Further, the issue of time spent travelling to and from work under split shifts receives little attention in the Baines Report; largely confined to the observation (at page 25) that:

> 'Reimbursement for the workers' time spent driving clients, or driving between different clients, was also reported to be inconsistent.' (emphasis added).

[181] Perhaps the high point in this regard was the observation at [29] of the Stanford Report that 'multiple interviewees reported the great difficulties of managing very unstable and unpredictable shift and roster schedules.' (emphasis added). The Baines Report, however, does not indicate whether the 'multiple interviewees' who expressed the views summarised at paragraph 29 in the report constituted a majority of those interviewed or merely two of them. Further, the interviews apparently ranged in length for 15 minutes to 1.25 hours;[153] however, the Baines Report, does not indicate if most interviews were short (say 15 – 20 minutes) or longer. It is conceivable that the opinions expressed by Dr Stanford were primarily based on the views expressed by 2 or 3 interviewees who were interviewed for 1.25 hours. No explanation is provided for the variation in the length of the interviews conducted.

[182] The ASU relies on several opinions expressed in the Stanford Report,[154] in particular:

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[153] Exhibit ASU4 - Stanford Report, September 2019, Attachment E at p 11.

[154] See generally, ASU Submission, 2 October 2019.

1. The characterisation of the disability services workforce as a low paid, highly casualised, female dominated workforce who work fragmented shifts with limited hours.

2. At [8] of the Stanford Report:

> 'The individualised, market-based system which the NDIS uses to deliver services to participating clients is creating a profound fragmentation and instability in the nature of delivered services. Demand for specific services fluctuates constantly due to changes in the number of clients, their approved budgets, their specific choices of services, and other factors… agencies are attempting to shift the resulting uncertainty and risk associated with fluctuations in demand and other causes of revenue fluctuations onto their employees, through the imposition of increasingly insecure and unstable employment relationships, rostering practices, and compensation.'

3. At [29] of the Stanford Report:

> 'two of the most commonly-expressed problems encountered in our qualitative research relate directly to the topics under consideration in this Four Yearly Review of the SCHDS industry Award. Multiple interviewees reported the great difficulties of managing very unstable and unpredictable shift and roster schedules, and balancing the demands of such unpredictable work with their other family and community responsibilities. The assignment of DSWs to work discontinuous shifts, often in diverse locations, greatly exacerbates the personal cost and stress of this instability in work. The time spent in traveling to and from work under these split or broken shifts, and the often wasted time between these short periods of work, has the effect of greatly reducing the effective hourly income associated with this work – as well as imposing considerable stress on the workers and their families.' (emphasis added).

4. At [54](a) and (c) of the Stanford Report:

> '(a) The SCHDS Award has permitted the growing use of casual labour, which now accounts for most employment in the sector (and virtually all new hires). Casual workers are not protected by many of the same basic provisions (for example, regarding stability in shift scheduling or entitlements to notice or termination or redundancy pay) as permanent workers.
>
> …
>
> (c) The Award also allows employers to assign "broken shifts" (with one or more uncompensated non-meal breaks within any 12-hour period), to both permanent and casual employees in disability services, with no penalty. This also facilitates the fragmentation and disruption of normal work schedules, complicates the challenges facing disability service workers to maintain health work-life balance, and undermines their effective hourly compensation (since time between portions of broken shifts typically occurs at sub-optimal locations and times of the day, thus preventing workers from experiencing full "value" for their leisure time).'

5. At [56], [57] and [59] of the Stanford Report:

> '…Given the fragmentation of work assignments under the NDIS, and the increasingly common requirement that DSWs must travel to their clients – in some cases to

> multiple locations in the course of a day – work-related transportation is occupying a growing share of DSWs' total time….
>
> Note that the hyper-flexibility permitted by the SCHDS Award in shift scheduling, short assignments, broken shifts, and required but uncompensated travel time serves to eliminate the incentive or pressure on employers to try to organise work in the most efficient and stable manner. From the employer's perspective, there is little if any incentive to avoid scheduling work in small, discontinuous blocks (motivated, presumably, by the fragmented and unpredictable nature of demand from clients), nor to geographically plan the assignment of appointments to minimise travel time. When something is "free" (in this case, the disruption and uncompensated time of workers), it will not be treated with value and used efficiently. The weakness of the SCHDS Award in addressing these problems of instability and unpredictability in working arrangements is thus clearly facilitating the further fragmentation and destabilisation of work in the sector.'
>
> …
>
> In my judgment the two proposed revisions to the SCHDS Award – to specify penalty wage rates in cases of split or broken shifts, and to require minimum payment at normal rates for work-required transportation services – are both well-justified responses to problems of work fragmentation and unfairness that were documented in our original research, and in other studies. They would represent small, partial but important steps in addressing the growing fragmentation of work in this sector: a trend that is undermining the quality of work life for DSWs, the quality of service for clients, and the fundamental economic efficiency of agencies and employers.'

[183] As to point 1, Dr Stanford's characterisation of the disability services workforce is not referenced to a particular source; it is unclear what definition of 'low paid' underpins the proposition put. Further, the characterisation of the workforce as being 'highly' casualised is of little assistance. The basis for the proposition that the workforce work fragmented shifts with limited hours, is unstated.

[184] Points 2 and 3 refer to opinions expressed in the Stanford Report for which no basis is sufficiently stated.

[185] As to points 4 and 5, three observations may be made:

1. The basis for the opinions expressed is unstated.

2. The opinion expressed includes the propositions that the SCHADS Award permits 'hyper flexibility'; has permitted the growing use of casual labour; and allows employers to assign 'broken shifts' with no penalty. These propositions involve an implicit expression of expert opinion about the proper construction of a domestic law (that is the SCHADS Award), which is impermissible. Further, it seems to us that the expressed opinion involves a degree of speculation as to the linkage between the terms of the SCHADS Award and the employment practices in a sector covered by the Award. It is not legitimate for experts to guess or speculate.[155]

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[155] *HG v The Queen* (1999) 197 CLR 414 and *R v Berry* (2007) 17 VR 153 at [69].

3. Dr Stanford's opinion that 2 of the proposed Union variations to the SCHADS Award are 'both well-justified responses to problems of work fragmentation and unfairness' amounts to little more than a submission directed at the issue before us.

[186] As to the last point, we would also observe that the lack of transparency regarding many of the opinions expressed in the Stanford Report, which is exacerbated by the conflation of the potential sources upon which the opinions are said to be based, creates an impression of an expert report that is little more than a submission, albeit a submission by a person with expertise. In a moment of unguarded candour Dr Stanford describes his report as an 'expert submission'; we agree with that characterisation.[156] In summary, we have derived little assistance from the Stanford Report.

3.4 THE MACDONALD ARTICLE

[187] The Unions sought to rely on a witness statement of Dr Fiona Macdonald, dated 15 February 2019.[157] Dr Macdonald's statement is quite short; simply noting her research interests and appointments. Attachment FM-2 to Dr Macdonald's witness statement is an article titled '*Wage theft, underpayment and unpaid work in marketised social care*' by Dr Macdonald, Eleanor Bentham and Jenny Malone (the Macdonald article).[158] The Unions (and Ai Group) advanced various proposed findings based upon the Macdonald article. Dr Macdonald was not required for cross-examination.

[188] The Macdonald article reports on a research project undertaken into the paid and unpaid work time of disability support workers. The research project combined an analysis of working day diaries and qualitative semi-structured interviews and on analyses of interviews and working day diaries for 10 disability support workers who provide support and care under the NDIS. The participants were recruited through advertisements, in newspapers and job websites through 'snowballing'.[159]

[189] The 10 participants' 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.[160] Nine of the 10 participants were multiple job holders: 5 worked in 2 or 3 different disability support work jobs. Other jobs included aged care and residential support. The main reason given for holding multiple jobs was that their main job provided insufficient income. In their main job, 7 of the participants were permanent part-time and 3 were casual employees. Part-time employees had contracts specifying minimum hours, although these minimums were as low as 2 hours a fortnight.

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[156] Exhibit ASU4 - Stanford Report, September 2019, p 4.

[157] Exhibit HSU25 – Witness Statement of Fiona Macdonald, 15 February 2019.

[158] Macdonald, F, Bentham, E and Malone, J, 'Wage theft, underpayment and unpaid work in marketised social care' *The Economic and Labour Relations Review* 2018, Vol. 29(1) 80–96 ('Macdonald article').

[159] Macdonald article, p 85.

[160] Macdonald article, p 87.

[190] The HSU sought to rely on the Macdonald article in relation to the following claims: minimum engagement, broken shifts, travel time, overtime and client cancellation.[161] The ASU and UWU both sought to rely on the Macdonald article in respect of their travel time claims.[162] The UWU also sought to rely on the Macdonald article in respect of its broken shift claim.[163]

[191] The key 'findings' identified in the Macdonald article may be summarised as follows:

1. All participants had highly variable daily and weekly hours and all were regularly 'expected' to do additional work, often at very short notice. The diaries show that the workers' days were typically made up of several relatively short paid work 'shifts' spent with support recipients, interspersed with often long periods of unpaid time. Over the 30 days, the 10 participants 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.

2. Only 2 of the participants (both employees of the same long-established and large service provider) were paid for time spent travelling between clients. However, seven (including those two), received a per-kilometre reimbursement for using their own cars when travelling between clients. The participants were reimbursed for using their cars to transport clients, if the distance was within the kilometre range specified in the client's NDIS funding package.

3. All 10 workers undertook unpaid work either travelling between clients or unpaid overtime (administration and face-to-face support), or both, over the 3 diarised days. For individual workers, the total amount of such unpaid work undertaken over the 3 days ranged from 22 minutes to over 6 and a quarter hours. For some, unpaid work time was equivalent to a third or more of paid work time in a single day and comprised up to 25% of the duration of the working day.

4. The workers' 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. Though days were often very long, the proportion of the total working day that was paid work was often small. On 17 of the 30 work days, employees were paid for 5 or fewer hours' work in the context of a long span of working hours. As an example: 'one day in DSW 9's diary showed that she left home at 8:45 am and finished her day 13.5 hours later, at 10:15 pm, having completed four shifts and earned only 5 hours' pay. This pattern of paid work was not uncommon: the diaries showed that for each worker, on average over their 3 working days, paid work time was between 27 per cent and 73 per cent of the working day'.[164]

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[161] HSU Submission, 18 November 2019 at Attachment A; HSU Submission, 13 October 2019.

[162] ASU Submission, 19 November 2019; UWU Submission, 18 November 2019, p 3.

[163] UWU Submission, 18 November 2019, p 7.

[164] Macdonald article at Table 1, p 89.

5. The organisation of disability support work often renders 'free' or 'personal' time as unusable time in a worker's day. For example, workers spent time travelling back and forth from home to work in breaks between periods of paid work, and they often found themselves too far from home to make it worthwhile returning, so they simply waited somewhere near their next client's home.

[192] ABI noted a number of what it characterised as 'deficiencies with the qualitative data' in the Macdonald article, namely:

- the sample size is confined to 10 employees who were all employed in the disability services sector
- the qualitative research is from 2016 and is limited to one geographical area, and
- the findings were based on an analysis of working diaries of only 30 days (3 diarised days for each of the 10 employees). [165]

[193] Similarly, Ai Group submitted that 'the weight that can be afforded to the article by Dr McDonald is negligible'. Ai Group argues that the article seeks to derive insights from the work diaries over a period of just 3 days of 10 disability support workers performing work under the NDIS in a single regional area and can not be seen as representative of all disability support workers. Ai Group also observes that the article is 'somewhat dated' given the research was undertaken in 2016 and there has been a range of changes to the NDIS funding arrangements since that time. Finally, Ai Group points to what it describes as a 'further difficulty' in that the article is based on the responses or diary entries of unnamed employees of unnamed employers. Ai Group argues that this material is in the nature of hearsay and that none of the employees were offered as witnesses:

> 'Consequently, there is simply no way to test the veracity of any of the information they provided to the researchers. It would not have been possible to test this through cross examination of Dr Macdonald. The responses of the disability workers and the associated analysis in the article can be given little if any weight.'[166]

[194] Despite arguing that only 'negligible' weight be attributed to the Macdonald article Ai Group somewhat paradoxically sought to rely on the article in support of various propositions, in particular, that enhancing any existing obligation to provide payment for travel time:

> 'might in some cases be a catalyst for an employer either not taking on certain clients/work or restructuring the way work is allocated… and may have unintended adverse consequences for the availability of work for employees'.[167]

[195] Ai Group also proposed a number of general findings, relying in part on the Macdonald article, namely:

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[165] ABI Submission, 10 February 2020 at para 111.

[166] Ai Group Submission, 10 February 2020 at paras 27 - 32.

[167] Ai Group Submission, 10 February 2020 at paras 28 – 29.

1. It is common for employees to be employed by and to be performing work for more than one employer covered by the SCHADS Award.[168]

2. Some employees find personal satisfaction in undertaking work in the sectors covered by the SCHADS Award.[169]

3. Some full-time and part-time employees are required to work 30-minute engagements.[170]

4. The number of 'breaks' in a broken shift can vary from 1 – 5.[171]

5. Many employees are not paid for time spent travelling to and from clients.172

[196] The validity of qualitative research, such as that reported in the Macdonald article, is widely accepted, though results drawn from interviews and the work diaries of a relatively small group of participants cannot be said to be representative of the views or experiences of *all* employees in the cohort from which the interviewees are drawn.

[197] Contrary to Ai Group's contention, the validity of the conclusions expressed in such research can be challenged by calling for the records of interview and cross-examining the researcher. The employer parties chose not to take such a course in respect of Dr Macdonald's evidence.

[198] The authors of the Macdonald article recognise the limitations of their research noting that:

> 'The 10 DSWs cannot be seen as representative of all DSWs working under the NDIS. However, this study can provide valuable insights into some of the ways in which work is being organised under the NDIS and impacts on employees. Despite the small sample size, our interviews were approaching saturation (Morse, 1995), with issues raised in interviews highly consistent across the 10 participants. While there was considerable dissimilarity in paid and unpaid work patterns recorded in diaries, common issues and themes emerged from all 10 workers' diaries. The issues are also similar to those identified in recent surveys of DSWs and providers examining NSIS workforce issues (Cortis et al., 2017; NDS, 2016).'[173]

[199] Despite these limitations, research of the type presented in the Macdonald article provides a valuable insight into the working arrangements of disability support workers. We note that these findings are consistent with the evidence of other witnesses in these proceedings and we refer to that material in section 5 of this decision.

[200] In our view the Macdonald article supports the following findings:

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[168] Ai Group Submission, 18 November 2019 at para 12 citing Macdonald article, p 87.

[169] Ai Group Submission, 18 November 2019 at para 13 citing Macdonald article, p 87.

[170] Ai Group Submission, 18 November 2019 at para 25 citing Macdonald article, p 88.

[171] Ai Group Submission, 18 November 2019 at para 26 citing Macdonald article, p 88.

[172] Ai Group Submission, 18 November 2019 at para 29 citing Macdonald article, p 87.

[173] Macdonald article, p 85.

1. Disability support workers work variable daily and weekly hours. Part-time employees in the disability services sector regularly work additional hours.[174]

2. It is not uncommon for employees to be employed by and to be performing work for more than one employer covered by the SCHADS Award.[175]

3. Some employees find personal satisfaction in undertaking work in the sectors covered by the SCHADS Award.[176]

4. Disability support workers can be engaged to work broken shifts over a significant span of hours that can include a substantial amount of 'unpaid time'.[177] The number of 'breaks' in a broken shift can vary from 1 – 5.[178]

5. Some full-time and part-time employees are required to work 30-minute engagements.[179]

6. Employees covered by the SCHADS Award can be travelling to and from clients for significant periods of time without payment.[180]

7. Many employees are not paid for time spent travelling to and from clients[181]

8. The working arrangements of some disability support workers 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.[182]

9. Lengthy periods of time where the worker is engaged in the work of the employer but only paid for a few hours is a significant disutility for some employees, in circumstances where they find themselves too far from home to make returning worthwhile and so simply wait somewhere near their next client's home.[183]

10. The gendered character of caring work has influenced the work practices referred to in the above findings.[184]

[201] As to finding 10, the ASU[185] and HSU[186] relied on the Macdonald article in support of a proposed finding that the gendered character of caring work has had an impact on work practices. The Unions rely on the following extract from the article:

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[174] Macdonald article, p 87.

[175] Macdonald article, p 87. Also see Ai Group Submission, 18 November 2019 at para 12 citing Macdonald article, p 87.

[176] Macdonald article, p 87. Also see Ai Group Submission, 18 November 2019 at para 13 citing Macdonald article, p 87.

[177] Macdonald article, pp 88 - 93. Also see UWU Submission, 18 November 2019 at para 21, citing Macdonald article, pp 88 and 93.

[178] Macdonald article, p 87. Also see Ai Group Submission, 18 November 2019 at para 26 citing Macdonald article, p 88.

[179] Macdonald article, p 88. Also see Ai Group Submission, 18 November 2019 at para 25 citing Macdonald article, p 88.

[180] Macdonald article, pp 88 – 91. Also see UWU Submission, 18 November 2019 at para 19, citing Macdonald article, p 88.

[181] Macdonald article, pp 88 – 91. Also see Ai Group Submission, 18 November 2019 at para 29 citing Macdonald article, p 87.

[182] Macdonald article, pp 86 - 88. Also see UWU Submission, 18 November 2019 at para 20, citing Macdonald article, p 88.

[183] Macdonald article, p 88.

[184] Macdonald article, p 82 – 84, 93.

[185] ASU Submission, 19 November 2019 at para 85.

> 'Non-payment of social care work is supported by the gendered legacy of care work as women's work (Hayes, 2017; Palmer and Eveline, 2012). With care work continuing to be mainly performed unpaid by women in the family, it is often regarded as performed for altruistic reasons and as unskilled and not deserving of decent pay. These norms have a powerful role in social care, influencing employer strategies and also workers' preparedness to perform unpaid work. Furthermore, much social care work is performed in not-for-profit agencies that have long traditions and strong norms of volunteering that contribute to pressures on workers (Baines et al., 2017)."[187]

[202] Ai Group did not challenge the finding sought.[188] ABI submitted that the passage in the MacDonald article is 'vague and generalised' and that:

> 'It is also unclear *how* the ASU contends the "gendered character of caring work" impacts "work practices", or even *what* work practices are being referred to.[189]

[203] Contrary to ABI's submission we think it is tolerably clear that the work practices being referred to are those which are the subject of the finding set out above. As to 'how' it is contended that the 'gendered character of caring work' impacts on work practices; the point made in the Macdonald article is plain – social care work is often regarded 'as performed for altruistic reasons and as unskilled and not deserving of decent pay' and these norms influence the work practices in the disability sector. We accept the validity of that observation.

[204] We note that the Unions sought several other findings based on the Macdonald article which we do not propose to make. These proposed findings either lack a relevant connection to the claims before us or were not supported by the evidence. Two examples serve to illustrate the approach we have taken.

[205] First, the HSU sought a finding in the following terms:

> 'The capacity for individualised and marketized care arrangements, which shift the location of care work from public organisational settings to private settings, to lead to underpayment of social care workers, has been observed in the United Kingdom by the Low Pay Commission. By defining "work" time as only the contact time between the worker and the client, minimum wage obligations are avoided. Comparable structural changes, practices and economic forces are at play in the Australian context, and the Award as currently drafted, facilitates the practices which give rise to underpayments.'[190] (footnotes omitted)

[206] ABI challenged the proposed finding on the basis that:[191]

- the impact of any UK reforms is not relevant to the current matter before the Commission, and

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[186] HSU Submission, 18 November 2019 at para 32.

[187] Macdonald article, pp 83 – 84.

[188] Ai Group Submission, 11 March 2020, p 3.

[189] ABI Submission, 11 March 2020 at para 30.

[190] HSU Submission, 18 November 2019 at para 57.

[191] ABI Submission, 26 February 2020, p 15.

- there is not a sufficient evidentiary basis for this finding to be made.

[207] We agree with ABI and do not propose to make the finding sought.

[208] Second, in a joint submission filed on 10 February 2020 the Unions submitted we should make the following findings based on the Macdonald article:

> '*Broken shift claim:*
>
> (i) The individualisation and marketisation of social care in the United Kingdom resulted in the adoption of arrangements where workers are paid only for contact time and not for travel time, and short periods of paid time are interspersed with fragmented, variable and unpredictable periods of non-work time. As a consequence social care workers there at greater risk than other workers of not receiving the National Minimum Wages; and
>
> (ii) Disability support workers may work between one and 5 separate "shifts" in the course of any day with "shifts" as short as 30 minutes long.'[192]

[209] The HSU relied on the following passage from the Macdonald article in support of the proposed finding:

> 'work scheduling techniques that 'drain waged-time from the working day' and the devolution to workers of the risks of variable client demand result in fragmented, often varying and unpredictable work schedules: short periods of paid time (invariably face-to-face contact time with care recipients) are interspersed with other also fragmented, variable and unpredictable periods of unpaid 'non-work' time' (McCann, 2016: 44–45; Rubery et al., 2015). So, workers have long days for little recompense, contributing to low pay'.[193]

[210] The Macdonald article does not provide a sufficiently cogent evidentiary basis for the proposed finding.

4 GENERAL FINDINGS ON THE EVIDENCE

[211] As noted in the *September 2019 Decision*,[194] the social, community, home care and disability services industry is undergoing structural change by reason of reforms that have been (and continue to be) implemented across the country.

[212] We made a number of general findings in the *September 2019 Decision* and also made some observations about the relevance of the NDIS funding arrangements to the determination of the claims before us:[195]

> 'The two main reforms are the NDIS and the introduction of 'Consumer Directed Care' for home care packages. Other similar reforms are also taking place in respect of State and Territory funding models. Broadly speaking, these reforms involve a move away from a block funding model to an individualised funding model whereby individual consumers receive a tailored, individualised care plan (with individualised funding), under which consumers have a

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[192] Joint Union Submission, 10 February 2020 at paras 222(a) and (e) referring to Macdonald article, pp 82 - 83 and 87.

[193] Macdonald article, p 83.

[194] *September 2019 Decision* at [48] – [75].

[195] *September 2019 Decision* at [50] – [59], [124] – [143].

greater ability to choose how care services are provided to them (including what, when, where, and by whom those services are provided).

The aged care industry is comprised of residential aged care (covered by the Aged Care Award 2010) and home care, which is covered by the SCHADS Award. In the non-residential aged care sector, there are two main programs under which services are delivered: the Commonwealth Home Support Program (CHSP), and the Home Care Packages (HCP) Program. Entry to the system is though My Aged Care operated by the Federal Government. The system is designed, regulated and funded by the Federal Government.

In the home care sector, Federal Government reforms announced in 2012 created Consumer Directed Care (CDC). CDC is a service delivery model designed to give more choice and flexibility to consumers, by allowing individuals to have more control over the types of care and services they access and the delivery of those services (including who delivers the services and when).

CDC was first piloted as a model of care in 2010-11 and from July 2015, all Home Care Packages must be delivered on a CDC basis.

Prior to the introduction of CDC, Home Care Packages were provided as a bundled set of services relatively tightly-specified by government. Availability of Commonwealth funding for these services had been capped by the allocation of funded "places" to a limited group of approved providers (as provided for in the Aged Care Act 1997), by the funding levels prescribed and by a cap on consumer fees.

Home Care Packages are generally available to older persons who need coordinated services to help them to stay in their home, and to younger persons with a disability, dementia or other special care needs that are not met through other specialist services.

The NDIS was established under the *National Disability Insurance Scheme Act 2013* with the objectives of:

(a) supporting the independence and social and economic participation of people with disability;

(b) providing reasonable and necessary supports, including early intervention supports, for participants;

(c) enabling people with disability to exercise choice and control in the pursuit of their goals and the planning and delivery of their supports;

(d) facilitating the development of a nationally consistent approach to the access to, and the planning and funding of, supports for people with disability; and

(e) promoting the provision of high quality and innovative supports to people with disability.

The NDIS supports people under the age of 65 who have a permanent and significant disability. Under the NDIS, individual consumers (eligible 'participants') have greater choice and control over how their services are delivered, which includes control over what services are provided to them, when those services are provided, where those services are provided, and by whom those services are provided. Participants have the ability to choose their service providers, and to terminate their service arrangements at their discretion.

Each participant's supports are set out in a 'NDIS Plan' which is developed by the National Disability Insurance Authority (NDIA) in consultation with the individual participant. Service providers do not have any control over, or input into, the NDIS Plans. NDIS Plans specify a 'global' funding amount for different categories of 'fixed' and/or 'flexible' supports, but typically do not specify details of how or when those supports are to be provided.

Participants then typically enter into a service agreement with one or more service providers for the delivery of services outlined in their NDIS Plan.'

[213] We then went on to make the following observations about the NDIS:

1. The NDIS may be characterised as a move from a block funded welfare model of support to a fee-for-service market based approach.[196]

2. The initial roll out targets for the NDIS have not been met. The NDS submits that the current rate of roll out is about 75% of the level originally planned in 2011 and that the rollout will extend 'well into 2019-20 and is unlikely to be completed before then'.[197] Similarly, the HSU submits 'The rollout targets have not been met and it can be expected that the rollout will continue well into 2020'.[198]

3. According to the National Disability Insurance Authority (NDIA) Quarterly Report, as at 31 March 2019:

   - there were 277,155 NDIS participants, of whom 85,489 were receiving support for the first time; and

   - the total number of registered providers was 20,208, of whom 57% (11,418) were 'active' as at 31 March 2019, meaning that they had claimed a payment from the NDIA for delivering a service. 45% of the total number of providers were individual/sole traders.[199]

4. The NDS (2019), Australian Disability Workforce Report of July 2018 notes that:

   - 48% of disability support workers are permanent (full-time or part-time) and 46% are casual; and

   - the trend towards casualisation is not universal across the sector and is more prevalent in small and medium organisations and absent in large organisations.[200]

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[196] Productivity Commission Study Report, October 2017, National Disability Insurance Scheme (NDIS) Costs, p 8.

[197] NDS Submission, 17 May 2019 at para 35.

[198] HSU Submission, 17 May 2019 at para 27.

[199] HSU Submission, 17 May 2019 at para 28; AFEI Submission, 22 May 2019 at para 32.

[200] NDS (2018) Australian Disability Workforce Report July 2018, p 6.

5. The NDS has developed a data metrics tool called 'Workforce Wizard', to assist disability organisations track workforce trends. This was the source of the data referred to by the *Part-time and Casual Employment* Full Bench at [633] of its July 2017 decision. Since the NDS July 2018 Workforce Report the NDS has obtained data from the 'Workforce Wizard' for the December 2018-19 quarter (including from 187 organisations comprising 41,119 workers in the disability and allied health sectors), which shows that the average proportion of casual employment increased from 40.9% in September 2015 to 45.2% in December 2018 (but has remained at around 45% since September 2017, with the exception of the September 2018 quarter, at 47.3%).

   Based on this data the NDS submits that:

   'While disability service providers are hiring more casual workers, the trend towards increased casual employment since 2015 appears to have stabilised.'[201]

[214] In the *September 2019 Decision* we also considered the profile of employees in the social, community, home care and disability services industry, noting that it differs from the profile of employees in 'all industries' in 4 respects:[202]

- social, community, home care and disability services industry employees are predominately female (73.9%, compared with 50.0% of all employees)
- around half (50.3%) of social, community, home care and disability services industry employees are employed on a part-time or casual basis (i.e., less than 35 hours per week), compared with 34.2% of all employees
- around half (50.7%) of social, community, home care and disability services industry employees are aged 45 years and over, compared with 36.9% of all employees, and
- fewer than two-thirds (62.8%) of social, community, home care and disability services industry employees have completed Year 12 or equivalent, compared with 68.1% of all employees.

[215] We also concluded that a proportion of employees covered by the SCHADS Award may be regarded as 'low paid' within the meaning of s.134(1)(a) of the Act.[203]

[216] In Background Paper 1, we asked the parties (among other things) whether any of the findings made in the Tranche 1 *September 2019 Decision* were challenged. We received submissions from the following parties:

- NDS (7 February 2020)
- Ai Group (10 February 2020)

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[201] NDS Submission, 17 May 2019 at para 41.

[202] *September 2019 Decision* at [26].

[203] *September 2019 Decision* at [44] – [47].

- ABI (10 February 2020)
- Joint Union (10 February 2020)
- AFEI (11 February 2020).

[217] Each of the parties proposed that we make some 'general findings'. There is significant overlap in the general findings sought by the various employer parties. The findings we make below are primarily based on those proposed by ABI and NDS, taking into account the views expressed by other parties in respect of some of those proposed findings.

[218] In our view the evidence supports the following general findings:

The SCHADS Sector

1. The SCHADS Award covers employees across a range of sectors including social and community services, crisis assistance, disability services, home care and family day care.[204]

2. Many service providers in the SCHADS industry are not-for-profit organisations.

3. It is common for employees to be employed by and to be performing work for more than one employer covered by the SCHADS Award.[205]

4. The disability sector is characterised by a high level of part-time and casual employment.[206]

5. Employees providing disability services in clients' homes perform a range of duties including assisting clients with showering, personal hygiene, meal preparation, taking medication, cleaning, laundry, taking them to public places such as shops or a café, other community engagement activities and taking them to medical appointments,[207]

Reform in the SCHADS Sector

6. There have been significant regulatory changes in the disability services and home care sectors over recent years. These have included:

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[204] FWC – Survey Analysis of the *Social, Community, Home Care and Disability Services Industry Award 2010* (June 2019).

[205] Exhibit HSU25 – Witness Statement of Fiona Macdonald, 15 February 2019, Attachment FM-2, p 87.

[206] NDS, 'Australian Disability Workforce Report', February 2018, CB1828; Exhibit ASU4 – Stanford Report, September 2019 at paras 16 - 18; Exhibit NDS1 – Witness Statement of David Moody, 12 July 2019 at paras 23 – 40.

[207] See for example, Exhibit ASU10 – Witness Statement of Augustino Encabo, 13 February 2019 at paras 13 – 15; Exhibit ASU9 – Witness Statement of Richard Rathbone, 13 February 2019 at paras 12 – 13; Exhibit HSU27 – Witness Statement of Pamela Wilcock, 15 February 2019 at paras 8 – 9; Exhibit HSU4 – Witness Statement of Heather Waddell, 15 February 2019 at para 4; Exhibit HSU28 – Witness Statement of Thelma Thames, 15 February 2019 at paras 4 – 5; Exhibit HSU29 – Witness Statement of Bernie Lobert, 15 February 2019 at para 8.

(a) the introduction of the NDIS which has been progressively implemented throughout Australia from July 2013,[208] and

(b) the introduction of reforms in the home care sector since around 2012.[209]

7. A key feature of those regulatory changes was the transition from traditional 'block funding' models to individualised funding arrangements underpinned by the principle of 'consumer-directed care'.[210]

8. The principle of 'consumer-directed care' involves providing individual consumers with choice and control over what services are provided to them, when and where those services are provided, how those services are provided, and by whom those services are provided.[211]

9. Many clients have a preference for continuity of care in the sense that care is provided by the same employee or group of employees.[212]

10. These reforms have fundamentally changed the operating environment in the following ways:

(a) service providers now have less certainty in relation to revenue[213]

(b) service providers are experiencing greater volatility in demand for services,[214] as consumers have a greater ability to terminate their service arrangements[215]

(c) there has been an increase in the number of service providers in the market[216]

(d) service providers are exposed to greater competition for business[217]

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[208] *National Disability and Insurance Scheme Act 2013* (Cth). Also see ABI Submission, 5 April 2019 at paras 3.15 – 3.18; Ai Group Submission, 8 April 2019 at paras 83 – 87.

[209] ABI Submission, 5 April 2019 at paras 3.7 – 3.14; See also the *Aged Care Legislation Amendment (Increasing Consumer Choice) Act 2016* (Cth).

[210] Exhibit ASU4 – Stanford Report, September 2019 at para 24; Exhibit UV7 – Witness Statement of Melissa Coad, 16 September 2019 at para 14.

[211] See *National Disability and Insurance Scheme Act 2013* (Cth), s.3(1)(e); Exhibit ABI2 – Witness Statement of Darren Mathewson, 12 July 2019 at para 48; Exhibit UV7 – Witness Statement of Melissa Coad, 16 September 2019 at para 16.

[212] Transcript, 15 October 2019 at PN470-PN474, PN520-PN524; Transcript, 16 October 2019 at PN1554-PN1561.

[213] Exhibit ABI3 – Witness Statement of Jeffrey Wright, 12 July 2019 at paras 22, 24; Exhibit ABI8 – Witness Statement of Wendy Mason, 17 July 2019 at para 37; Exhibit ASU4 – Stanford Report, September 2019 at para 8.

[214] Exhibit ASU4 – Stanford Report, September 2019 at para 8: 'Demand for specific services fluctuates constantly due to changes in the number of clients, their approved budgets, their specific choices of services, and other factors'.

[215] Exhibit ABI7 – Witness Statement of Scott Harvey, 2 July 2019, Attachment A: ConnectAbility's Service Agreement allows participants to cancel with four weeks' notice.

[216] NDS, 'State of the Disability Sector Report 2018', p 20, CB3385.

[217] NDS, 'Australian Disability Workforce Report', February 2018, p 14, CB3329; Exhibit HSU25 – Witness Statement of Fiona Macdonald, 15 February 2019, Attachment FM-2, p 85.

(e) service providers have reduced levels of control in relation to the delivery of services, as individual consumers have more control over the manner in which services are provided to them

(f) there is a greater fragmentation of working patterns,[218] as the employer is now less able to organise the work in a manner that is most efficient to it,[219] and

(g) greater choice and control for consumers has led to greater rostering challenges by reason of:

(i) an increase in cancellations by clients;[220]

(ii) an increase in requests for changes to services by consumers;[221] and

(iii) an increase in requests for services to be delivered by particular support workers,[222]

While the operating environment has changed, the work performed by employees in the sector has not fundamentally changed – they continue to provide similar services as in the past, albeit that the extent and scope of their work have expanded as a consequence of increased funding to the sector.

The NDIS

11. NDIS is a market based, individualised system[223] designed to give participants more choice and control over their daily lives.[224]

12. The implementation of the NDIS is overseen by the NDIA which is an independent statutory agency. As part of its market stewardship role, the NDIA imposes price controls on some supports by limiting the prices that registered providers can charge for those supports and by specifying the circumstances in

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[218] Exhibit ASU4 – Stanford Report, September 2019 at para 8: 'The individualised, market-based system which the NDIS uses to deliver services to participating clients is creating a profound fragmentation and instability in the nature of delivered services'.

[219] Exhibit ABI7 – Witness Statement of Scott Harvey, 2 July 2019 at para 28.

[220] Exhibit ABI6 – Witness Statement of Deb Ryan, 12 July 2019 at para 41.

[221] Exhibit ABI8 – Witness Statement of Wendy Mason, 17 July 2019 at para 34.

[222] Exhibit ABI8 – Witness Statement of Wendy Mason, 17 July 2019 at para 42; Exhibit UV7 – Witness Statement of Melissa Coad, 16 September 2019 at para 26.

[223] Exhibit ASU4 – Stanford Report, September 2019 at para 8; Exhibit HSU25 – Witness Statement of Fiona Macdonald, 15 February 2019, Attachment FM-2, p 85; Natasha Cortis, 'Working under the NDIS: Insights from a survey of employees in disability services' (June 2017), section 1, CB3137; NDS Submission, 16 July 2019 at para 8.

[224] Exhibit NDS1 – Witness Statement of David Moody, 12 July 2019 at paras 11 – 12.

which registered providers can charge participants for supports.[225] These prices are contained in the NDIS PB Support Catalogue 2019-20.[226]

13. The prices and rules contained in the Price Guide are monitored by the NDIA's Pricing Reference Group.[227] The prices are typically updated on an annual basis by way of an Annual Price Review.[228] The Pricing Reference Group helps guide NDIS price regulation activities and decisions.[229]

14. The NDIA uses an Efficient Cost Model to:

    (a) estimate the costs to disability service providers of employing disability support workers to deliver supports through the NDIS,[230] and

    (b) inform its pricing decisions in respect of the supports delivered by disability support workers on which it imposes price limits.[231]

15. The Efficient Cost Model purports to estimate the costs of delivering a billable hour of support taking into account 'all of the costs' associated with every billable hour.[232]

16. In relation to labour costs, the Efficient Cost Model uses the SCHADS Award as 'the foundation' of its assumptions and methodology.[233]

17. The Efficient Cost Model does not contain any specific provision for, or does not account for, a range of actual or contingent costs proscribed by the SCHADS Award which are associated with delivering services. These missing cost items include:[234]

    (a) overtime

    (b) redundancy pay

    (c) paid compassionate leave

    (d) paid community service leave (for jury service)

    (e) the supply of uniforms or payment of a uniform allowance

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[225] NDIS Price Guide 2019-20, 1 October 2019, CB4321.

[226] Exhibit ABI12 – NDIA Support Catalogue, 1 October 2019.

[227] Media Release, 'NDIS price increases for a sustainable and vibrant disability services market', Minister for Families and Social Services and Assistant Minister for Social Services, Housing and Disability Services, 30 March 2019, CB2858.

[228] Ibid, CB2859.

[229] Ibid, CB2859.

[230] NDIA, 'National Disability Insurance Scheme: Efficient Cost Model for Disability Support Workers', June 2019, CB494.

[231] Ibid, CB493.

[232] Ibid, CB494.

[233] Ibid, CB494.

[234] Ibid, CB489.

(f) all other allowances payable under the Award, including:

(i) the laundry allowance

(ii) meal allowances

(iii) the first aid allowance

(iv) the motor vehicle kilometre reimbursement

(v) the telephone allowance

(vi) the heat allowance

(vii) the on-call allowance

(viii) the additional week's annual leave for shift workers, and

(ix) rest breaks during overtime.

18. Additionally, the Efficient Cost Model contains other assumptions that have the effect of further underestimating the true costs of service providers in delivering services under the NDIS. For example:

(a) the Efficient Cost Model does not account for payroll tax[235]

(b) the Efficient Cost Model does not account for over-Award payments under applicable enterprise agreements[236]

(c) the Efficient Cost Model assumes that 80% of the disability support workforce is permanently employed (which witness Mark Farthing described as 'highly inaccurate'[237]), which results in the model underestimating the costs incurred by service providers where their workforce consists of casual employees at a rate of greater than 20% of the overall frontline workforce[238]

(d) the Efficient Cost Model assumes 'utilisation rates' (paid time that is billable compared to overall paid time) of between 87.7% and 92%,[239] which does not provide sufficient allowance for essential non-billable tasks such as administration, handover, training, team meetings, and other non-chargeable tasks,[240] and

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[235] Ibid, CB496.

[236] Ibid, CB494.

[237] Transcript, 15 October 2019 at PN897.

[238] NDIA, 'National Disability Insurance Scheme: Efficient Cost Model for Disability Support Workers', June 2019, CB497; Transcript, 15 October 2019 at PN894-PN900.

[239] NDIA, 'National Disability Insurance Scheme: Efficient Cost Model for Disability Support Workers', June 2019, CB498.

[240] Natasha Cortis, 'Working under the NDIS: Insights from a survey of employees in disability services' (June 2017), CB3156-3157.

(e) the Efficient Cost Model assumes that a support worker is employed in a particular classification for each type of support delivery, but in reality the employee delivering the support may actually be at a higher pay-point.[241]

19. The Efficient Cost Model assumes a margin on other costs of 2%.[242]

20. The NDIA has been aggressive in its price regulation activities in trying to set the absolute minimal cost to control the cost to government of the NDIS as a whole.[243]

21. Employers in the disability services sector have been under significant financial strain since the introduction of the NDIS.[244] By way of example:

(a) there were considerable transitional issues with the rollout of the NDIA due to the size, speed and complexity of the reform[245]

(b) the cost of transitioning to the NDIS and interacting with new systems and processes added to providers' cost bases and affected their financial position[246]

(c) the pricing model has had a negative effect on the sector[247]

(d) as at February 2018, while some providers had profitable operating models, many were struggling[248]

(e) in 2018 providers reported concerns that financial losses will lead to a market failure,[249] and

(f) providers held concerns in 2018 that they would not be able to continue providing services at the current prices.[250]

22. The implementation of the NDIS has led to an increased fragmentation of how work is performed. While some disability support continues to be provided in

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[241] NDIA, 'National Disability Insurance Scheme: Efficient Cost Model for Disability Support Workers', June 2019, CB494.

[242] NDIA, 'National Disability Insurance Scheme: Efficient Cost Model for Disability Support Workers', June 2019, CB499.

[243] *Part-time and Casual Employment Case* at [630].

[244] Exhibit ASU4 – Stanford Report, September 2019 at para 24.

[245] 'National Disability Insurance Scheme (NDIS) Costs: Productivity Commission Position Paper' June 2017, CB1976.

[246] McKinsey & Company 'Independent Pricing Review: National Disability Insurance Agency: Final Report', February 2018, CB1748. See also 'National Disability Insurance Scheme (NDIS) Costs: Productivity Commission Study Report', October 2017, CB3848-3851.

[247] Productivity Commission Study Paper 'National Disability Insurance Scheme (NDIS) Costs', CB3759.

[248] McKinsey & Company, 'Independent Pricing Review: National Disability Insurance Agency: Final Report', February 2018, CB1729.

[249] NDS, 'State of the Disability Sector Report 2018', p 20, CB3395.

[250] NDS, 'State of the Disability Sector Report 2018', p 20, CB3395: 'Fifty-eight per cent of disability service providers agreed or agreed strongly that they were worried they wouldn't be able to provide NDIS services at their current prices'.

settings such as group homes, an increasing amount of work is performed by individual workers in the homes of individual clients, or on an individual or small group basis in community settings.[251]

23. Employers are under greater market pressure than before to accommodate the needs and preferences of clients and this has a flow on effect to how work needs to be organised.[252]

24. The transition to the NDIS has been financially very challenging for some employers.[253]

The Home Care Sector

25. The home care sector is primarily funded by the Commonwealth Government. The Commonwealth Government controls the supply of services and packages, the levels of funding, the regulatory framework, the administrative infrastructure for payment of subsidies and consumer entry and navigation through the system.[254]

26. There are 3 main categories of service or packages in the home care sector. They are as follows:

The Commonwealth Home Support Program (CHSP)

(i) the CHSP commenced in 2015 and provides ongoing or short-term care and support services.[255] The CHSP provides funding to a considerably large number of aged persons, however there is no data retained in relation to the demand for the program,[256] and

(ii) the CHSP relies on grants for funding and, except for recent additional funds being provided to existing providers to increase their services, at no time recently has there been an open round for funding, funding has not been available on an annual basis and there is no clarity as to when funding will be released.[257]

Home Care Packages (HCPs)

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[251] Exhibit NDS2 – Witness Statement of Steven Miller, 28 June 2019, paras 16 – 18.

[252] For example, Transcript, 17 October 2019 at PN2249-2253.

[253] Exhibit ASU4 – Stanford Report, September 2019 at para 24, 51, 53.

[254] Exhibit ABI2 – Witness Statement of Darren Mathewson, 12 July 2019 at para 39.

[255] Exhibit ABI2 – Witness Statement of Darren Mathewson, 12 July 2019 at para 36.

[256] Exhibit ABI2 – Witness Statement of Darren Mathewson, 12 July 2019 at para 41: 'In 2017-18, CHSP provided support to a total of 847,534 aged persons'.

[257] Exhibit ABI2 – Witness Statement of Darren Mathewson, 12 July 2019 at paras 43 – 44.

(i) HCPs were introduced in 2013 to replace several other programs. The introduction of HCPs also saw the introduction of consumer-directed care and individualised funding,[258] and

(ii) CDC has seen a shift in the way that care is provided to participants and the model encourages greater choice on the part of the consumer. Following further reform in 2017, HCPs are now directly allocated to the person requiring the support rather than to providers and with their funding the participant then selects the provider they prefer,[259] and

Veteran Programs

(i) Veterans' Home Care (VHC) provide funding to certain eligible veterans who require assistance to continue to live independently. There is also a DVA Community Nursing Program to enhance the independence of veterans. While the programs hold similarities to the other home care programs, they are funded separately through Department of Veteran Affairs.[260]

27. There has been a decline in the overall performance of home care providers, which is reported as being attributable to increased competition 'caused by the introduction of consumers being able to choose the provider from whom they receive their services'.[261]

28. The home care sector is experiencing changes similar to the NDIS because of consumer-directed care.[262]

[219] We have taken these general findings into account in our consideration of the claims before us.

[220] It is convenient to deal here with 2 final matters concerning our observations in the *September 2019 Decision*.

[221] First at [75] of the *September 2019 Decision* we noted that: 'No employer participant in the NDIS gave evidence in the proceedings regarding the financial impact of the claims before us'.

[222] As ABI points out, that observation was correct at the time but there has since been evidence adduced during the Tranche 2 proceedings from several employer witnesses regarding the financial impact of various proposed claims.

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[258] Exhibit UV7 – Witness Statement of Melissa Coad, 16 September 2019 at para 14.

[259] Exhibit ABI2 – Witness Statement of Darren Mathewson, 12 July 2019 at para 48; Exhibit UV7 – Witness Statement of Melissa Coad, 16 September 2019 at para 25.

[260] Exhibit ABI2 – Witness Statement of Darren Mathewson, 12 July 2019 at para 56.

[261] Aged & Community Services Australia, 'Seventh report on the Funding and Financing of the Aged Care Sector – summation and commentary', July 2019, CB457.

[262] Exhibit ABI2 – Witness Statement of Darren Mathewson, 12 July 2019 at paras 61 – 69.

[223] Second, at [123] – [143] of the *September 2019 Decision* we discussed the relevance of the government funding arrangement.

[224] Ai Group's submission in respect of this issue is encapsulated at paragraph 163 of its written submission of 8 April 2019:

> 'The operation of the NDIS and the constraints it places on employers covered by the Award should, in our respectful submission, form the cornerstone of the Commission's consideration of the impact of the Unions claims on employers. Such a consideration necessarily leads to the inevitable conclusion that employers cannot and should not be saddled with the additional employee entitlements sought by the Unions in these proceedings.' (emphasis added)

[225] We concluded that the proposition advanced by Ai Group overstates the extent to which the NDIS funding arrangements are relevant to the determination of the clause before us. At [136] of the *September 2019 Decision* we said:

> 'We accept that the impact of granting the claims on business and on employment costs is a relevant consideration and weighs against making the variations proposed by the Unions. But we reject the notion that the constraints placed on employers by the NDIS funding arrangements should be given determinative weight.'

[226] At [138] – [143] we said:

> 'The Commission's statutory function is to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net. It is not the Commission's function to make any determination as to the adequacy (or otherwise) of the funding models operating in the sectors covered by the SCHADS Award. The level of funding provided and any consequent impact on service delivery is a product of the political process; not the arbitral task upon which we are engaged.
>
> We recognise that it may take time for a funding arrangement to adapt to a change in circumstances, such as an increase in employment costs occasioned by a variation to the award safety net. Such matters can be addressed by appropriate transitional arrangements.
>
> We would also observe that the approach advocated by Ai Group would result in employees covered by the SCHADS Award effectively subsidising the level of services delivered by the NDIS (and other government funded social services) through lower minimum terms and conditions of employment than warranted by a merits based assessment of the claims before us taking account of *all* of the relevant s.134 considerations. Such a 'subsidy' would operate in circumstances where a significant number of these employees are low paid.
>
> If, as the employer parties suggest, the NDIS pricing arrangements are underpinned by flawed assumptions and do not reflect the practicalities of providing services to participants or adequately compensate providers for their labour costs, this is a matter for Government to address, as the funder of the services. Such factors do not provide justification for a distortion of the Commission's statutory functions in setting the award safety net.
>
> The Commission's statutory function should be applied consistently to all modern award employees, while recognising that the particular circumstances that pertain to particular awards may warrant different outcomes. The fact that a sector receives government funding is not a sound basis for differential treatment. Further, given the gendered nature of employment

in many government funded sectors such differential treatment may have significant adverse gender pay equity consequences.

The impact upon business and employment costs of any proposed variation is one of a number of considerations to be taken into account. In the context of the matters before us we are not persuaded that such considerations should be given determinative weight.'

[227] Ai Group submits:

'In our respectful submission, the reliance by employers in the sector on government funding is a key differentiating factor between employers covered by the Award and employers covered by many other awards. The result is that an increase in employment costs on employers covered by the Award may be more profound than employers covered by other awards who have a greater capacity to recover increased costs by, for example, increasing the fees for their goods or services.

The intervention in the market by the NDIS places a serious limitation on an employer's ability to withstand or absorb increased employment costs. That is, in our submission, a sound basis for differential treatment. To that extent, the finding at paragraph [142] of the decision is, respectfully, challenged by Ai Group.'[263]

[228] We do not propose to depart from our observations in the *September 2019 Decision* in respect of this issue.

5 WORKING ARRANGEMENTS

5.1 OVERVIEW

[229] This section deals with claims in relation to:

- minimum engagement (section 5.2)
- broken shifts (section 5.3)
- travel time (section 5.4)
- variations to rosters (section 5.5)
- remote response/recall to work (section 5.6), and
- client cancellations (section 5.7).

[230] The claims are inter-related and are to do with the scheduling of work in the SCHADS industry.

[231] We deal later with the detail of each claim.

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[263] Ai Group Submission, 10 February 2020 at paras 108 – 109.

[232] The following findings may be made about working arrangements generally in the SCHADS sector:

1. Short shifts or engagements are a very common feature in the home care and disability services sectors.[264] Some employees are engaged for only 30 minutes[265] and in some instances for only 15 minutes.[266]

2. Broken shifts are commonly utilised by employers covered by the SCHADS Award and there is a very high incidence of broken shifts in the home care and disability services sectors.[267]

3. The length of an engagement that forms part of a broken shift can vary from 15 minutes to 7 hours[268] and there is significant variation in the duration of the break period.

4. Most employees are not paid for time spent travelling to and from clients,[269] (which includes travelling between clients[270] and travelling to the first client and from the last client).[271]

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[264] Exhibit ASU4 – Stanford Report, September 2019 at para 11; Exhibit HSU3 – Witness Statement of William Elrick Statement, 14 February 2019 at para 19; Exhibit HSU28 – Witness Statement of Thelma Thames, 15 February 2019 at para 12; Exhibit ABI5 – Witness Statement of Graham Shanahan, 28 June 2019 at para 35; Exhibit ABI6 – Witness Statement of Deborah Ryan, 12 July 2019 at para 64; Exhibit ABI9 – Witness Statement of Joyce Wang, 12 July 2019 at para 56; Exhibit ABI3 – Witness Statement of Jeffrey Wright, 12 July 2019 at para 41; Exhibit ABI8 – Witness Statement of Wendy Mason, 17 July 2019 at para 63.

[265] Exhibit AIG1 – Staff Roster; Exhibit HSU25 – Witness Statement of Fiona Macdonald, 15 February 2019 at Annexure FM-2, p 88; Exhibit HSU3 – Witness Statement of William Elrick, 14 February 2019 at para 19; Exhibit HSU4 – Witness Statement of Heather Waddell, 15 February 2019 at paras 21 - 22; Exhibit HSU28 – Witness Statement of Thelma Thames, 15 February 2019 at para 12; Exhibit HSU31 – Witness Statement of Scott Quinn, 16 December 2019 at para 20; Exhibit UV1 – Witness Statement of Trish Stewart, 17 January 2019 at Annexure B; Exhibit ASU2 – Witness Statement of Robert Steiner, 15 October 2019 at para 15.

[266] Exhibit AIG1 – Staff Roster; Exhibit HSU29 – Witness Statement of Bernie Lobert at para 22; Exhibit UV1 – Witness Statement of Trish Stewart, 17 January 2019 at Annexure B.

[267] Exhibit HSU26 – Witness Statement of Robert Sheehy, 15 February 2019 at para 7; Exhibit HSU5 – Witness Statement of Christopher Friend, 15 February 2019 at para 49; Exhibit HSU30 – Witness Statement of James Eddington, 15 February 2019 at para 23; Exhibit ABI9 – Witness Statement of Joyce Wang, 12 July 2019 at paras 65 – 67; Exhibit ABI3 – Witness Statement of Jeffrey Wright, 12 July 2019 at para 44; Exhibit ABI8 – Witness Statement of Wendy Mason, 17 July 2019 at para 67; Exhibit UV1 – Witness Statement of Trish Stewart, 17 January 2019 at paras 13 -15; Exhibit UV4 – Witness Statement of Deon Fleming, 16 January 2019 at paras 18 - 21.

[268] Exhibit HSU32 – Supplementary Witness Statement of Scott Quinn, 3 October 2019 at para 10; Exhibit UV4 - Witness Statement of Deon Fleming, 16 January 2019 at paras 19 and 21; Exhibit AIG1 – Staff Roster; Exhibit UV1 – Witness Statement of Trish Stewart, 17 January 2019 at para 12 and Annexure B; Exhibit HSU5 – Witness Statement of Christopher Friend, 15 February 2019 at para 47; Exhibit ASU2 – Witness Statement of Robert Steiner, 15 October 2019 at para 15; Transcript, 18 October 2019, cross-examination of Deborah Gaye Ryan at PN3047-PN3048 and PN3052.

[269] Exhibit ASU9 – Witness Statement of Richard Rathbone, 13 February 2019 at para 17; Exhibit ASU7 – Witness Statement of Tracy Kinchin, 24 June 2019 at para 16; Exhibit HSU25 – Witness Statement of Fiona Macdonald, 15 February 2019 at Annexure FM-2 at pp 87; Exhibit HSU5 – Witness Statement of Christopher Friend, 15 February 2019 at para 47; Exhibit HSU4 – Witness Statement of Heather Waddell, 15 February 2019 at para 13; Exhibit HSU28 – Witness Statement of Thelma Thames, 15 February 2019 at para 16; Exhibit HSU29 – Witness Statement of Bernie Lobert, 15 February 2019 at para 15; Exhibit HSU32 – Supplementary Witness Statement of Scott Quinn, 3 October 2019 at para 10; Exhibit UV4 – Witness Statement of Deon Fleming, 16 January 2019 at para 22; Exhibit UV1 – Witness Statement of Trish Stewart, 17 January 2019 at para 16; Exhibit UV2 – Supplementary Witness Statement of Trish Stewart, 1 April 2019 at para 6; Exhibit UV8 – Witness Statement of Jared Marks, 3 October 2019; Exhibit ASU2 – Witness Statement of Robert Steiner, 15 October 2019 at para 14.

5. The combination of unpaid travel time, broken shifts and short engagements 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.[272]

6. Employees report a range of adverse consequences with working broken shifts with short engagements and unpaid travel time, in particular:[273]

- they interfere with the employee's time with family and friends, with their hobbies or with their involvement in the community
- broken shifts and short engagements mean a longer span of hours to make the same money they would make if they were rostered continuously. The span of hours may be 12 hours, but the employee is only paid for 4 to 5 hours work; this can be very tiring
- short engagements are not worth the time and cost involved
- home care employees can be required to travel significant distances, the travel time is unpaid, and it is uneconomical to work, and
- broken shifts can be 'very disruptive'; an employee may 'need to sit around for 2-3 hours waiting for a shift to start that only lasts for 15 minutes'.

[233] In the next 3 sections of our decision (sections 5.2, 5.3 and 5.4) we set out our reasons for deciding to vary the SCHADS Award in the following ways:

1. To introduce a minimum engagement for part-time employees by deleting clause 10.4(c) and inserting a new clause 10.5 to provide the following minimum payment for part-time and casual employees:

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[270] Exhibit HSU4 – Witness Statement of Heather Waddell, 15 February 2019 at para 13.

[271] Exhibit HSU28 – Witness Statement of Thelma Thames, 15 February 2019 at para 16; Transcript, 17 October 2019, cross-examination of Jeffrey Wright at PN2609-PN2611; Transcript, 18 October 2019, cross-examination of Graham Shanahan at PN2890.

[272] Exhibit UV3 - Further Witness Statement of Trish Stewart, 1 October 2019, at para 6; Exhibit UV4 – Witness Statement of Deon Fleming, 16 January 2019 at para 22; Exhibit HSU25 – Witness Statement of Fiona Macdonald, 15 February 2019 at Annexure FM-2, p 88; Transcript, 17 October 2019, cross-examination of James Stanford at PN2274.

[273] Exhibit ASU10 – Witness Statement of Augustino Encabo, 13 February 2019 at para 32; Exhibit ASU9 – Witness Statement of Richard Rathbone, 13 February 2019 at para 16; Exhibit HSU29 – Witness Statement of Bernie Lobert, 15 February 2019 at paras 13 – 15; Exhibit HSU5 – Witness Statement of Christopher Friend, 15 February 2019 at paras 44 – 48 and 57 – 58; Exhibit HSU4 – Witness Statement of Heather Waddell, 15 February 2019 at paras 21 – 22 and 24 – 25; Exhibit HSU30 – Witness Statement of James Eddington, 15 February 2019 at paras 21 – 22, 30 – 32, 35, 37 – 38; Exhibit HSU26 – Witness Statement of Robert Sheehy, 15 February 2019 at paras 7 – 9; Exhibit HSU31 – Witness Statement of Scott Quinn, 3 October 2019 at paras 20, 27, 39, 40 – 43; Exhibit HSU3 – Witness Statement of William Elrick Statement, 14 February 2019 at paras 19 and 21 – 23; Exhibit UV4 – Witness Statement of Deon Fleming, 16 January 2019 at paras 18 – 24; Exhibit UV1 – Witness Statement of Trish Stewart, 17 January 2019 at paras 12 and 15 – 17.

- social and community service employees (except when undertaking disability work) – 3 hours' pay, and

- all other employees – 2 hours' pay.

2. To vary clause 25.6 to:

- define a broken shift as a shift consisting of 2 separate periods of work with a single unpaid 'break' (other than a meal break)

- clarify how this interacts with the new minimum payment clause, and

- to accommodate the occasional need for a broken shift to involve more than 1 unpaid break subject to:

(i) a maximum of 2 'breaks' in the shift

(ii) the agreement of the employee, and

(iii) an additional payment.

[234] We also express the following *provisional* views:

1. The additional remuneration for working a broken shift under clause 25.6 of the SCHADS Award should be an allowance calculated as a percentage of the standard weekly rate.

2. An employee working a '1 break' broken shift under clause 25.6 should receive a broken shift allowance of 1.7% of the standard rate, per broken shift ($17.10 per broken shift).

3. The broken shift allowance payable for a 2 break broken shift should be set at 2.5% of the standard rate ($25.15 per broken shift).

4. An employee who is a day worker performing work outside of the ordinary span of hours (including as part of a period of work in a broken shift) is entitled to overtime for such work.

[235] In section 5.5 we express the view that there is merit in varying clause 25.5(d) to permit the variation of a roster by mutual agreement in circumstances where the variation is proposed by an employee to accommodate an agreed shift swap with another employee.

[236] In section 5.6 we note that there is broad support from most of the employer interests and the Unions for the introduction of a term in the SCHADS Award dealing with 'remote response' work, or work performed by employees outside of their normal working hours and away from their working location.

[237] We agree that it is necessary to introduce an award term dealing with remote response work and make the following general observations about such a term:

1. A shorter minimum payment should apply in circumstances where the employee is being paid an 'on call' allowance.

2. There is merit in ensuring that each discrete activity (such as a phone call) does not automatically trigger a separate minimum payment.

3. A definition of 'remote response work' or 'remote response duties' should be inserted into the Award. We note that ABI proposes the following definition:

   'In this award, remote response duties means the performance of the following activities:

   (a) Responding to phone calls, messages or emails;

   (b) Providing advice ("phone fixes");

   (c) Arranging call out/rosters of other employees; and

   (d) Remotely monitoring and/or addressing issues by remote telephone and/or computer access.'[274]

4. The clause should include a mechanism for ensuring that the time spent by an employee working remotely is recorded and communicated to their employer.

[238] We express the *provisional* view that the minimum payment for remote response work performed between 6.00am and 10.00pm should be 30 minutes and the minimum payment between 10.00pm and 6.00am should be 1 hour. However, we note that there is an inter-relationship between the minimum payment period and the rate of payment.

[239] We also note that the rate of pay applicable to remote response work (as opposed to the minimum payment) is problematic.

[240] Finally, in section 5.7 we decide to vary the SCHADS Award in the manner proposed by ABI subject to 2 amendments:

(i) our *provisional* view that proposed clause 25.5(f)(v) be amended, and

(ii) amending clause 25.5(f)(vii)(B) to delete '3 months' and insert '6 weeks'.

[241] We also note that ABI is to consider the 'double dipping' point.

5.2 MINIMUM ENGAGEMENT CLAIM

[242] Minimum engagement terms in modern awards specify the minimum time of each engagement or shift and hence the minimum payment to which an employee is entitled for each engagement or shift worked. The HSU seeks to amend the SCHADS Award to introduce a uniform minimum 3 hour engagement for all classes of employees.

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[274] ABI Submission, 10 February 2020 at p 58.

[243] As an initial observation, we note that while this type of award clause is commonly described as a minimum *engagement* term, the existing SCHADS Award clause and our proposed clause operate as a minimum *payment* term, which requires employers to pay employees for the specified minimum number of hours in certain circumstances. However, given the nature of the parties' proposals and submissions in this matter, for convenience the expression 'minimum engagement' (term or period) is generally used throughout this decision.

[244] It is convenient to deal first with the rationale for minimum engagement terms, relevant award history and some other general matters, before turning to the HSU's claim.

5.2.1 The Rationale for Minimum Engagement Terms

[245] After a review of the relevant authorities the *Part-time and Casual Employment Case* the Full Bench observed that the rationale for minimum engagement terms in modern awards was to ensure that:

> 'the employee receives a sufficient amount of work, and income, for each attendance at the workplace to justify the expense and inconvenience associated with that attendance by way of transport time and cost, work clothing expenses, childcare expenses and the like. An employment arrangement may become exploitative if the income provided for the employee's labour is, because of very short engagement periods, rendered negligible by the time and cost required to attend the employment. Minimum engagement periods are also important in respect of the incentives for persons to enter the labour market to take advantage of casual and part-time employment opportunities (and thus engage the consideration in paragraph (c) of the modern awards objective in s.134.'[275]

[246] As we said in the *Aged Care Substantive Claims Decision*,[276] the short point made in the relevant authorities is that minimum engagement terms protect employees from exploitation by ensuring that they receive a minimum payment for each attendance at their workplace to justify the cost and inconvenience of each such attendance.

[247] We also note the observation of the *Casual and Part-time Employment* Full Bench that there are a number of 'important countervailing considerations' that need to be considered in establishing award minimum engagement requirements, namely:[277]

- longer minimum engagement periods may prejudice those persons who wish to and can only work for short periods of time because of family, study or other commitments, or because they have a disability

- the need for and length of a minimum engagement period may vary from industry to industry, having regard to differences such as in rostering practices and whether there are broken shifts

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[275] *Part-time and Casual Employment Case* at [399].

[276] *Aged Care Substantive Claims Decision* at [186].

[277] *Part-time and Casual Employment Case* at [403].

- an excessive minimum engagement period may cause employers to determine that it is not commercially viable to offer casual engagements or part-time work, which may prejudice those who desire or need such work, and

- a minimum daily engagement period for part-time employees might not need to be as long as for casual employees, because part-time employees are likely to enjoy the greater security of a guaranteed number of weekly hours of work.

[248] A number of the employer organisations drew our attention to these 'countervailing considerations' in support of their respective positions.

5.2.2 Award History

[249] The employer parties highlight 2 decisions in relation to the SCHADS Award which are said to support the submissions they advance.

A Award modernisation

[250] The issue of minimum engagement periods did not receive any systematic consideration during the award modernisation process, which largely preserved the predominant provisions concerning minimum engagements contained in pre-reform awards.[278] As explained by the Full Bench in *Victorian Employers' Chamber of Commerce and Industry*:[279]

> 'The Award Modernisation Full Bench of the Australian Industrial Relations Commission (**AIRC**) did not address the question of minimum engagements in any of its decisions and statements made in connection with the award modernisation process. This is because minimum engagements did not emerge as a significant issue during that process.'

[251] The issue of minimum engagement was given some, albeit limited, consideration in the award modernisation proceedings relating to the making of the SCHADS Award.

[252] The Exposure Draft published by the Commission on 25 September 2009 contained a 3 hour minimum engagement for casual employees, and no minimum engagement for the other categories of employment.[280] A few of the employer parties then made submissions objecting to the proposed 3 hour minimum engagement, particularly in relation to the home care and disability sectors. The issue of minimum engagements for casual employees was also the subject of oral submissions during a Full Bench hearing on 5 November 2009, but no evidence was led in relation to the issue.

[253] In the decision to make the SCHADS Award the Award Modernisation Full Bench dealt with the minimum engagement provisions for casual employees, at [83] as follows:

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[278] See generally *Victorian Employers' Chamber of Commerce and Industry* [2012] FWAFB 6913.

[279] [2012] FWAFB 6913 at [12].

[280] See 10.4(c) of the Exposure Draft, published 25 September 2009.

> 'The minimum period of engagement for casuals has been altered to take into account the different sectors of this industry...'[281]

[254] In the present proceedings ABI and some of the other employer parties contended that the reasons which were advanced by employer parties during the award modernisation process, in support of short minimum engagement periods, remain relevant today, if not more so following the implementation of consumer-directed care reforms. ABI relies on the matters raised in those submissions and submits that there is no proper basis to depart from the conclusions reached by the Full Bench when the SCHADS Award was made.[282]

[255] In conducting the Review, the Commission takes account of previous decisions relevant to any contested issue. The extent of the evidence and submissions put in the previous proceedings are relevant in considering the weight to accord that decision.

[256] Contrary to ABI's submission we are not persuaded that the issue of minimum engagements received 'considerable focus during the making of the Award'.[283] No evidence was adduced in those proceedings and the Full Bench's reasons for the decision are somewhat perfunctory and tend to suggest that the issue was not the subject of detailed consideration, much less a merits-based review.

B The Transitional Review

[257] The issue of minimum engagements for part-time employees was the subject of some consideration during the Transitional Review.

[258] The Transitional Review commenced in early 2012. A previous Full Bench concluded that the Transitional Review was separate, and narrower in scope, than the 4 yearly review of modern awards:

> 'To summarise, we reject the proposition that the [Transitional] Review involves a fresh assessment of modern awards unencumbered by previous Tribunal authority. It seems to us that the Review is intended to be narrower in scope than the 4 yearly reviews provided in s.156 of the FW Act.'[284]

[259] In short, the Transitional Review was dealing with a system in transition, it was a 'one off' process required by the transitional provisions and conducted a relatively short time after the completion of the award modernisation process. The fact that the transition to modern awards was taking place at the time of the Transitional Review militated against the adoption of broad changes to modern awards as part of that review.

[260] In the Transitional Review, the ASU sought the introduction of a 3 hour minimum engagement for part-time employees across all streams of the SCHADS Award, submitting that the absence of a minimum engagement period for part-time employees was at odds with

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[281] [2009] AIRCFB 945.

[282] ABI Submission, 12 July 2019 at paras 6.27 - 6.28.

[283] ABI Submission, 12 July 2019 at para 6.30.

[284] *Modern Awards Review 2012* [2012] FWAFB 5600 at [99].

both the 'critical mass' of relevant pre-reform awards as well as the position provided for other employees under the SCHADS Award.

[261] Vice President Watson dismissed the application and relevantly held that:

> 'It is clear that in common with many other awards, the AIRC deliberately did not insert a minimum engagement period for part-timers in this award. It was obviously influenced by the variable position under predecessor awards. In my view the introduction of a minimum engagement period for part-time employees as part of this review would require a strong case that evaluated the impacts on employees and employers across the various sectors covered by the award. The application fails to meet this standard.'[285]

[262] While the Vice President rejected the application for minimum engagements for part-time employees he did grant the ASU's claim for the insertion of what is now clause 10.3(c) of the SCHADS Award. Clause 10.3(c) imposes an obligation on employers to agree with part-time employees in writing on an agreed pattern of work (including number of hours to be worked, the days on which work is to be performed, and the starting and finishing times on each day) which can then only be varied by written agreement. In granting that variation, the Vice President had regard to the absence of minimum engagement provisions as a factor leading to his decision:

> 'That part of the application seeking a requirement that part-time arrangements be agreed in writing prior to commencing employment is a common award provision. It requires employees to be given clear information as to the basis of their employment when they are engaged. I consider that the case for such a clause is strong, especially when there is no award minimum engagement period. In my view the concerns of the employers can be allayed by standard procedures that comply with the clause, such as those that have been developed for employers covered by similar provisions in other awards. I will make this change prospective to allow employers to prepare for the change. If significant practical problems emerge an appropriate variation can be sought. I will insert the clause sought by the ASU with effect from 1 August 2013.'[286] (emphasis added)

[263] ABI submits that it follows from the Vice President's reasons that if a minimum engagement for part-time employees were to be inserted into the SCHADS Award because of the present proceeding then the case for maintaining clause 10.3(c) is weakened, and should be reconsidered:

> 'In our submission, any proposal to introduce a minimum engagement for part-time employees should not occur without a contemporaneous review and reconsideration of clause 10.3(c).'[287]

[264] We deal with this point later but note here that the context in which this decision was made reduces the weight we attach to it.

[265] Many of the applications made as part of the Transitional Review involved matters expressly dealt with by the Commission in the award modernisation process; the ASU's application was a case in point. In those circumstances the need to advance probative

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[285] *Australian Municipal, Administrative, Clerical and Services Union* [2013] FWC 4141 at [19].

[286] *Australian Municipal, Administrative, Clerical and Services Union* [2013] FWC 4141 at [20].

[287] ABI Submission, 12 July 2019 at para 6.40.

evidence in support of an application to vary a modern award was particularly important as the Transitional Review did not involve a fresh assessment of modern awards unencumbered by previous Tribunal decisions. As a previous Full Bench has observed:

> '… the Tribunal is unlikely to revisit issues considered as part of the Part 10A award modernisation process unless there are cogent reasons for doing so, such as a significant change in circumstances which warrants a different outcome.'[288]

[266] The ASU's Transitional Review application was not supported by probative evidence; it was little more than an attempt to revisit the Award Modernisation Full Bench's consideration of the issue. The decision rejecting the ASU application is of little present relevance.

C Part-time and Casual Employment Common Issue Proceedings

[267] Modern awards contain a range of different minimum engagement (payment) periods for casual and part-time employees. In the *Part-time and Casual Employment Common Issue Proceedings*, the ACTU sought to replace the current disparate arrangements with a uniform standard of a 4 hour minimum engagement for all part-time and casual employees. The *Part-time and Casual Employment* Full Bench rejected the ACTU claim, reasoning that:

> '[406] … while the evidence might call for the review of minimum engagement periods in some particular awards, it did not go so far as to demonstrate that any daily engagement of a casual or part-time employee below 4 hours was necessarily unfair and exploitative, which is what we think would be needed to justify the establishment of a 4 hour minimum engagement standard across all awards. Additionally we do not consider that a case has been made out for the daily minimum engagement of casual employees and part-time employees to be aligned in all cases, since in most modern awards part-time employment operates on the basis of a minimum weekly guarantee of hours, with the pattern of working hours established at the commencement of the employment and thereafter not able to be changed other than by agreement. For that reason, the circumstances of part-time employees are distinct in terms of income security from those of casual employees.
>
> [407] While a 4 hour minimum daily engagement might under some awards represent an appropriate balancing of the competing considerations to which have earlier referred, we do not consider that it can be adopted on the across-the-board basis proposed by the ACTU. That would not in all awards meet the modern awards objective in s.134, because we consider that it might have the counter-productive result of reducing workforce participation and social inclusion, and also because under some awards it may inhibit flexible modern work practices and the efficient and productive performance of work.'[289]

[268] However, the Full Bench did consider that it was necessary for modern awards to contain some form of minimum engagement period for casual employees 'in order to avoid their exploitation in order to meet the modern awards objective'.[290]

[269] In its decision of 5 July 2017, the *Part-time and Casual Employment* Full Bench expressed the *provisional* view that 34 modern awards, which at that time contained no

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[288] *Modern Awards Review 2012* [2012] FWAFB 5600 at [99].

[289] *Part-time and Casual Employment Case* at [406] – [407].

[290] *Part-time and Casual Employment Case* at [408].

minimum engagement period at all, should be varied to include a 2 hour minimum engagement period for casuals. Some 29 modern awards were ultimately varied to provide a 2 hour minimum engagement period for casuals.

[270] The *Part-Time and Casual Employment* Full Bench also dealt with a claim by ABI to vary the part-time employment provision in the SCHADS Award to allow greater flexibility in the way in which the hours of work for part-time employees are fixed.

[271] ABI's claim, in its final amended form, was for clause 10.3 to read as follows:

> '**10.3 Part-time employment**
>
> (a) A part-time employee is one who is engaged to work less than 38 hours per week or an average of less than 38 hours per week and who has reasonably predictable hours of work.
>
> (b) The terms of this award will apply to part-time employees on a pro rata basis on the basis that the ordinary weekly hours of work for full-time employees are 38.
>
> (c) Subject to clause 10.3(d), before commencing employment, the employer and the employee will agree in writing on the regular pattern of work including the number of hours to be worked each week, the days of the week the employee will work and the starting and finishing times each day. Any agreed variation to the regular pattern of work will be recorded in writing.
>
> (d) Despite anything else in this clause 10.3, an employer and an employee may agree not to fix the employee's hours of work if the employee is engaged to provide supports to clients in circumstances where the client has discretion to vary when the support is provided. In these circumstances:
>
> (i) before commencing employment the employer and the employee will agree in writing on:
>
> (A) the number of hours to be worked each week (or the average number of hours); and
>
> (B) the days and/or times of the week that the employee is not available to work (if any);
>
> (ii) the employee's hours will be set by the employer in accordance with clause 25.5, save that the employee will not be required to work on those days or at those times referred to in clause 10.3(d)(i)(B).
>
> (iii) Any agreed variation to the employee's availability or to the number of hours to be worked must be recorded in writing.'[291]

[272] ABI's proposed variation, in its final iteration, was only directed at those aspects of disability services which were said to be subject to client control and thus where the employer had least control over the hours required to be worked. In respect of part-time employees in that area, ABI proposed an employment model whereby actual working hours were not

[291] *Part-time and Casual Employment Case* at [558].

determined by agreement at the outset of the employment and were thereafter only alterable by agreement, but rather that the employer would have the ability to roster those hours in accordance with clause 25.5 subject to it providing an agreed guaranteed number of weekly hours and such working hours being rostered at periods when the employee had agreed to be available to work.

[273] ABI's case was advanced on the basis that the circumstances attending the development and implementation of the NDIS meant that the current part-time employment provision in the SCHADS Award no longer met the modern awards objective and required alteration to do so.

[274] ABI's claim was opposed by the HSU, ASU and the UWU.

[275] ABI's claim was rejected, but the Full Bench concluded that there was merit in clarifying that an agreed part-time work arrangement does not necessarily have to provide for the same guaranteed number of hours in each week.[292] Clause 10 was subsequently amended to insert sub clause 10.3(d)[293], which provides:

> '(d) The agreed regular pattern of work does not necessarily have to provide for the same guaranteed number of hours in each week.'

[276] The *Casual and Part-time Employment* Full Bench rejected ABI's claim because it was not satisfied that the variation proposed was necessary to achieve the modern awards objective and, in particular, for the reasons set out at [636] – [641] of the decision of 5 July 2017. The absence of any requirement for a part-time employee to be engaged for a minimum number of hours per week was one of the reasons given by the Full Bench for that conclusion:

> '[559] ABI's proposed variation, in its final iteration, was only directed at those aspects of disability service provision which were said to be subject to client control and thus where the employer had least control over the hours required to be worked. In respect of part-time employees in that area, its variation proposed an employment model whereby actual working hours were not determined by agreement at the outset of the employment and were thereafter only alterable by agreement, but rather that the employer would have the ability to roster those hours in accordance with clause 25.5 subject to it providing an agreed guaranteed number of weekly hours and such working hours being rostered at periods when the employee was agreed to be available to work.
>
> …
>
> [638] Most importantly, the SCHCDSI Award does not contain any requirement for a minimum number of hours' work per week, nor (unlike the current provisions in the Hospitality Awards) does it provide for any minimum hours per day. This latter aspect of the award was emphasised by Vice President Watson in his 2013 decision which added the current clause 10.3(c), in the passage we have earlier set out. That means that the agreed pattern of hours for a part-time employee can encompass short periods of service, which a number of the employer witnesses envisaged would be an increasingly common feature of the NDIS service model. In this respect, part-time employment is more flexible than casual employment under the SCHCDSI Award, since clause 10.4(c) provides, in effect, that disability services workers

[292] *Part-time and Casual Employment Case* at [641].

[293] PR598488.

> are to be paid a one hour minimum when performing home care work and a 2 hour minimum for other types of work.'[294]

[277] In the present matter a few of the employer parties relied on the above extract in opposing the introduction of a minimum engagement term for part-time employees. As Ai Group put it:

> 'The interrelationship between the various Award provisions and the need to ensure that the requisite flexibility to engage employees to work shorter shifts due to the NDIS service model is reflected in the above passage. Indeed we consider that the introduction of a minimum engagement period for part-time employees may call into question the need for other Award variations that improve an employer's ability to engage part-time employees with sufficient flexibility to satisfy their clients' needs.'[295]

[278] Similarly, AFEI submits:

> 'The history of the Award demonstrates that the absence of a part-time minimum engagement period has been treated as a flexibility to employers which balances other restrictions on parttime employment, particularly those in clause 10.3(c) of the Award.
>
> The absence of a part-time minimum engagement period is thus an important feature of the Award's safety-net and should not be disturbed without flexibility gains for employers. To do so would result in a safety net which is not fair to employers. As flexibility gains for employers are not part of the HSU proposed variation, the claim should be rejected.'[296]

[279] We deal with these submissions later.

[280] We accept that the *Part-time and Casual Employment Case* is relevant to the present matter but, as that decision makes clear, and as acknowledged by ABI,[297] ultimately the task of considering minimum engagements in a modern award needs to be undertaken having regard to the particular characteristics of the industry covered by the award. And that is what we have done.

5.2.3 Other General Matters

[281] There are 2 further general matters before we turn to the submissions and evidence in relation to the HSU's claim.

A Minimum engagements and broken shifts: the Aged Care Substantive Claims Decision

[282] The issue of minimum engagements in the context of broken shifts received some recent consideration in our *Aged Care Substantive Claims Decision*.[298] In those proceedings the HSU sought to vary clause 22.8 of the *Aged Care Award 2010* (the *Aged Care Award*) to

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[294] *Part-time and Casual Employment Case* at [559] and [638].

[295] Ai Group Submission, 13 July 2019 at para 178.

[296] AFEI Submission, 23 July 2019 at paras 74 – 75.

[297] ABI Submission, 12 July 2019 at para 6.15.

[298] *Aged Care Substantive Claims Decision*.

ensure that the minimum engagement requirement in clause 27.7(b) applied to each part of the broken shift, as follows:

> '**22.8 Broken shifts**
>
> With respect to broken shifts:
>
> (a) Broken shift for the purposes of this clause means a shift worked by a casual or permanent part-time employee that includes breaks (other than a meal break) totalling not more than four hours and where the span of hours is not more than 12 hours.
>
> (b) A broken shift may be worked where there is mutual agreement between the employer and employee to work the broken shift.
>
> (c) Payment for a broken shift will be at ordinary pay with penalty rates and shift allowances in accordance with clauses 25—Overtime penalty rates and 26– Shiftwork, with shift allowances being determined by the commencing time of the broken shift.
>
> (d) All work performed beyond the maximum span of 12 hours for a broken shift will be paid at double time.
>
> (e) An employee must receive a minimum break of 10 hours between broken shifts rostered on successive days.
>
> (f) Each portion of the shift must meet the minimum engagement requirements in 22.7(b).'[299] (emphasis added)

[283] It is also relevant that Clause 22.7(b) of the *Aged Care Award* provides:

> '**22.7 Minimum engagements**
>
> … (b) Permanent part-time and casual employees will receive a minimum payment of two hours for each engagement.'

[284] The HSU's proposed variation would mean that casual and part-time employees working a broken shift must receive a minimum payment of 2 hours for each portion of the broken shift.

[285] We decided to vary the *Aged Care Award* in the manner proposed by the HSU for the following reasons:

> '[187] The interpretation of clause 22.8 advanced by ABI and AFEI would allow a casual or part-time employee to be engaged to perform work on two or more occasions in a day and an engagement may be for less than an hour. Indeed there would be no minimum duration for an individual engagement provided the sum of the engagements (or broken shifts) on a particular day exceed 2 hours in total. It seems to us that such an outcome is antithetical to the purpose of a minimum engagement term, such as clause 22.7 in the Aged Care Award.

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[299] AM2018/13 – *4 yearly review of modern awards – Award stage – Group 4 – Aged Care Award 2010 – Substantive claims,* HSU Submission, 23 January 2019 at para 11.

[188] We note that ABI (and AFEI) point to a number of what are said to be 'safeguards' in relation to the use of broken shift, namely:

1. Broken shifts can only be worked by casual and permanent part-time employees.

2. A broken shift can only be worked where the employee agrees to work the broken shift.

3. The breaks within a broken shift cannot total more than four hours.

4. The span of hours of a broken shift cannot exceed 12 hours.

5. Part-time employees have the certainty of their pattern of work having been agreed in advance (in writing), including the number of hours to be worked each week, the days of the week to be worked, and the starting and finishing times of each day.

6. The existing minimum engagement provisions ensure that employees receive a minimum payment of two hours' pay when working a broken shift.

[189] We are not persuaded these 'safeguards' are adequate and nor do we consider that in its current form, clause 22.8 is a fair and relevant safety net term. The fact that broken shifts can only be worked by 'mutual agreement' does not provide sufficient protection, particularly for casual employees.

[190] It is relevant to note that the Full Bench in the *2017 Casual and Part-time Employment decision* considered (and rejected) an Ai Group proposal to vary the *Fast Food Industry Award 2010* to allow an employer and a casual employee to agree on an engagement of less than the 3 hour minimum provided in clause 13.4 of that award. In rejecting the claim the Full Bench said:

> 'The actual award variation advanced by the Ai Group may be criticised in the same way as the NRA proposal was criticised by Vice President Watson in his 2010 decision – namely that it "does not address the balance that is required with award provisions of this type to provide reasonable safeguards for employees against unfair engagement practices". The general concept of casual employees agreeing to reduced minimum engagement periods is itself problematic, since the continued engagement of casuals at all is dependent upon them agreeing to the terms of each engagement (subject only to any applicable award obligations binding on the employer). Ai Group's proposed provision does not require any minimum engagement period to be agreed in substitution for the standard 3 hour period at all, meaning that it would facilitate the complete removal of minimum engagement periods and thus open the door to the exploitation of casual employees.'

[191] Later in that decision, the Full Bench rejected the proposition that provisions which allow employees, voluntarily and at their initiative, to work additional hours at ordinary rates would represent a tangible benefit for employees, noting that:

> 'Where a casual is engaged on a daily basis, the employer has the capacity under any facilitative provision, to dictate the terms of engagement, so that any employee who did not volunteer in writing to work additional hours at ordinary time rates would not be engaged.'

> [192] Further, in the *Modern Awards Review 2012 – Award Flexibility Decision* the Full Bench rejected applications which sought to include minimum engagement periods within the scope of the model flexibility term:
>
> > 'We are not persuaded that it is appropriate to include 'minimum engagement periods' within the scope of the model flexibility term. As we have noted these provisions relate to minimum wages and for many employees are an important aspect of the modern award safety net. As Vice President Watson observed in Secondary School Students case:
> >
> > > "There is a long history of minimum engagement periods for part time and casual employees providing protection for employees from employer expectations of working short periods where the cost and inconvenience of attending the workplace outweighs the benefits received from the engagement."
> >
> > Any variation to minimum engagement periods in modern awards should only be by application to vary the relevant modern award or by enterprise agreement. This will ensure that the variation is subject to appropriate scrutiny. It is not appropriate to permit such variations by IFAs, which are effectively self-executing. In our view, the inclusion of such terms within the scope of the model flexibility term would not be consistent with the modern awards objective.'
>
> [193] To the extent that clause 22.8 permits casual and part-time employees to be engaged (and paid for) for a portion of a broken shift which is less than 2 hours it does not provide a fair safety net.'[300] (footnotes omitted)

B Neutrality of treatment

[286] The second general matter concerns our adoption of the principle of 'neutrality of treatment' in the *September 2019 Decision* as part of our rationale for varying the SCHADS Award to ensure that casual employees receive the casual loading *in addition to* the rates for Saturday and Sunday work, and for working on public holidays. In support of that variation the Unions had relied on passages from the *Penalty Rates Case*[301] and the discussion in that case of the 'default approach' adopted by the Productivity Commission (the PC) in the *Productivity Commission Inquiry Report: Workplace Relations Framework* (the PC Final Report).

[287] The PC Final Report was published on 30 November 2015 following an inquiry into the 'Workplace Relations Framework' arising from a request made by the Commonwealth Government pursuant to Parts 2 and 3 of the *Productivity Commission Act 1998* (Cth).[302] Weekend penalty rates are considered in Chapters 10, 13, 14, 15 and Appendix F of the PC Final Report. The consideration of penalty rates in the PC Final Report was limited to penalty rates that apply to the hospitality, entertainment, retail, restaurant and café industries, referred to as the HERRC industries in the PC Final Report.

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[300] *Aged Care Substantive Claims Decision* at [187] – [193].

[301] *Penalty Rates Case* at [338].

[302] Productivity Commission, *Productivity Commission Inquiry Report: Workplace Relations Framework*, p v ('PC Final Report').

[288] In relation to weekend penalty rates the central recommendation in the PC Final Report (Recommendation 15.1) was that the Commission should, as part of the Review:

- set Sunday penalty rates that are not part of overtime or shiftwork at the higher rate of 125% and the existing Saturday award rate for permanent employees in the HERRC industries

- set weekend penalty rates to achieve greater consistency between the HERRC industries, but without the expectation of a single rate across all of them, and

- investigate whether weekend penalty rates for casuals in the HERRC industries should be set so that casual penalty rates on weekends would be the sum of the casual loading and the revised penalty rates applying to permanent employees, with the principle being that there should be a clear rationale for departing from this.[303]

[289] The third dot point is of present relevance.

[290] At Appendix F.3 of the PC Final Report, the PC notes that there are 3 basic models for calculating penalty rates for casuals and concludes that the 'default approach' is 'the optimal approach'.[304] Under the default method the casual loading is added to the penalty rate applying to a permanent employee.

[291] In essence the default approach calculates the penalty wage rate for casuals as:

$$\text{Penalty wage} = \text{Base wage} \times \frac{(\text{casual loading} + \text{Penalty rate})}{100}$$

[292] The PC's rationale for the adoption of the 'default approach' as the 'optimal approach' is explained at page 496 of the PC Final Report:

> 'The conflation of the casual loading and the premium rate for weekend work can hide the anomalous treatment of weekend rates for casuals in some awards. In principle, a wage system should not favour the employment of a person with identical competencies over another, yet this occurs in some awards for weekend work …
>
> For neutrality of treatment, the casual loading should be *added* to the penalty rate of a permanent employee when calculating the premium rate of pay over the basic wage rate for weekend work. This would make an employer indifferent, at the margin, between hiring a permanent employee over a casual employee…
>
> Achieving neutrality would require that penalty rates for casual employees would rise on Saturday's for some awards.'[305]

[293] The *Penalty Rates Case* expressed 'a preference' for the PC's 'default approach' and went on to apply the default approach in varying the Sunday penalty rates in Hospitality[306],

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[303] PC Final Report, p 497.

[304] PC Final Report, p 1125.

[305] PC Final Report, p 496.

[306] *Penalty Rates Case* at [887] – [897].

Retail[307] and Pharmacy Awards[308]; the weekend penalty rates in the Fast Food Award[309] and the public holiday penalty rates in the Hospitality and Retail Awards. The Full Bench in the *General Retail Industry Award Case*[310] applied that approach and increased the penalty rates for casuals working evenings (Monday to Friday) and on Saturdays. As mentioned earlier, the 'default approach' is explained at Appendix F.3 of the PC Final Report.

[294] As we noted in the *Aged Care Substantive Claims Decision*, the principle of neutrality of treatment which underpins the PC's default approach had also been adopted by the Australian Industrial Relations Commission (AIRC) (a predecessor tribunal to the Commission) in considering the appropriate quantum of the casual loading. In the *Metals Casual Decision*[311] an AIRC Full Bench increased the casual loading in the *Metal Engineering and Associated Industries Award 1998 – Part 1*, an antecedent of the *Manufacturing and Associated Industries and Occupations Award 2010*, from 20% to 25%, and in so doing made the following observation:

> 'We have sought in our detailed reasoning in this case to develop a rationale about casual employment and its particular incidents that may be capable of application, with such changes as are necessary to other types of employment. In setting each condition we have given weight to the desirability of *not* producing different standards or reflecting preference for one type of employment over another.'[312] (emphasis added)

[295] The approach adopted by the AIRC Full Bench is even more apparent in the following extract, earlier in the same decision:

> 'The Commonwealth submitted that the loading should be so calculated as to make the choice between casual and "permanent" employees broadly cost neutral … we consider that the proposition does crystallise what should be an important objective in calculating and fixing the loading. A logical and proper consequence of providing for casual employment with the incidents currently attached to it is that, so far as the award provides, it should not be a cheaper form of labour, nor should it be made more expensive than the main counterpart types of employment.'[313]

[296] In the *September 2019 Decision*[314] we endorsed the following conclusion from the *Aged Care Substantive Claims Decision*:

> 'In our view the principle of neutrality of treatment, which underpins the PC's 'default approach' and informed the *Metals Casual Decision*, is a sound industrial principle and, absent some compelling countervailing consideration, should generally be applied.'[315]

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[307] *Penalty Rates Case* at [1704] – [1715].

[308] *Penalty Rates Case* at [1878] – [1883].

[309] *Penalty Rates Case* at [2034] – [2035].

[310] *4 yearly review of modern awards – General Retail Industry Award 2010* [2018] FWCFB 5897.

[311] *Re Metal, Engineering & Associated Industries Award* (2000) 110 IR 247 ('*Metals Casual Case*').

[312] *Metals Casual Case* at [200].

[313] *Metals Casual Case* at [157].

[314] *September 2019 Decision* at [152].

[315] *Aged Care Substantive Claims Decision* at [137].

[297] The principle of neutrality of treatment and the concomitant proposition that modern award terms should not be set such as to reflect a preference for one type of employment over another, supports the consistent application of minimum engagement terms to casual *and* part-time employees.

[298] We now turn to the claim before us.

5.2.4 The Claim

[299] At present the SCHADS Award includes a minimum engagement term for casual employees only and the minimum engagement period is dependent upon the type of work performed. Clause 10.4(c) provides as follows:

> '(c) Casual employees will be paid the following minimum number of hours, at the appropriate rate, for each engagement:
>
> (i) social and community services employees except when undertaking disability services work–3 hours;
>
> (ii) home care employees–1 hour; or
>
> (iii) all other employees–2 hours.'

[300] As we have mentioned, HSU seeks to introduce a uniform 3-hour minimum engagement for all classes of employee: full-time, part-time and casual. In particular, the HSU seeks to delete clause 10.4(c) and insert a new clause 10.6 as follows:

> 'The minimum engagement for employees under this award will be 3 hours.'

5.2.5 The Submissions

[301] The submissions and witness evidence relevant to the HSU's minimum engagement claim are set out at **Attachment C**.

[302] The HSU submits that the absence of appropriate minimum engagement terms means that the SCHADS Award does not provide a fair and relevant minimum safety net:

> 'It is striking (and counter-intuitive)… that the least protection by way of minima in respect of casual employees, applies to home care and disability support workers, about whom it might reasonably be concluded the expense and inconvenience associated with each shift of work is greatest. It is also striking that no minimum engagement applies in respect of part-time employees.
>
> …
>
> …it is commonplace within the industry for employees to be "rostered" to perform very short shifts – sometimes less than an hour, and often corresponding with the period of an appointment with a client of the service – interspersed with unpaid breaks between such periods of work/appointments. During the break in shift employees are required to travel (sometimes considerable distances) between clients in their own vehicles.

> The impact of those practices is compounded by the fact that within the industry the majority of workers are employed on Award rates only.
>
> … Those workers are some of the lowest paid and vulnerable workers in the modern award system – those performing care work for vulnerable clients including the elderly, those with dementia or people with disabilities, in their homes.'[316]

[303] The HSU contends that a 3 hour minimum engagement represents a fair and relevant minimum standard for workers under the SCHADS Award. Given the current standard minimum 3 hour engagement that applies to casual SACS workers (other than disability services employees), (see clause 10.4(c)(i)) the HSU submits that there is little basis for a provision any less than that standard for part-time workers.

[304] The claim is supported by the other Unions and opposed, to varying extents, by the employer parties.

[305] Ai Group and AFEI oppose the HSU's claim in its entirety. Ai Group relies upon the various 'countervailing considerations' identified by the *Casual and Part-time Employment* Full Bench (to which we referred earlier, see [247]) and submits that they are particularly relevant in the context of the HSU's claim:

> 'Much of the work performed by employees providing home care and disability services work involves assisting clients with specific tasks such as showering, preparing and/or consuming a meal, taking medication, cleaning and so on. These are tasks which, in many instances, necessarily only require a limited period of time to complete. In the context of the NDIS, the question is not simply whether the employer can allocate or roster work differently so as to enable an employee to work a longer shift. The duration of the employee's engagement is determined entirely by the wishes of the client; including both the nature of the assistance they request and the timing of the delivery of that assistance (that is, a client may request two types of assistance be provided on a particular day, but they be provided in two separate instances – once in the morning and another in the afternoon).
>
> These difficulties are further compounded by the extent to which multiple clients of an employer may request assistance simultaneously (for example, we understand there to be a particularly high demand for employers' services in the morning when clients typically need assistance with showering, having breakfast etc). An employer can satisfy such service demands only by engaging a larger number of employees, each of whom are rostered to work concurrently. This may result in a situation where those employees are each requested to work shorter engagements rather than arranging the work such that it can be performed by a smaller number of employees as a series of consecutive 'jobs' or 'supports'. As a result, an employer's ability to arrange work in a way that would enable the performance of work over a consecutive 3 hour period is seriously diluted.
>
> In this context, "an excessive minimum engagement period may cause employers to determine that it is not commercially viable to offer casual engagements or part-time work, which may prejudice those who desire or need such work"[317]. It would also prejudice those who wish to work shorter engagements due to their personal circumstances or commitments. In either case, the grant of the claim "might have the counter-productive result of reducing workforce

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[316] HSU Submission, 15 February 2019, paras 24, 29, 30 and 32.

[317] *Part-time and Casual Employment Case* at [403].

> participation and social inclusion and … it may inhibit flexible modern work practices and the efficient and productive performance of work"[318]

[306] AFEI submits that during the award modernisation process the Commission gave specific consideration to the history and needs of the relevant sectors covered by the Award in setting the casual minimum engagement periods and accordingly 'the current provisions should not be disturbed unless there is sufficient evidence of any change in the circumstances of the sectors or employees that would warrant departure from the current provisions'. AFEI contends that the 'limited evidence' adduced in these proceedings is:

> 'insufficient to give the Commission a proper indication of a single workplace let alone an entire sector, let alone a number of sectors covered by the Award. Furthermore, the HSU has not filed any evidence in respect to its proposal to vary the casual minimum engagement period for the Family Day Care Scheme Sector from 2 hours to 3 hours.
>
> Such limited evidence does not assist the Commission in its review of minimum engagement periods for casual home care employees, casual disability services employees, or casual family day care scheme employees.'[319]

[307] As we have already mentioned, the merits of the minimum engagement term in the SCHADS Award were *not* the subject of detailed consideration during the award modernisation process. We deal later with the evidence in the present proceedings.

[308] The short point advanced by Ai Group and AFEI is that the HSU has not advanced a merits case in support of the variation sought and that such a variation would increase employment costs, reduce flexibility and have an adverse impact on service delivery. It is submitted that the variation proposed by the HSU is not *necessary* (within the meaning of s.138 of the Act) to ensure that the SCHADS Award achieves the modern awards objective.

[309] ABI, Business SA and NDS adopted a more nuanced response to the HSU's claim.

[310] ABI opposes various elements of the HSU claim, it opposes:

- any change to the existing minimum engagements for casual employees
- the proposed introduction of any minimum engagement for full-time employees, and
- the introduction of a uniform 3 hour minimum engagement for *all* part-time employees.

[311] However, ABI is *not* opposed to the introduction of minimum engagements for part-time employees provided that:

- they are consistent with the existing minimum engagement periods for casual employees, and

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[318] Ai Group Submission, 13 July 2019 at paras 171 – 173.

[319] AFEI Submission, 23 July 2019 at paras 88 – 89.

- attendances for the purpose of staff meetings and training / professional development are subject to a minimum engagement of 1 hour.

[312] In short, ABI does not oppose:

- a 1 hour minimum engagement for part-time home care employees
- a 2 hour minimum engagement for part-time employees undertaking disability services work
- a 2 hour minimum engagement for part-time employees in the crisis assistance and supported housing sector
- a 2 hour minimum engagement for part-time employees in the family day care scheme sector, and
- a 3 hour minimum engagement for part-time employees in the SACS sector (excluding disability services).[320]

[313] Business SA acknowledged that the HSU 'has provided cogent reasons why there should be a minimum engagement for part-time employees',[321] but opposed the imposition of a 3 hour minimum engagement.

[314] NDS submits that applying a 3 hour minimum engagement to each period of work is unworkable in the context of NDIS. However, NDS observes that '[a] balance… needs to be struck in reviewing this award'[322] and that it is *not* opposed to considering a minimum engagement of 2 hours for part-time disability services employees, limited to work performed when delivering client services.

[315] NDS proposes the option of a minimum engagement only in the context of disability services, 'in light of evidence of how working hours arrangements have changed in response to the implementation of NDIS'. NDS do not propose consideration of such a provision in other sectors.[323]

[316] NDS also submits that any such consideration needs to be in the context of also considering how clause 10.3 operates together with the rostering provisions of clause 25.5, to enable some reasonable degree of flexibility in the rostering of part-time employees.[324] We return to that issue shortly.

[317] ABI does not oppose the NDS proposition that consideration be given to a minimum engagement of 2 hours for part-time disability services employees.

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[320] ABI Submission, 12 July 2019 at para 6.48.

[321] Business SA Submission, 12 July 2019 at para 34.

[322] NDS Submission, 12 July 2019 at para 25.

[323] NDS Submission, 26 February 2020 at para 31.

[324] NDS Submission, 12 July 2019 at para 25.

[318] AFEI and Ai Group oppose the position advanced by NDS and Ai Group opposes the position of ABI. Ai Group submits a 2 hour minimum engagement for part-time employees is not necessary to ensure that the Award achieves the modern awards objective.

> 'Relevantly, the evidence demonstrates that shifts of less than two hours are commonly worked, including shifts of less than an hour.
>
> It is also relevant that shift durations are dictated by client needs and employers do not have any capacity under the NDIS to recover additional funding in respect of time that is not spent providing a service to a client (subject to specific provisions concerning travel between clients). Ai Group says it would be unfair to visit the resulting serious cost implications on employers.'[325] (footnotes omitted)

[319] Ai Group submits that while a 2 hour minimum engagement would result in less adverse consequences than a 3 hour minimum engagement, 'the NDS's proposal does not sufficiently ameliorate the many concerns we have previously outlined in opposition to the union's claim.'[326]

[320] In response to the NDS's proposal the HSU submits that, in respect of part-time employees, they 'can see little basis for a provision any less than' the minimum engagement period applying to casual employees under clause 10.4(c)(i), which is 3 hours.[327]

[321] We now turn to the evidence.

5.2.6 The Evidence

[322] In our view the evidence supports the following findings:

1. Short shifts are a very common feature in the home care and disability services sectors.[328] In the home care and disability support areas employers regularly engage employees to work shifts of a duration of less than 3 hours,[329] for example:

   - Mr Elrick, a Victorian organiser for the HSU, gave evidence of 'shifts' as short as 15 minutes (although the worker was paid for 45 minutes in that instance).[330] Mr Eddington, a Tasmanian legal and industrial officer employed by the HSU, was aware of shift lengths of as little as 15 minutes,

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[325] Ai Group Submission, 10 February 2020 at paras 140 - 141.

[326] Ai Group Submission, 10 February 2020 at para 142.

[327] Joint Union Submission, 10 February 2020 at para 225.

[328] Exhibit ASU4 – Stanford Report, September 2019 at para 11; Exhibit HSU3 – Witness Statement of William Elrick Statement, 14 February 2019 at para 19; Exhibit HSU28 – Witness Statement of Thelma Thames, 15 February 2019 at para 12; Exhibit ABI5 – Witness Statement of Graham Shanahan, 28 June 2019 at para 35; Exhibit ABI6 – Witness Statement of Deborah Gaye Ryan, 12 July 2019 at para 64; Exhibit ABI9 – Witness Statement of Joyce Wang, 12 July 2019 at para 56; Exhibit ABI3 – Witness Statement of Jeffrey Wright, 12 July 2019 at para 41; Exhibit ABI8 – Witness Statement of Wendy Mason, 17 July 2019 at para 63.

[329] Exhibit ABI9 – Witness Statement of Joyce Wang, 12 July 2019 at para 56; Exhibit ABI8 – Witness Statement of Wendy Mason, 17 July 2019 at para 61.

[330] Exhibit HSU3 - Witness Statement of William Elrick, 14 February 2019 at para 19.

and a common practice of engaging workers for shifts of 1 hour (the current minimum for a casual employee)[331]

- Ms Thames, a home care worker employed by Uniting, has worked shifts of half an hour in duration,[332] and

- Ms Ryan, a witness called by ABI, gave evidence that Community Care Options rosters shift lengths as short as 15 minutes.[333]

2. The incidence of short shifts is reflective of the nature of the services provided in this industry, and the personal care services, domestic care services, and lifestyle services that are provided, which include:[334]

- medication prompting

- personal care services (assistance with showering and getting dressed)

- meal preparation

- assistance improving skills (e.g. meal planning, teaching cooking skills, support in responsibility for personal hygiene)

- domestic assistance (e.g. making beds, vacuuming and mopping floors, cleaning the toilet and bathroom, laundry, shopping for groceries)

- transportation and assistance with mobility

- development of social skills and cognitive and emotional support

- community engagement, and

- respite care.

3. It is common for consumers in the home care and disability services sectors to request services of a short duration, for example:

- Mr Shanahan, Mr Wright and Ms Mason gave evidence that services of less than 1 hour are common,[335] Mr Shanahan said that approximately 80% of all client visits are less than 1 hour[336]

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[331] Exhibit HSU30 - Witness Statement of James Eddington, 15 February 2019 at para 22.

[332] Exhibit HSU28 - Witness Statement of Thelma Thames, 15 February 2019 at para 12.

[333] Exhibit ABI6 - Witness Statement of Deb Ryan, 12 July 2019 at para 64.

[334] Exhibit ASU10 – Witness Statement of Augustino Encabo, 13 February 2019 at paras 13 and 15; Exhibit HSU28 – Witness Statement of Thelma Thames, 15 February 2019 at para 5; Exhibit HSU4 – Witness Statement of Heather Waddell, 15 February 2019 at para 4; Exhibit ASU9 – Witness Statement of Richard Rathbone Statement, 13 February 2019 at paras 10 and 12; Exhibit HSU27 – Witness Statement of Pamela Wilcock, 15 February 2019 at para 9.

[335] Exhibit ABI5 – Witness Statement of Graham Shanahan, 28 June 2019 at paras 34 – 35; Exhibit ABI3 – Witness Statement of Jeffrey Wright, 12 July 2019 at para 39; Exhibit ABI8 – Witness Statement of Wendy Mason, 17 July 2019 at para 63.

- Mr Shanahan and Mr Wright both gave evidence that there is client demand for 30-minute services,[337] and

- Ms Ryan gave evidence that some services are for 15 minutes' duration.[338]

4. Due to the high incidence of short duration client services, it is common for employees to provide a series of short-duration services to different clients throughout a single shift.[339]

5. As mentioned earlier, employees report a range of adverse consequences with working broken shifts with short engagements and unpaid travel time (see finding 6 at [232] above).

[323] We also note the observation of the *Part-time and Casual Employment* Full Bench regarding evidence of short shifts in the disability sector covered by the SCHADS Award which 'verged on being exploitative':

> 'There was some evidence of short shifts being worked in a manner which verged on being exploitative. For example, in the disability sector, Ms Potoi referred to working 1½ hour shifts in the disability sector as a part-time employee in circumstances where the travel required to perform the shift took the same amount of time again; Mr Quinn worked shifts varying in length from 4 hours to 30 minutes; and Mr Morgan worked whatever shifts were offered in order to preserve his job security.'[340]

5.2.7 Consideration

[324] We turn first to whether a minimum engagement term should be introduced for full-time and part-time employees, such that they are entitled to a minimum period of payment per shift.

[325] In support of the claim the HSU submits:

> 'The Award presently provides no minimum engagement for full-time and part-time employees in any of the sectors it covers. This issue is of particular concern for parttime workers. The provisions regarding rostering and span of hours mean this issue is of less import for full-time workers.'[341] (emphasis added)

[326] We agree with the highlighted sentence.

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[336] Exhibit ABI5 – Witness Statement of Graham Shanahan, 28 June 2019 at para 35.

[337] Exhibit ABI5 – Witness Statement of Graham Shanahan, 28 June 2019 at para 34; Exhibit ABI3 – Witness Statement of Jeffrey Wright, 12 July 2019 at para 40.

[338] Exhibit ABI6 - Witness Statement of Deb Ryan, 12 July 2019 at para 61.

[339] Exhibit ABI5 – Witness Statement of Graham Shanahan, 28 June 2019 at para 38; Exhibit ABI7 – Witness Statement of Scott Harvey, 2 July 2019 at para 57; Exhibit ABI6 - Witness Statement of Deborah Ryan, 12 July 2019 at paras 64 - 66; Exhibit ABI3 – Witness Statement of Jeffrey Wright, 12 July 2019 at para 41; Exhibit ABI8 – Witness Statement of Wendy Mason, 17 July 2019 at para 59.

[340] *Part-time and Casual Employment Case* at [406].

[341] HSU Submission, 15 February 2019 at para 20.

[327] Under the current terms of the SCHADS Award, full-time employees must be engaged to work 38 hours per week or an average of 38 hours per week, and the way in which those hours can be worked is conditioned by a range of requirements, including:

- shifts must not exceed 8 hours each, or up to 10 hours by agreement
- the employee must be free from duty for not less than 2 full days in each week or 4 full days in each fortnight or 8 full days in each 28 day cycle, and
- the employee must be given a break of not less than 10 hours between the end of one shift or period of work and the start of another.

[328] It follows that the prospect of full-time employees performing shifts of a short duration is likely to be very remote. The evidence does not support a finding that full-time employees are affected by unreasonably short shifts. And, in any event, the fact that full-time employees have a guarantee of 38 hours' work and pay per week eliminates or at least ameliorates any adverse impact.

[329] In our view, there is no merit basis for the introduction of a minimum engagement period in respect of full-time employees. We reject this element of the HSU's claim.

[330] We now turn to whether a minimum engagement term should be introduced for part-time employees.

[331] As mentioned earlier, ABI, Business SA and NDS do not oppose the introduction of minimum engagement terms for part-time employees, subject to a few caveats.

[332] Ai Group and AFEI oppose the introduction of any minimum engagement period for part-time employees and point to the 'countervailing considerations' identified by the *Part-time and Casual Employment* Full Bench, in particular the needs of clients and the rostering practices of employers covered by the SCHADS Award.

[333] Ai Group contends that:

> 'Part-time employees covered by the Award have the security of a guaranteed number of weekly hours of work by virtue of clause 10.3(c) of the Award. This of itself 'creates an important distinction between casual and part-time employment in the context of determining the necessity of a minimum engagement period'.[342]

[334] In advancing this submission Ai Group draws attention to the following observation by the *Part-time and Casual Employment* Full Bench:

> 'we do not consider that a case has been made out for the daily minimum engagement of casual employees and part-time employees to be aligned in all cases, since in most modern awards part-time employment operates on the basis of a minimum weekly guarantee of hours, with the pattern of working hours established at the commencement of the employment and thereafter

[342] Ai Group Submission, 13 July 2019 at para 175.

> not able to be changed other than by agreement. For that reason, the circumstances of part-time employees are distinct in terms of income security from those of casual employees.'[343]

[335] The part-time employment provisions in the SCHADS Award operate based on a minimum weekly guarantee of hours whereby the pattern of hours is agreed before the commencement of employment. Clause 10.3 relevantly provides:

> **'10.3 Part-time employment**
>
> (a) A part-time employee is one who is engaged to work less than 38 hours per week or an average of less than 38 hours per week and who has reasonably predictable hours of work.
>
> (b) The terms of this award will apply to part-time employees on a pro rata basis on the basis that the ordinary weekly hours of work for full-time employees are 38.
>
> (c) Before commencing employment, the employer and employee will agree in writing on:
>
> (i) on a regular pattern of work including the number of hours to be worked each week, and
>
> (ii) the days of the week the employee will work and the starting and finishing times each day.
>
> (d) The agreed regular pattern of work does not necessarily have to provide for the same guaranteed number of hours in each week.' (emphasis added)

[336] We accept that the circumstances of part-time employees are distinct, in terms of income security, from those of casual employees. A part-time employee has 'reasonably predictable hours of work' and a guaranteed number of hours each week; a casual employee does not. Indeed, an incident of casual employment is the absence of guaranteed work.

[337] To the extent that the above observation by the *Part-time and Casual Employment* Full Bench suggests that the provision of a guaranteed number of hours per week to part-time employees removes the need to provide a minimum period of engagement, we respectfully disagree; the 2 issues are unrelated.

[338] A part-time employee may have, say, 4 hours of guaranteed work each week, but the way in which those hours are worked may result in several very short shifts of say, 30 minutes duration. As the *Part-time and Casual Employment* Full Bench observed:

> 'An employment arrangement may become exploitative if the income provided for the employee's labour is, because of very short engagement periods, rendered negligible by the time and cost required to attend the employment.'[344]

[339] Minimum engagement periods protect employees from exploitation by ensuring that they receive a minimum payment for each work attendance. Further, as mentioned earlier, the

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[343] *Part-time and Casual Employment Case* at [406].

[344] *Part-time and Casual Employment Case* at [399].

principle of neutrality of treatment supports the consistent application of minimum engagement terms to casual *and* part-time employees.

[340] In our view, equity and fairness require that part-time employees covered by the SCHADS Award have an entitlement to a minimum period of payment per shift.

[341] We now turn to consider the duration of the minimum engagement.

[342] It will be recalled that clause 10.4(c) currently provides:

> '(c) Casual employees will be paid the following minimum number of hours, at the appropriate rate, for each engagement:
>
> (i) social and community services employees except when undertaking disability services work–3 hours;
>
> (ii) home care employees–1 hour; or
>
> (iii) all other employees–2 hours.'

[343] The HSU seeks a uniform 3 hour minimum engagement.

[344] The HSU submits that the observations of the *Part-time and Casual Employment* Full Bench invite a consideration of the time and cost expended by employees for the performance of any particular shift of work, in order to weigh whether the income is rendered negligible. The HSU submit that to undertake that weighing process in the case of disability services and home care workers requires consideration of (at least) the following matters:[345]

- the length of 'shifts' offered
- the capacity of employers to break shifts
- the time and cost expended in travelling to attend shifts
- whether such time and cost are remunerated and reimbursed, and
- the 'dead time' lost by employees because of broken shifts.

[345] It seems to us that a number of these matters are not directly relevant for present purposes; they arise in respect of other claims.

[346] The HSU also submits that a 3 hour minimum engagement for workers will:

(a) provide workers with sufficient remuneration from a shift as to make the shift viable when regard is had to the time and cost involved in preparing for and travelling to and from the shift

(b) promote the efficient performance of work, and

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[345] HSU Submission, 3 October 2019 at para 24.

(c) contribute to the attraction and retention of skilled workers into the industry.[346]

[347] We note that the HSU does not refer to the evidentiary basis for the propositions at (b) and (c).

[348] All the employer parties oppose a uniform 3 hour minimum engagement.

[349] ABI submits that the imposition of a 3 hour minimum engagement would have a very significant adverse impact on employers:

> 'it will also seriously disadvantage members of the community who access services from these employers, as employers would not be prepared to continue delivering support services of a short duration, which is contrary to the objectives of the NDIS and other consumer directed care initiatives. It will also adversely affect employees who prefer short shifts to accommodate their other family, caring or study commitments.'[347]

[350] AFEI and Ai Group oppose *any* minimum engagement term for part-time employees. A key element of the case they put is the contention that rostering arrangements are dictated by client needs. The employers contend that the shortness of shifts is a necessary or fundamental feature of the industry, that it is a product of the fact that clients require services of a short duration. This contention is based on 3 related propositions:

1. The services required by clients in home care and disability services are of short duration.

2. An objective of the NDIS and other consumer-directed care initiatives is that service providers respond to the needs of clients.

3. Rostering reflects the nature of short duration client services.

[351] We accept that client preferences and continuity of care can impact the shift lengths that are provided to employees,[348] but the submissions put by AFEI and Ai Group overstate that impact.

[352] Contrary to AFEI's submission we reject the proposition that the services provided by employees covered by the SCHADS Award are 'dictated by client needs'.[349] Nor do we accept Ai Group's submission that 'employers do not choose how and when work is scheduled.'[350]

[353] We note that a few of the employer witnesses referred to the impact of client demands and that it made planning consistent service difficult, but the same witnesses made

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[346] Joint Union Submission, 10 February 2020 at para 46.

[347] ABI Submission, 12 July 2019 at para 6.46.

[348] Exhibit ABI3 – Witness Statement of Jeffrey Wright, 12 July 2019 at para 38; Exhibit ABI8 – Witness Statement of Wendy Mason, 17 July 2019 at para 55.

[349] AFEI submission, 19 November 2019 at para B-2.

[350] Ai Group Submission, 26 February 2020 at para 76.

concessions in cross-examination. For example, Mr Wright in his statement at [38] states that 'the provider has no control over their choice, but we need to accommodate it nonetheless',[351] but in cross-examination Mr Wright agreed that HammondCare did not have a legal obligation to offer services to anyone who demands it at any time of day, and that in fact it is HammondCare that determines the range of services and the pricing that it applies to those services.[352] Similarly, Ms Mason states in her statement at [55] that 'the company's home care activities are based on client demand and therefore rostering takes place around the preferred times of our clients'[353] but acknowledged in cross-examination that it is a negotiated process between the client and the care facilitator.[354]

[354] The contention that short shifts are the inevitable result of short appointments ignores the choices made by employers about the length of the shifts that they offer, and the influence upon those choices of the fact that the SCHADS Award does not impose a minimum engagement (payment) period for part-time employees.

[355] Determining the duration of a minimum engagement period is largely a matter of impression and judgment, balancing the relevant considerations. This is not an area where the disutility of short shifts can be precisely quantified; nor where the impact on employers can be confidently predicted.

[356] In essence the Unions contend that the remuneration from short shifts 'would not justify the time and cost required for the worker to attend' such a shift and that the variation proposed is required to ensure that a shift is 'viable' from an employee's perspective. We accept that this will not invariably be the case, it will depend on the circumstances. But it seems to us that in most cases it is likely that the time and cost associated with working short engagements will be disproportionate to the income derived from the period of the engagement.

[357] Viewed solely from an employee's perspective we see the force of the argument put. It is apparent from the evidence that the current work arrangements – including the prevalence of short shifts – have a significant adverse effect on the employees subject to those arrangements.

[358] But there are a few significant countervailing considerations.

[359] The evidence suggests that the imposition of a uniform 3 hour minimum engagement for all categories of workers would have several adverse outcomes for employers. In short, the imposition of a uniform 3 hour minimum engagement would not be a fair outcome for employers. A 3 hour minimum engagement:

(a) will impose a significant financial strain for employers[355]

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[351] Exhibit ABI3 – Witness Statement of Jeffrey Wright, 12 July 2019.

[352] Transcript, 17 October 2019, cross-examination of Mr Jeffrey Wright at PN2543-PN2551.

[353] Exhibit ABI8 – Witness Statement of Wendy Mason, 17 July 2019.

[354] Transcript, 18 October 2019, cross-examination of Wendy Mason at PN3230-PN3237.

[355] Exhibit ABI5 – Witness Statement of Graham Shanahan, 28 June 2019 at para 40; Exhibit ABI9 – Witness Statement of Joyce Wang, 12 July 2019 at para 63.

(b) may adversely affect customer service levels or prevent service providers from providing particular services,[356] and

(c) is likely to significantly impact staff rostering workloads and reduce flexibility.[357]

[360] The imposition of a 3 hour minimum engagement for all categories of workers may also adversely impact consumers and the ability of the NDIS to deliver on the principles of consumer-directed care.

[361] The balance of considerations tells against the adoption of a uniform 3 hour minimum engagement. We reject this element of the HSU's claim. What then should be the minimum engagement (payment) period for part-time and casual employees?

[362] As mentioned earlier, ABI is *not* opposed to the introduction of minimum engagements for part-time employees provided that:

- they are consistent with the existing minimum engagement periods for casual employees, and
- attendances for the purpose of staff meetings and training / professional development are subject to a minimum engagement of one hour.

[363] In short, ABI does not oppose:

- a 1 hour minimum engagement for part-time *home care* employees
- a 2 hour minimum engagement for part-time employees undertaking *disability services* work
- a 2 hour minimum engagement for part-time employees in the crisis assistance and supported housing sector
- a 2 hour minimum engagement for part-time employees in the family day care scheme sector, and
- a 3 hour minimum engagement for part-time employees in the SACS sector (excluding disability services).[358]

[364] Similarly, NDS does not oppose a minimum 2 hour engagement for part-time disability services employees.

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[356] Exhibit ABI7 – Witness Statement of Scott Harvey, 2 July 2019 at para 60.

[357] Exhibit ABI6 - Witness Statement of Deborah Ryan, 12 July 2019 at para 72; Exhibit ABI3 – Witness Statement of Jeffrey Wright, 12 July 2019 at para 42.

[358] ABI Submission, 12 July 2019 at para 6.48.

[365] As noted earlier, AFEI and Ai Group oppose the position advanced by NDS and Ai Group opposes the position of ABI.

[366] The HSU submits that the 2 hour minimum engagements suggested by ABI and NDS 'barely rise above the level of the verging on exploitative shift of Ms Potoi considered by the *Casual and Part-time Employment* Full Bench.'[359]

[367] In our view, a 2 hour minimum engagement (payment) period for casual and part-time employees undertaking disability work; work in the crisis assistance and supported housing sector and employees in family day care reflects an appropriate balance between the various considerations and is a fair and relevant minimum safety net term. We proposed to retain the existing 3 hour minimum payment period for casual SACS employees, except when they are undertaking disability work and extend the operation of the current minimum payment provisions to part-time employees.

[368] Save for 2 matters, we see merit in the position put by ABI. In our view the adoption of a 2 hour minimum engagement for casual and part-time employees in the sectors identified by ABI (disability work; work in the crisis assistance and supported housing sector and employees in family day care) appropriately balances the competing considerations. But we depart from ABI in 2 respects:

1. The minimum engagement terms for casual and part-time home care employees – we will adopt a 2 hour minimum engagement period (ABI suggested 1 hour).

2. ABI proposes that attendance for the purpose of staff meetings and training / professional development be subject to a minimum engagement of 1 hour. We do not propose to adopt this proposal.

[369] We are not persuaded that the characteristics of the home care work sector sufficiently warrant a shorter minimum engagement period.

[370] This outcome is consistent with the decision of the *Part-time and Casual Employment* Full Bench to insert a 2 hour minimum engagement for casuals in 32 modern awards which previously had not contained a minimum engagement period at all.

[371] We are conscious of the circumstances faced by employers covered by the SCHADS Award.

[372] While the adoption of a 2 hour minimum engagement may alter the rostering practices of some employers, the evidence shows that employers often bundle a series of short-duration client services together to create a shift for employees.[360] Employers also attempt to 'build' a shift for workers by combining numerous client services so that the shift is attractive to

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[359] HSU Submission, 3 October 2019, at para 29.

[360] Exhibit ABI5 – Witness Statement of Graham Shanahan, 28 June 2019 at para 38; Exhibit ABI3 – Witness Statement of Jeffrey Wright, 12 July 2019 at para 41; Exhibit ABI8 – Witness Statement of Wendy Mason, 17 July 2019 at para 71; Exhibit ABI7 – Witness Statement of Scott Harvey, 2 July 2019 at paras 57 - 58; Exhibit ABI6 - Witness Statement of Deborah Ryan, 12 July 2019 at para 65.

employees.[361] This rostering practice is easier in metropolitan areas where there is a high volume of customers located within close proximity to each other. We acknowledge that it may be more challenging to 'build' a shift of work in regional and rural areas and we have taken this into account.[362]

[373] The evidence indicates that it can be difficult to provide employees with shifts *longer than 2 hours*,[363] and that *employers may struggle* to meet client demand over peak periods if required *to provide shifts of 3 hours*.[364]

[374] We now turn to the second way in which we depart from ABI – a 1 hour minimum engagement for staff meetings etc.

[375] This proposal was opposed by the Unions, on the following bases:

> '…so far as ABI seeks to reserve a one hour minimum engagement for staff meetings and the like, ABI does not identify any other award with like provision. Given the rationale for minimum engagements is the avoidance of exploitation resulting from having the income generated by an attendance at work outweighed by the time and cost of attendance, there is no basis for exempting any particular work related activity from any minimum engagement provision.'[365]

[376] ABI did not advance a cogent merit argument in support of their proposal and nor were we directed to any relevant evidence. We are not persuaded to provide a 1 hour minimum engagement for the activities identified, at this time. But that is not the end of the matter; we propose to provide ABI (and any other interested party) an opportunity to present further arguments and evidence in support of the proposed change.

[377] The merits favour the variation of clause 10.4(c) by deleting the current term and inserting a new clause 10.5 as follows:

> **'10.5 Minimum payments for part-time and casual employees**
>
> Part-time and casual employees will be paid for the following minimum number of hours, at the appropriate rate, for each shift or period of work in a broken shift:
>
> **(a)** social and community services employees (except when undertaking disability services work)—3 hours;
>
> **(b)** all other employees—2 hours.'

[378] We now turn to deal with the s.134 considerations.

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[361] Transcript, 18 October 2019, cross-examination of Deborah Ryan at PN3050; Transcript, 17 October 2019, cross-examination of Steven Miller at PN2035-2039; Exhibit ABI7 – Witness Statement of Scott Harvey, 2 July 2019 at paras 57 - 58; Exhibit ABI8 – Witness Statement of Wendy Mason, 17 July 2019 at paras 60 – 61.

[362] Exhibit ABI8 – Witness Statement of Wendy Mason, 17 July 2019 at paras 57 – 58.

[363] Exhibit ABI5 – Witness Statement of Graham Shanahan, 28 June 2019 at para 39; Exhibit ABI3 – Witness Statement of Jeffrey Wright, 12 July 2019 at para 41; Exhibit ABI8 – Witness Statement of Wendy Mason, 17 July 2019 at para 61.

[364] Exhibit ABI5 – Witness Statement of Graham Shanahan, 28 June 2019 at para 38.

[365] Joint Union Submission, 10 February 2020 at para 37.

[379] Section 134(1)(a) requires that we consider 'relative living standards and the needs of the low paid'. A threshold of two-thirds of median full-time wages provides a suitable benchmark for identifying who is 'low paid', within the meaning of s.134(1)(a) of the Act. A proportion of employees covered by the SCHADS Award may be regarded as 'low paid' within the meaning of s.134(1)(a) of the Act.

[380] The low paid will be better able to meet their needs if the proposed variation is made.

[381] The 'needs of the low paid' is a consideration which weighs in favour of the variation we propose to make.

[382] Section 134(1)(b) requires that we consider 'the need to encourage collective bargaining'. We are not persuaded that the proposed variation to include a new clause 10.5 would 'encourage collective bargaining', it follows that this consideration does not provide any support for such a change.

[383] Section 134(1)(c) of the Act requires that we consider 'the need to promote social inclusion through increased workforce participation'. Obtaining employment is the focus of s.134(1)(c).

[384] The impact of the proposed variation on total employment is not likely to be significant. We regard this consideration as neutral.

[385] It is convenient to deal with the considerations ss.134(1)(d) and (f) together.

[386] The proposed variation may result in a change in rostering practices for some employers; it will limit flexibility in the rostering of employees and is likely to increase employment costs.

[387] The considerations in s.134(1)(d) and (f) weigh against the variation we propose.

[388] The considerations in s.134(1) (da), (e), (g) and (h) are not relevant in the present context.

[389] The modern awards objective is to 'ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions', taking into account the particular considerations identified in ss.134(1)(a)–(h) of the Act. We have taken into account those considerations insofar as they are presently relevant and have decided to vary the SCHADS Award as proposed at [377] above.

[390] There is one final matter before we leave the topic of minimum engagement.

[391] A few of the employer parties contend that the variation of the SCHADS Award to introduce minimum engagement periods for part-time employees calls into question aspects of the current award provisions which regulate part-time employment. In this context reference is made to the reasons given by the *Part-time and Casual Employment* Full Bench for rejecting ABI's claim in those proceedings and Vice President Watson's reasons for rejecting the ASU's claim in the Transitional Review. We do not propose to embark on a review of the part-time employment provisions in the SCHADS Award on our own motion. If any party seeks to vary those provisions they may make an application to do so.

5.3 BROKEN SHIFTS CLAIMS

5.3.1 Background

A The current award term

[392] Clause 25.6 of the SCHADS Award provides for certain types of work to be undertaken on a non-consecutive basis (i.e. as broken shifts):

> '**25.6 Broken shifts**
>
> This clause only applies to social and community services employees when undertaking disability services work and home care employees.
>
> (a) A **broken shift** means a shift worked by an employee that includes one or more breaks (other than a meal break) and where the span of hours is not more than 12 hours.
>
> (b) Payment for a broken shift will be at ordinary pay with penalty rates and shift allowances in accordance with clause 29 – Shiftwork, with shift allowances being determined by the finishing time of the broken shift.
>
> (c) All work performed beyond the maximum span of 12 hours for a broken shift will be paid at double time.
>
> (d) An employee must receive a minimum break of 10 hours between broken shifts rostered on successive days.'

[393] Employees whose ordinary hours involve a broken shift on a Saturday or Sunday are paid 150% of their ordinary rate for Saturday work and 200% for Sunday work (see clause 26.1). These rates are in substitution for and not cumulative upon the shift penalties in clause 29 (see clause 26.2).

[394] It is convenient to deal with the award history and the broken shift provisions in other modern awards before turning to the submissions and evidence in respect of the claims.

B Award History - the Transitional Review

[395] The broken shift provision in clause 25.6 was considered during the Transitional Review. In that matter the ASU sought to vary clause 25.6 to remove the availability of broken shifts in the disability sector; or, in the alternative, to introduce a broken shift allowance. Vice President Watson concluded that a case had not been made out to vary the existing arrangements:

> 'As with many other modern awards, this Award replaced a large number of other awards that applied in different states or parts of the social and community services sector. In creating a single award for the sector the AIRC had regard to the various provisions that applied under those previous instruments and applied the statutory tests applicable to the award modernisation exercise. The retention of arrangements for some became a change for others not covered by provisions of a particular type. It is understandable therefore that the change presents some difficulties. It is also understandable that a reversal of the situation would present difficulties for others. That is particularly so when one considers the blurring of home

> care and disability services in practice. I do not consider that a case has been made out to modify the existing arrangements. The variations to the Award in 2012 also deal with the position of penalties for broken shifts. No case for a further change has been made out.'[366]

[396] ABI initially contended that the Unions (and in particular, the ASU) were simply seeking to relitigate a matter which had been previously advanced and rejected. In a later submission ABI clarified its position as follows:

> 'We accept that the unions are free to reagitate a previously agitated matter that was considered during the transitional review process. We further accept that decisions made during the transitional review do not prevent the Commission from reconsidering the matter in these proceedings and reaching a different conclusion based on the evidence and submissions before it. The question is whether the Commission should place weight on the transitional decision and, if so, how much weight should be given to it. We accept that it is open to the Commission to place limited weight on the transitional review decision.'[367]

[397] We note that in the same Transitional Review decision the Vice President also rejected the ASU's application for minimum engagements for part-time employees. We also note that the Transitional Review was more limited in scope than the Review and that the relevant legislation had changed and that s.134(1)(da) was subsequently inserted into the Act.

[398] Consistent with the view we have taken in dealing with the minimum engagement claim we have decided not to give significant weight to the Vice President's decision to reject the ASU's broken shifts claim.

[399] AFEI refer to a separate Transitional Review proceeding in their submissions opposing any change in relation to broken shifts. We deal with that submission later.

C Broken shift terms in modern awards

[400] The ASU contends that only 18 modern awards permit employers to engage employees on 'broken' or 'split shifts'. A summary of the broken shift provisions in other modern awards was set out as an annexure to the ASU submissions.[368]

[401] In Background Paper 1, we asked the parties whether the ASU annexure was 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 were challenged and why?)'[369]

[402] In response, Ai Group submitted that the 'notes' prepared by the ASU did not necessarily comprehensively describe or explain the way the relevant broken shift provisions operate and made some observations about a number of those comments.[370]

[403] ABI agreed that the ASU's summary was accurate save for a few minor points.[371]

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[366] *Australian Municipal, Administrative, Clerical and Services Union* [2013] FWC 4141 at [29].

[367] ABI Submission, 10 February 2020 at para 26.

[368] ASU Submission, 18 February 2019.

[369] Background Paper 1 at [73].

[370] Ai Group Submission, 10 February 2020 at paras 133 and 134.

[404] It is apparent from a review of the broken shift provisions in the ASU annexure that the extent of the regulation of broken shifts varies between modern awards. As a general proposition, the SCHADS Award is less beneficial to employees than the broken shift provisions in a significant number of the awards listed in the ASU annexure. For example:

- 7 of the awards restrict broken shifts to 2 periods of work (i.e. one 'break', excluding meal breaks), and
- several awards provide that broken shifts may only be worked by mutual agreement.

[405] Most of the modern awards listed in the ASU annexure provide for the payment of an allowance calculated as a percentage of the 'standard rate' prescribed in the particular award, although the relevant percentage varies considerably across awards.

[406] Standard rates were included in modern awards during the award modernisation process. The award modernisation request made by the Minister for Employment and Workplace Relations, as amended on 16 June 2008, contains the following paragraph:

> '27 The Commission is to ensure that all modern awards include an appropriate method or formula for automatically adjusting relevant allowances when minimum wage rates are adjusted.'

[407] A definition of 'standard rate' was then inserted into each of the relevant modern awards during the modernisation process. The standard rate was set at the 'minimum wage for the key classification in the award'.[372] Wage related allowances are expressed as a percentage of the standard rate and this provides a mechanism for adjustment of the allowances when the standard rate is adjusted because of the Annual Wage Review. The definition in the SCHADS Award is:

> '**standard rate** means the minimum wage for a Social and community services employee level 3 at pay point 3 in clause 15.3'

[408] The quantum of the broken shift allowance in the relevant awards set out in the ASU annexure noted at [400] above:

Award	**% of standard weekly rate**	**Amount**	**Payable**
Higher Education-General Staff – Award 2020[373]	0.28	$2.47	per day

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[371] Namely: (a) clause 22.8 of the *Aged Care Award 2010* now includes a subsection (f) which provides that each portion of the shift must meet the minimum engagement requirements; (b) *Children's Services Award 2010* – reference to ordinary hours clause should read 21.2; (c) *Mining Industry Award 2010* – Clause 14.3(c)(ii) for allowance; (d) *Animal Care and Veterinary Services Award 2010* – broken shift allowance is clause 16.2(b). See ABI Submission, 10 February 2020 at para 25, p 59.

[372] *Award Modernisation* [2008] AIRCFB 717 at [27].

[373] *Higher Education-General Staff-Award 2020*, clause C.1.3.

Award	% of standard weekly rate	Amount	Payable
Higher Education-General Staff – Award 2020[374]	1.38	$12.16	maximum per week
Hospitality Industry (General) Award 2020[375]	0.33	$2.90	per day where the period between shifts is between 2 and 3 hours
Hospitality Industry (general) Award 2020[376]	0.50	$4.39	per day where the period between shifts is more than 3 hours
Mining Industry Award 2020[377]	1.07	$9.39	per week
Security Services Industry Award 2020[378]	1.62	$14.35	per rostered shift
Cleaning Services Award 2020[379]	0.458	$3.69	per day
Cleaning Services Award 2020[380]	2.29	$18.43	maximum per week
Registered and Licensed Clubs Award 2020[381]	0.40	$3.51	per day
Fitness Industry Award 2020[382]	1.70	$14.16	per day
Animal Care and Veterinary Services Award 2020[383]	1.60	$14.04	per shift
Restaurant Industry Award 2020[384]	0.50	$4.39	for each separate work period of 2 hours or more
Children's Services Award 2010[385]	1.91	$16.76	per day

5.3.2 The Claims

[374] *Higher Education-General Staff-Award 2020*, clause C.1.3.

[375] *Hospitality Industry (General) Award 2020*, clause 26.14(b)(i).

[376] *Hospitality Industry (General) Award 2020*, clause 26.14(b)(ii).

[377] *Mining Industry Award 2020*, clause 18.2(d)(iii).

[378] *Security Services Industry Award 2020*, clause 17.4

[379] *Cleaning Services Award 2020*, clause 17.2(b).

[380] *Cleaning Services Award 2020*, clause 17.2(b).

[381] *Registered and Licensed Clubs Award 2020*, clause 19.2(c).

[382] *Fitness Industry Award 2020*, clause 17.2(b) (and for excess fares incurred, a payment of $1.95 per day).

[383] *Animal Care and Veterinary Services Award 2020*, clause 16.2(a).

[384] *Restaurant Industry Award 2020*, clause 21.3(b).

[385] *Children's Services Award 2010*, clause 15.1.

[409] There are 3 claims in respect of broken shifts.

A The HSU Claim

[410] The HSU is seeking the following changes to clause 25.6 of the SCHADS Award:[386]

> **'25.6 Broken shifts**
>
> **(a)** This clause only applies to:
>
> **(i)** social and community services employees when undertaking disability services work; and
>
> **(ii)** home care employees.
>
> **(~~a~~b)** For the purposes of this clause, a ~~A~~ **broken shift** means a shift worked by ~~an~~ a casual or part-time employee that includes no more than one ~~or more~~ break~~s~~ (other than a meal break) and where the span of hours is not more than 12 hours.
>
> **(c)** A broken shift may only be worked where there is mutual agreement between the employer and employee.
>
> **(d)** Where an employee works a broken shift, they shall be paid at the appropriate rate for the reasonable time of travel from the location of their last client before the break to their first client after the break, and such time shall be treated as time worked. The travel allowance in clause 20.5 also applies.
>
> **(e)** The minimum period of engagement specified in clause 10.6 shall apply to each period of work in a broken shift.
>
> **(~~b~~f)** In addition to the rates at 14.4(d) ~~Payment for a broken shift will be at ordinary pay with~~ penalty rates and shift allowances in accordance with clause ~~29~~— Shiftwork and clause 28—Overtime apply~~. with shift allowances being determined by the finishing time of the broken shift.~~
>
> **(g)** Shift allowances will be determined by the starting or finishing time of the broken shift, whichever allowance is higher. The allowance will apply across both parts of the shift.
>
> **(~~c~~h)** All work performed beyond the maximum span of 12 hours for a broken shift will be paid at ~~double time~~ 200% of the minimum hourly rate.
>
> **(~~d~~i)** An employee must receive a minimum break of 10 hours between broken shifts rostered on successive days.' (proposed variation in underlined text)

[411] The variation proposed varies clause 25.6 in the following respects:

- it limits the application of the clause to part-time and casual employees. The clause would no longer apply to full-time employees

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[386] HSU Amended Draft Determination, 15 February 2019 at para 3.

- it imposes a limit of 1 break per shift such that a shift could only be 'broken' into 2 parts on a given day

- it requires that the employer and employee must agree that the employee will work a broken shift for a broken shift to be worked

- it introduces an express obligation to pay an employee for time spent travelling during the break in the shift and to treat such time as time worked

- it requires that each portion of the broken shift must be at least 3 hours in length, and

- it provides that the shift allowance be determined by either the starting time or the finishing time of the broken shift, whichever is the greater.

[412] In its supplementary submissions in reply of 3 October 2019 (at [40] – [41]) the HSU accepts that it is appropriate in this industry for full-time workers to work broken shifts by agreement and accepts that its draft variation 'inadvertently excludes that possibility'.[387] It later submits that the words 'a casual or part-time employee' should be deleted from its proposed variation determination.[388]

[413] We have already dealt with the minimum engagement (payment) claim and will vary clause 25.6 in accordance with that decision. The aspect of the claim which deals with travel time is dealt with later.

B The UWU Claim

[414] The UWU claim is substantially the same as elements of the HSU claim. The UWU seeks the following changes to clause 25.6:

> '**25.6 Broken shifts**
>
> This clause only applies to social and community services employees when undertaking disability services work and home care employees.
>
> (a) A broken shift means a shift worked by an employee that includes one or more breaks (other than a meal break) and where the span of hours is not more than 12 hours. For the purposes of this award a broken shift is a shift where an employee works in two separate periods of duty on any day within a maximum spread of twelve (12) hours and where the break between periods exceeds one hour.
>
> (b) Payment for a broken shift will be at ordinary pay with penalty rates and shift allowances in accordance with clause 29—Shiftwork, with shift allowances being determined by the starting or finishing time of the broken shift, whichever is greater.

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[387] HSU Submission, 3 October at para 40.

[388] Joint Union Submission, 10 February 2020 at para 223.

(c) All work performed beyond the maximum span of 12 hours for a broken shift will be paid at double time.

(d) An employee must receive a minimum break of 10 hours between broken shifts rostered on successive days.' (proposed variation in underlined text)

[415] The variations proposed:

- redefine a broken shift such that a shift could only be 'broken' into 2 parts on a given day where the break in the shift must not exceed 1 hour, and
- provides that the shift allowance be determined by either the starting time or the finishing time of the broken shift, whichever is greater.

C The ASU Claim

[416] The ASU is seeking the insertion of a new clause 25.6(b)(i), in the terms set out below:[389]

'25.6 Broken shifts

This clause only applies to social and community services employees when undertaking disability services work and home care employees.

(a) A **broken shift** means a shift worked by an employee that includes one or more breaks (other than a meal break) and where the span of hours is not more than 12 hours.

(**b)** An employee who works a broken shift will receive:

(i) ~~Payment for a broken shift will be at o~~Ordinary pay plus a loading of 15% of their ordinary rate of pay for each hour from the commencement of the shift to the conclusion of the shift inclusive of all breaks; and

(ii) ~~with~~ penalty rates and shift allowances in accordance with clause 29—Shiftwork, with shift allowances being determined by the finishing time of the broken shift.

(c) All work performed beyond the maximum span of 12 hours for a broken shift will be paid at double time.

(d) An employee must receive a minimum break of 10 hours between broken shifts rostered on successive days.' (proposed variation in underlined text)

[417] The variation sought would provide that employees working a broken shift receive an *additional* 15% loading for the duration of the entire shift and any intervening breaks; that is, in addition to the shift allowances provided in clause 29.

5.3.3 The Submissions

[389] ASU Submission, 18 February 2019 at para 20.

[418] The submissions and witness evidence relevant to the Unions' broken shift claims are set out at **Attachment D**.

A Union submissions

(i) HSU and UWU

[419] The HSU contends that the only current restraint on the utilisation of broken shifts is that the shift may not span more than 12 hours (cl 25.6(a)) and that the current award provisions are 'manifestly open to exploitation':

> 'The capacity to have more than one break during the shift can mean that an employee may be required to work three or more separate periods of work over the course of many hours in order to generate a reasonable amount of earnings.'[390]

[420] The HSU submits that under the current regime a large part of the day may be taken up accumulating disproportionately few hours of paid work. Mr Quinn described one of his working days as follows:

> '…on 17 July 2019, I worked from 8am-9am, 11am-12pm, 2pm to 5pm and 6:30pm to 7:30pm. So over an 11.5 hour day I worked 6 hours, with two breaks of two hours and one break of 1.5 hours.'[391]

[421] It is contended that the establishment of a minimum engagement period and the elimination of the capacity to break such periods is likely to promote the efficient and productive performance of work:

> 'it will create a clear, and direct financial incentive for employers to manage work allocation in a way which will attract and retain appropriately skilled workers.'[392]

[422] The UWU submits that the combination of the non-payment of travel time, the unrestricted use of broken shifts, and the lack of minimum engagement provisions do not provide a fair and relevant minimum safety net of terms and conditions, but rather, 'lend themselves to inappropriate and unsustainable work patterns.'[393]

[423] As to the s.134 considerations, the UWU submits:

- s.134(1)(a) – 'relative living standards and the needs of the low paid' – the SCHADS Award cannot be said to be 'fair and relevant' when low paid award reliant employees are not paid for time that they are required to travel in the course of their duties, and

- underemployment is a significant issue in the social and community sector and the proposed variation may increase work participation in a few ways:

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[390] HSU Submission, 15 February 2019 at para 37.

[391] HSU Submission, 18 November 2019 at para 71 citing Exhibit HSU32 - Supplementary Witness Statement of Scott Quinn, 3 October 2019 at para 24.

[392] HSU Submission, 18 November 2019 at para 80.

[393] UWU Submission, 1 April 2019 at para 9.

- currently employed workers will be paid for the hours they actually work. This will increase the hours worked by each employee, and

- if workers are paid for the time they actually work, they may reduce their weekly hours of work, creating opportunities for other workers to increase their hours.

[424] In conclusion the UWU submits:

> 'In summary, there is evidence that justifies amending the Award to limit the amount of breaks within a shift to one. Multiple broken shifts reduce the earning capacity of employees, and are disruptive to the lives of employees. Roster patterns in which multiple broken shifts are used operate on the basis that employees will be available for long periods of time in order to obtain sometimes a few hours of work. Service providers are able to set out the terms on which they provide services and have the capacity to arrange work in a manner that restricts the breaks within a shift to one. There is also a clear preference for some providers to limit breaks in shift to one. The Award should incentivise rostering practices which maximise continuous patterns of work.'[394]

(ii) ASU

[425] The ASU contends that the current clause 25.6 does not provide a fair and relevant safety net of minimum terms and conditions and submits that clause 25.6 currently provides 'exceptional flexibility' to employers in rostering home care or disability services employees in 'broken arrangements', in particular:[395]

- ordinary hours do not need to be worked continuously

- there are no restrictions on the number of breaks in work

- there is no minimum engagement

- there is no requirement for the employee to agree to work broken shifts, so broken shifts may be rostered at the discretion of the employer

- shift allowances are determined by the finishing time of the broken shift, and

- no allowance is paid to compensate for the disutility associated with working a broken shift.

[426] The ASU submits that:

> 'Employees do not receive any additional remuneration to compensate for this extreme variability in rostering.'[396]

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[394] UWU Submission, 18 November 2019 at para 44.

[395] ASU Submission, 18 February 2019 at para 21.

[396] ASU Submission, 18 February 2019 at para 22.

[427] Further, the ASU contends that the SCHADS Award has the following unique features which provide employers with significant flexibility:

- the roster of part-time employees may be changed at any time under clause 25.5(d)(iii) which provides that the restrictions on changing the roster do not apply to mutually agreed additional hours worked by part-time employees
- part-time employees are not paid overtime until they work 10 hours in a day or 38 hours in a week or 79 hours in a fortnight[397]
- there is no minimum engagement for part-time or full-time employees
- employers are not required to roster meal breaks if they require an employee to have a meal with a client or clients[398]
- casual disability services employees are only entitled to a 2 hour minimum engagement[399]
- casual home care employees are only entitled to a 1 hour minimum engagement,[400] and
- if a client cancels an appointment, a home care employee's roster can be changed if they are notified before 5.00pm the day before. In these circumstances they will not be paid for the shift. If they are notified about the client cancellation after that time, they will only be paid for the minimum specified hours on that day. An employee can also be directed to work make-up time sometime in that roster period or the next.[401]

[428] The ASU submits that the combined effect of clause 25.6 and the other unique features of the SCHADS Award is that:

> 'an employee may be rostered to work broken shifts with little restriction on how those hours may be worked. This permits employers to roster employees in highly irregular and unsociable patterns of work.'[402]

[429] The ASU also submits that working such irregular and unsystematic hours 'has a negative effect on the physical and psychological health, and on the social life, of workers and their families and the people they care for.'[403]

[430] The ASU notes that the HSU and UWU have also proposed variations to clause 25.6. The other Unions' claims deal with the same problems addressed by the ASU claim but seek

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[397] SCHADS Award, clause 28.1(b).

[398] SCHADS Award, clause 27.1(c).

[399] SCHADS Award, clause 10.4(c)(iii).

[400] SCHADS Award, clause 10.4(c)(ii).

[401] SCHADS Award, clause 25.5(f).

[402] ASU Submission, 18 February 2019 at para 24.

[403] ASU Submission, 18 February 2019 at para 30.

to fix the problem in different ways. Finally, the ASU submits that if we were not minded to make the variations they seek, then the ASU would support either one of the variations proposed by the other Unions.

B Employer submissions

(iii) ABI

[431] ABI does not cavil with the proposition that 'there is likely to be a degree of disutility associated with working a broken shift for some employees'.[404] ABI accepts that the SCHADS Award requires amendment to ensure that employees are not exposed to practices which do not provide them with a fair and relevant safety net of terms and conditions; but does not accept that there is any need to materially alter the broken shifts provision. ABI submits that the issues identified by the Unions can be rectified by:

- making some modest adjustment to the broken shifts provision
- addressing the concerns around travel time, and
- introducing appropriate minimum engagements for part-time employees.

[432] We deal elsewhere with ABI's proposal in respect of minimum engagement and travel time.

[433] In the context of the broken shifts provision ABI does *not* oppose:

- the introduction of a requirement that broken shifts only be worked where there is mutual agreement between the employer and individual employee, and
- the existing payment under clause 25.6(b) being varied such that the applicable shift allowances be determined by either the starting time or the finishing time of the broken shift, whichever is the greater.[405]

[434] In relation to the other elements of the HSU's broken shifts claim, ABI opposes the proposal to impose a limit of 1 break per broken shift such that a broken shift cannot consist of more than 2 portions of work on the basis that such a variation would:

- reduce operational flexibility and prevent employers from having employees work a broken pattern of work across the course of a day to meet customer needs, and
- be likely to have the effect of reducing the number of hours of work that employers can offer to employees, thereby reducing their hours of work and take home pay.

[435] ABI also opposes the introduction of a 15% loading to be paid when employees work a broken shift.

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[404] ABI Submission, 12 July 2019 at para 7.34.

[405] ABI Submission, 19 November 2019 at para 6.6.

[436] In respect of part-time employees, ABI submits that the alleged 'disutility' of working broken shifts needs to be assessed against the requirement at clause 10.3(c) that their pattern of work be agreed in writing on commencement of employment. In light of that existing protection, it is submitted that any disutility arising from a broken shift is mitigated by the employee having agreed on commencement of employment to the pattern of work and by having advance notice of that fixed pattern of work.

(iv) NDS

[437] NDS submits that current clause 25.6 and the restrictions imposed by clause 10.3(c) in setting the hours of work of part-time employees provides significant protection for part-time employees in relation to the predictability of their hours of work. Further, casual employees receive a casual loading in compensation for irregular hours of work.

[438] NDS opposes the detail of most of the Union claims relating to broken shifts but accepts that an appropriate balance must be struck between the flexibility needed in order to deliver services in the context of tight pricing and the need for employees to have some level of stability in their employment.

[439] NDS submits that the proposal to restrict broken shifts to 2 portions of work and one 'break' is an unnecessary restriction that would impact on the ability of participants to schedule supports for when they need them throughout the day.

[440] NDS opposes the ASU's claim for a 15% additional loading, 'particularly in the context of the tight pricing arrangements that affect provision of disability services' and submits that the quantum of the loading is 'out of kilter' with the provisions of other awards that deal with broken shifts.

[441] As to the proposal that broken shifts only be worked by mutual agreement, NDS submits that such a change is not necessary given the requirements of clause 10.3 in relation to part-time employment, and the provisions of clause 25.5 in relation to rosters; but does not oppose the proposal.

[442] NDS does not oppose the UWU proposal to provide that any shift penalty be determined by the starting or finishing time of the broken shift, whichever is highest.

(v) Business SA

[443] Business SA opposes the proposition that broken shifts only be worked by agreement and the proposal that broken shifts be limited to only 1 break.[406]

[444] Business SA also opposes the claim for a 15% broken shift loading submitting that the claimed loading is 'significantly higher than any other industry'.[407]

(vi) AFEI

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[406] Business SA Submission, 12 July 2019 at paras 44 and 46.

[407] Business SA Submission, 12 July 2019 at para 42.

[445] AFEI opposes any variation in respect of broken shifts and submits that the current clause 25.6 formed part of the SCHADS Award when it was made by the Award Modernisation Full Bench and that it was inserted to specifically address the needs of the disability services and home care industries.

[446] AFEI opposes the HSU and UWU claims to vary clause 25.6(b) to provide that shift allowances are determined by the 'starting or finishing time of the broken shift, whichever allowance is higher' (change proposed as underlined). AFEI contends that the shift penalties applicable to broken shifts were the subject of consideration during the Transitional Review and that that position 'should not be departed from unless there has been a material change in circumstances since that time'.[408] We deal with this submission later.

[447] In essence AFEI submits that the existing arrangements for broken shifts are appropriate for the industry; the claims would increase employers' cost and administrative burden and could adversely impact on service delivery; and the limited nature of the evidence does not establish the merit basis required to vary the SCHADS Award.[409]

[448] AFEI also opposes the variations proposed by ABI and NDS. AFEI submits that the introduction of a requirement that broken shifts only be worked by mutual agreement is 'inappropriate' in circumstances where broken shifts are 'a standard arrangement in the industry'.[410]

(vii) Ai Group

[449] Ai Group opposes the various Union claims to vary the current broken shift arrangements (including those proposals which are not opposed by ABI and NDS). We note that there is some overlap between the points advanced by AFEI and those put by Ai Group.

[450] As to the HSU/UWU proposal to vary the application of shift allowances to broken shifts, Ai Group submits that a case for varying the current arrangements has not been made out.[411] Further, Ai Group submits that there is no statutory imperative to provide additional remuneration to employees working shifts.

[451] Ai Group opposes the introduction of a requirement that broken shifts only be worked by mutual agreement and submits that the proposal 'has the potential to significantly disrupt current employment practices in the sector [and] would significantly undermine the utility of the broken shift provisions'.[412]

5.3.4 The Evidence

[452] In our view the evidence supports the following findings:

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[408] AFEI Submission, 19 November 2019 at para 119.

[409] AFEI Submission, 16 February 2020 at paras 1.33(a)(i), 1.34; AFEI Submission, 23 July 2019 at paras 123 – 125; AFEI Submission, 19 November 2019 at para B.5.

[410] AFEI Submission, 11 February 2020 at para 2.30(2).

[411] Ai Group Submission, 13 July 2019 at paras 283 – 284 and 287.

[412] Ai Group Submission, 13 July 2019 at para 290 – 294.

1. Broken shifts are commonly utilised by employers covered by the SCHADS Award and there is a very high incidence of broken shifts in the home care and disability services sectors.[413]

2. It is the preferred practice of some employers to roster on the basis that there is only 1 break in any shift (unexpected client cancellation being the main reason to depart from this practice).[414] Further, it is the practice of some employers to pay a broken shift allowance;[415] other employers only have employees work a broken shift by agreement.[416]

3. Most broken shifts involve 2 portions of work and 1 break.[417] Occasionally broken shifts involve more than 1 break.[418]

4. Broken shifts can cover a significant span of hours (up to 12 hours) which can include a substantial amount of 'unpaid time'.

5. Where broken shifts are worked, there is significant variation in the duration of the break period. Some broken shifts involve a break period of less than 1 hour, while other broken shifts involve a break period of 6-8 hours.

6. During breaks in a broken shift, employees sometimes spend time at home or undertaking non-work related activities.[419] On other occasions a considerable proportion of the period of the break is used in undertaking unpaid travel or the duration of the break is insufficient to enable the employee to engage in other meaningful activity.

7. As mentioned earlier, employees report a range of adverse consequences with working broken shifts with short engagements and unpaid travel time (see finding 6 above at [232] above).

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[413] Exhibit HSU26 – Witness Statement of Robert Sheehy, 15 February 2019 at para 7; Exhibit HSU5 – Witness Statement of Christopher Friend, 15 February 2019 at para 49; Exhibit HSU30 – Witness Statement of James Eddington, 15 February 2019 at para 23; Exhibit ABI9 – Witness Statement of Joyce Wang, 12 July 2019 at paras 65 – 67; Exhibit ABI3 – Witness Statement of Jeffrey Wright, 12 July 2019 at para 44; Exhibit ABI8 – Witness Statement of Wendy Mason, 17 July 2019 at para 67; Exhibit UV1 – Witness Statement of Trish Stewart, 17 January 2019 at paras 13 -15; Exhibit UV4 – Witness Statement of Deon Fleming, 16 January 2019 at paras 18 - 21.

[414] Exhibit ABI3 – Witness Statement of Jeffrey Wright, 12 July 2019 at para 45; Transcript, 18 October 2019, cross-examination of Deborah Ryan at PN3086-3092; Exhibit ABI8 – Witness Statement of Wendy Mason at para 72.

[415] Exhibit ABI3 – Witness Statement of Jeffrey Wright, 12 July 2019 at para 46.

[416] Exhibit ABI8 - Witness Statement of Wendy Mason, 17 July 2019 at para 69.

[417] Exhibit ABI3 – Witness Statement of Jeffrey Wright, 12 July 2019 at para 45.

[418] Exhibit ABI3 – Witness Statement of Jeffrey Wright, 12 July 2019 at para 45; Exhibit ABI8 – Witness Statement of Wendy Mason at para 72.

[419] Exhibit HSU28 – Witness Statement of Thelma Thames, 15 February 2019 at para 15; Exhibit HSU31 – Witness Statement of Scott Quinn, 16 December 2019 at para 29; Exhibit HSU32 – Supplementary Witness Statement of Scott Quinn, 3 October 2019 at paras 10, 21, 27 – 28; Exhibit UV1 – Witness Statement of Trish Stewart, 17 January 2019 at paras 6, 7 and 9; Transcript, 15 October 2019, cross-examination of Trish Stewart at PN461, PN464, PN525 and PN527; Transcript, 16 October 2019, cross-examination of Robert Steiner at PN1570 and PN1572; Transcript, 18 October 2019, cross-examination of Joyce Wang at PN3537.

[453] In relation to finding 3 above, the finding is similar in terms to a proposed finding advanced by ABI;[420] ABI's proposed finding was *not* opposed by the NDS but was opposed by other parties, in particular by the Unions and Ai Group.

[454] The Unions' opposition to ABI's proposed finding was not the subject of much elaboration.[421] For its part, Ai Group submits – contrary to the position advanced by ABI – that the evidence does not establish that most broken shifts in the disability sector involve 2 portions of work and one break, or that it is only occasionally necessary for a broken shift to include more than 1 break.[422] Ai Group refers to the following parts of the evidence in support of its contention:[423]

- in an article attached to the statement of Dr Macdonald, which reported the results of qualitative research undertaken in respect of 10 disability support workers, the authors identified that over a period of 30 working days, 'the 10 [disability support workers] worked between one and 5 separate shifts per day'.[424] This amounts to up to 4 breaks per day

- Mr Friend gave evidence that the HSU's members have reported having 'up to four or five breaks'[425]

- Mr Quinn gave evidence that 'a typical day of shifts' in his employment involved 3 breaks over the course of a day[426]

- Exhibit AIG1 (an employee roster during the period of 4 May 2018 – 21 September 2018) demonstrates an employee was from time to time required to perform a series of engagements during a day with up to at least 4 breaks in between, and

- Ms Stewart described a 'typical day' for her as including 5 breaks between a series of engagements.[427]

[455] AFEI's submissions rely on the same evidentiary foundation.

[456] In short, Ai Group relies on the evidence of 4 individual employees; the hearsay evidence of Mr Friend and the Macdonald article which examined the working arrangements of 10 disability support workers over a period of 30 working days. As mentioned earlier, it is somewhat paradoxical that Ai Group relies on the Macdonald article for this purpose while advancing the general submission that we should afford only negligible weight to the article.

[457] In contrast ABI relies on 3 employer witnesses (Mr Wright, Ms Mason and Mr Miller) who gave evidence about the operation of broken shifts in the enterprises in which they

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[420] ABI Submission, 19 November 2019 at para 6.13.

[421] Joint Union Submission, 10 February 2020 at para 200.

[422] Ai Group Submission, 10 February 2020 at para 135.

[423] Ai Group submission, 18 November 2019 at para 26.

[424] Exhibit HSU25 – Witness Statement of Fiona Macdonald, 15 February 2019 at Annexure FM-2.

[425] Exhibit HSU5 – Witness Statement of Christopher Friend, 15 February 2019 at para 27.

[426] Exhibit HSU31 – Witness Statement of Scott Quinn, 16 December 2015 at para 27.

[427] Exhibit UV1 – Witness Statement of Trish Stewart, 17 January 2019 at para 15.

worked – HammondCare, Baptist Care and the Endeavour Foundation. Collectively these enterprises employ some 6,442 employees in the relevant sectors.

[458] Mr Wright is the People Services Operations Manager for HammondCare. HammondCare operates in the social, community home care and disability services industry and employs about 4,000 employees. HammondCare engages employees on broken shifts and in his statement Mr Wright notes that 'broken shifts are inevitable with ever changing client needs and staff absences'. In one month, in May 2019, HammondCare engaged employees on 4,216 broken shifts. As to the nature of the broken shifts rostered by HammondCare, Mr Wright says:

> 'There are very few shifts that exceed two portions per day, however with client cancellations, sometimes they are necessary.'[428]

[459] Ms Mason is the Operations Manager for the Services (Baptist Care at Home) Division (Baptist Care), which employs about 1,182 employees.[429] Baptist Care engages employees to work broken shifts.[430] In one month, May 2019, 1,591 broken shifts were worked by the company's home care employees. In her statement, Ms Mason says:

> 'These shifts are necessary in order to offer clients the flexible services that they request.'[431]

[460] Baptist Care's home service rostering guidelines and procedures 'aim to minimise the number of breaks (and hence work periods) during the broken shifts'.[432] At [72] of her statement, Ms Mason says:

> 'Employees will only be scheduled to work more than two portions (or work periods) during the broken shift where no other option exists… it is usually out of necessity to meet our clients' needs.'[433]

[461] Ms Mason provided a Supplementary Statement dated 25 November 2019 in response to questions raised by the Commission during the Hearing of 8 October 2019.[434]

[462] The spreadsheet attached to Ms Mason's Supplementary Statement provides data on broken shifts worked in the Home Service division of Baptist Care.[435] In September 2019 there were 1,452 broken shifts worked (about 10% of all shifts worked in September 2019). Of those 1,452 broken shifts:

- 1,189 had 1 'break' (that is only 2 separate periods of work)
- 231 had 2 'breaks'

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[428] Exhibit ABI3 - Witness Statement of Jeffrey Wright, 12 July 2019 at para 45.

[429] Exhibit ABI8 - Witness Statement of Wendy Mason, 17 July 2019 at para 20.

[430] Exhibit ABI8 - Witness Statement of Wendy Mason, 17 July 2019 at para 66.

[431] Exhibit ABI8 - Witness Statement of Wendy Mason, 17 July 2019 at para 67.

[432] Exhibit ABI8 - Witness Statement of Wendy Mason, 17 July 2019 at para 70.

[433] Exhibit ABI8 - Witness Statement of Wendy Mason, 17 July 2019 at para 72.

[434] Transcript, 18 October 2019, cross-examination of Wendy Mason at PN3187 and PN3313-PN3317.

[435] Supplementary Statement of Wendy Mason, 25 November 2019.

- 28 had 3 'breaks', and
- 3 had 4 'breaks'.

[463] Hence over 80% of the broken shifts worked in September 2019 only had 1'break' and almost 98% had only 1 or 2 breaks.

[464] Mr Miller is the Head of Operations, Service Delivery for the Endeavour Foundation. The Endeavour Foundation employs 1,260 support workers. Mr Miller provided a Supplementary Statement dated 19 November 2019 in response to questions raised by the Commission during his oral evidence.[436] In his Supplementary Statement Mr Miller sets out an analysis of 2,000 separate actual shifts worked by support workers over a roster period. Of those 2,000 shifts, 746 were broken shifts. Of the 746 broken shifts:

- 668 had 1 'break', of over 1 hour in duration, and
- 78 had 2 'breaks', each of over 1 hour in duration.

[465] Hence, 90% of the broken shifts in this roster period had only 1 'break' of over an hour in duration.

[466] We have considered the Unions' critique of the data presented in Mr Miller's Supplementary Statement in the Joint Unions' submission of 10 February 2020[437] and the NDS response to that critique.[438] In our view the data in Mr Miller's Supplementary Statement supports the observations made above.

[467] In short, the evidence upon which ABI relies is more cogent and comprehensive than the evidence upon which Ai Group relies. The evidence of the ABI witnesses supports finding 3 above (at [452] above) and we reject the contrary contention advanced by Ai Group and others.

5.3.5 Consideration

A General

[468] We begin by considering the current regulation of broken shifts in the SCHADS Award.

[469] A number of the employer parties point to certain limitations and what are said to be 'safeguards' in the current broken shifts term, in particular:

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[436] Joint Union Submission, 10 February 2020. Also see Transcript, 17 October 2019, cross-examination of Steven Miller at PN2054-PN2057 and PN2082.

[437] Joint Union Submission, 10 February 2020 at paras 63 – 64.

[438] NDS Submission, 26 February 2020 at paras 16 – 19.

- clause 25.6 is limited in its application – it only applies to social and community services employees when undertaking disability services work, and home care employees

- clause 25.6(b) regulates the way shift allowances are payable under clause 29, in the context of a broken shift

- double time rates must be paid for all work performed beyond the maximum span of 12 hours (clause 25.6(c)), and

- employees must receive a minimum break of 10 hours between broken shifts rostered on successive days (clause 25.6(d)).

[470] We accept that there is a need to permit and regulate the operation of broken shifts in respect of social and community services employees undertaking disability services work and home care employees. But we are not satisfied that the current 'limitations' and 'safeguards' are adequate. As mentioned earlier, the SCHADS Award is less beneficial to employees than the broken shift provisions in a significant number of awards (see [404] – [408]). In its current form clause 25.6 is *not* a fair and relevant safety net term.

[471] In section 5.2 we decided to vary the minimum payment term for part-time and casual employees.

[472] As we mentioned, Ai Group opposed *any* variation to the SCHADS Award in respect of minimum engagements; but, in response to the NDS 2 hour minimum engagement proposal, Ai Group advanced the following, alternate, submission:

> 'There may be merit in giving consideration to a two hour minimum engagement that can be apportioned in accordance with the broken shifts provisions in the context of broader consideration also being given to the current restrictions applying to part-time employment in clauses 10.3(c) and 25.5. Given the inherent interconnectedness of this issue with various other claims advanced by the unions, including the imposition of greater restrictions on the performance of broken shifts and payment for time spent travelling, any consideration of this issue should be undertaken in the broader context of those claims also.'[439]

[473] We agree with the second sentence in the above quote – the issues of minimum engagement, travel time and broken shifts are inter-related, and we have treated them so.

[474] It is not entirely clear what Ai Group is suggesting by the apportionment of a 2 hour minimum engagement. If it is suggested that the 2 hour minimum engagement may be met by cumulating the periods of work performed during each part of a broken shift, then we reject that proposition, it would substantially undermine the purpose of the minimum payment term. We note that we reached a similar conclusion in the *Aged Care Substantive Claims Decision* (discussed at [282] – [285] above).

[475] A 2 hour minimum payment period will apply to each part of a broken shift. This is made clear in new clause 10.5.

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[439] Ai Group Submission, 10 February 2020 at para 143.

[476] The various claims in respect of broken shifts address 3 central issues:

- the number and duration of 'breaks' per shift
- the requirement for mutual agreement, and
- payment.

B The number and duration of breaks per shift

[477] Clause 25.6(a) expressly states that a broken shift may include 'one or more breaks (other than a meal break)'.

[478] The HSU and UWU seek to vary clause 25.6 such that a broken shift is defined, in essence, as a shift where the employee performs work in 2 separate periods of duty with a single 'break' (other than a meal break). Further, the UWU claim provides that the 'break' between periods of work must exceed 1 hour.

[479] In support of their claim the Unions point to the disutility experienced by employees working broken shifts involving multiple breaks between engagements. Some employees reported working a series of engagements during a day with 4 or 5 breaks in between.

[480] The employer parties oppose the restriction of broken shifts to 2 separate periods of duty with a single 'break', essentially on the basis that such a change would reduce operational flexibility and impact their capacity to schedule work in response to client needs.

[481] The evidence establishes that most broken shifts covered by clause 25.6 involved 2 portions of work and 1 'break'; occasionally broken shifts involve more than 1 break.

[482] In opposing this element of the Unions' claim Ai Group advances the following submission:

> 'Ai Group has received very strong feedback from industry that the removal of this flexibility would have a devastating impact on their operations and ability to viably meet the needs of the clients they service. This is particularly so in the context of the disability and home care sectors.'[440]

[483] Two things may be said about this submission. First, the proposition that the impact of such a change would be 'particularly' felt in the disability and home care sectors is superfluous – it is obvious that the impact will be felt in those sectors; as we have mentioned, the Award term only applies to work performed in those sectors.

[484] The second, more significant problem with the submission put concerns the statement that Ai Group has received 'very strong feedback from industry' that restricting broken shifts to one 'break' would have a 'devastating impact on their operations' and affect the service to their clients. Ai Group advances no evidence in support of the asserted 'strong feedback'.

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[440] Ai Group Submission, 13 July 2019 at para 272.

Indeed, Ai Group chose to call no evidence at all in the proceeding in respect of this issue or any of the claims before us. In relation to this issue there is no evidence as to:

- which enterprise(s) provided the feedback and to whom
- the particulars of the 'devastating impact on their operations', or
- any financial or other data supporting the proposition that such a variation would impact on their ability to 'viably meet the needs of the clients they service'.

[485] The absence of such evidence makes it impossible to effectively challenge the Ai Group's assertion. In the circumstances it would be unfair to place any reliance on this submission and we propose to give it no weight.

[486] We accept that restricting broken shifts to 2 portions of work with 1'break' will reduce operational flexibility; but the extent of any adverse consequence is overstated. As we have mentioned, the evidence is that *most* broken shifts in the relevant sectors involve 2 portions of work and 1 'break'; it is only *occasionally* that broken shifts involve more than 1 break.

[487] Further, the adverse impact on employees (or disutility) of multiple breaks in a broken shift is likely to be greater than a single break between 2 portions of work. Multiple breaks between engagements are likely to result in increased 'dead time'; time for which employees are not paid.

[488] In the circumstances of the SCHADS Award the merits weigh in favour of varying clause 25.6 to define a broken shift as a shift consisting of 2 separate periods of work with a single unpaid 'break' (other than a meal break). However, we also think that provision should also be made to accommodate the occasional need for a broken shift to involve more than 1 unpaid break. We would be prepared to permit such an occurrence subject to:

- a maximum of 2 unpaid 'breaks' in the shift
- a 2 break shift would be subject to the agreement of the employee, on a per occasion basis, and
- a 2 break shift would be subject to a higher payment than payable for a 1 break shift, in recognition of the additional disutility.

[489] The additional payment should be included as an allowance payable where there are 2 'breaks' in the shift (see [554]).

[490] Before we turn to the s.134 considerations, we wish to clarify how the minimum payment period in new clause 10.5 will interact with these limits on the number of permitted breaks in a broken shift.

[491] Clause 25.6 will also be varied to make clear that where a break in work for an employee (whether it be travel time or 'dead time') falls within a minimum payment period, then it is to be counted as time worked and does not constitute a break in the employee's shift for the purposes of clause 25.6. The example below shows how this would work.

Example:

A part-time home care employee agrees to work a broken shift with 2 breaks on a Wednesday.

This means that the employee must receive a minimum payment of 6 hours (new clause 10.5).

The employee is rostered to work the 3 periods of work commencing at 9.00 am, 12.30 pm and 4.30 pm, respectively.

During the **first period of work**, the employee:

- attends to a client at home from 9.00 am to 9.30 am
- travels 30 minutes to a second client arriving at 10.00 am, and
- spends 1 hour with the second client finishing at 11.00 am.

The employee spends 1.5 hours of the first period of work working with clients and 30 minutes travelling. The employee must be paid for 2 hours of work.

The employee then has a break of 1.5 hours until the next period of work starts at 12.30 pm.

During the **second period of work**, the employee:

- works with a single client from 12.30 pm to 2.30 pm
- the employee will be paid for 2 hours of work, and
- the employee then has a break of 2 hours before the next period of work starts at 4.30 pm.

During the **third period of work**, the employee:

- attends to a client at home from 4.30 pm to 6.00 pm
- travels 15 minutes to another client arriving at 6.15 pm, and
- spends 2 hours working with the client and finishes at 8.15 pm.

The employee is paid for 3.75 hours for this period. Because the shift finishes after 8.00 pm, the employee will be paid at the overtime rate for the period from 8.00 pm to 8.15 pm.

The broken shift is worked over 11.25 hours, within the 12 hour span.

Over the course of the shift the employee will be paid:

- 7.5 hours at the applicable ordinary hourly rate
- 0.25 hours at the overtime rate of time and a half (for work performed after 8.00pm)
- the 2 break broken shift allowance, and
- any other allowances to which the employee is entitled.

[492] We now turn to deal with the s.134 considerations.

[493] Section 134(1)(a) of the Act requires that we consider 'relative living standards and the needs of the low paid'. A threshold of two-thirds of median full-time wages provides a suitable benchmark for identifying who is 'low paid', within the meaning of s.134(1)(a). A proportion of employees covered by the SCHADS Award may be regarded as 'low paid' within the meaning of s.134(1)(a) of the Act.

[494] The low paid will be better able to meet their needs if the proposed variation is made.

[495] The 'needs of the low paid' is a consideration which weighs in favour of the variation we propose to make.

[496] Section 134(1)(b) requires that we consider 'the need to encourage collective bargaining'. We are not persuaded that the proposed variation to clause 25.6 would 'encourage collective bargaining', it follows that this consideration does not provide any support for such a change.

[497] Section 134(1)(c) of the Act requires that we consider 'the need to promote social inclusion through increased workforce participation'. Obtaining employment is the focus of s.134(1)(c).

[498] The impact of the proposed variation on total employment is not likely to be significant. We regard this consideration as neutral.

[499] It is convenient to deal with the considerations ss.134(1)(d) and (f) together.

[500] The proposed variation will result in a change in rostering practices for some employers; it will limit flexibility in the rostering of employees and is likely to increase employment costs.

[501] The considerations in s.134(1)(d) and (f) weigh against the variation we propose.

[502] The consideration in s.134(1)(da) of the Act is addressed in further detail at [544] – [545]. For the present purposes we note that the variation we propose will provide additional remuneration for employees working unsocial hours.

[503] The considerations in s.134(1) (e), (g) and (h) are not relevant in the present context.

[504] The modern awards objective is to 'ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions', taking into account the particular considerations identified in ss.134(1)(a)–(h) of the Act. We have taken into account those considerations insofar as they are presently relevant and have decided to vary the SCHADS Award as proposed at [488] above.

[505] As to the UWU's claim that the SCHADS Award be varied to specify that the 'break' in the broken shift 'must exceed one hour', a cogent merit basis for the claim has not been made out. The evidence suggests considerable variability in the duration of the break in the context of the current SCHADS Award terms. We propose varying those terms – to vary the minimum payment clause and to limit the number of unpaid breaks in a broken shift. We expect that these variations will change rostering practices, including the duration of a 'break' in a broken shift. In these circumstances any prescription as to the duration of the break is

premature. The issue can be revisited after the changes we will make have been in operation for at least 12 months.

C A requirement for mutual agreement

[506] The HSU seeks to vary clause 25.6 to provide that a broken shift may only be worked 'where there is mutual agreement between the employer and employee.'

[507] ABI does not oppose the introduction of such a requirement.

[508] NDS does not oppose this aspect of the HSU's claim but submits that the change is not necessary given the requirements of clause 10.3 in relation to part-time employment.

[509] AFEI and Ai Group oppose the introduction of a requirement that broken shifts only be worked by mutual agreement. AFEI submits that such a variation is inappropriate given the prevalence of broken shifts in the industry.

[510] Ai Group submits that it is unclear whether the variation proposed would require agreement to be reached in relation to each broken shift or whether it would be sufficient for an employer to obtain agreement once and then roster the employee on broken shifts on an on-going basis. We agree that the proposed term is unclear as to how it would operate in practice.

[511] Ai Group raises 2 further points in response to the proposal:[441]

- if an employee could at any time simply elect to either perform or not perform a particular broken shift, it would also undoubtedly complicate rostering arrangements and potentially undermine their capacity to align with an employer's operational needs. This would be a particularly problematic development in the context of the participant driven dynamics of the NDIS, and

- it is entirely unclear how, from a practical perspective, such a clause could be fairly imposed in the context of currently engaged employees. If an employee has been engaged on the condition that they work broken shifts (or in circumstances where any agreement as to their hours of work reflect the availability of broken shifts), it would be patently unfair to invalidate such arrangements and it is foreseeable that in some instances the change would jeopardise the ongoing viability of the individual's employment.

[512] As we noted in the *Aged Care Substantive Claims Decision*, a requirement that broken shifts can only be worked by 'mutual agreement' is not generally a particularly effective protection, especially for casual employees (and as pointed out by NDS, part-time employees already have the protection of clause 10.3).

[513] In these circumstances and having regard to the matters raised by Ai Group, we are not persuaded that the change proposed in respect of the default of '1 break' shifts has the requisite merit.

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[441] Ai Group Submission, 13 July 2019 at paras 293 – 294.

D Payment

[514] Clause 25.6(b) deals with the remuneration paid to employees who work broken shifts, it provides:

> 'Payment for a broken shift will be at ordinary pay with penalty rates and shift allowances in accordance with clause 29 – Shiftwork, with shift allowances being determined by the finishing time of the broken shift.'

[515] The effect of this provision is that an employee working a broken shift is paid a shift allowance in accordance with clause 29. The shifts prescribed in clause 29 are as follows:

- afternoon shift (any shift finishing after 8pm and at or before midnight Monday to Friday), and
- night shift (any shift finishing after midnight or commencing before 6am Monday to Friday).

[516] Clause 29.3 deals with the loadings for various shift types:

- an employee who works an *afternoon shift* is paid 'a *loading of 12.5%* of their ordinary rate of pay for the whole of such shift', and
- an employee who works a *night shift* is paid 'a *loading of 15%* of their ordinary rate of pay for the whole of such shift'.

[517] The HSU and UWU seek to vary clause 25.6(b) so that the shift allowance payable to an employee working a broken shift is determined by 'the starting or finishing time of the broken shift, whichever allowance is higher' (emphasis added). The ASU seeks an additional loading of 15% for the duration of the shift.

[518] As we have mentioned, all the employers oppose the ASU's claim for a 15% loading. ABI and NDS do not oppose the variation of clause 25.6(b) so that the applicable shift allowances are determined by either the starting time or the finishing time of the broken shift, whichever is greater. AFEI and Ai Group oppose any change to broken shift payments.

[519] AFEI submits that clause 25.6(b) was considered during the Transitional Review and should not be varied 'unless there has been a material change in circumstances since that time'.[442] Two things may be said about this submission.

[520] First, implicit in the AFEI submission is the notion that to enliven our discretion to vary a modern award we must first be satisfied that there has been a material change in circumstances since the relevant issue was last considered by the Commission.

[521] A similar proposition was advanced by the Unions in the *Penalty Rates Case*. In rejecting that proposition the Full Bench said:

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[442] AFEI Submission, 23 July 2019 at paras 118 – 120.

'[234] Section 156 sets out the requirement to conduct 4 yearly reviews of modern awards and what may be done in such reviews

…

[244] Section 156 clearly delineates what must be done in a Review, what must not be done and what may be done…

[263] In our view there is no warrant in the text of the section for the importation of a material change in circumstances test. … The Unions' proposition would place a constraint on the discretion conferred by s.156(2)(b)(i) which is not warranted by the terms of s.156 or the relevant statutory context and purpose. The Commission must assess the evidence and submissions in support of an award variation against the statutory tests, principally whether the award provides a fair and relevant minimum safety net of terms and conditions and whether the proposed variation is necessary in order for the award to achieve the modern awards objective. The proposition advanced by the Unions would preclude the Commission from varying a modern award where the Commission was satisfied that the award was not meeting the modern awards objective, unless there was a material change in circumstances. This would be inconsistent with s.138 of the FW Act and could not have been intended.

[264] The adoption of the proposed 'material change in circumstances test' would obfuscate the Commission's primary task in the Review of determining whether the modern award achieves the modern awards objective. To adopt such a test would be to add words to the text of s.156 in circumstances where it is not necessary to do so in order to achieve the legislative purpose…'[443]

[522] In the subsequent judicial review application, the Full Federal Court also rejected the 'material change in circumstances test':

'The applicants contend that the FWC misconstrued its powers under ss 156(1) and (2) of the Fair Work Act by exercising the power to make a determination to vary the awards without having satisfied itself that, since the making of the awards the subject of the review or the last review of them, there had been a material change in circumstances such that the award, in each case, no longer met the "modern awards objective"...

The applicants put the same argument to the FWC, that is, the FWC had no power to make a determination to vary the awards without having satisfied itself that there had been a material change in circumstances such that the award in each case no longer met the "modern awards objective". The FWC rejected the argument in the primary reasons at [230]-[268]. In short, the FWC considered that a determination varying an award may be warranted if it is established that there has been a material change in circumstances since the making of the award under review, but the FWC's power to do so is not conditioned on it being satisfied that there has been such a change in circumstances.

The FWC's conclusion in this regard is correct.'[444]

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[443] *Penalty Rates Case* at [234], [244] and [263] – [264].

[444] *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161 at [16], [23] – [24].

[523] Second, as we have said earlier, in conducting the Review the Commission considers previous decisions relevant to any contested issue – including Transitional Review decisions. The extent of the evidence and submissions put in the previous proceedings is relevant to the weight we give to that decision.

[524] The Transitional Review proceeding to which AFEI refers consisted of a conference convened by Senior Deputy President Kaufman to deal with a union proposal to vary clause 25.6(b). The conference subsequently led to a consent variation determination. The variation determination was not the subject of a hearing, no evidence was adduced, and the Senior Deputy President gave no reasons for his decision. In these circumstances we propose to give no weight to those proceedings. We reject AFEI's submission that clause 25.6(b) not be varied unless there has been a material change in circumstances.

[525] We turn first to the ASU's claim. The ASU seeks to vary clause 25.6(b), as follows:

> '**(b)** An employee who works a broken shift will receive:
>
> > **(i)** ~~Payment for a broken shift will be at o~~Ordinary pay plus a loading of 15% of their ordinary rate of pay for each hour from the commencement of the shift to the conclusion of the shift inclusive of all breaks; and
> >
> > **(ii)** ~~with~~ penalty rates and shift allowances in accordance with clause 29—Shiftwork, with shift allowances being determined by the finishing time of the broken shift.' (proposed variation in underlined text)

[526] The ASU has not identified the reasoning or logic underpinning the quantum of the loading proposed.

[527] The 15% loading sought by the ASU to be paid is not limited to each hour worked during a broken shift, but is expressed to apply to the entire duration of the broken shift from commencement of the first portion of work to the cessation of the final portion of work (inclusive of breaks). Further, the loading is proposed to be payable *in addition* to the existing requirement that shift allowances be payable in accordance with clause 29, determined by the finishing time of the broken shift.

[528] It is not appropriate that a 15% loading be applied *in addition* to the existing penalty rates and shift allowances. Nor is it fair or reasonable that the 15% loading be payable in respect of the entire duration of the broken shift from commencement of the first portion of work to the cessation of the final portion of work (inclusive of breaks and unpaid non-working time). It is plainly unreasonable to require an employer to pay a 15% loading in respect of, say, a 12-hour span, in circumstances where the employee may not be working for up to 8 hours of that period.

[529] The ASU's claim lacks merit. We reject the claim.

[530] We now turn to the claim by the HSU and UWU to vary clause 25.6(b) so that the applicable shift allowance is determined by the start or finishing time, whichever is higher. The HSU seeks to replace the current clause 25.6(b) with the following:

> '(f) In addition to the rates at 14.4(d) penalty rates and shift allowances in accordance with clause 29 – Shiftwork and clause 28 – Overtime apply.

(g) Shift allowance will be determined by the starting or finishing time of the broken shift whichever allowance is higher. The allowance will apply across both parts of the shift.'

[531] ABI and NDS do not oppose the variation sought by the HSU and UWU. AFEI and Ai Group oppose the claim.

[532] Clause 25.6(b) provides that the payment of a shift allowance specified in clause 29 is determined by the '*finishing time* of the broken shift'. Fixing the quantum of the broken shift allowance to the finishing time of the shift (as is currently the case – clause 25.6(b)) gives rise to some curious results.

[533] As the UWU points out, under the current term an employee who commenced a broken shift at 5am and finished at 3pm would not receive any shift loading. No other party challenged the accuracy of the example provided.

[534] Ai Group submit that there is 'nothing anomalous about such an outcome', because:

> 'There is no 'early morning' shift allowance payable under the Award and a shift that ends at 3pm would never attract an additional loading as it would not constitute either an afternoon or night shift under the Award.'[445]

[535] We disagree. A broken shift allowance is intended to compensate employees for the disutility of working a broken shift. The way the current term operates means that some employees who work broken shifts will receive *no* additional remuneration to compensate for the associated disutility. Such an outcome is anomalous; and wrong in principle.

[536] Ai Group also points to 2 other difficulties with the claim:[446]

- the proposed clauses cannot sensibly be applied given that the definitions for an afternoon or night shift under the SCHADS Award operate by reference to the finishing time for the shift; they do not contemplate the starting point, and

- such a variation would operate unfairly and unjustifiably to the benefit of an employee in all instances.

[537] The first point is incorrect. Clause 29.2(b) defines a night shift as 'any shift which finishes after 12 midnight *or commences before 6.00am* Monday to Friday'. Ai Group's second point was not the subject of much elaboration. It is not apparent to us how the proposal can be said to unjustifiably benefit employees in all instances.

[538] It seems to us that there is a more significant, conceptual issue with the proposal (and with the current SCHADS Award term).

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[445] Ai Group Submission, 13 July 2019 at para 287.

[446] Ai Group Submission, 13 July 2019 at paras 283 – 284.

[539] As mentioned earlier, broken shift allowances compensate employees for the disutility of working broken shifts. Both the current SCHADS Award term and the Unions' proposed variation operate such that the additional payment for a broken shift and the quantum of that payment depend on the start/finish time of that shift. The HSU points to the anomalous outcomes which flow from the current term – some employees receive no additional compensation for working a broken shift. It seems to us that the same circumstance may arise under the variation proposed by the Unions. For example, under the Unions' proposal an employee who commences a broken shift *after* 6am and finishes *before* 8pm receives no additional payment for working a broken shift.

[540] The entitlement to additional remuneration for working a broken shift should not depend on the times at which the shift starts and finishes. It is perhaps for this reason that most awards which contain a broken shift allowance express that allowance as a percentage of the standard rate (see [406] – [408] above). Indeed, the only 2 modern awards which use the shift finishing time to determine the additional remuneration are the SCHADS Award and the Aged Care Award.

[541] We acknowledge that the current method of calculating the broken shift allowance in the SCHADS Award is one of long standing. Consistent with the approach generally taken by the Award Modernisation Full Bench it may be accepted that the current shift allowance methodology reflected the terms in the preponderance of pre-reform instruments. But we are not confined by this history and nor are we required to make a decision in the terms applied for.

[542] This proceeding forms part of the Review. As the Full Federal Court observed in *Shop, Distributive and Allied Employees Association v The Australian Industry Group*:

> 'The meaning of s 156(2) is clear. The FWC must review all modern awards under s 156(2)(a). In that context "review" takes its ordinary and natural meaning of "survey, inspect, re-examine or look back upon". Consequential upon a review the FWC may exercise the powers in s 156(2)(b). In performing both functions the FWC must apply the modern awards objective as provided for in s 134(2)(a).'[447]

[543] It is convenient to deal now with 2 aspects of the modern awards objective.

[544] Section 134(1)(da) which requires that we consider the 'need to provide additional remuneration' for, relevantly, 'employees working shifts', was the subject of a number of observations by the Full Bench in the *Penalty Rates Case* as follows:[448]

> 'The expression 'additional remuneration' in the context of s.134(1)(da) means remuneration in addition to what employees would receive for working what are normally characterised as 'ordinary hours', that is reasonably predictable hours worked Monday to Friday within the 'spread of hours' prescribed in the relevant modern award. Such 'additional remuneration' could be provided by means of a penalty rate or loading paid in respect of, for example, work performed on weekends or public holidays. Alternatively, additional remuneration could be provided by other means such as a 'loaded hourly rate'.

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[447] Ibid at [38].

[448] *Penalty Rates Case* at [192] and [195]-[196].

…

Section s.134(1)(da) is a relevant consideration, it is *not* a statutory directive that additional remuneration must be paid to employees working in the circumstances mentioned in paragraphs 134(1)(da)(i), (ii), (iii) or (iv). Section 134(1)(da) is a consideration which we are required to take into account. To take a matter into account means that the matter is a 'relevant consideration' in the *Peko-Wallsend*[449] sense of matters which the decision maker is bound to take into account. As Wilcox J said in *Nestle Australia Ltd v Federal Commissioner of Taxation*:

> 'To take a matter into account means to evaluate it and give it due weight, having regard to all other relevant factors. A matter is not taken into account by being noticed and erroneously disregarded as irrelevant'.[450]

Importantly, the requirement to take a matter into account does not mean that the matter is necessarily a determinative consideration. This is particularly so in the context of s.134 because s.134(1)(da) is one of a number of considerations which we are required to take into account. No particular primacy is attached to any of the s.134 considerations. The Commission's task is to take into account the various considerations and ensure that the modern award provides a 'fair and relevant minimum safety net'.'[451] (footnotes omitted)

[545] We are required to consider the need to provide additional remuneration for working shifts. While s.134(1)(da) of the Act is not a statutory directive that additional remuneration must be paid; it is a relevant consideration. Neither the current SCHADS Award term nor the Unions' proposal provide additional remuneration to all employees working broken shifts.

[546] Second, the reference in s.134(1)(g) of the Act to the 'need to ensure a simple, easy to understand, stable and sustainable modern award system' does not mean that we are constrained by the current terms of an award. As the Full Federal Court observed in *Shop, Distributive and Allied Employees Association v The Australian Industry Group*:

> 'The reference in s 134(1)(g) to the "need to ensure a simple, easy to understand, stable and sustainable modern award system" does not support the applicants. That is a matter which the FWC must take into account as part of the modern awards objective. It is thus a matter for the FWC to determine the weight to be given to the value of stability in the particular review it is conducting, along with the weight to be given to all other matters it must take into account, cognisant of its duty (which itself involves an evaluative assessment of potentially competing considerations) to ensure that modern awards, together with the National Employment Standards, provide the required fair and relevant minimum safety net. It is not legitimate to take one element in the overall suite of potentially relevant considerations to the discharge of the FWC's functions, such as stability, and discern from that one matter a Parliamentary intention that the scheme as a whole is to be construed with that end alone in mind.'[452]

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[449] *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24.

[450] (1987) 16 FCR 167 at 184; cited with approval by Hely J in *Elias v Federal Commissioner of Taxation* (2002) 123 FCR 499 at [62] and by Katzmann J in *Construction, Forestry, Mining and Energy Union v Deputy President Hamberger* (2011) 195 FCR 74 at [103].

[451] *Penalty Rates Case* at [192] and [195]-[196].

[452] [2017] FCAFC 161 at [33].

[547] It is our *provisional* view that the additional remuneration for working a broken shift under clause 25.6 of the SCHADS Award should be an allowance calculated as a percentage of the standard weekly rate.

[548] The 'standard rate' in the SCHADS Award is defined in clause 3 as the minimum rate for a social and community services employee level 3 at pay point 3, currently $1006.10.

[549] As mentioned earlier, there is considerable variation in the proportion of the standard rate fixed as a broken shift allowance. Fixing the proportion calls for the exercise of broad judgment, it is not a matter which lends itself to precise quantification. In fixing the proportion for the SCHADS Award we have had regard to the current method – which may result in an employee receiving a loading of 15% of their ordinary rate – and to the fact that employees do not operate from a base location. As mentioned earlier, employees in home care and certain disability services have no '*base location*' where they start at and finish at each day. The work site for such employees is the home of the client, or locations where the client may need to be taken (such as medical centres, shopping centres, social events).

[550] This is relevant because broadly speaking a broken shift allowance compensates for 2 disutilities:

- the length of the working day being extended because hours are not worked continuously, and

- the additional travel time and cost associated with effectively presenting for work on 2 occasions.

[551] As to the second matter, a broken shift of 2 portions of work and a break will usually mean that the employee will travel between the end of the first portion of the shift and the start of the second. Depending on the duration of the break they may travel home or to the location of their next engagement.

[552] These considerations have led us to the *provisional* view that we should set the proportion of the standard rate in the SCHADS Award towards the upper end of the range of other modern awards (and noting that several of the awards discussed at [400] also include travel time allowances).

[553] It is our *provisional* view that an employee working a broken shift under clause 25.6 receive a broken shift allowance of 1.7% of the standard rate, per broken shift. At present this amounts to $17.10 per broken shift. This is the amount payable to any employee who works a 'one break' broken shift.

[554] As mentioned earlier, a 2 break shift would be subject to a higher payment. It is our *provisional* view that the broken shift allowance payable for a 2 break broken shift be set at 2.5% of the standard rate (or $25.15 per broken shift). This new broken shift allowance will replace the current entitlement in clause 25.6(b).

[555] In addition, there is currently a lack of clarity in the SCHADS Award as to when overtime is payable in respect of work performed by day workers outside the ordinary span of hours; however it would seem as a matter of logic that overtime is payable for such work.

[556] It is our *provisional* view that the SCHADS Award should be varied to make clear that where an employee who is a day worker (including part-time and casual employees) performs work outside of the ordinary span of hours (including as part of a period of work in a broken shift), the employee is entitled to overtime for such work.

5.4 TRAVEL TIME CLAIMS

5.4.1 Background – the current SCHADS Award term

[557] Clause 20.5 of the SCHADS Award deals with travelling, transport and fares as follows:

> '**20.5 Travelling, transport and fares**
>
> (a) Where 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 $0.80 per kilometre.
>
> (b) When an employee is involved in travelling on duty, if the employer cannot provide the appropriate transport, all reasonably incurred expenses in respect to fares, meals and accommodation will be met by the employer on production of receipted account(s) or other evidence acceptable to the employer.
>
> (c) Provided that the employee will not be entitled to reimbursement for expenses referred to in clause 20.5(b) which exceed the mode of transport, meals or the standard of accommodation agreed with the employer for these purposes.
>
> (d) An employee required to stay away from home overnight will be reimbursed the cost of reasonable accommodation and meals. Reasonable proof of costs so incurred is to be provided to the employer by the employee.'

[558] It is apparent from the terms of clause 20.5 that it only applies where an employee is required and authorised by their employer to use their motor vehicle in the course of their duties and, further, the clause only provides for reimbursement of travel expenses and not for travelling time.

5.4.2 The Claims

[559] There are 3 claims in respect of travel time.

[560] The ASU and UWU seek to insert a new award term - clause 25.7 - Travel Time, as follows: [453]

> '**25.7 Travel Time**
>
> (a) Where an employee is required to work at different locations they shall be paid at the appropriate rate for reasonable time of travel from the location of the preceding client to the

[453] UWU Submission, 1 April 2019 at paras 1 – 11 and draft determination; ASU Submission, 2 July 2019 at paras 1 – 58.

location of the next client, and such time shall be treated as time worked. The travel allowance in clause 20.5 also applies.

(b) This clause does not apply to travel from the employee's home to the location of the first client nor does it apply to travel from the location of the last client to the employee's home.'

[561] The HSU's claim involves 2 variations to the SCHADS award. First, the HSU seeks a new subclause 25.6(d) to provide a payment for travel that may be undertaken in the course of a break during a broken shift, as follows:

'**25.6 Broken shifts**

(d) Where an employee works a broken shift, they shall be paid at the appropriate rate for the reasonable time of travel from the location of their last client before the break to their first client after the break, and such time shall be treated as time worked. The travel allowance in clause 20.5 also applies.'

[562] Second, the HSU seeks a new entitlement to a travel allowance for disability support workers and home care workers of $0.78 per kilometre in respect of all travel. In particular, the HSU seeks to vary clause 20.5(a), as follows:

'(a) Where 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. Disability support workers and home care workers shall be entitled to be so reimbursed in respect of all travel:

(a) from their place of residence to the location of any client appointment;

(b) to their place of residence from the location of any client appointment;

(c) between the locations of any client appointments on the basis of the most direct available route.' (proposed variation in underlined text)

[563] ABI advances an alternate variation for consideration (see below).

[564] The submissions and witness evidence relevant to the Union travel time claims are set out at **Attachment E.**

5.4.3 The Submissions

A Union submissions

[565] The ASU relies on its submission dated 2 July 2019 and its submission in reply dated 2 October 2019.

[566] The UWU relies on its submission dated 15 February 2019, supplementary submission dated 1 April 2019 and further submission in reply dated 3 October 2019.

[567] In summary, the UWU contends that:

> 'Employees in the home care and disability services sector perform travel at the direction of their employer in between client locations as a key part of their role. This work could not occur without travel.
>
> Yet, there are employers who engage employees to travel significant distances to and between clients without any payment for work directed travel. The employer evidence has not indicated that there would be any excessive costs as a result of a travel time clause; rather several witnesses noted they already pay for travel time. Service providers are able to include a fee for travel time in home care arrangements, and travel time is claimable (within limits) under the NDIS and accommodated within government funding for home care packages.
>
> Regardless of the funding arrangements, travel between and to and from client locations is not optional. It is a core requirement of the role of these employees. In the absence of an explicit clause on travel time, some employers are shifting these costs onto low paid workers. This is inconsistent with a fair and relevant safety net of conditions.
>
> We do not concede that travel time is not payable under the terms of the current Award and have current proceedings on this issue in the Queensland Magistrates Court. These proceedings are unresolved and the employer is disputing the claim. Irrespective of the outcome of this case, it is still necessary to review and vary the Award's treatment of work related travel as the evidence indicates that there are numerous employers who do not pay travel time under the terms of the Award.'[454] (footnotes omitted)

[568] The HSU adopts the submissions of the UWU in respect of travel required of workers.[455]

B Employer submissions

(i) NDS

[569] NDS opposes the ASU, UWU and HSU travel time claims and submits that current practices with respect to travel undertaken during a broken shift vary but there is evidence that some of the time needed for travel between clients is not paid time.

[570] NDS submits that:

> 'Travel in the disability sector is often associated with the use of broken shift because in home supports are usually only needed for short periods at certain times of the day, such as meal times. For example, Robert Steiner gave evidence about the extent of travel in his job. Part of his evidence pointed to the importance of ensuring continuity of support for clients with psychosocial disability. The consequence was that where a client only needed intermittent supports during the day, it was often necessary for the same employee to travel back to provide that support in order to avoid the disruptive effect of different workers attending the client.'[456]

(ii) AFEI

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[454] UWU Submission, 18 November 2019 at paras 27 – 30.

[455] HSU Submission, 18 November 2019 at para 82.

[456] NDS Submission, 19 November 2019 at para 41.

[571] AFEI opposes the ASU, UWU and HSU travel time claims and relies on its submissions of 17 September 2019 and submits further that:[457]

- not all disability support workers and home care workers are required to travel considerable distances during the course of their working days in order to perform their work;
- where employees do travel a considerable distance, such travel is undertaken on an irregular basis;
- employees do not always use their breaks to travel from one client to another; and
- an employer has limited control over the time it takes for an employee to get from one client to another due to a number of factors including traffic.

(iii) ABI

[572] ABI relies on its reply submission of 13 September 2019 and submits that:

> '[o]ur clients do not have any objection to the notion that employees should receive reasonable compensation for time spent travelling in the course of their duties. However, our clients do not consider that the union claims are an appropriate variation for the reasons outlined in our written submissions of 13 September 2019.'[458]

[573] To the extent that the Commission finds that the existing broken shifts clause does not meet the modern awards objective of providing a fair and relevant minimum safety net of conditions ABI proposes an 'alternative variation' for consideration which, it submits rectifies any issue with the existing broken shifts provision, but does not suffer from the problems with the union proposals.[459]

[574] ABI submits that an appropriate way of dealing with the issue of unpaid travel time in the gaps between portions of work in a broken shift is to introduce a payment mechanism into the Award in the form of an allowance. ABI submits that this proposal avoids the complexities which arise if the time was to be 'time worked'.

[575] ABI notes that a number of pre-reform awards dealt with this issue in this way.

[576] For example, clause 29(ii) of the *Miscellaneous Workers Home Care Industry (State) Award* (AN120341) provided for a payment at the rate of 3% of the ordinary hourly rate per kilometre travelled where employees were rostered to work with consecutive clients. The clause provided:

> '(ii) Where employees are rostered to work with consecutive clients they shall be paid for the time taken to travel between locations at the rate of three per cent of the ordinary hourly rate per kilometre travelled, excluding travel from the employee's home to the first place of work

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[457] AFEI Submission, 19 November 2019 at paras G-2 to G-5.

[458] ABI Submission, 19 November 2019 at para 14.6.

[459] ABI Submission, 13 September 2019 at part 9.

and return to home at the cessation of his or her duties; provided that this payment shall not be made if the employee is being otherwise paid under this award.'

[577] Similarly, clause 20.4.2 of the *Community Services (Home Care) (ACT) Award 2002* (AP816351CRA) had a similarly worded provision. It provided:

'Where employees are rostered to work with consecutive clients they shall be paid for the time taken to travel between locations at the rate of 3% of the ordinary hourly rate per kilometre travelled, excluding travel from the employee's home to the first place of work and return to home at the cessation of his/her duties.'

[578] ABI submits:

'9.6 An allowance such as those mentioned above would appear to be a sensible way of compensating employees for time spent travelling during periods that are expressed in clause 25.6(a) as not being work time.

9.7 Such an allowance appears to meet the objectives of the Unions in terms of compensating employees for travel time, without any of the complex implications outlined in paragraphs 8.8 to 8.11 above.

9.8 An allowance of this type would also appear to more readily meet the modern awards objective, in the sense that it:

(a) provides additional remuneration for employees working broken shifts;

(b) provides an entitlement that is simpler and easier to understand than the Unions' proposals;

(c) addresses the relative living standards and the needs of the low paid;

(d) provides a floor entitlement from which parties can collectively bargain;

(e) does not prevent the utilisation of broken shifts (see the 'need to promote flexible modern work practices and the efficient and productive performance of work');

(f) does not impose an unreasonable regulatory burden on business (notwithstanding it representing a significant new cost imposition on employers).

9.9 As stated at paragraph 7.11 above, our clients are not opposed to the introduction of a form of allowance, subject to there being an appropriate delay to its implementation to provide the industry with time to prepare for its implementation.'[460]

[579] It is convenient to note here that NDS does not oppose the alternate proposal advanced by ABI.[461] AFEI does not oppose ABI's proposal 'in principle' but seeks an opportunity to comment on the terms of any variation determination to give effect to the proposal.[462]

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[460] ABI Submission, 13 September 2019 at paras 9.6 – 9.9.

[461] NDS Submission, 10 March 2020 p 2.

[580] Ai Group acknowledges that an allowance of the type contained in the relevant pre-modern awards may alleviate some of the concerns it has with the Unions' proposals (such as the complexities associated with measuring time spent travelling and the treatment of such time as time worked), but notes that ABI's proposal raises the following issues:[463]

(a) How is the quantum of the allowance to be determined?

(b) In what circumstances would the allowance be payable?

(c) Should the employee be required to provide a written record of the number of kilometres travelled? Should payment be contingent on the provision of such a record and its verification?

[581] Ai Group submits that if we form the view that ABI's proposal warrants further consideration then parties should be given a further opportunity to address the issue before a final determination is made.

[582] The Unions oppose any variation in the form proposed by ABI.[464] In their joint submission of 10 March 2020 the Unions advance 4 arguments in support of their position:[465]

1. The ABI proposal would amount to a small and inadequate compensation to the employee travelling for work. When an employer directs an employee to undertake work at different locations, the employee is in service to the employer, and the time spent travelling between those locations should be treated as time worked.

2. An allowance should deal with some additional duty, expense or disability and not for what are hours of work.

3. If travel between clients were to be considered an allowance rather than time-worked, employees working long days with multiple clients would rarely be entitled to overtime, save for when working beyond the 12 hour span for a broken shift, despite devoting many hours to the employer's business.

4. The submission that the Union's travel time proposals are unworkable cannot be sustained. The evidence is that employers in the home care sector and in disability services have regard to travel time when rostering employees. Employers have also adopted methods of recording work travel for the purposes of paying the travel allowance.

(iv) Ai Group

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[462] AFEI Submission, 11 March 2020 at paras B-26 to B-27.

[463] Ai Group Submission, 11 March 2020, p 4.

[464] See generally, ASU Submission, 2 October 2019 at paras 14 – 27; HSU Submission, 2 October 2019 at paras 42 – 47; UWU Submission, 3 October 2019 at paras 6 – 12; Joint Union Submission, 10 February 2020 at paras 49 – 66.

[465] Joint Union Submission, 10 March 2020 at para 33.

[583] Ai Group opposes the ASU, UWU and HSU travel time claims for the reasons set out in its submissions of 16 September 2019.[466]

5.4.4 The Evidence

[584] In our view the evidence supports the following findings:

1. Employees in home care and certain work in disability services have no '*base location*' where they start and finish each day.[467] A key feature of the duties of such employees is the provision of services in the clients' homes or other sites at the direction of the employer.

2. Home care workers and many disability services support workers are required to travel to various locations to provide services to clients.

3. Time spent by employees travelling varies depending on which clients they support on any given day and where they reside, and a range of factors may affect how long it takes an employee to travel from one location to another on any given day.[468]

4. Most employees are not paid for time spent travelling to and from clients,[469] (which includes travelling between clients[470] and travelling to the first client / from the last client).[471] Some employees covered by the Award can be travelling to and from clients for significant periods of time without payment.[472]

5. There are a range of practices adopted by some employers to remunerate employees in respect of time spent travelling. For example:

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[466] Ai Group Submission, 16 September 2019.

[467] Transcript, 17 October 2019, cross-examination of Jeffrey Wright at PN2581-PN2583; Transcript, 18 October 2019, cross-examination of Graham Shanahan at PN2865-PN2866.

[468] Transcript, 15 October 2019, cross-examination of Trish Stewart at PN459-PN460; Transcript, 16 October 2019, cross-examination of Robert Steiner at PN1573-PN1574.

[469] Exhibit ASU9 – Witness Statement of Richard Rathbone, 13 February 2019 at para 17; Exhibit ASU7 – Witness Statement of Tracy Kinchin, 24 June 2019 at para 16; Exhibit HSU25 – Witness Statement of Fiona Macdonald, 15 February 2019 at Annexure FM-2 at pp 87; Exhibit HSU5 – Witness Statement of Christopher Friend, 15 February 2019 at para 47; Exhibit HSU4 – Witness Statement of Heather Waddell, 15 February 2019 at para 13; Exhibit HSU28 – Witness Statement of Thelma Thames, 15 February 2019 at para 16; Exhibit HSU29 – Witness Statement of Bernie Lobert, 15 February 2019 at para 15; Exhibit HSU32 – Supplementary Witness Statement of Scott Quinn, 3 October 2019 at para 10; Exhibit UV4 – Witness Statement of Deon Fleming, 16 January 2019 at para 22; Exhibit UV1 – Witness Statement of Trish Stewart, 17 January 2019 at para 16; Exhibit UV2 – Supplementary Witness Statement of Trish Stewart, 1 April 2019 at para 6; Exhibit UV8 – Witness Statement of Jared Marks, 3 October 2019; Exhibit ASU2 – Witness Statement of Robert Steiner, 15 October 2019 at para 14.

[470] Exhibit HSU4 – Witness Statement of Heather Waddell, 15 February 2019 at para 13.

[471] Exhibit HSU28 – Witness Statement of Thelma Thames, 15 February 2019 at para 16; Transcript, 17 October 2019, cross-examination of Jeffrey Wright at PN2609-PN2611; Transcript, 18 October 2019, cross-examination of Graham Shanahan at PN2890.

[472] Exhibit UV2 - Supplementary Witness Statement of Trish Stewart, 1 April 2019 at para 8; Exhibit HSU25 – Witness Statement of Fiona Macdonald, 15 February 2019 at Annexure FM2, p 88.

(a) Ms Stewart gave evidence that Excelcare paid her normal hourly rate for time spent travelling 'between appointments' which was also counted as time worked. However, the employer was said to use Google maps to 'get an estimate' for how long the travel should take and this was how our pay was calculated'.[473]

(b) Mr Shanahan gave evidence that Coffs Coast Health & Community Care Pty Ltd pays employees their 'normal rate of pay' when travelling between clients, although it was not specified how that payment was calculated or determined.[474]

(c) Mr Shanahan gave evidence that in 'extraordinary circumstances' the business also pays an additional allowance where employees are required to travel significant distances to provide support to clients (the example given was where an employee based in Coffs Harbour is required to attend a client at Dorrigo).[475]

(d) HammondCare pays an allowance where broken shifts are worked, which is described as 'recognizing and compensating employees for possible travel time and kilometres that may be incurred'.[476]

(e) HammondCare also has a regime in respect of 'Travel in Extraordinary Circumstances'.[477]

(f) CASS Care Limited pays an allowance in accordance with clause 6.1.1(c) of the CASS Care Limited Enterprise Agreement (Other Than Children's Services) (NSW) 2018-2021.[478]

6. As mentioned earlier, employees report a range of adverse consequences with working broken shifts with short engagements and unpaid travel time (see finding 6 above at [232]).

5.4.5 Consideration

[585] As mentioned earlier, minimum engagement, broken shifts and travel time are inter-related. They each impact on how work is organised and the remuneration for that work. All parties acknowledge the connection between these issues. For example, the ASU accepts that if its claim for paid travel time is successful then the quantum of its broken shift allowance

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[473] Exhibit UV2- Supplementary Witness Statement of Trish Stewart, 1 April 2019 at para 5; Exhibit UV5 – Supplementary Witness Statement of Deon Fleming, 28 March 2019 at para 5.

[474] Transcript, 18 October 2019, cross-examination of Graham Shanahan at PN2887.

[475] Transcript, 18 October 2019, cross-examination of Graham Shanahan at PN2890.

[476] Exhibit ABI1 – HammondCare Residential Care and HammondCare at Home Enterprise Agreement 2018 at clause 13.4.5 and Annexure 1.

[477] Exhibit ABI1 - HammondCare Residential Care and HammondCare at Home Enterprise Agreement 2018 at clause 23.2.

[478] Transcript, 18 October 2019, cross-examination of Joyce Wang at PN3505-3517, PN3557-3558 and PN3629-3647.

claim (15%) should be less; because the claimed loading includes a component to compensate for the disutility of unpaid travel time.[479]

[586] In sections 5.2 and 5.3 we have:

- decided to introduce a minimum engagement for part-time employees by deleting clause 10.4(c) and inserting a new clause 10.5 to provide the following minimum payment for part-time and casual employees:
    - social and community service employees (except when undertaking disability work) – 3 hours' pay, and
    - all other employees – 2 hours' pay,
- decided to vary clause 25.6 to define a broken shift as a shift consisting of 2 separate periods of work with a single unpaid 'break' (other than a meal break) and to accommodate the occasional need for a broken shift to involve more than one unpaid break subject to:
    - a maximum of 2 unpaid 'breaks' in the shift
    - a 2 break shift would be subject to the agreement of the employee, on a per occasion basis, and
    - a 2 break shift would be subject to an additional payment, in recognition of the additional disutility (relative to a single break shift), and
- expressed the following *provisional* views:
    - the additional remuneration for working a broken shift under clause 25.6 of the SCHADS Award should be an allowance calculated as a percentage of the standard weekly rate
    - an employee working a 'one break' broken shift under clause 25.6 should receive a broken shift allowance of 1.7% of the standard rate, per broken shift ($17.10 per broken shift)
    - the broken shift allowance payable for a 2 break broken shift be set at 2.5% of the standard rate ($25.15 per broken shift), and
    - an employee who is a day worker performing work outside of the ordinary span of hours (including as part of a period of work in a broken shift) is entitled to overtime for such work.

[587] The changes we propose to make are likely to result in changes to rostering practices and to how work is organised. It may also change the extent of 'unpaid' travel between

[479] ASU Submission, 2 July 2019 at para 56.

engagements. Further, the broken shift allowance we propose is intended to compensate for 2 disutilities:

- the length of the working day being extended because hours are not worked continuously, and
- the additional travel time and cost associated with effectively presenting for work on 2 occasions.

[588] As a general proposition we accept that employees should be compensated for the time spent travelling between engagements. But framing an award entitlement to address this issue raises several issues, including the circumstances in which any payment is to be made and the calculation of that payment. We are also conscious of the s.134 considerations, in particular:

- the needs of the low paid
- the impact on employment costs and the regulatory burden, and
- the need to ensure that any provision is simple and easy to understand.

[589] This issue requires further consideration. A conference will be convened to discuss the next steps.

5.5 VARIATIONS TO ROSTERS CLAIMS

5.5.1 Background

[590] Clause 25.5(d) deals with changes to rosters:

> **'25.5(d) Change in roster**
>
> (i) Seven days' notice will be given of a change in a roster.
>
> (ii) However, a roster may be altered at any time to enable the service of the organisation to be carried on where another employee is absent from duty on account of illness, or in an emergency.
>
> (iii) This clause will not apply where the only change to the roster of a part-time employee is the mutually agreed addition of extra hours to be worked such that the part-time employee still has four rostered days off in that fortnight or eight rostered days off in a 28 day roster cycle, as the case may be.'

[591] There are 3 claims in respect of changes to rosters, 2 advanced by ABI and one by the UWU. It is convenient to deal with the UWU claim first.

[592] The submissions and witness evidence relevant to the claims are set out at **Attachment F.**

5.5.2 UWU Claim

A The claim and submissions

[593] The UWU seeks to vary clause 25.5(d)(i) to provide full-time and part-time employees with an entitlement to be paid at overtime rates in circumstances where 7 days' notice of a roster change is not provided. In particular, the UWU seeks to amend clause 25.5(d)(i) as follows:

> '(i) Seven days' notice will be given of a change in a roster. Full time and part time employees will be entitled to the payment of overtime for roster changes where seven days' notice is not provided.'[480]

[594] The UWU submits that roster changes without adequate notice can be disruptive and have a significant impact on the ability of employees to attend to their family and caring responsibilities and that the proposed variation will remove any ambiguity about what occurs when 7 days' notice is not provided. In relation to the latter point the UWU initially submitted that:

> 'The Award does not explicitly identify what the consequences is for the employer for failing to provide seven days' notice of a roster change in a situation where the exceptions in clause 25.5(d)(ii) and (iii) do not apply.
>
> The logical interpretation is that any roster changes where seven days' notice has not been provided must be paid as overtime. This is also the stand industrially generally.
>
> However, many employers in the sector do not heed this, and regularly make changes to employee rosters without the required notice and without the payment of overtime.'[481]

[595] In the subsequent Joint Union Submission of 10 February 2020 the UWU withdrew its statement that overtime is payable where 7 days' notice of a roster change is not given and agrees that the consequence of such conduct would arise from it being a breach of the Award.[482]

[596] In summary the UWU contends that:

> 'On the above evidence, the Commission can be satisfied that inserting a provision providing for the payment of overtime where late roster changes are not agreed to by an employee would have limited cost impact on employers, but would provide a reasonable means of compensation employees when such changes do occur and assist in the development of good rostering practices.'[483]

[597] The various employer interests oppose the UWU's claim.

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[480] UWU Submission, 15 February 2019, para 72.

[481] UWU Submission, 15 February 2019 at paras 67 – 74.

[482] See Joint Union Submission, 10 February 2020 at para 287.

[483] UWU Submission 18 November 2019 at para 51.

[598] ABI submits that where employers seek to change an employee's roster it is for legitimate operational reasons and generally in order to meet client needs.

[599] ABI also submits that if the claim is granted it will increase the extent of casualisation in the sectors covered by the SCHADS Award:

> 'Ultimately, if the Award is varied to make it even more difficult for employers to utilise part-time employees in the current dynamic operating environment (for example, by imposing overtime payment obligations where a part-time employee's roster is changed), employers will transition towards a workforce composition with a greater proportion of casual employees.'[484]

[600] NDS opposes the claim and submits it is unnecessary because a failure to provide the requisite notice is a breach of the Award and the employer can be prosecuted and fines imposed as a result. NDS also refers to the protection afforded to part-time employees by the requirements of clause 10.3(c), while full-time employees have the protections of the ordinary hours provisions of clauses 25.1 – 25.4.[485]

[601] AFEI submits that the claim is not supported by probative evidence and is not necessary for the SCHADS Award to achieve the modern awards objective. AFEI submits[486] that the implications of non-compliance with Award terms is sufficiently addressed in the Act which provides:

- rights and protections to employees so that issues of non-compliance with Award terms can be raised without adverse action taken against them
- union rights of entry for investigation of non-compliance
- Fair Work Ombudsman powers of investigation of non-compliance
- standing of employees, and unions to seek legal redress for non-compliance with an Award, and
- powers of the Fair Work Ombudsman for compliance enforcement.

[602] AFEI also contends that the proposed variation would, result in 'unnecessarily high regulatory restraints and costs associated with achieving mutually suitable working arrangements with employees, as well as uncertainty for employers and employees in determining entitlements.'[487]

[603] Ai Group submits it is not necessary, within the meaning of s.138 of the Act, or appropriate to provide for the payment of overtime penalties by reference to circumstances which constitute a breach of an Award clause, having regard to the following:

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[484] ABI Submission, 12 July 2019 at para 14.8.

[485] NDS Submission, 16 July 2019 at paras 50 – 52.

[486] AFEI Submission, 23 July 2019 at para 99.

[487] AFEI Submission, 23 July 2019 at para 104.

- the award already appropriately and comprehensively regulates the way overtime should be paid

- the proposal would introduce inconsistencies between award terms and give rise to various problems, including uncertainty as to whether rostering provisions can be breached if a relevant payment is made, and

- the evidentiary case advanced does not establish the various factual assertions relied on in support of the claim.

[604] Ai Group also submits that there are existing limitations on the ability to vary a roster on less than 7 days' notice in respect of part-time employees and, more generally, under clause 10.3. Ai Group also points to several drafting issues in the proposed variation which it submits are 'problematic'.[488]

B The Evidence

[605] In our view the evidence supports the following findings:

1. There has been an increase in the variability of working hours since the introduction of consumer-directed care.[489]

2. It is common for employees' rosters to change regularly and for those changes to occur with less than 7 days' notice.[490]

3. Changes to employees' rosters are generally made for operational reasons including client cancellations and to cover employee absences to meet the needs of the clients.491

4. Roster changes can be disruptive for employees.[492]

[606] The UWU also contended that the evidence supported the following findings:

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[488] Ai Group Submission, 13 July 2019 at paras 395 – 417.

[489] Exhibit ABI6 - Witness Statement of Deborah Ryan, 12 July 2019 at paras 41, 62; Exhibit HSU27 – Witness Statement of Pamela Wilcock, 15 February 2019 at para 21; Exhibit HSU28 - Witness Statement of Thelma Thames, 15 February 2019 at 11; Exhibit HSU31 – Witness Statement of Scott Quinn, 3 October 2019 at paras 16, 36.

[490] Exhibit UV4 – Witness Statement of Deon Fleming, 16 January 2019 at paras 13, 15 and 16; Exhibit UV1 - Witness Statement of Trish Stewart, 17 January 2019 at para 9 - 11; Exhibit UV6 - Witness Statement of Belinda Sinclair, 16 January 2019 at para 22 - 25; Exhibit HSU32 – Supplementary Witness Statement of Scott Quinn, 3 October 2019 at para 31.

[491] Exhibit HSU27 – Witness Statement of Pamela Wilcock, 15 February 2019 at para 11; Exhibit HSU28 - Witness Statement of Thelma Thames, 15 February 2019 at para 11; Exhibit UV4 – Witness Statement of Deon Fleming, 16 January 2019 at para 15 - 17; Exhibit UV1 – Witness Statement of Trish Stewart, 17 January 2019 at para 10; Exhibit HSU5 – Witness Statement of Christopher Friend, 15 February 2019 at para 30; Exhibit UV6 - Witness Statement of Belinda Sinclair, 16 January 2019 at para 22.

[492] Exhibit UV1 - Witness Statement of Trish Stewart, 17 January 2019 at para 10; Exhibit UV4 – Witness Statement of Deon Fleming, 16 January 2019 at para 16; Exhibit UV6 - Witness Statement of Belinda Sinclair, 16 January 2019 at para 25.

1. Employees regularly agree to roster changes because there is under-employment in the sector and they require additional income.

2. It is uncommon for employees to disagree to roster changes, and where such disagreement occurs, it is for a good reason.

[607] In support of these proposed findings the UWU relies on the evidence of Trish Stewart, Deon Fleming and Belinda Sinclair.[493] In relation to Ms Stewart's evidence the UWU relies on [10] – [11] of Ms Stewart's statement, which says:

> 'At least once per week, my roster will be altered as a result of either another support worker who has called in sick or a client cancelling their appointment. If a client cancels their appointment before 5pm the day before their scheduled appointment then I do not get paid for the shift. If they cancel after 5pm the day before, then I will get paid. This means that I can never be certain of the amount of hours I am going to receive and how much I will be paid each week.
>
> Most weeks I would like to pick up more hours because I do not receive enough hours to cover my weekly expenses. My managers normally ask me to cover a shift at short notice if a colleague has taken sick leave. I will normally accept these hours if I am available because I need to accept all of the hours I am offered to make enough money.'[494]

[608] In relation to Ms Fleming's evidence the UWU relies on [15] – [17] of Ms Fleming's statement, which says:

> '15. My roster is frequently changed. Most weeks the roster that is released at the beginning of the week is varied due to client cancellations and my colleagues taking sick leave.
>
> 16. If clients cancel on the same day of their appointment, then I am paid for the shift. But if a client cancels a home care visit before 5pm the day before the scheduled appointment, then I am not paid for that appointment and these are hours I miss out on. At least once per week, I will have a client cancel their appointment with the required notice. This creates a lot of uncertainty for me in being able to anticipate how much I will get paid in the week.
>
> 17. At least once per fortnight my manager will ask me if I can take on extra work because a colleague has called in sick. If I am available, I will take these extra shifts because I want to work more hours.'[495]

[609] The evidence at [16] relates to client cancellations and [17] relates to the working of additional hours; they do not support the UWU's proposed finding in respect of the roster change claim. The balance of Ms Fleming's evidence is consistent with Ms Stewart's evidence, namely that her roster is frequently changed, due to client cancellations and colleagues taking sick leave.

[610] Finally, the UWU relies on [22] – [25] of Ms Sinclair's statement and part of her oral evidence. The relevant passages from Ms Sinclair's statement are:

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[493] See UWU Submission, 18 November 2019 at para 48 – 49.

[494] Exhibit UV1 - Witness Statement of Trish Stewart, 17 January 2019 at paras 10 and 11.

[495] Exhibit UV4 - Witness Statement of Deon Fleming, 16 January 2019 at paras 15 – 17.

'22. My roster can change without notice when another employee falls ill or is unable to work. I understand that Wesley Mission North at Macquarie Park uses a large number of external staff to meet the workload. If an external company can't meet the service, it is called a "push back" and my roster might change. If Wesley Mission cannot find a casual then they change the roster so that the client will not miss out on service by adding the service onto a permanent employee's roster.

23. My roster changed late in the afternoon on Friday 7 December 2019 afternoon. I don't know why. Two other care worker's clients were on my roster. I wasn't asked if I was able to or would like to do these shifts; I did not agree to the roster changes. I was required to make the following changes to my roster:

Day	**Before roster change**	**After roster change**
Monday	8.00 am – 2.10 pm	8.50am – 2.10 pm
Tuesday	8.00 am – 10.30 am	8.00am – 1.00 pm
Wednesday	8.00 am – 10.20 am	8.00 am – 1.00 pm
Thursday	10.00 am – 3.15 pm	8.25 am – 3.15 pm
Friday	8.00 am – 10:40 am	8.00 am – 12:10 pm

24. On, Wednesday 12 December 2019, I was asked if I could move my Health Safety Representative hour in the office to that day so I could do an additional shift on Friday, going shopping with a client. This meant I would finish my day ten minutes after my agreed availability, so I was able to decline the request. I had another commitment at 3.00pm. I suggested that I might be able to help provided the shift finished by 2.45pm. My Friday then changed to 7.50 am to 2.45 pm.

25. My employer is constantly making changes to my roster and these changes make it difficult for me to plan things for when I am not rostered or to make a weekly budget, despite that I am a permanent employee, not a casual.

26. I agree to changes in my roster because I need the hours and am concerned that if I complain or don't accept additional hours, I will be rostered less. This is not an accusation against my employer but my concern. I have a tight budget and cannot afford to lose hours.'[496]

[611] The following passages from Ms Sinclair's cross-examination are also said to support the UWU's proposed findings:

(After taking the witness to [26] of her statement)

'MS LO: Would you say the changes to your roster have been agreed to?---The majority of the time I agree to them. Sometimes they're first thing in the morning and you just have to do it because clients need to be showered.

So have there been instances where you have disagreed to work when changes have been made to your roster?---Yes, there has, because they were outside of my availability.

Outside, and that's the main reason why you would disagree?---To the best of my knowledge.

[496] Exhibit UV6 - Witness Statement of Belinda Sinclair, 16 January 2019 at paras 22 – 26.

> Are there any other reasons you would disagree to work those additional hours?---Not that comes to mind, no.'[497]

[612] We are not persuaded that the evidence supports the findings sought by the UWU. While the findings may be consistent with the experience of some employees, they are expressed in broad general terms. Further, while it may be accepted that it is uncommon for employees to refuse to change their roster, there is insufficient evidence to support the allied proposition that in cases of employee refusal 'it is for a good reason'.

C Consideration

[613] We are not persuaded that the variation of the SCHADS Award in the terms sought by the UWU is necessary for the Award to achieve the modern awards objective.

[614] We acknowledge that there are provisions in some modern awards which may be characterised as punitive and which are directed as securing compliance with a particular term, for example, punitive provisions relating to the late payment of wages.[498] But it remains uncommon for an award term to provide for the payment of a penalty rate by reference to circumstances which constitute an award breach. The usual position is that award breaches are addressed by the penalty regime in Chapter 4 of the Act.

[615] We would also observe that the SCHADS Award imposes a range of positive obligations upon employers – none of which provides for the payment of a penalty rate in the event of non-compliance. For example:

Access to the Award & NES

- Clause 5 – Make sure copies of the award are available

Individual flexibility arrangements

- Clause 7.4 – When initiating an agreement, provide employee with written proposal (including a translation if required)
- Clause 7.9 – Keep the agreement as a record; give copy to employee

Consultation about major workplace change

- Clause 8.1 – Following a definite decision to make major changes, give notice and discuss with employees
- Clause 8.2 – Provide written information to employees affected under clause 8.1
- Clause 8.4 – Promptly consider matters raised by employees regarding major changes

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[497] Transcript, 15 October 2019, cross-examination of Belinda Sinclair at PN605-PN608.

[498] See generally, *4 Yearly Review of Modern Awards* [2015] FWCFB 1549 and *Timber Industry Award – 4 yearly review decision* [2015] FWCFB 2856 at [57]. The *Timber Industry Award 2020* provides for a penalty for late payment if the employees are paid in cash.

Consultation about changes to rosters or hours of work

- Clause 8A.2 – Consult with employees affected by proposed roster changes
- Clause 8A.4 – Consider employee views given re change to roster

Types of employment

- Clause 10.5(i) – If refusing a request for casual conversion, provide written reasons with 21 days
- Clause 10.5(p) – Provide employee with copies of this subclause within 12 months of employment

Classifications

- Clause 13.2 – Advise employee of classification

Allowances

- Clause 20.2(d) – Reimburse employees for cost of safety equipment
- Clause 20.5(b) – Cover the cost of travelling on duty where no transport available
- Clause 20.5(d) – Cover the cost of accommodation and meals where overnight stay
- Clause 20.6 – Refund costs of installing phone and any associated rental charges

Superannuation

- Clauses 23.2, 23.4, 23.5 – Make super contributions
- Clause 23.3(c) – Pay authorised voluntary employee amounts

Payment of wages

- Clause 24.2 – Pay wages no later than 7 days after termination

Overtime and penalty rates

- Clauses 28.2(e) & (f) – Where not taken as time off, pay overtime upon request for overtime covered by an agreement
- Clause 28.2(g) – Keep a copy of any agreement for time off instead of payment for overtime
- Clause 28.2(j) – If not taken during employment, pay out overtime following termination

Request for flexible working arrangements

- Clause 30A.2 – Before responding to request for change in working arrangements, discuss the request with employee
- Clause 30A.4 – Provide employee with written copy of response

Leave

- Clause 31.4(c) – Keep record of agreed period of annual leave
- Clause 31.5(i) – Keep record of agreement regarding cashed out annual leave
- Clause 31.8(e) – Grant paid annual leave request by way of notice (excess leave accruals)
- Clause 36.7(a) – Keep family violence notices confidential.

[616] Evidence of widespread breach of a particular award term may warrant an award term of the type sought by the UWU; but the evidence adduced by the UWU falls well short of what is required. We dismiss the claim.

5.5.3 The ABI Claims

[617] ABI has 2 claims relating to rostering:

- to permit rosters to be altered at any time by agreement between the employer and relevant employee (provided the agreement is recorded in writing), and

- to clarify the operation of the existing provision allowing for roster changes in the event of another employee being absent from duty on account of 'illness'.[499]

A The clause 25.5(d)(ii) claim

[618] ABI proposes a variation to clause 25.5 by deleting clause 25.5(d)(ii) (and by extension (iii)) and inserting the following:

> '(ii) However, a roster may be altered at any time:
>
> A by agreement between the employer and relevant employee, provided the agreement is recorded in writing;
>
> B to enable the service of the organisation to be carried out where another employee is absent from work on account of illness, compassionate leave, community service leave, ceremonial leave, leave to deal with family and domestic violence, or in an emergency; or
>
> C where the change involves the mutually agreed addition of hours for a part-time employee to be worked in such a way that the part-time employee still has four rostered days off in that fortnight or eight rostered days off in a 28 day roster cycle.'[500]

[619] ABI did not adduce any evidence specifically directed at this claim and do not seek any factual findings in respect of its proposed variation. ABI characterises its proposed

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[499] ABI Submission, 2 July 2019 at para 4.13.

[500] We note that pursuant to ABI Submission, 10 February 2020 at para 1, p 54, ABI accepted and agreed with the Ai Group Submission dated 26 September 2019 identifying an unintended consequence of ABI's proposed draft, and agreed to replace the words 'personal/carer's leave' with 'illness'.

variation as 'relatively minor'[501] and contends that the claim is obvious as a matter of industrial merit and that in such circumstances it is unnecessary to advance probative evidence in support of the proposed variation.

[620] ABI also submits that the wording of the proposed variation is said to be consistent with the Full Bench Decision in *4 yearly review of modern award–Nurses Award 2020*[502] (the *Nurses Decision*). We return to the *Nurses Decision* shortly.

[621] The claim is opposed by the Unions. It is broadly supported by the employer interests; though AFEI does not support the requirement that any agreement between the employer and employee be recorded in writing.[503]

B Consideration

[622] We turn first to the current extent of flexibility in respect of rostering arrangements.

[623] The UWU contends that the SCHADS Award already provides 'a significant level of flexibility in rostering'[504] and the proposed variation is unnecessary; ABI takes a different view and submits that the SCHADS Award does *not* currently provide 'a significant level of flexibility in rostering' and submits that the right to change a roster on 7 days' notice is limited in 2 ways:[505]

- the employer must consult with the employee regarding the proposed change in accordance with clause 8A prior to implementing the roster change under clause 25.5(d)(ii), and

- where the employer wishes to change the roster of a part-time employee, clause 10.3(c) operates so as to prevent the employer from utilising the right under clause 25.5(d)(i) unless the employee agrees in writing to the change.

[624] A fortnightly roster of employees' ordinary hours of work must be accessible to employees at least 2 weeks before the commencement of the roster period (see clause 25.5(a)).

[625] As mentioned earlier, clause 25.5(d)(i) sets out the general rule that 7 days' notice must be given of a change in a roster. Subclauses 25.5(d)(ii) and (iii) set out the exceptions to that general obligation:

> '(ii) However, a roster may be altered at any time to enable the service of the organisation to be carried on where another employee is absent from duty on account of illness, or in an emergency.

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[501] ABI Submission, 2 July 2019 at para 4.13.

[502] [2018] FWCFB 7347.

[503] AFEI Submission, 3 July 2019 at paras 7 – 9.

[504] UWU Submission, 15 February 2019 at para 77.

[505] ABI Submission, 12 July 2019 at paras 14.9 – 14.10.

(iii) This clause will not apply where the only change to the roster of a part-time employee is the mutually agreed addition of extra hours to be worked such that the part-time employee still has four rostered days off in that fortnight or eight rostered days off in a 28 day roster cycle, as the case may be.'

[626] In short, a roster can be varied 'at any time' (that is, without giving 7 days' notice) to enable the service provided by an organisation to be carried on:

- where another employee is absent from duty on account of illness, or
- in an emergency.

[627] Clause 8A of the SCHADS Award provides:

'8A Consultation about changes to rosters or hours of work

8A.1 Clause 8A applies if an employer proposes to change the regular roster or ordinary hours of work of an employee, other than an employee whose working hours are irregular, sporadic or unpredictable.

8A.2 The employer must consult with any employees affected by the proposed change and their representatives (if any).

8A.3 For the purpose of the consultation, the employer must:

(a) provide to the employees and representatives mentioned in clause 8A.2 information about the proposed change (for example, information about the nature of the change and when it is to begin); and

(b) invite the employees to give their views about the impact of the proposed change on them (including any impact on their family or caring responsibilities) and also invite their representative (if any) to give their views about that impact.

8A.4 The employer must consider any views given under clause 8A.3(b).

8A.5 Clause 8A is to be read in conjunction with any other provisions of this award concerning the scheduling of work or the giving of notice.'

[628] The consultation requirements in clause 8A only apply in particular circumstances, this is to proposed changes to an employee's '*regular* roster'; it does not apply to one off changes due to the illness of another employee or in an emergency.

[629] Clause 10.3 of the SCHADS Award provides:

'10.3 Part-time employment

(a) A part-time employee is one who is engaged to work less than 38 hours per week or an average of less than 38 hours per week and who has reasonably predictable hours of work.

(b) The terms of this award will apply to part-time employees on a pro rata basis on the basis that the ordinary weekly hours of work for full-time employees are 38.

(c) Before commencing employment, the employer and employee will agree in writing on:

(i) on a regular pattern of work including the number of hours to be worked each week, and

(ii) the days of the week the employee will work and the starting and finishing times each day.

(d) The agreed regular pattern of work does not necessarily have to provide for the same guaranteed number of hours in each week

(e) The agreement made pursuant to clause 10.3(c) may subsequently be varied by agreement between the employer and employee in writing. Any such agreement may be ongoing or for a specified period of time.'

[630] ABI submits that the limitation in clause 10.3(e) materially diminishes the right under clause 25.5(d) to change a part-time employee's roster.[506] We agree; a part-time employee's agreed regular pattern of work can only be varied by agreement between the employer and employee, in writing.

[631] But while clause 10.3 may be said to 'materially diminish' an employer's capacity to unilaterally vary a part-time employee's roster, that does not, of itself, justify the variation proposed. As mentioned earlier, one of the defining characteristics of part-time employment is the presence of reasonably predictable hours of work and a guaranteed number of hours each week. These characteristics are reflected in clause 10.3

[632] Further, as previously mentioned, the part-time provisions in the SCHADS Award have been the subject of recent consideration in the *Part-time and Casual Employment Common Issue Proceedings* as part of the Review. In those proceedings the Full Bench observed that 'the current provision as it is applied in practice is reasonably flexible.'[507]

[633] We now turn to the *Nurses Decision* upon which ABI relies.

[634] In the absence of probative evidence and cogent submissions about the merit of ABI's claim, the Commission should adopt the approach of previous Full Benches which protect employees covered by the Award from undue pressure to change their rosters at short notice.

[635] The relevant aspect of the *Nurses Decision* relates to a claim advanced by the Aged Care Employers:

> 'ACE proposes to vary clause 8.2 of the Nurses Award exposure draft (clause 25 of the current award) in order to provide an employer with the ability to alter an employee's roster without the requirement of giving the employee seven days' notice, in circumstances where the employee has agreed to the roster change.'[508]

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[506] ABI Submission, 12 July 2019 at para 14.12.

[507] *Part-time and Casual Employment Case* at [641].

[508] *4 yearly review of modern awards—Nurses Award 2010* [2018] FWCFB 7347 at [146].

[636] The Commission rejected the claim but went on to say:

> '[159] We do not intend to make the change proposed by ACE however we will provide greater flexibility. We will remove the words "due to illness" from clause 25.4 and insert the words "pursuant to clauses 33 – Ceremonial leave; 34 – Personal/carers' leave and compassionate leave and 36 – Leave to deal with Family and Domestic Violence."
>
> [160] We propose that clause 25.4 will read as follows:
>
> **25. Rostering**
> …
>
> 25.4 Seven days' notice of a change of roster will be given by the employer to an employee. Except that, a roster may be altered at any time to enable the functions of the hospital or facility to be carried out where another employee is absent from work pursuant to clauses 33 – Ceremonial leave; 34 – Personal/carers' leave and compassionate leave and 36 – Leave to deal with Family and Domestic Violence, or in an emergency. Where any such alteration requires an employee working on a day which would otherwise have been the employee's day off, the day off instead will be as mutually arranged.
>
> [161] Interested parties are invited to file submissions in relation to the proposed wording of clause 25.4.'[509]

[637] Part of ABI's claim is consistent with the outcome in the *Nurses Decision*, but only that part which proposes an extension of the circumstances in which an employer can vary a roster in clause 25.5(d)(ii) to include the circumstance where another employee is absent on various forms of leave (See item (ii)(B) in ABI's claim; [618] above). The *Nurses Decision* is inconsistent with that part of ABI's claim which permits the variation of rosters by agreement.

[638] In rejecting the Aged Care Employers claim in the *Nurses Decision* the Full Bench said: 'we have considered the ANMF's submission concerning the possibility that an employee may feel pressured to agree to a change to the roster within the 7 day period and we agree with it'.[510] The Commission then echoed the AIRC in *Re Award Modernisation*,[511] saying:

> 'We consider that the nature of the employer-employee relationship is such that if a supervisor asks an employee to change rosters within the 7 day period before the commencement of the roster period the employee's decision making may be compromised by fear (even if unwarranted) of repercussions if the request is declined'.[512]

[639] Similar sentiments were expressed by the Full Bench in the *Part-time and Casual Employment Case* in rejecting an Ai Group proposal to vary the *Fast Food Industry Award 2010* to allow an employer and a casual employee to agree to an engagement of less than the 3 hour minimum provided in that award. The Full Bench rejected the claim on the basis that it

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[509] *4 yearly review of modern awards—Nurses Award 2010* [2018] FWCFB 7347 at [159] – [161].

[510] Ibid at [156].

[511] *Re Award Modernisation (2009)* 181 IR at [148].

[512] Ibid at [157].

would facilitate the complete removal of minimum engagement periods and open the door to the exploitation of casual employees.[513]

[640] We are not persuaded that the variation of the SCHADS Award in the terms sought by ABI is necessary for the Award to achieve the modern awards objective.

[641] Contrary to ABI's submission we do not think that the claim is 'obvious as a matter of industrial merit'.[514] There is no evidence that clause 25.5(d)(ii) requires amendment to encompass the circumstances where another employee is absent on various forms of leave. The proposal that rosters may be varied by agreement is inconsistent with the observation in the *Nurses Decision* and in the *Part-time and Casual Employment Case*. Further, there is evidence in the present proceedings of employee concerns that a capacity to vary rosters by agreement may lead to employees feeling pressured to change their shifts to accommodate a request by their employer. In her statement Ms Emily Flett says:

> 'I am worried that if rosters could be changed by agreement at any time, I would be pressured to change my shifts to accommodate my employer. We have a sense of duty to keep the place running. A good example of this was in April 2019. Anglicare Victoria had restructured the on call team to centralise the work that was done by the regional North West After hour's team in the Collingwood office. This required roster changes. We felt incredible pressure to adhere to whatever the organisation told us they needed to do, even if it would cause us problems. We just tried to adapt and have come across to the central roster. We have all lost income doing this, we are now working more nights for less money.'[515]

[642] ABI has failed to establish the requisite merits basis for the claim.

[643] While we are not prepared to vary 25.5(d) in the manner proposed by ABI we see merit in varying the clause to permit the variation of a roster by mutual agreement in circumstances where the variation is proposed by an employee to accommodate an agreed shift swap with another employee. In our view such a facilitative change does not run the risk of employees feeling pressured to accommodate *employer* requests to change their shift. It is our *provisional* view that clause 25.5(d)(ii) be varied as follows:

> (ii) However, a roster may be changed at any time:
>
> (A) if the change is proposed by an employee to accommodate an agreed shift swap with another employee; or
>
> (B) to enable the service of the organisation to be carried on where another employee is absent from duty on account of illness, or in an emergency.

5.6 REMOTE RESPONSE/RECALL TO WORK OVERTIME CLAIMS

5.6.1 Background

[644] Clause 28.4 of the SCHADS Award deals with 'Recall to work overtime' and states:

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[513] *Part-time and Casual Employment Case* at [686]; also see *Aged Care Substantive Claims Decision* at [187] – [193].

[514] ABI Submission, 10 February 2020 at para 1.

[515] Exhibit ASU8 – Witness Statement of Emily Flett, 22 September 2019 at para 20.

> '**28.4 Recall to work overtime**
>
> An employee recalled to work overtime after leaving the employer's or client's premises will be paid for a minimum of two hours' work at the appropriate rate for each time so recalled. If the work required is completed in less than two hours the employee will be released from duty.'

[645] Clause 20.9 of the Award, 'On Call allowance' states:

> '**20.9 On call allowance**
>
> (a) An employee required by the employer to be on call (i.e. available for recall to duty) will be paid an allowance of 2.0% of the standard rate in respect to any 24 hour period or part thereof during the period from the time of finishing ordinary duty on Monday to the time of finishing ordinary duty on Friday.
>
> (b) The allowance will be 3.96% of the standard rate in respect of any other 24 hour period or part thereof, or any public holiday or part thereof.'

[646] The current on call allowances in the SCHADS Award are $20.12 (clause 20.9(a)) and $39.84 (clause 20.9(b)) respectively.

[647] One of the issues raised during the review is how the SCHADS Award operates in circumstances where an employee, who is not 'at work' or otherwise rostered to work or performing work at a particular time, is contacted and required to undertake certain functions remotely without physically attending the employer's premises (such as providing information to the employer over the telephone). It is convenient to refer to such work as 'remote response work'.

[648] The SCHADS Award does not currently directly address work performed outside of ordinary hours that does not require travel to a physical workplace. As the HSU observes:

> 'The Award provides (at clause 20.9) for payment of an on call allowance for employees who are required to be available for recall to duty.
>
> Clause 28.4 regulates the payment for when an employee is recalled to work. Where an employee is recalled to work overtime after leaving the work, the employee is paid for a minimum of two hours work at the appropriate rate for each recall, but must be released if the work is completed within that period.
>
> The award does not clearly identify whether employees required to perform additional work without attending the place of work are entitled to compensation. Many employees are now able to perform valuable work for the employer outside the employer's premises connecting remotely with employer systems. Such work should be compensated appropriately.
>
> The HSU contends the Award should be amended to make clear that employees required to perform work out of hours should be compensated, with a minimum payment of one hour attached to such work.'[516]

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[516] HSU Submission, 15 February 2019 at paras 69 – 72.

[649] NDS makes a similar point:

> 'The award is currently silent on how to deal with work performed outside ordinary rostered hours that does not require travel to a physical workplace. This has the potential to create confusion and disputation around the application of clause 28.4 which deals with recall to work overtime.
>
> Since the making of this modern award in 2010 there has been a rapid growth in the use of technology to enable remote working arrangements.
>
> NDS is aware that on call arrangements are widely used throughout the social and community services sector, not just in disability services. The purpose of on call varies but includes availability for dealing with client emergencies, ensuring frontline workers can access advice from senior employees for non-routine circumstances, and in the context of the NDIS, handling short term rostering issues such as client cancellation or employee absences.'[517]

[650] There were initially 3 claims in respect of remote response and recall to work overtime, by ABI, the HSU and ASU. The ABI claim went through a number of different iterations and, as we shall see, the HSU subsequently withdrew its claim.

[651] The submissions and witness evidence relevant to remote response/recall to work claims are set out at **Attachment G**.

5.6.2 The ABI Claim

A The Claim

[652] ABI's *initial* claim is set out at items 5 – 7 in the draft determination filed on 2 April 2019 as follows:

> '5. By deleting clause 20.9 and inserting in lieu thereof:
>
> **20.9 On call allowance**
>
> An employee required by the employer to be on call (i.e. available for recall to duty at the employer's or client's premises and/or for remote response duties) will be paid an allowance of:
>
> (i) $17.96 for any 24 hour period or part thereof during the period from the time of finishing ordinary duty on Monday to the time of finishing ordinary duty on Friday; or
>
> (ii) $35.56 in respect of any other 24 hour period or part thereof on a Saturday, Sunday, or public holiday.
>
> 6. By inserting new clause 20.10 as follows:
>
> **20.10 Remote response**

[517] NDS Submission, 2 July 2019 at paras 41 – 43.

(a) In this award, remote response duties means the performance of the following activities by an employee outside of hours at the direction of, or with the authorisation of, their employer:

(i) responding to phone calls, messages or emails;

(ii) providing advice ('phone fixes');

(iii) arranging call out/rosters of other employees; and

(iv) remotely monitoring and/or addressing issues by remote telephone and/or computer access, in circumstances where the employee is not required to attend their employer's premises, or any other particular place of work, and at a time when the employee is either on call or has not otherwise been rostered to work.

(b) Subject to clause 20.10(f), where an employee is directed or authorised by their employer to perform remote response duties between 6.00am and 10.00pm, the employee will be paid at the applicable rate of pay specified in this Award for any such work performed between these hours, with a minimum payment of 15 minutes.

(c) Where an employee undertakes multiple separate instances of remote response duties during a particular period referred to in clause 20.10(b), and the total time spent performing such duties does not exceed 15 minutes, only one minimum payment is payable.

(d) Subject to clause 20.10(f), where an employee is directed or authorised to perform remote response duties between 10.00pm and 6.00am the employee will be paid at the applicable rate of pay specified in this Award for any such work performed between these times, with a minimum payment of one hour. Where such work exceeds one hour, payment will be made at the applicable rate for the duration of the work.

(e) Where an employee undertakes multiple separate instances of remote response duties during a particular period referred to in clause 20.10(d), and the total time spent performing duties does not exceed one hour, only one minimum payment is payable.

(f) Subject to clause 20.10(g), an employee who performs remote response duties must maintain and provide to their employer a time sheet specifying the time at which they commenced and concluded performing any remote response duty and a description of the work that was undertaken. This record must be provided to the employer prior to the end of the next full pay period or in accordance with any other arrangement as agreed between the employer and the employee.

(g) An employer may implement an alternate method or system for the recording and notification of the details referred to in clause 20.10(f).

(h) An employer is not required to pay an employee for any time spent performing remote duties if the employee does not comply with the requirements of clause 20.10(f) or any alternate method or system pursuant implemented under clause 20.10(g).

(i) For the purposes of this clause, remote response duties do not include employees undertaking administrative tasks such as (but not limited to) reviewing or inquiring about their roster or seeking changes to their roster.

(j) Clause 28.3 does not apply where an employee performs remote response work in accordance with this clause.

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

28.4 Recall to work overtime at the employer's or client's premises

An employee recalled to work overtime after leaving their place of work to attend at a premises where work is performed will be paid for a minimum of two hours' work at the appropriate rate for each time recalled. If the work required is completed in less than two hours the employee will be released from duty. This clause does not apply to an employee performing remote response duties in accordance with clause 20.10 of this Award.'

[653] ABI's initial claim involves a proposed new clause 20.10, as well as consequential amendments to clauses 20.9 and 28.4. Under the proposed new clause 20.10, employees would be entitled to payment for performing remote response duties, with the quantum of such payment and the relevant minimum payment dependent on when the remote response duties are performed.

[654] Specifically, ABI's initial claim proposed that employees be paid:[518]

- at the applicable rate of pay for work performed between 6.00am and 10.00pm, with a minimum payment of 15 minutes, and
- at the applicable rate of pay for work performed between 10.00pm and 6.00am, with a minimum payment of one hour.

[655] In its submission in reply dated 13 September 2019 the UWU did not oppose the insertion of a remote response clause but did not support a clause in the terms proposed by ABI. At [50] – [53] of its submission the UWU submits:

'The variation proposed by ABI and others does not adequately distinguish between remote response work performed whilst on call, and remote response work performed ad hoc, and only requires payment at the applicable rate of pay for remote response work performed.

A distinction between remote response duties performed whilst on call, and not, is necessary. When an employee is not on call, an employee should be able to expect that they are free to go about their life without any intrusion from the workplace. This is particularly so when employees are award-reliant. Any remote response duties that the employer requires the employee to perform when they are not on call should be costed at a higher rate. This would encourage an employer to roster effectively, and ensure that an appropriate employee is available 'on call' to address issues that may arise. Placing a higher cost on remote response work performed by employees not on call also provides some compensation for the greater disutility associated with the work.

Remote response duties are performed outside of rostered hours, and should be paid at overtime rates. If remote response duties are not costed effectively, this could result in some employers requiring employees to work multiple instances of remote response across a long period of time, effectively disrupting any rest break the employee is entitled to between shifts.

[518] ABI Draft Determination, 2 April 2010.

> ABI and others' proposed variation also explicitly excludes 'administrative duties' from the ambit of remote response. We oppose this exclusion. If the employer directs or authorises an employee to perform administrative duties outside of ordinary hours, then there is no reason why such duties should not be paid for under this clause.'[519]

[656] In its submission of 23 September 2019, the ASU opposed ABI's claim on the basis that ABI's proposal was lacking in the following respects:

- the description of 'remote response' does not describe work in the SCHADS industry
- an employer would be entitled to *direct* an employee to perform work outside of their ordinary hours
- the proposed clause expands the scope of the current 'on call' term
- the proposed clause makes no distinction between a 'remote response' where an employee is rostered on call and where the employee is not rostered to work
- employees are only paid at the 'applicable rate' for any time worked. Part-time employees may be paid at their minimum rate of pay if they have not worked for more than 10 hours in a day or 38 hours in the week. The work should attract a penalty rate to compensate for the disutility of the work
- employers may refuse payment to employees who do not provide a timesheet but there is no obligation on the employer to inform the employee 'of the appropriate record keeping practices'
- the proposed clause explicitly excludes 'administrative tasks', yet it appears that the application is directed at administrative tasks, and
- clause 28.3 does not apply where an employee performs work under the proposed clause: 'This means employees could be required to attend work after a disrupted rest period or after working a significant amount of overtime'.

[657] In its supplementary submissions in reply dated 2 October 2019 the HSU broadly adopted the ASU's submissions.[520]

[658] On 15 October 2019 ABI filed an amended draft determination dealing with 'remote response' directed at seeking to narrow the issues in dispute between the parties.

[659] Later, some minor amendments were made to ABI's proposed variation in its further amended draft determination filed on 10 February 2020. In its final form ABI proposes the following variations:

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[519] UWU Submission, 13 September 2019 at paras 50 – 53.

[520] HSU Submission, 2 October 2019 at para 7.

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

20.9 On call allowance

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

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

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

4. By inserting at clause 3.1:

3.1 In this Award, unless the contrary intention appears:

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

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

28.4 Recall to work

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

6. By inserting new clauses 28.5 and 28.6:

28.5 Remote response when not on call

(a) An employee who is not required to be on call and who is requested to perform work by the employer via telephone or other electronic communication away from the workplace (a remote response request) will be paid at the appropriate rate for a minimum of one hour's work on each occasion a remote response request is made, provided that multiple remote response requests made and concluded within the same hour shall be compensated within the same one hour's payment. Any time worked continuously beyond one hour will be rounded to the nearest 15 minutes and paid accordingly.

(b) Any further requests to perform remote response work will be paid an additional one hour for each time so requested provided that multiple remote response requests made and concluded within the same hour shall be compensated within the same one hour's payment.

(c) An employee who performs work in accordance with this clause 28.5 must maintain and provide to their employer a time sheet specifying the time at which they commenced and concluded performing any work away from the workplace and a description of the work that was undertaken. This record must be provided to the employer prior to the end of the next full pay period or in accordance with any other arrangement as agreed between the employer and the employee.

(d) The employer is not required to pay an employee for any time spent performing work away from the workplace in accordance with this clause if the employee does not comply with the requirements of clause 28.5(c). Clause 28.5(d) does not apply if the employer has not informed the employee of the reporting requirements.

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

28.6 Remote response when on call

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

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

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

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

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

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

B The Submissions

[660] ABI submits that its proposal is intended to provide a scheme of remuneration for situations where an employee is required, outside of their working hours, to provide advice or assistance remotely. ABI submits that this is not a novel claim or provision, and that similar types of provisions appear in:

- the *Local Government Award 2020* (at clauses 21.4(c) and 21.6(d))

- the *Local Government (State) Award 2014* (NSW) (at clause 19E)
- the *Water Industry Award 2020* (at clauses 20.4(d) and 20.6(d))
- the *Business Equipment Award 2020* (at clauses 20.6(d) and 20.7), and
- the *Contract Call Centres Award 2020* (at clauses 20.4(c), 20.7).[521]

[661] The relevant extracts from the above awards are set out at **Attachment H**.

[662] ABI submits that its proposal provides a fair and relevant minimum safety net payment regime for this type of remote work, which is proportionate to the lower level of disutility associated with remote work.

[663] NDS supports the revised ABI claim in relation to remote response, and the consequential amendments to the on-call provisions and the recall to work overtime provisions.

[664] NDS relies on its submission of 2 July 2019 at [41] – [57] and supports the ABI submission of 2 July 2019 and the amended draft determination filed on 15 October 2019. NDS also supports the submission of AFEI of 3 July 2019 at [13] and [14].

[665] AFEI does not oppose the ABI claim, subject to clarification that the provisions only apply to 'response' duties and do not apply to employees who are under a general instruction or requirement to undertake work from home, including routine overtime work (or simply to ensure projects are completed within deadlines), which is performed from home.

[666] AFEI proposes the following amendments to ABI's claim:[522]

'28.5 Remote response when not on call

(a) An employee who is not required to be on call and who is requested by the employer to perform work on a particular occasion for a particular unplanned incident ~~by the employer~~ where the work is a response via telephone or other electronic communication away from the workplace.

28.6 Remote response when on call

(a) This clause applies to an employee who is required to be on call and who is required by the employer to perform work on a particular occasion for a particular unplanned incident ~~by the employer~~ where the work is a response via telephone or other electronic communication away from the workplace.'

[667] In reply, ABI acknowledges the concern expressed by AFEI in relation to the wording proposed by its clients for triggering the operation of the clause (that is, where an employee is 'requested or required to perform work by the employer via telephone or other electronic communication away from the workplace').

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[521] This list has been updated to reflect the clause numbering of the new 2020 modern awards.

[522] AFEI Submission, 19 November 2019 at para 1.25.

[668] While ABI accepts that concern, it does not consider that the specific variation proposed by AFEI is sufficiently clear to alleviate the concern raised and submitted:

> 'if the Commission is minded to introduce more precision as to the notion of "remote response work, ABI considers that the better approach to achieving this objective would be to include a definition of "remote response work" or "remote response duties".'[523]

[669] Ai Group's response to ABI's claim is set out at [71] – [79] in its submission of 18 November 2019.

[670] Ai Group's overarching position in relation to each of the proposals relating to remote response work is as follows:

- Ai Group is not calling for any variation to the SCHADS Award directed at imposing new obligations on employers in relation to 'remote response' work
- should the Full Bench nonetheless be minded to vary the SCHADS Award to include a term relating to 'remote response' work, Ai Group submits that ABI's proposal ought to be preferred over that advanced by the HSU and ASU, and
- ABI's proposal strikes a more reasonable balance between the interests of employers and employees. It is an appropriately conservative approach to the imposition of new obligations upon employers given the potential for such new provisions to have adverse consequences. There is also some difficulty of robustly assessing these matters given the nature and lack of evidentiary material relating to this issue advanced by the parties seeking the change.

[671] Ai Group submits that ABI's proposal is intended to achieve the following outcomes:

- to clarify that the recall to work overtime provisions apply in circumstances where an employee is required to return to a workplace that is not their domestic residence to undertake overtime work
- to introduce a new mechanism for determining the remuneration of employees for work undertaken at their domestic residence, via telephone or other means of electronic communication, which provides for different entitlements depending upon whether the employee undertakes such work while 'on call' or while not 'on call', and
- to clarify that an employee is required to be 'on call' for the purposes of clause 20.9 if they are required to be available for 'remote response duties'.

[672] Ai Group notes that 'remote response duties' does not appear to be defined in ABI's proposal, although its meaning can be gleaned implicitly from the terms of clauses 28.5 and 28.6. Ai Group understands 'remote response duties' to be work that is required to be done by the employee via a telephone or other electronic device away from the workplace.

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[523] ABI Submission, 10 February 2020 at p 58.

[673] In reply, ABI agrees with Ai Group's characterisation of the intention of its proposal and proposed that if the Commission is minded to introduce more precision as to the notion of 'remote response work' or 'remote response duties', then this could be done by inserting a definition in the following terms:

> 'In this award, remote response duties means the performance of the following activities:
>
> (a) Responding to phone calls, messages or emails;
>
> (b) Providing advice ("phone fixes");
>
> (c) Arranging call out/rosters of other employees; and
>
> (d) Remotely monitoring and/or addressing issues by remote telephone and/or computer access.'[524]

[674] The various Unions oppose ABI's amended claim.

[675] In response to ABI's amended claim the HSU relies on its submissions of 2 October 2019,[525] in which it broadly adopted the ASU's submissions which were directed at ABI's initial claim.

[676] In its submission of 19 November 2019, the ASU address ABI's amended claim, as follows:

> 'We note that ABI filed an amended draft determination in respect of their remote response and recall to work overtime clause. Our submissions of 16 September 2019 remain relevant to the amended draft determination. The ABI draft determination does not provide an appropriate rate of payment to employees who are recalled to work overtime away from the workplace. It is also a complicated provision that will be difficult to implement in practice.'[526]

[677] The UWU submits that [49] and [52] of its submission of 13 September 2019 remain relevant to ABI's amended claim.[527] These paragraphs are set out below:

> '49. ABI and others have filed a draft determination to insert a clause addressing remote response duties. We do not oppose the insertion of a remote response clause, however we do not support the terms as proposed by ABI and others.
>
> . . .
>
> 52. Remote response duties are performed outside of rostered hours, and should be paid at overtime rates. If remote response duties are not costed effectively, this could result in some employers requiring employees to work multiple instances of remote response across a long period of time, effectively disrupting any rest break the employee is entitled to between shifts.'

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[524] ABI Submission, 10 February 2020 at p 58.

[525] HSU Submission, 18 November 2019 at para 155.

[526] ASU Submission, 19 November 2019 at para 123.

[527] UWU Submission, 18 November 2019 at para 85.

[678] The Joint Union submission of 10 February 2020 does not address the terms of ABI's amended claim.

5.6.3 The Union Claims

A The Claim

[679] The HSU initially sought to vary clause 28.4 to include a new sub-clause dealing with circumstances where an employee is required to perform work from home after leaving the employer's or client's premises. Under the HSU proposal, the employee would have been entitled to a minimum of 1 hours' pay at overtime rates 'for each time recalled'.[528]

[680] The following question was posed to the HSU in Background Paper 1 (Q23):

> *How does the proposed clause operate in the event that an employee responds to, say, three phone calls within the same one hour period?*

[681] The HSU responded that it does not press for the adoption of its draft clause and supports the ASU draft determination.[529] We need to say no more about the HSU proposal.

[682] The ASU's claim seeks the deletion of clause 28.4 and the insertion of a new clause, as follows:[530]

> '**28.4 Recalled to work overtime**
>
> (a) An employee who is recalled to work overtime after leaving the workplace and requested by their employer to attend a workplace in order to perform such overtime work will be paid for a minimum of two hours' work at the appropriate overtime rate for each time recalled. If the work required is completed in less than two hours the employee will be released from duty.
>
> (b) An employee who is not required to be on call and who is requested to perform work by the employer via telephone or other electronic communication away from the workplace will be paid at the appropriate overtime rate for a minimum of two hours work. Multiple electronic requests made and concluded within the same hour shall be compensated within the same one hour's overtime payment. Time worked beyond two hours will be rounded to the nearest 15 minutes.
>
> (c) An employee who is required to be on call and who is requested to perform work by the employer via telephone or other electronic communication away from the workplace will be paid at the appropriate overtime rate for a minimum of one hours work. Multiple electronic requests made and concluded within the same hour shall be compensated within the same one hour's overtime payment. Time worked beyond one hour will be rounded to the nearest 15 minutes.'

[683] The ASU submits that its proposed variation gives effect to the following principles:[531]

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[528] See HSU Amended Draft Determination, 15 February 2019 at [16].

[529] Joint Union Submission, 10 February 2020 at para 188.

[530] ASU Submission 23 September 2019.

[531] ASU Submission 23 September 2019 at para 7.

1. Remote work, like physical recall to the workplace, should be voluntary and paid at overtime rates.

2. There should be a clear incentive for remote work to only occur while an employee is required to be on call. This can be achieved by a structure of minimum payments.

3. A 2 hour minimum payment at overtime rates should apply where an employee works remotely when they are not required to be on call. This aligns with the minimum payment for a recall to work overtime at the physical workplace.

4. A 1 hour minimum payment should apply where an employee works remotely when they are required to be on call. This aligns the minimum payment for remote work while on call with the minimum payment for work performed during a sleepover.

5. Further, because this is a significant expansion of the current 'on call provision', cl 25.3–Rostered days off should be varied to ensure that on call time counts as duty for the purposes of the clause. This is to ensure that the expansion of the scope of on call work does not reduce an employee's personal time.

B The Submissions

[684] The ASU relies on their submission dated 23 September 2019.

[685] The ASU submits that there is 'significant disutility to the employee associated with working outside of ordinary hours even if they are not recalled to the physical workplace.'[532] The ASU relies on the witness statements of Deborah Anderson and Emily Flett in support of its application and submits that:

> 'Both witnesses report that while they derive satisfaction from their work and feel loyal to their clients, the hardship of on call work is significant. Both witnesses describe the severe physical, psychological and social impact on working remotely. In both cases, their employer has offered an above award two hour minimum payment at overtime rates to attract them to the work. Both witnesses report that they would be less willing to do this work if they were paid any less.'[533]

[686] We note that both of the witnesses referred to are rostered to be 'on call'. We also note that the relevant part of Ms Flett's statement was withdrawn following an objection from the employer parties.[534] In these circumstances the ASU is not able to rely on this aspect of Ms Flett's evidence.

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[532] ASU Submission, 23 September 2019 at para 6.

[533] ASU Submission, 23 September 2019 at para 6.

[534] See Exhibit ASU5 – Schedule of employer objections to statements of Emily Flett and Augustino Encabo, para 16. Also see Transcript, 18 October 2019 at PN3353-3380.

[687] The various employer interests oppose the ASU's claim.

[688] ABI states that it is opposed to the ASU claim and has advanced a separate proposal to introduce a remote response duties compensation regime.

[689] In its submission of 18 November 2019 Ai Group identifies 6 broad issues with the ASU claim.

1. Handling multiple requests

[690] Ai Group submits that there is merit in the proposition that any remote response clause should ensure that each discrete activity does not necessarily trigger a separate minimum payment:

> 'It would be unfair to employers if…an employee undertook say three short phone calls…each of only a few minutes duration and the employer was required to provide 6 hours pay'.[535]

[691] Ai Group submits that there is no apparent basis for the ASU proposal that only multiple requests within the same hour are compensated 'within the same one hour's overtime payment when the minimum payment proposed is for two hours' work'.[536] Ai Group submits that under the ASU's proposal an employee could handle 2 separate requests during a 2 hour period and be entitled to more than 2 hours' pay.

2. The circumstances which attract payment

[692] Ai Group submits that there is a lack of clarity associated with the description of the activities which attract payment under the ASU's proposal. Clauses 28.4(b) and (c) provide that the trigger for payment is when the employee is 'requested to perform work by the employer via telephone or other electronic communication away from the workplace'.

[693] Ai Group submits that it is unclear whether an employee is to be paid for work undertaken away from the workplace in response to a telephone call or electronic communication to work, or whether it is the work of actually answering a telephone call or electronic communication which attracts a payment (Ai Group assumes it is the latter).

[694] Ai Group also submits that an employee who is 'on call' who is checking their phone or emails to check for requests to work may be caught by the ASU proposal and be entitled to payment under clause 28.4(c). Further, clause 28.4(c) does not appear to only apply to circumstances where an employee is working outside of their rostered or scheduled work:

> 'Instead, it simply applies to work that is undertaken away from the workplace. This would capture circumstances where an employee is permitted to work from home or some other convenient location as part of their ordinary duties'.[537]

3. Record keeping

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[535] Ai Group Submission, 18 November 2019 at para 112.

[536] Ai Group Submission, 18 November 2019 at para 113.

[537] Ai Group Submission, 18 November 2019 at para 118.

[695] The ASU's proposal contains no mechanism for ensuring that the time an employee spends working remotely is recorded and communicated to their employer.

4. The appropriate rate of pay

[696] The ASU's proposal requires that all remote response work be paid at overtime rates, regardless of whether the work is undertaken during overtime or ordinary hours. Ai Group submits[538] that this is inappropriate for 3 reasons:

(i) employees may be performing their ordinary hours of work at home as part of their usual working arrangements and may be part of their rostered hours of work;

(ii) the proposal 'greatly restricts an employer's capacity to utilise casual and part-time employees to perform work at home at ordinary hourly rates'. At present casual and part-time employees can work outside their rostered hours at ordinary rates, subject to such hours not exceeding specified daily, weekly or fortnightly limits; and

(iii) the work itself is not 'overtime', at least for casual and part-time employees; but would be paid at overtime rates.

[697] Ai Group submits that remote response work should only attract the rates that would ordinarily be applicable (which may be ordinary rates, overtime rates or penalty rates).

5. An incentive to put employees 'on call' and minimum payment periods

[698] Ai Group submits that there is 'some logical force' to the ASU's proposal that a remote response or recall clause provide an incentive for an employer to put an employee 'on call' where they may be requested to perform work related activities outside of ordinary working hours; but this should not be overstated. Ai Group agrees with having a shorter minimum payment in circumstances where the employee is paid an 'on call' allowance. Ai Group submits that ABI's proposal provides 'a sensible structure of escalating levels of minimum payment', namely:

- a 2 hour minimum payment to an employee actually required to attend a workplace other than their residence
- a 1 hour minimum payment when required to work remotely while *not* on call, and
- when an employee is 'on call' (and being paid an on-call allowance), a 15 minute minimum payment during the day and a 45 minimum payment at night.

[699] Ai Group submits that the ASU's proposed 2 hour minimum is not justified:

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[538] Ai Group Submission, 18 November 2019 at para 130; Ai Group Submission, 13 July 2019 at paras 461 – 466.

> 'It is disproportionate to what might, at least in some instances, be a very short period of work undertaken without the employee incurring the cost or inconvenience of travelling to some other location…
>
> It is not possible to reconcile the proposition that the employee should be paid for two hours when they perform a small amount of work, in their own home, with the reality that an employee is entitled to two hours payment when they undertake overtime work away from their home under both the current terms of clause 28.4 and the ASU proposed provision.'[539]

6. Issues associated with clause 28.3

[700] Ai Group submits that if we are satisfied that remote response work warrants specific recognition in the SCHADS Award then 'it would be sensible to amend clause 28.3':

> 'Clause 28.3(a) provides for an employee, other than a casual, to have 10 consecutive hours off duty after completing overtime and before the commencement of their ordinary work on the next day or shift.
>
> Clause 28.3(b) provides a further entitlement to double time payments when an employee is not provided the requisite 10 hour break.
>
> If an employee performs a small amount of work which is undertaken remotely and in the nature of that which appears to be contemplated by ABLA's Clients' and the ASU's claims, it is not justifiable for the application of clause 28.3 to be triggered. For example, an employee who receives a 5 minute phone call during the 10 hour break (by perhaps only an hour before its conclusion) should not be subsequently entitled to a further 10 consecutive hours off duty without loss of pay.
>
> Clause 25.3 does not appear to currently contemplate that work may be undertaken remotely. So much is apparent from the clause's contemplation of an entitlement to be "absent" under clause 28.3(b) until they have had the requisite 10 hour break.'[540]

[701] AFEI opposes the ASU claim and relies on its submissions of 23 July 2019 in response to the HSU's claim to vary the recall to work provisions, in particular:

- work subsequently performed at home does not meet the ordinary meaning of a 'recall', that is 'a person who is recalled is summoned to return to a place in a manner where there is a requirement for the person to return'[541]

- there is no basis for imposing a minimum payment of 1 hour for responding to a phone call or performing any of the other duties identified in the claim when the employee is at home, is not required to leave home and:

    - is not inconvenienced by losing any time associated with travelling to perform work and then returning home

    - is not incurring the expense of unpaid travel to work, and

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[539] Ai Group Submission, 18 November 2019 at paras 139 - 140.

[540] Ai Group Submission, 18 November 2019 at paras 150 – 153.

[541] AFEI Submission, 23 July 2019 at para 128 citing [2018] FWC 4334 at [59].

- is not expected to wear work clothes or change into a work uniform,

- the proposal imposes a minimum payment at overtime rates for work that does not necessarily involve overtime

- it is likely that the individual incidents of the work identified would take substantially less than 1 hour and could be as short as 5 minutes to respond to a phone call or message. The claim could result in an employee being paid an amount which is 'extremely disproportionate' to the work performed

- the proposal provides that the employee would need to be 'required' to perform work from home:

> 'it does not specify who/from where the 'requirement' arises. An employee might claim an entitlement under the provision for working from home where they have self-determined that they are required to perform the work, where this has not been authorised by the employer'.

- the provision does not require the employee to provide any evidence of the time undertaken in performing the work from home or the extent of the work performed.

[702] As to the ASU's draft determination, AFEI notes that the provision takes effect when the employee is requested to perform work by the employer via telephone or other electronic communication away from the workplace. AFEI submits that this element of the claim:

> 'This would widen the application of the provision from response work (i.e. being 'recalled to work' due to a specific instruction or direction from an employer on a particular occasion and for a more particular purpose.), to potentially circumstances where an employee undertakes routine/general overtime work (potentially as part of their core responsibilities, pursuant to a general instruction or requirement)… [and] could potentially cause confusion in respect of whether an employee is performing overtime or remote response work, and thus whether remote response provisions will apply.'[542] (footnotes omitted)

[703] AFEI also submits that the ASU's proposed variation could increase the regulation of employees who routinely undertaken overtime work as part of the nature/seniority of their position.

5.6.4 The Evidence

[704] ABI relies on the evidence of 3 witnesses: Mr Darren Mathewson,[543] Ms Deb Ryan[544] and Mr Scott Harvey.[545]

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[542] AFEI Submission, 19 November 2019 at paras 1.9 – 1.10.

[543] See generally, Exhibit ABI2 – Witness Statement of Darren Mathewson, 12 July 2019; Transcript, 17 October 2019, cross-examination at PN2303 – PN2518.

[544] See generally, Exhibit ABI6 – Witness Statement of Deb Ryan, 12 July 2019; Transcript, 18 October 2019, cross-examination at PN2946 – PN3095.

[545] See generally, Exhibit ABI7 – Witness Statement of Scott Harvey, 2 July 2019; Transcript, 18 October 2019, cross-examination at PN3107 - PN3152.

[705] Mr Mathewson is the Executive Director at Aged and Community Service Australia for NSW, Australian Capital Territory, Tasmania and Victoria. Mr Mathewson's evidence was general in nature in which he describes the aged care workforce[546] and the various reforms and programs in the home sector including consumer directed care. At [72] – [74] of his statement Mr Mathewson deals with the impact of various reforms on financial performance in the sector.

[706] Ms Ryan is the CEO of Community Care Options Limited. Community Care Options Limited provides aged care home care packages and NDIS services; and employs about 170 employees. Ms Ryan's evidence relating to recall to work is set out at [73] – [76] and [78] – [79] of her statement:

> 'We don't recall employees to the workplace, but we have staff on call. We provide an above award on call allowance.
>
> The Company provides an on call service to clients and staff between6.00am and 8.30am and 4.30pm to 10.00pm Monday to Friday, and from 6.00am to 10.00pm on weekends and public holidays.
>
> The person on call only answers the phone, they don't have to go out and attend to anything. We pay $50.00 per day on weekdays and $100.00 per weekend day. Employees are allocated two weeks per year for on call. They work one full week on call in first 6 months and one in second six months. They are paid $450.00 for the week (in addition to their wages) to answer the phone and manage whatever the call requires.
>
> Some days the on call person will receive no calls, and some days they could receive 10 calls.
>
> Reasons that clients use the on call service can be to change their service, to inform us that they are going to hospital and for cancellations. Clients are asked only to use the on call service if the issue is urgent.
>
> Employees use the on call service to call in sick or if they need to change their shift. They also use the service if they require support with a client issue. We encourage employees to use it for this purpose as we want our staff to feel well supported. The on call person will assist by amending the roster.'

[707] Mr Harvey is the Operations Manager at ConnectAbility Australia Limited. ConnectAbility provides a range of social, community home care and disability services to over 600 clients across the Hunter Region and Central Coast regions of NSW, and employs about 270 employees. Mr Harvey's evidence relating to 'recall to work' is set out at [61] – [63] of his statement:

> 'ConnectAbility has an on-call team for its community supports service provision. This role is currently provided by Team Leaders and Rostering staff. Community support workers are not engaged to provide on-call responsibility as part of their role.
>
> ConnectAbility also has an on-call team for supported independent living (SIL) operations. This role is currently provided by accommodation coordinators and managers. Residential support workers are not engaged to provide on-call responsibilities as part of their role.

[546] Exhibit ABI2 – Witness Statement of Darren Mathewson, 12 July 2019 at paras 19 – 24.

> 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.'

[708] The ASU relies on aspects of Dr Stanford's evidence, the Muurlink Report and the evidence of 2 witnesses: Ms Deborah Anderson[547] and Ms Emily Flett.[548]

[709] Ms Anderson is a Shared and Supported Living Coordinator with The Leisure Life Village NSW. Ms Anderson is rostered to be 'on call' once a week, from 5.00pm until 8.00am the following morning and sometimes on weekends (between 9.00am and 9.00am). Ms Anderson sets out the duties she performs while 'on call', at [17] – [22] of her statement which include:

- responding to emergencies
- administrative tasks such as rostering
- providing phone advice and assisting less experienced staff, including providing advice on medication issues and recommending corrective action when equipment is not functioning correctly, and
- finding staff members to fill in when another staff member is sick or has to leave work early.

[710] Ms Anderson is paid an above Award allowance of $30.00 when rostered on call between Monday and Friday, and $50.00 when rostered on call on weekends and public holidays. When working while rostered on call Ms Anderson is paid at the rate of time and half for the first 2 hours and double time after that.[549]

[711] At [23] of her statement Ms Anderson states that she is 'not usually required to work out of hours unless…rostered to be on call':

> 'I am not usually required to work out of hours unless I am rostered to be on call. If I am contacted out of hours, this is usually just a telephone call from a new coordinator or a more junior staff member with a quick enquiry. There is no overt expectation from my employer to do this work. However, there is a clear expectation that I will be available to answer calls from management outside of working hours. But this does not happen very often and has only minor impact on me.'

[712] Ms Anderson discusses the impact of on call work at [24] of her statement:

> 'When I am on call, I cannot leave my home as I need to have phone, internet and computer access. I must also be ready and able to respond to any requests for work. I cannot go anywhere nor do anything else. This is particularly difficult on weekends when doing an on

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[547] See generally, Exhibit ASU1 – Witness Statement of Deborah Anderson, 2 September 2019.

[548] See generally, Exhibit ASU8 – Witness Statement of Emily Flett, 22 September 2019.

[549] Exhibit ASU1 – Witness Statement of Deborah Anderson, 2 September 2019 at para 22.

> call shift from 9am until 9am. This causes high anxiety for me as I could be called out to any site to handle difficult incidences. This has occurred 3 times so far, and once resulted in me having to do a 23 hour shift. This can also result in me being required to attend at two places at the one time which is highly stressful as I can't go to a house to attend an incident when I am already attending an incident at another house.'

[713] Ms Flett is an After Hours Practitioner with Anglicare Victoria. Ms Flett works in a team that provides after hours on call support to staff, volunteers and young people in Anglicare's care:

> 'I work in a dedicated team that provides after hours on call support to staff, volunteers and young people in our care. We work from the Anglicare Offices in Collingwood, we respond to phone calls from all regions of the metro area. This position tests you out because you get a variety of calls every night, some of these calls are day to day issues, such as staffing matters, but we spend a lot of our time providing risk mitigation and managing crisis. The position is relatively senior as it holds a large amount of responsibilities and Anglicare staff calling in can use this management structure for support, guidance and direction, while out of hours for their regular line manager.
>
> Anglicare created our dedicated on-call team to address the impact of on call work on staff performing their regular duties during the day time and to reduce the impacts on them as previously, house managers, specialist practitioners and other frontline staff were required to be on call. Now this work has been given to our team so appropriate breaks can be structured in to a roster and we reduce burnout on valuable staff.'[550]

[714] Ms Flett works 10 to 15 'recall' hours each fortnight and is paid 2 hours' pay at double time when she receives a call.[551]

[715] Ms Flett discusses the impact of on call work at [21] – [25] of her statement, noting that if she works through the night on call she feels exhausted the following day; 'cannot exercise at a high level', 'cannot ride my motorbike or pushbike', finds it 'harder to engage' with her partner friends and family and doesn't have the energy to socialise.

[716] As to Dr Stanford's evidence we have already observed that the Stanford Report has 'serious deficiencies' (see [171]] – [186] above) and that we have derived little assistance from Dr Stanford's evidence.

[717] We have also already dealt with the Muurlink report (see [154] – [157]), noting that while its direct relevance to the claims before us is somewhat limited, we accept the general proposition that working irregular or unsystematic hours can have a negative effect on physical and psychological health. We also accept, again as a general proposition, that a worker's sense of control at work is connected to worker well-being.

[718] In relation to both the ABI and ASU witness evidence we would make the general observation that the evidence is largely confined to 'on call' work. The evidence is of limited relevance to the circumstances where an employee is not 'on call', or rostered to work, who is

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[550] Exhibit ASU8 – Witness Statement of Emily Flett, 22 September 2019 at paras 9 – 10.

[551] Exhibit ASU8 – Witness Statement of Emily Flett, 22 September 2019 at para 16 'and no more if I receive 20/30 calls in that same period, once I get a call in the next call block after the two hours I will again be paid another two hour block'.

contacted and required to perform certain work functions remotely without physically attending work premises.

[719] In our view the following findings are largely uncontentious:

1. Employees covered by the SCHADS Award are requested or required, from time to time, to perform 'remote work' (i.e. work away from the workplace) at times outside of their rostered working hours.

2. Given the nature of the SCHADS sector it is necessary to have arrangements in place for out of hours work.[552]

3. Employers have different practices in place for ensuring that employees are available to receive calls or otherwise respond to emergencies or other inquiries or issues that may arise.[553]

4. There is disutility associated with performing work outside of ordinary hours in circumstances where the employee is not recalled to a physical workplace (i.e. remote response work).

[720] The evidence does not support any findings beyond these general propositions.

5.6.5 Consideration

[721] It seems to us that there is broad support from most of the employer interests and the Unions for the introduction of a term in the SCHADS Award dealing with 'remote response' work, or work performed by employees outside of their normal working hours and away from their working location.

[722] We agree that it is necessary to introduce an award term dealing with remote response work and make the following general observations about such a term:

1. A shorter minimum payment should apply in circumstances where the employee is being paid an 'on call' allowance.

2. There is merit in ensuring that each discrete activity (such as a phone call) does not automatically trigger a separate minimum payment.

3. A definition of 'remote response work' or 'remote response duties' should be inserted into the Award. We note that ABI proposes the following definition:

   'In this award, remote response duties means the performance of the following activities:

   (a) Responding to phone calls, messages or emails;

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[552] Exhibit ABI6 – Witness Statement of Deb Ryan, 12 July 2019 at para 78.

[553] Some employers have dedicated 'on call teams', while others utilise the general workforce who may be on call from time to time.

(b) Providing advice ("phone fixes");

(c) Arranging call out/rosters of other employees; and

(d) Remotely monitoring and/or addressing issues by remote telephone and/or computer access.'[554]

4. The clause should include a mechanism for ensuring that the time spent by an employee working remotely is recorded and communicated to their employer.

[723] While there is a significant degree of overlap between the ASU and ABI proposals, the key difference relates to the scheme of remuneration to be applied when employees perform remote response work.

[724] In essence the ASU seeks to introduce a regime whereby:

- employees who are *not* required to be on call but are requested to perform work while away from the workplace are paid at the appropriate overtime rate for a minimum of 2 hours work, with time worked beyond 2 hours rounded to the nearest 15 minutes, and

- employees who are required to be 'on call' and requested to perform work away from the workplace while on call will be paid at the appropriate overtime rate for a minimum of 1 hours' work, with time worked beyond 1 hour rounded to the nearest 15 minutes.

[725] ABI's amended claim also provides for different entitlements depending upon whether the employee is required to be 'on call' for the purpose of clause 20.9 (and paid an on call allowance).

[726] If an employee is *not* 'on call' a remote response request is paid at the 'appropriate rate' for a minimum of 1 hours' work on each occasion a remote response request is made, provided that multiple remote response requests made and concluded within the same hour are compensated within the same 1 hour's payment.

[727] If an employee is 'on call' then the relevant minimum payment in respect of performing remote response work depends on *when* the remote response duties are performed. ABI proposed that employees be paid:[555]

- at the minimum rate of pay for work performed between 6.00am and 10.00pm, with a minimum payment of 15 minutes, and

- at the applicable rate of pay for work performed between 10.00pm and 6.00am with a minimum payment of 45 minutes.

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[554] ABI Submission, 10 February 2020, p 58.

[555] ABI Submission, 2 July 2019 at para 6.6.

[728] In all circumstances remote response work is paid at 'the appropriate rate'; it is only the minimum payment which varies. We return to this issue shortly.

[729] Determining an appropriate monetary entitlement for this type of work involves an assessment of the value of the work and the extent of disutility associated with the time at which the work is performed. In the *Penalty Rates Case,* the Full Bench observed at [202]:

> 'A central consideration in this regard is whether a particular penalty rate provides employees with 'fair and relevant' compensation for the disutility associated with working at the particular time(s) to which the penalty attaches.'

[730] As mentioned earlier, we accept that there is disutility associated with performing remote response work. However, the level of disutility associated with employees performing remote response work is less than that experienced by employees who are recalled to a physical workplace or who are 'on call' to be recalled to work, as employees are not required to:

- stay in the vicinity of the workplace while on-call
- keep themselves, their work clothes and transport in a state of readiness while on-call for a possible recall to work
- spend time travelling to or from the workplace if recalled to work, or
- incur additional travelling expenses (such as public transport fares, petrol or road tolls) if recalled to work.

[731] The ASU's proposal requires that *all* remote response work be paid at overtime rates. Further, if the employee is not 'on call' (and receiving an 'on call' allowance) they are paid overtime rates for a minimum of 2 hours. If they are 'on call' the minimum payment is one hour at overtime rates.

[732] We are not persuaded that the ASU's proposed minimum payments are warranted. We agree with Ai Group's submission in respect of this aspect of the ASU's claim:

> 'It is disproportionate to what might, at least in some instances, be a very short period of work undertaken without the employee incurring the cost or inconvenience of travelling to some other location…

[733] We see the logic inherent in the structure of ABI's minimum payment regime but take a different view as to the minimum periods prescribed. Our *provisional* view is that the minimum payment for remote response work performed between 6.00am and 10.00pm should be 30 minutes and the minimum payment between 10.00pm and 6.00am should be 1 hour. However, we note that there is an inter-relationship between the minimum payment period and the rate of payment.

[734] The rate of pay applicable to remote response work (as opposed to the minimum payment) is problematic.

[735] The ASU contends that all remote response work is to be paid at overtime rates, regardless of whether the work is undertaken during overtime or ordinary hours.

[736] ABI's amended claim provides that all remote response work is paid at 'the appropriate rate'. Proposed clause 28.6(b)(i) states that 'the employee will be paid at *the appropriate rate specified in this Award for any such work performed between these hours*'.

[737] It seems to us that the expression 'the appropriate rate' lacks clarity in this context and is apt to confuse. The 'appropriate rate' for such work depends on a range of factors, such as:

- Is the employee a full-time, part-time or casual employee?
- Is a shift allowance applicable?
- In which sector does the employee work? (e.g. if the employee is a full-time employee different overtime rates apply depending on whether they are a 'disability services, home care and day care employee' or a 'social and community services an crisis accommodation employee': see clause 28.1(a))
- Does the remote response work constitute work in excess of 38 hours per week?
- Is the remote response work being performed on a Saturday or Sunday?

[738] It seems to us that ABI's formulation – 'the appropriate rate' – gives rise to considerable complexity; a simpler formulation would be preferable. In our view, this issue requires further consideration and will be the subject of a conference. Prior to the conference, ABI will be asked to provide further elaboration as to the meaning of 'the appropriate rate', as applied in a range of circumstances. A Notice of Listing for the Conference will be issued shortly.

5.7 CLIENT CANCELLATION CLAIMS

5.7.1 Background

[739] Clause 25.5(f) of the SCHADS Award deals with client cancellation, as follows:

> **(f) Client cancellation**
>
> (i) Where a client cancels or changes the rostered home care service, an employee will be provided with notice of a change in roster by 5.00 pm the day prior and in such circumstances no payment will be made to the employee. If a full-time or part-time employee does not receive such notice, the employee will be entitled to receive payment for their minimum specified hours on that day.
>
> (ii) The employer may direct the employee to make-up time equivalent to the cancelled time, in that or the subsequent fortnightly period. This time may be made up working with other clients or in other areas of the employer's business providing the employee has the skill and competence to perform the work.

[740] In short, employers may direct employees to make-up time equivalent to the cancelled time in that fortnight or during the subsequent fortnight.

[741] Clause 25.5(f) operates as follows:

- the clause applies only to 'home care services', an undefined term

- where a client cancels or changes a rostered home care service the employer is required to provide an employee with notice of a change to their roster by 5pm the day before the scheduled service:

    - if the employer notified the relevant employee before 5pm on the day prior that they are no longer required to work the employee is *not* entitled to any payment

    - where notice is *not* provided by 5pm the day prior, the employee is entitled to payment for their 'minimum specified hours on that day'.

- an employer may direct the employee to perform 'make-up time equivalent to the cancelled time', provided:

    - make-up time is worked in the same or the following fortnightly period; and

    - the time may be made up working with other clients or in other areas of the employer's business, if the employee has the skills and competence to perform the work.

5.7.2 The Claims

[742] ABI and the HSU both seek to vary clause 25.5(f).

[743] The submissions and witness evidence relevant to each of ABI's and HSU's client cancellation claims are set out at **Attachment I**.

A The ABI Claim

[744] ABI seeks to expand the scope of the current client cancellation clause to capture the provision of disability services in the community (for example, care services provided in the community to people with a disability).

[745] The ABI cancellation claim seeks to delete clause 25.5(f) and insert the following:

'**(f) Client cancellation**

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

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

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

B. cancel the rostered shift.

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

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

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

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

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

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

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

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

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

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

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

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

[746] The current clause 25.5(d) provides:

Change in roster

(i) Seven days' notice will be given of a change in a roster.

(ii) However, a roster may be altered at any time to enable the service of the organisation to be carried on where another employee is absent from duty on account of illness, or in an emergency.

(iii) This clause will not apply where the only change to the roster of a part-time employee is the mutually agreed addition of extra hours to be worked such that the part-time employee still has four rostered days off in that fortnight or eight rostered days off in a 28 day roster cycle, as the case may be.

[747] It is uncontentious that ABI's proposed client cancellations clause would operate as follows:

1. The clause would apply to home care and disability services.

2. In the event of a client cancellation, the clause would provide an employer with 2 options:

   Option 1: The employer would have the right to direct the employee to perform other work during the hours that they were rostered to work.

   In these circumstances the employer would be required to pay the employee the amount they would have been paid had the employee performed the cancelled service or the amount payable for the work actually performed; whatever is greater.

   Option 2: The employer would be permitted to cancel the shift.

   In these circumstances the employer would be required to:

   (i) pay the employee the amount they would have received had they performed the cancelled service, or

   (ii) provide the employee with make-up time. Such make up time must be rostered to be performed within 3 months of the date of the cancelled shift. The employer must consult with the employee about when the make-up time will be performed.

[748] ABI submits that where it is not feasible to redeploy an employee to other work in the event of a client cancellation, the employer should have the ability to cancel the employee's rostered shift and offer them make-up time later. ABI submits that this type of regime is not new in the home care sector, including in situations where the in-home service is provided to a person with a disability but submits that it should be extended to the broader disability sector where supports are provided in the community.

[749] ABI submits that in respect of client cancellations there is a clear disconnect between the terms of the SCHADS Award and the funding arrangements under the NDIS and that this disconnect is having a materially adverse impact on the viability of businesses operating in this sector.

[750] NDS supports ABI's proposed variation to the client cancellation provisions and submits that the variation would be consistent with the promotion of flexible modern work practices and the efficient and productive performance of work (s.134(1)(d) of the Act).

[751] NDS notes that the NDIS Price Guide for 2019-2020 has modified the funding arrangements in the event of client cancellation; but submits that despite the modification to the funding arrangements client cancellation remains a problem:

> 'An employer still needs to be able to reallocate work in the event of a cancellation, if other work is available. An example where this is important for reasons of efficiency and

productivity, is if the worker can be redeployed to backfill for another worker on unplanned personal leave.

Notwithstanding the changes to the arrangements for cancellations under the NDIS Price Guide, the employer still has a problem in relation to cancellations made with more than 2 days' notice but less than 7 days. If no other work is available to be allocated to the worker, then the worker is paid without having to perform work, and the employer is unable to charge the customer for this. Furthermore, clause 25.5 (d) limits the ability of an employer to change a roster with less than 7 days' notice to situations of illness or emergency.

The current clause 25.5(f) deals with this situation for home care workers by providing the option using make up time by the end of the following fortnightly period.

The proposed new clause 25.5(f) extends this option to disability support workers, but also extends the time available for the employer to find suitable work to 3 months.

NDS submits that an extended period is needed to enable suitable work to be found for the working of make-up time because of the difficulty of matching appropriate workers to individual clients.

Client choice and control in the operation of the NDIS is also a factor in the need for an extended period to organise make up time, because the individual client has enhanced negotiating power with providers in relation to the timetabling of supports, as well as the identity of the worker as previously mentioned. The provider cannot unilaterally schedule work for their own administrative convenience without reference to the client.'[556] (footnotes omitted)

[752] AFEI and Ai Group oppose aspects of the ABI proposal.

[753] AFEI supports the introduction of paragraph 25.5(f)(i) and (ii) of ABI's proposed variation but opposes the removal of the words 'in such circumstances no payment will be made to the employee', in clause 25.5(f)(i).[557]

[754] Similarly, Ai Group submits that it supports greater flexibility being afforded in respect of client cancellations to the provision of disability services but contends that:

'Any scheme dealing with client cancellation should retain an ability to cancel an employee's shift without payment where a client cancels or changes their service request.'[558]

[755] Ai Group contends that ABI's proposal will 'exacerbate or further any existing disconnect between the 2 in some respects'[559] and provides the following example in support of this contention:

'If a client cancels a home care service that is less than 8 hours in duration and $1000 in price with 72 hours' notice and the employer immediately notifies the employee that their corresponding shift is cancelled:

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[556] NDS Submission, 2 July 2019 at paras 32 – 37.

[557] AFEI Submission, 3 July 2019 at paras 10 – 12.

[558] Ai Group Submission, 26 September 2019 at para 45.

[559] Ibid at para 33.

(a) **Under the NDIS**, the cancellation is not a "short notice" cancellation. The employer therefore cannot recover any amount under the NDIS funding arrangements.

(b) **Under the current Award clause**: the employer is not required to pay the employee or to afford the employee make-up time. The employee's shift can be cancelled.

(c) **Under ABI's proposal**: the employer no longer has the ability to cancel the employee's shift without payment to the employee. The employer must either:

(i) direct the employee to perform other work at the same time and pay the employee in accordance with clause 25.5(f)(iii); or

(ii) cancel the shift and pay the employee the amount they would have received had they performed the cancelled service; or

(iii) provide the employee with make-up time.'[560]

[756] ABI agrees that the example provided by Ai Group is accurate as to the operation of its proposed clause and refers to paragraphs [2.28] - [2.32] of its reply submissions dated 12 October 2019 in which it addresses the concerns of Ai Group as follows:

> 'Our proposed client cancellation clause is intended to deal with circumstances where services are cancelled by clients less than 7 days before the rostered shift is due to take place. It seeks to provide a fair and workable mechanism to deal with those situations without the employer or employee being unfairly disadvantaged.
>
> We note that Ai Group have identified that our clients' claim is less flexible for employers than the existing clause in respect of client cancellations in the home care stream of the Award. Further, and ironically, they identify that our claim is less beneficial for employers than the HSU claim in respect of home care services. We accept both of those propositions to be correct. However, the primary aim of our clients' claim is to extend a client cancellation / make-up pay regime to the disability services stream, and in doing so, we have proposed to materially improve the existing Award regime as it stands for home care employees.
>
> We submit that the proposed variation strikes the right balance and meet awards objective.'

[757] Ai Group submits that in 2 respects the ABI proposal is 'more onerous, more costly and more inflexible'[561] than the existing client cancellation scheme:

1. It operates in the event of any client cancellation, even where ample notice of the cancellation is provided by the client to the employer and, in turn, by the employer to the employee. Even where an employee has, for instance, four weeks of notice of a cancellation, the clause will require the employer to either pay them or to afford them make-up time. Ai Group submits:

> 'There is … no foundation for proceeding on the basis that the purpose or rationale underpinning the requirement to pay an employee in the context of a short notice change under the current clause is also relevant in the context of an employee having weeks of notice. Rather, the proposition that an employee should be compensated in

[560] Ibid at para 34.

[561] Ibid at para 37.

> the same way for a roster change with multiple weeks of notice as they should for a change made after 5pm on the preceding day, self-evidently has little force'.[562]

2. The proposed clause will in many instances increase employment costs and the regulatory burden. The clause will require an employer, in the context of any client cancellation to either pay the employee for the shift or to find other work for the employee to perform (either at the same time or later, in the form of make-up time). The proposed clause creates an employer obligation to provide make-up time (unless payment is made to the employee).

[758] Ai Group submits that ABI's proposal for dealing with client cancellations 'is not consistent with the need to afford flexible modern work practices and will have an adverse impact on many employers' (referring to ss 134(1)(d) and (f)).[563]

[759] ABI disagrees with Ai Group's proposition that the proposal will 'exacerbate or further any existing disconnect between the two in some respects'. ABI accepts that its proposed clause does not operate in perfect harmony with the NDIS funding arrangements. ABI also accepts that it operates detrimentally to employers in certain circumstances but submits that the proposed variation 'strikes the right balance for employers and employees.'

[760] ABI submits that the proposed client cancellation clause is intended to deal with circumstances where services are cancelled by clients less than 7 days before the rostered shift is due to take place. It seeks to provide a fair and workable mechanism to deal with those situations without the employer or employee being unfairly disadvantaged.

[761] The Unions oppose ABI's proposed variation.

[762] The HSU submits that there is no warrant, financial or otherwise, for extending the existing cancellation arrangements to disability workers, noting that the capacity of employers to charge for cancelled services under the NDIS has 'improved dramatically' because of changes to the 2019-2020 Price Guide.[564]

[763] The UWU also submits that the evidence does not support an extension of the clause 25.5(f) to disability services; rather the evidence justifies the removal of clause 25.5(f) altogether, as there is evidence that client cancellations in home care are often chargeable.

[764] The ASU submits that there is no probative evidence that identifies any need for a client cancellation term in the disability services sector and that the employer witness evidence that they will lose clients if they charge for cancellation of a service is speculative and should be given little weight:

> 'No employer has been able to quantify the cost of client cancellations to their business. Any witness evidence about the cost of client cancellation is purely speculative and should be given no weight. The employer witness evidence demonstrates that employers in the disability

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[562] Ibid at para 40.

[563] Ibid at para 44.

[564] HSU Submission, 18 November 2019 at para 152.

> services are better placed to manage the risk of cancellation and absorb the unquantified costs of cancellation than their employees.'[565]

[765] The ASU submits that funding arrangements for the NDIS allow employers to recover most of the cost of cancelled shifts and that from the evidence provided by the employers, 'the majority of cancellations occur at very short notice. For all other services, employers may charge 90% of the cost of the service unless 5 clear business days' notice is given. Providers may claim an unlimited number of cancellations.'[566]

[766] The ASU submits that ABI's proposed variation would 'further reduce the control that employees have over their working hours, and thus make the already intolerable working conditions in the sector worse'.[567]

[767] In reply, ABI rejects the HSU submission that the revised cancellation rules provide 'a generous mechanism for service providers to recoup the cost of service cancellations' and submits that in most cases, the rules do not allow employers to charge clients anything at all provided the client gives more than 2 clear business days' notice of the cancellation of a service.

[768] ABI acknowledges that the updated cancellation rules in the NDIS Price Guide 2019-20 has improved the position of employers when it comes to clients cancelling scheduled services provided under the NDIS, but submits that this development does not nullify the merit of the claim.

[769] ABI contends that there is still a material disconnect between the Award requirements around changing rosters or cancelling shifts and an employer's ability to charge clients for cancelling scheduled services.

[770] ABI contends that this 'disconnect' creates a situation where the employer receives no revenue, and yet has an employee who has been rostered to provide the now-cancelled service. Unless the employer can usefully deploy the employee to other productive work at that exact time slot, they face a potential situation of incurring labour costs without deriving any revenue.

[771] In response to the UWU's submission ABI contends that the position advanced is illogical:

> 'The United Voice's conditional support for our proposed clause in respect of home care employees undermines their opposition to it applying to disability services employees.
>
> While the United Voice refer to the different regulatory regimes for the different streams of work, the reality is that there is no less merit of a client cancellation / make-up time arrangement in the disability services stream as it is in the home care stream.'[568]

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[565] ASU Submission, 19 November 2019 at para 117.

[566] ASU Submission, 19 November 2019 at para 120.

[567] ASU Submission, 19 November 2019 at para 121.

[568] ABI Submission, 12 October 2019 at paras 2.18 – 2.19.

[772] In response to paragraph [35] of the ASU submission, ABI disputes the proposition that the new NDIS rules allow providers to charge a 90% cancellation fee 'in most circumstances'. ABI submits that there is a significant window where a provider is not able to charge a cancellation fee and yet the employer is unable to vary the employee's roster or cancel the shift.

[773] ABI also observes that while the ASU makes a general assertion at [29] that clause 25.5(f) in its current state 'does not meet the modern awards objective', they do not proffer any changes to it or provide any suggestions for improving the existing regime. ABI submits that the credibility of that position deserves scrutiny.

B The HSU Claim

[774] The HSU's principal position is that there should be no client cancellation clause in the SCHADS Award:

> 'the Commission would not be satisfied, on the evidence before it, that cancellation of a home care appointment at short notice would leave the employer without a source of funding to meet employee wages. First, wages are modest. Second, it is far from the case that employers in the home care industry are suffering through any financial hardship. Third, on the evidence before the Commission, it would not be satisfied that organisations providing home care services are not able to make arrangements whereby they charge when clients cancel scheduled services.
>
> …
>
> In summary, the existing cancellation clause in the Award operates to shift the financial risk (which on the evidence above is minimal) of variable client demand onto the employee, and to require the employee to forego wages to build up the employer's goodwill. The clause is not a fair and relevant minimum condition.'[569]

[775] In the alternative the HSU submits that, the clause should be amended to ensure that employees receive payment for all of their rostered hours if they are not given at least 48 hours' notice of cancellation.

[776] The HSU propose the following amendments to clause 25.5.(f):

> '**(f) Client cancellation**
>
> (i) Where a client cancels or changes the rostered home care service, an employee will be provided with notice of a change in roster ~~by 5.00 pm the day prior~~ at least 48 hours in advance and in such circumstances no payment will be made to the employee. If a full-time or part-time employee does not receive such notice, the employee will be entitled to receive payment for their ~~minimum specified hours~~ rostered hours for that visit on that day.
>
> (ii) The employer may direct the employee to make-up time equivalent to the cancelled time, in that or the subsequent fortnightly period. This time may be made up working with other clients or in other areas of the employer's business providing the employee has the skill and competence to perform the work.'

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[569] HSU Submission, 18 November 2019 at paras 138 and 143.

[777] The HSU contends that the brevity of the notice required in the current clause (by 5.00 pm the day prior) has the capacity to be disruptive for employees seeking to arrange other responsibilities around work commitments. The HSU refers to the evidence of Ms Waddell for whom the capacity for such change meant that she found herself on one occasion, with a change which required her to attend an appointment 50 kilometres away, without sufficient fuel in her car to undertake the trip.[570]

[778] The HSU contends that the capacity to cancel set hours of work on such terms significantly undermines the entitlement of part-time workers to regular and guaranteed days and hours of work.

[779] ABI opposes the HSU claim and submits that as most cancellations or changes to rostered home care services are made in the 24 hours prior to the scheduled service:

> 'the HSU variation would effectively nullify the utility of this clause for employers, which is more important than ever in the context of the consumer – directed care reforms that have recently been implemented.'[571]

[780] NDS opposes the HSU claim on the basis that 'it does not provide for any flexibility for dealing with client cancellation in the disability sector'.[572]

[781] AFEI submits that the Commission should prefer the variation proposed by ABI to that proposed by the HSU.

[782] Ai Group opposes the deletion of clause 25.5(f) on the basis that if the provision were removed from the Award, an employer would effectively be prohibited from making any variation to an employee's roster unless 7 days' notice is provided.[573]

[783] As to the HSU's alternative position, Ai Group does not oppose HSU's proposal to amend clause 25.5(f), on the basis that it broadly reflects the funding arrangements that now apply to client cancellations under the NDIS. Ai Group submits the prevailing funding arrangements are of clear significance to the determination of the safety net created by the Award:

> 'In this instance, the proposed variation would align with the NDIS funding arrangements and accordingly, Ai Group does not seek to oppose the proposal.'[574]

5.7.3 The Evidence

[784] In our view the evidence supports the following findings:

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[570] Exhibit HSU4 – Witness Statement of Heather Waddell, 15 February 2019 at paras 15 – 16.

[571] ABI Submission, 12 July 2019 at para 12.4.

[572] NDS Submission, 16 July 2019 at para 64.

[573] See SCHADS Award, clause 25.5(d).

[574] Ai Group Submission, 10 February 2020 at para 166.

1. Client cancellation events occur in both the home care and disability support sectors.[575]

2. Clients cancel scheduled services for a range of reasons including: ill health or injury, an unscheduled medical appointment, hospitalisation, transfer into permanent residential care, death, family visits, complex behavioural issues, social appointments, refusing to have the replacement worker if their usual worker is absent that day, absence from home at the time of the scheduled service, holidays, poor weather, and festival celebrations.[576]

3. Most client cancellations occur in the 24 hours prior to the commencement of the scheduled service:

    (a) Mr Shanahan gave evidence that clients typically give notice of a cancellation on the day when a client goes into hospital, permanent care, or when they pass away[577]

    (b) Mr Harvey gave evidence that 75% of cancellations occurring at ConnectAbility during the financial year ending 30 June 2018 were made within 24 hours or not provided at all[578]

    (c) Ms Ryan gave evidence that for the period 1 April 2019 to 30 June 2019 Community Care Options had clients cancel their services on the same day on 205 separate occasions[579]

    (d) Ms Wang gave evidence that:

        (i) in home ageing services, while more notice is typical, cancellations for unexpected reasons are usually less than 24 hours, and

        (ii) in disability services most cancellation notice is overnight and less than 24 hours,[580] and

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[575] Mr Shanahan gave evidence that Coffs Coast Health & Community Care Pty Ltd experience client cancellations on a 'regular basis' (Exhibit ABI5 – Witness Statement of Graham Shanahan, 28 June 2019 at para 20); Mr Harvey gave evidence that ConnectAbility experiences client cancellation events on a 'daily basis' (Exhibit ABI7 – Witness Statement of Scott Harvey, 2 July 2019 at para 32); Ms Ryan gave evidence that Community Care Options experiences client cancellations on 'at least a daily basis' (Exhibit ABI6 – Witness Statement of Deborah Ryan, 12 July 2019 at para 46); Ms Wang gave evidence that CASS Care Limited experiences client cancellations on a 'regular basis' (Exhibit ABI9 – Witness Statement of Joyce Wang, 12 July 2019 at para 35); Mr Wright gave evidence that HammondCare experiences client cancellations on a 'frequent basis' (Exhibit ABI3 – Witness Statement of Jeffrey Wright, 12 July 2019 at para 25).

[576] Exhibit ABI5 – Witness Statement of Graham Shanahan, 28 June 2019 at para 22; Exhibit ABI7 – Witness Statement of Scott Harvey, 2 July 2019 at para 37; Exhibit ABI6 – Witness Statement of Deborah Ryan, 12 July 2019 at para 48; Exhibit ABI9 – Witness Statement of Joyce Wang, 12 July 2019 at para 37; Exhibit ABI3 – Witness Statement of Jeffrey Wright, 12 July 2019 at para 27; Exhibit ABI8 – Witness Statement of Wendy Mason, 17 July 2019 at para 42.

[577] Exhibit ABI5 – Witness Statement of Graham Shanahan, 28 June 2019 at para 24.

[578] Exhibit ABI7 – Witness Statement of Scott Harvey, 2 July 2019 at para 36.

[579] Exhibit ABI6 – Witness Statement of Deborah Ryan, 12 July 2019 at para 47.

[580] Exhibit ABI9 – Witness Statement of Joyce Wang, 12 July 2019 at paras 39 - 40.

(e) Mr Wright gave evidence that for HammondCare 'the vast majority of client cancellations are within 0 to 6 hours of the scheduled commencement time of the service'.581

4. Client cancellation events are not uncommon, the evidence was:

(a) Ms Wang gave evidence that 'approximately 40 visits are cancelled per week' at CASS and, in the month of May 2019, 3.83% of visits were cancelled (180 of 4,700 total scheduled visits),[582]

(b) Mr Wright gave evidence that during May 2019 there were 2,708 cancellations out of 47,704 scheduled services which equates to 5.68% of services cancelled for the month,[583]

(c) Ms Mason gave evidence that BaptistCare experiences 'a high proportion of client cancellations on a very regular basis' and that in the month of May 2019 5,140 of 35,083 services were cancelled, which equates to 14.65% of scheduled services,[584] and

(d) Mr Harvey gave evidence that ConnectAbility experienced 1,134 cancellations during the financial year ending 30 June 2018.

5. The frequency of cancellation events causes significant rostering challenges for businesses. 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.[585]

6. Employers encounter difficulties in finding alternative work for employees at the time of their rostered shift when a scheduled client service is cancelled by the client.[586]

7. There is some evidence that employers cancel rostered shifts of part-time employees (without payment) under the provisions of the current clause 25.5(f).[587]

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[581] Exhibit ABI3 – Witness Statement of Jeffrey Wright, 12 July 2019 at para 29.

[582] Exhibit ABI9 – Witness Statement of Joyce Wang, 12 July 2019 at para 35.

[583] Exhibit ABI3 – Witness Statement of Jeffrey Wright, 12 July 2019 at paras 25 – 26.

[584] Exhibit ABI8 – Witness Statement of Wendy Mason, 17 July 2019 at paras 40 – 41.

[585] Exhibit ABI5 – Witness Statement of Graham Shanahan, 28 June 2019 at para 23; Exhibit ABI7 – Witness Statement of Scott Harvey, 2 July 2019 at paras 39 - 43; Exhibit ABI3 – Witness Statement of Jeffrey Wright, 12 July 2019 at para 38.

[586] Exhibit ABI7 – Witness Statement of Scott Harvey, 2 July 2019 at paras 39 - 42; Exhibit ABI6 – Witness Statement of Deborah Ryan, 12 July 2019 at para 50.

[587] Exhibit UV1 – Witness Statement of Trish Stewart, 17 January 2019 at para 10; Exhibit UV4 – Witness Statement of Deon Fleming, 16 January 2019 at paras 13 - 16. However, as Ai Group submits, the evidence does not substantiate the proposition that it is *common* for employer generally to cancel rostered shifts of part-time employees, without payment, under clause 25.5(f) of the Award.

8. Where an employee has a rostered shift cancelled without payment by their employer, the employee will lose out on expected income unless provided with a make up shift.[588]

9. Funding schemes have different terms in respect of cancellations589 and in some cases employers are prohibited from charging cancellation fees.

10. The updated cancellation rules in the NDIS Price Guide 2019-20 improved the position of employers when it comes to clients cancelling scheduled services under the NDIS.

11. 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;[590] though the evidence suggests that employers do not generally engage in such practices.[591]

12. Home care providers can set out the terms and conditions upon which they will provide services to a client, including terms about cancellation of services.[592]

13. 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,[593] however the evidence suggests that employers do not always enforce this contractual right for a range of reasons.[594]

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[588] Exhibit UV1 – Witness Statement of Trish Stewart, 17 January 2019 at para 10; Exhibit UV4 – Witness Statement of Deon Fleming, 16 January 2019 at paras 13 - 16; Transcript, 15 October 2019, cross-examination of Belinda Sinclair at PN745.

[589] Exhibit ABI5 – Witness Statement of Graham Shanahan, 28 June 2019 at para 21.

[590] Transcript, 18 October 2019, cross-examination of Deborah Ryan at PN3031-PN3032; Exhibit HSU15 - Same Day Cancellation Log (subject to confidentiality order); also, this is the logical conclusion from considering the interaction of cancellations clauses within service agreements (see Exhibit HSU19 - Baptist Care Commonwealth Home Support Programme (CHSP) pro-forma Service Agreement; Exhibit HSU20 - Baptist Care Home Care Agreement (Level 1) with the terms of clause 25.5(f) of the Award.

[591] Exhibit ABI5 – Witness Statement of Graham Shanahan, 28 June 2019 at para 27; Transcript, 17 October 2019, cross-examination of Jeffrey Wright at PN2651; Transcript, 18 October 2019 cross-examination of Wendy Mason at PN3321.

[592] Transcript, 17 October 2019, cross-examination of Darren Mathewson at PN2421-PN2424; Transcript, 18 October 2019, cross-examination of Deborah Ryan at PN3020-PN3029, PN3075-PN3080; Exhibit HSU16 - Community Care Options Home Care Agreement Template; Transcript, 18 October 2019, cross-examination of Wendy Mason at PN3237-PN3249; Exhibit HSU19 - Baptist Care Commonwealth Home Support Programme (CHSP) pro-forma Service Agreement; Exhibit HSU20 - Baptist Care Home Care Agreement.

[593] Transcript, 18 October 2019, cross-examination of Graham Shanahan at PN2891-2897; cross-examination of Deborah Ryan at PN3020-PN3029, PN3075-PN3080; Exhibit HSU15 - Same Day Cancellation Log (subject to confidentiality order); Exhibit HSU16 - Community Care Options Home Care Agreement Template; Transcript, 18 October 2019, cross-examination of Wendy Mason at PN3237-PN3249; Exhibit HSU19 - Baptist Care Commonwealth Home Support Programme (CHSP) pro-forma Service Agreement; Exhibit HSU20 - Baptist Care Home Care Agreement. Note: Mr Wright provided evidence that cancellation fees cannot be charged under the CHSP however later admitted that this understanding was based on what he had heard from '*operations people who are in that space within the organisation*' (see Transcript, 17 October 2019, cross-examination of Jeffrey Wright at PN2645-PN2651, PN2702-PN2706). 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. 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

14. 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.[595]

[785] In relation to finding 10 above NDS notes that the NDIS Price Guide for 2019-2020 modified the funding arrangements in the event of client cancellation as follows:

> 'Specifically, providers can claim 90% of the charge for the cancelled appointment where the client provides up to 2 days' notice, and there is no cap on the number of times this can be done. The Guide states:
>
> > Where a provider has a short notice cancellation (or no show) they are able to recover 90% of the fee associated with the activity, subject to the terms of the service agreement with the participant.
> >
> > A cancellation is a short notice cancellation (or no show) 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.
> >
> > There is no limit on the number of short notice cancellations (or no shows) that a provider can claim in respect of a participant.
> >
> > However, providers have a duty of care to their participants and if a participant has an unusual number of cancellations then the provider should seek to understand why they are occurring.
> >
> > The NDIA will monitor claims for cancellations and may contact providers who have a participant with an unusual number of cancellations.
>
> The changes for 2019-2020 mean that the financial impact on the employer of a cancellation made with 2 days' notice is slightly reduced compared to previous years, because the previous cap of payment for a maximum of 8 occasions per year has been removed.'[596] (footnotes omitted)

[786] Other parties acknowledged that the NDS' characterisation of the modified funding arrangements is broadly accurate.

[787] ABI agrees with NDS's characterisation subject to its comments in response to Question 49 in Background Paper 1. After setting out the UWU submission that 'in disability

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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).

[594] Exhibit ABI5 – Witness Statement of Graham Shanahan, 28 June 2019 at para 27; Transcript, 17 October 2019, cross-examination of Jeffrey Wright at PN2651; Transcript, 18 October 2019, cross-examination of Wendy Mason at PN3321.

[595] Transcript, 18 October 2019, cross-examination of Graham Shanahan at PN2891-PN2897; cross-examination of Wendy Mason at PN3273-PN3274.

[596] NDS Submission, 2 July 2019 at paras 30 – 31.

services, due to changes made in July 2019 in the NDIS Price Guide 2019-20, an unlimited amount of client cancellations are now claimable', question 49 states:

'Question for other parties: Do you agree with the above statement (and, if not, why not)?'

[788] In response to Question 49 ABI submits:

'No.

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

Firstly, under the current NDIS Price Guide 2019-20 valid from 1 December 2019, employers are only able to claim for cancellations where they are "short notice cancellations". Employers cannot charge for cancellations that do not meet that definition. The Price Guide defines a "short notice cancellation" as being where the participant:

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

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

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

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

Thirdly, providers are only permitted to charge for a short notice cancellation (or no show) if they have "not found alternative billable work for the relevant worker and are required to pay the worker for the time that would have been spent providing the support".'[597] (footnotes omitted)

[789] Ai Group notes that to the extent that NDS asserts that funding can be claimed in the event of all cancellations made with less than 2 business days' notice, it is not correct. Funding can be claimed in the event of a 'short notice cancellation (or no show)'. A 'short notice cancellation' occurs where the participant:

(a) does not show up for a scheduled support within a reasonable time, or is not present at the agreed place and within a reasonable time when the provider is travelling to deliver the support, or

(b) has given less than two (2) clear business days' notice for a support that meets both of the following conditions:

- the support is less than 8 hours continuous duration, AND

[597] ABI Submission, 10 February 2020 at para 49.

- the agreed total price for the support is less than $1000, or

(c) has given less than five (5) clear business days' notice for any other support.[598]

[790] The Joint Union accept that the statement is accurate but doubt the submission that the financial impact of client cancellations is 'slightly reduced'.

5.7.4 Consideration

[791] It is convenient to deal first with the HSU's claim that there should be *no* client cancellation clause in the SCHADS Award.

[792] We reject the HSU's claim. If granted an employer would be prohibited from making any variation to an employee's roster unless 7 days' notice is provided (see clause 25.5(d)(i)); save in the case where another employee is absent from duty due to illness or in an emergency (see clause 25.5(d)(ii)).

[793] As mentioned earlier, the modern awards objective provides that the Commission must ensure that modern awards, together with the NES, provides a 'fair…safety net'. Fairness in this context is to be assessed from the perspective of the employees and employers covered by the SCHADS Award.

[794] The deletion of the client cancellation clause would be manifestly unfair to employers covered by the SCHADS Award given:

- the incidence of client cancellations
- the fact that most client cancellations occur in the 48 hours prior to the scheduled services, and
- such circumstances create significant rostering challenges for businesses.

[795] We now turn to ABI's proposed variation to clause 25.5(f). The effect of ABI's proposed variation is set out earlier (at [747]). In short, the proposed variation does 3 things:

(i) it extends the operation of the clause to disability support work

(ii) it removes the option of withholding payment from a worker in the event of a cancellation, and

(iii) it provides more flexibility around the timetabling of make-up time.

[796] It is convenient to deal separately with each of these elements.

[797] As mentioned earlier, the current client cancellation term only applies to 'home care services', which is an undefined term. ABI's proposed term would apply to home care *and* disability services, so much is clear from proposed clause 25.5.(f)(i).

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[598] NDIS Price Guide 2019-20, 1 December 2019, p 18.

[798] ABI initially contended that the current client cancellation clause already applies to a significant part of the disability services sector, as it applies to services provided to people with a disability in their home. It initially submitted that there is no reason for distinguishing between supports provided to persons with a disability in their home and services provided in the community:

> 'Other than the location, there are clear similarities between care services provided by support workers in the home and care services provided in the community, including that:
>
> (i) community-based services are just as susceptible to client cancellation as in-home care services;
>
> (ii) community-based services are subject to the same cancellation rules under the NDIS as attendant care in the home; and
>
> (iii) the nature of the work is the same or very similar.'[599]

[799] ABI later revised its submission and now accepts that:

> 'it most likely erroneously construed the scope of the existing client cancellation clause. We do not press those parts of our submission of 2 July 2019 which asserted otherwise.
>
> Notwithstanding that issue, however, we maintain that it is necessary to extend the existing client cancellation clause in the Award beyond the home care sector and to the disability services sector. It is necessary to address this disconnect between the NDIS rules and the Award.'[600]

[800] ABI contends that there is no good reason why the SCHADS Award should provide a regime for dealing with client cancellations of rostered 'home care' services, but not provide any such regime for client cancellations of attendant care services in the community for people with a disability.

[801] ABI submits that where a disability services client cancels a scheduled service with less than 7 days' notice, the Award does not permit an employer to unilaterally change the employee's roster to accommodate the fact that their work is no longer required or available by reason of the client cancellation. Under NDIS rules, where the client cancels a shift more than 2 clear days before, but less than 7 days before the service is scheduled to be delivered the employer is prohibited from charging the client in most cases.

[802] ABI submits that in those circumstances, the only ways the employer can avoid incurring a loss for the cancelled service are:[601]

- where they can redeploy the employee to other work at that precise time, which will be difficult in most cases given that other employees would most likely have already been rostered to perform that work, or

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[599] ABI Submission, 2 July 2019 at para 5.3.

[600] ABI Submission, 12 October 2019 at paras 2.24 – 2.25.

[601] ABI Submission, 12 October 2019 at para 2.9.

- where clauses 25.5(d)(ii) or (iii) apply, which will be rare, or

- where the employee agrees to vary their hours (e.g. under clause 10.3(e)).

[803] We agree with ABI. Client cancellations occur in both the home care and disability support sectors. Client cancellation events occur in both sectors, and are not uncommon. The frequency of cancellation events causes significant rostering challenges for businesses. It is appropriate that the client cancellation term apply to both sectors.

[804] We now turn to the second element of ABI's proposal.

[805] At present clause 25.5(f) operates such that if a client cancels or changes a rostered home care service and the employee is notified of a consequent change to their roster by 5pm on the day prior that they are no longer required to work, then the employee is *not entitled to any payment.*

[806] In short, the current clause permits an employer to withhold payment of rostered work for an employee where the client cancels or changes the rostered shift and the employee is provided with notice or a change in roster occurs, by 5pm the day prior. As an alternative to withholding payment, the employer may direct the employee to perform make-up time equivalent to the cancelled time, in the current roster or the subsequent fortnightly period.

[807] ABI proposed that in circumstances where an employer cancels a rostered shift (under proposed clause 25.5(f)(ii)(B)) the employer *must* either:

- pay the employee the amount they would have received had they performed the cancelled service, or

- provide the employee with make-up time. Such make up time must be rostered to be performed within 3 months of the date of the cancelled shift. The employer must consult with the employee about when the make-up time will be performed.

[808] In essence ABI seeks to amend the client cancellation clause to delete the provision enabling an employer to withhold payment, but enables make up time to be worked within 3 months rather than within the next fortnightly period. Unlike the current clause, the proposed variation does not require that the employee is notified by any particular time.

[809] As mentioned earlier, NDS supports ABI's proposal. NDS submits that the current provision whereby an employee may not be paid in certain circumstances where there is a cancellation is 'onerous on the employee' and the ABI proposal remedies that aspect of the current award provision.[602]

[810] AFEI supports paragraphs 25.5(f)(i) and (ii) of ABI's proposal but opposes the removal of an employer's ability to cancel an employee's shift without payment to the employee. Ai Group takes a similar position and submits that in some respects the ABI

[602] NDS Submission, 7 February 2020, p 13.

proposal is 'more onerous, more costly and more inflexible' than the existing term (see [757] above).

[811] In response to Ai Group's submission that ABI's proposal is less flexible for employers than the existing clause in respect of client cancellations in the home care stream of the Award and less beneficial for employers than the HSU claim in respect of home care services, ABI accepts that both of those propositions are correct and submits:

> 'However, the primary aim of our clients' claim is to extend a client cancellation / make-up pay regime to the disability services stream, and in doing so, we have proposed to materially improve the existing Award regime as it stands for home care employees.
>
> We submit that the proposed variation strikes the right balance and meets the modern awards objective.'[603]

[812] The Unions generally oppose ABI's proposal, however the UWU notes that the proposal has a 'beneficial effect' in that:

> 'it would provide employees with a more stable and secure income as the employer would either have to pay the employee for the shift or may 'deploy' the employee to another shift rather than withhold payment altogether. In this respect, this clause is an improvement on the current client cancellation clause.'[604]

[813] The UWU supports ABI's proposed variation (in respect of home care workers; the UWU opposes the extension of the client cancellation term to disability support workers), provided that:[605]

1. There is a set time by which the employee must be notified of the cancelled shift. If the employee is notified by that timeframe, then the employer could require the employee to work make up time. If the employee is not notified by that timeframe, then the employee should be paid for the shift as rostered (and cannot be required to work make up time). The current standard of 5pm the day prior should be the starting point.

2. There is greater clarity around when the 'make-up time' must be paid. Where an employee is required to work make-up time, they should be paid as if the shift was not cancelled. The UWU would support a form of words as follows:

> (vii) Where 25.5(f)(iv)(B) applies the employee will receive payment for the cancelled service as if they had worked it (including any applicable penalties or loadings).
>
> (viii) Where the applicable rate of pay for working the make-up time is higher than the rate of pay the employee received for the cancelled service under 25.5(f)(vii) the employee will be paid the difference between the 2 rates of pay.

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[603] ABI Submission, 12 October 2019 at paras 2.31 – 2.32

[604] UWU Submission, 13 September 2020 at para 37.

[605] UWU Submission, 13 September 2020 at para 38.

3. The time within which make-up may be worked should not be three months. Three months is an excessive length of time. The three month time frame will allow larger balances of make-up time to accrue and also greater deficits in remuneration for work performed when make-up time is worked. The current Award clause requires that make-up time must be worked in 'that, or the subsequent fortnightly period'. We propose that the time in which make up can be worked is extended to only the next 2 fortnightly periods i.e. a month. This extension should enable employers to find an appropriate make-up shift for the employee, whilst not being so long as to lose the nexus between the paid shift and the make-up time shift.

4. Under the current award provision concerning make-up time, it is likely that if the employer does not direct the employee to work any balance within the fortnight, the right of the employer to direct the employee to perform work as make up time lapses. A clear provision that this is in fact the case, is necessary and particularly if the Commission is considering longer durations for the accumulation of make-up time.

[814] We acknowledge the force of points 1 and 3; but finds point 2 and 4 unpersuasive. We return to points 1 and 3 shortly.

[815] Broadly speaking, we think the second element of ABI's proposed clause has merit. Contrary to the submissions of AFEI and Ai Group we favour removing the option of withholding payment from an employee in the event of a client cancellation.

[816] The only reservation we have concerns the timeframe within which an employee is notified that their rostered shift has been cancelled.

[817] Clause 25.5(f)(v) of the ABI proposal provides that an employee must be paid for the cancelled shift 'where the employee was notified of the cancelled shift after arriving at the relevant place of work'. In the event that the 'cancelled shift' was the employee's first engagement of the day, the ABI proposal means that the employee will have incurred the inconvenience of having to attend the relevant place of work, and will receive no recompense.

[818] Under the current clause if an employee is not notified of the cancelled shift by 5pm on the day prior they are entitled to receive payment for their minimum specified hours on that day. A 'cut off' of 5pm on the day prior gives rise to some variability in terms of the actual period of notice provided. If the cancelled shift was to have started at 6am then the minimum notice required is 13 hours; whereas if the cancelled shift starts at 5pm the next day then 24 hours notice is required. Client cancellations can and do occur with less than 24 hours' notice. Our *provisional* view is that 12 hours notice is appropriate. This would mean that clause 25.5.(f)(v) in the ABI proposal be amended as follows:

> (v) The make up time arrangement ~~cannot~~can only be ~~utilised~~ used where the employee was notified of the cancelled shift at least ~~after arriving at the relevant place of work to perform~~ 12 hours prior to the scheduled commencement of the shift. In these cases, clause 25.5(f)(iv)(A) applies.

[819] The use of the word 'shift' in this context may require further consideration. A shift suggests all of the work performed on a particular day, which may consist of a number of client engagements.

[820] The third element of ABI's claim concerns the provision of more flexibility around the timetabling of make up time.

[821] At present clause 25.5(f)(ii) provides that the employer 'may direct the employee to make up time equivalent to the cancelled time *in that or the subsequent fortnightly period*'.

[822] Clause 25.5(f)(vii) of the ABI proposal provides:

> (vii) Where the employer elects to provide make up time:
>
> A. the make up time must be rostered in accordance with clause 25.5(a);
>
> B. the make up time must be rostered to be performed within 3 months of the date of the cancelled shift;
>
> C. the employer must consult with the employee in accordance with clause 8A regarding when the make up time is to be worked prior to rostering the make up time; and
>
> D. the make up shift can include work with other clients or in other areas of the employer's business provided the employee has the skill and competence to perform the work.

[823] We agree with subclauses A, C and D. In relation to subclause B we think a period of 3 months is too long in circumstances where the employee has 'lost' expected income due to a shift cancellation. In our view a period of 6 weeks strikes an appropriate balance between the various considerations.

[824] There is one final matter.

[825] At paragraph [34] of the ASU reply submission, the ASU states that ABI's proposed clause would permit an employer to 'double-dip' where the employer can charge a participant for a cancelled service:

> 'The proposed variations would… also permit an employer to 'double dip', because it would permit the employer to bill the NDIA for a cancelled service, but also require the employee to work make up time, for which the employer could claim further fees.'[606]

[826] ABI submits that this was not the intention of the proposal. The proposed clause is intended to cover the circumstances where an employer cannot charge a participant but would still be liable to pay the employee in respect of the cancelled shift.

> 'Our clients are not opposed to a variation to our proposal to explicitly state that the employer may only require an employee to work make-up time where the employer is permitted to charge the client a cancellation fee.'[607]

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[606] ASU Submission, 16 September 2019 at para 34.

[827] This issue can be addressed in the process of finalising the variation determination arising from our decision.

[828] We now turn to the HSU's proposal variation.

[829] We are not persuaded that the variation proposed provides a 'fair and relevant minimum safety net'. The variation retains the option of withholding payment from an employee in the event of a client cancellation. Further, as we have mentioned it is appropriate that the client cancellation term applies to both the home care and disability support sectors. In our view the merits favour a variation of the type proposed by ABI.

[830] In our view the merits favour the variation of the SCHADS Award in the manner proposed by ABI subject to 2 amendments:

- our *provisional* view that proposed clause 25.5(f)(v) be amended (see [818]above), and

- amending clause 25.5(f)(vii)(B) to delete '3 months' and insert '6 weeks'.

[831] We also note that ABI is to give further consideration to the 'double dipping' point (see [825] – [827] above).

[832] We now turn to deal with the s.134 considerations.

[833] Section 134(1)(a) of the Act requires that we consider 'relative living standards and the needs of the low paid'. A threshold of two-thirds of median full-time wages provides a suitable benchmark for identifying who is 'low paid', within the meaning of s.134(1)(a). A proportion of employees covered by the SCHADS Award may be regarded as 'low paid' within the meaning of s.134(1)(a) of the Act.

[834] The 'needs of the low paid' is a consideration which weighs in favour of the variation we propose to make. The variation effectively removes the option of withholding payment from an employee in the event of a client cancellation. We accept that the extension of the term to disability support workers may disadvantage some of those employees. But, having regard to the terms of the proposed variation we are satisfied that it provides a 'fair and relevant minimum safety net'.

[835] Section 134(1)(b) of the Act requires that we consider 'the need to encourage collective bargaining'. We are not persuaded that the proposed variation to clause 25.5 would 'encourage collective bargaining', it follows that this consideration does not provide any support for such a change.

[836] Section 134(1)(c) of the Act requires that we consider 'the need to promote social inclusion through increased workforce participation'. Obtaining employment is the focus of s.134(1)(c).

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[607] ABI Submission, 12 October 2019 at para 2.22.

[837] The impact of the proposed variation on total employment is unlikely to be significant. We regard this consideration as neutral.

[838] It is convenient to deal with the considerations in ss.134(1)(d) and (f) together.

[839] The extension of the client cancellation term to the disability support sector and the additional flexibility provided in relation to the rostering of make up time will benefit business. We accept that some elements of the proposed variation provide less flexibility for employers (a point conceded by ABI, see [756]above).

[840] On balance the considerations in s.134(1)(d) and (f) weigh in favour of the variation we propose.

[841] The considerations in s.134(1)(da)(e), (g) and (h) of the Act are not relevant in the present context.

[842] The modern awards objective is to 'ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions', taking into account the particular considerations identified in sections 134(1)(a)–(h). We have taken into account those considerations, insofar as they are presently relevant and have decided to vary the SCHADS Award as proposed at [818] above.

6. CLOTHING AND EQUIPMENT CLAIMS

6.1 BACKGROUND

[843] Clause 20.2 of the SCHADS Award currently provides:

> **20.2 Clothing and equipment**
>
> (a) Employees required by the employer to wear uniforms will be supplied with an adequate number of uniforms appropriate to the occupation free of cost to employees. Such items are to remain the property of the employer and be laundered and maintained by the employer free of cost to the employee.
>
> (b) Instead of the provision of such uniforms, the employer may, by agreement with the employee, pay such employee a uniform allowance at the rate of $1.23 per shift or part thereof on duty or $6.24 per week, whichever is the lesser amount. Where such employee's uniforms are not laundered by or at the expense of the employer, the employee will be paid a laundry allowance of $0.32 per shift or part thereof on duty or $1.49 per week, whichever is the lesser amount.
>
> (c) The uniform allowance, but not the laundry allowance, will be paid during all absences on paid leave, except absences on long service leave and absence on personal/carer's leave beyond 21 days. Where, prior to the taking of leave, an employee was paid a uniform allowance other than at the weekly rate, the rate to be paid during absence on leave will be the average of the allowance paid during the four weeks immediately preceding the taking of leave.
>
> (d) Where an employer requires an employee to wear rubber gloves, special clothing or where safety equipment is required for the work performed by an employee, the

employer must reimburse the employee for the cost of purchasing such special clothing or safety equipment, except where such clothing or equipment is provided by the employer.'

[844] There are 2 claims before us which seek to vary clause 20.2.

[845] The HSU seeks to introduce a new 'damaged clothing allowance' requiring employers to compensate employees for damage or soiling of any clothing or other personal effects (excluding hosiery) in the course of employment.

[846] The UWU proposes a variation whereby employers would be required to provide employees with enough uniforms to allow them to launder their work uniforms no more than once per week.

[847] The submissions and witness evidence relevant to the clothing and equipment claims are set out at **Attachment J**.

6.2 THE HSU CLAIM

[848] The HSU seeks to insert a new provision at clause 20.3 (and renumber current clauses 20.3 – 20.9) as follows:[608]

> **'20.3 Damaged clothing allowance**
>
> (i) Where an employee, in the course of their employment suffers any damage to or soiling of clothing or other personal effects (excluding hosiery), upon provision of proof of the damage, employees shall be compensated at the reasonable replacement value of the damaged or soiled item of clothing.
>
> (ii) This clause will not apply where the damage or soiling is caused by the negligence of the employee.'

[849] Under the proposed clause employers must compensate employees to the amount of the 'reasonable replacement value', for 'any damage to, or soiling of, clothing or other personal effects (excluding hosiery)' which occurs during the employee's employment, save where the damage or soiling is caused by the employee's negligence.

A Submissions

[850] The grounds advanced by the HSU in support of its claim are:

- an assertion that many employees, particularly support workers in home care and disability services, wear their own clothes to work and are not provided with a uniform[609]
- a submission that employees' clothes are at risk of being soiled or damaged in the course of their duties,[610] and

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[608] HSU Amended Draft Determination, 15 February 2019.

[609] HSU Submission, 15 February 2019 at para 61.

- an assertion that employees' clothes 'will frequently become damaged, soiled or worn' given the nature of the work they do.[611]

[851] The HSU submits that employees are obliged by their roles to take their clients as they find them, and to provide care and assistance to them because they are incapable of carrying out those tasks themselves.

[852] The various employer interests oppose the HSU's claim.

[853] ABI points to a number of drafting and practical issues with the proposed clause, in particular a lack of precision around how the replacement value of clothing is to be calculated and the phrase 'suffers any damage':

> 'It is not clear how an employer should determine what the "reasonable replacement value" is, and whether the employer would be required to replace a second hand piece of clothing with a new piece of clothing.'[612]

[854] ABI initially submitted that if an employer does not provide the employee with a uniform, then clause 20.2 entitled the employee to receive a uniform allowance. It was contended that this uniform allowance could be used to purchase clothes to wear to work, and, if those clothes become damaged in the course of their employment, to replace them. However, in its reply submission of 26 February 2020 ABI withdrew the submission that the uniform allowance is payable in circumstances where the employers do not provide uniforms.[613] We agree with ABI's concession. It seems clear that, as the Unions contend,[614] clause 20.2(b) only provides that the uniform allowance applies to employees required to wear uniforms.

[855] Ai Group submits that there is no probative evidence or material sufficient to satisfy the Commission that the proposed clause is necessary to ensure that the SCHADS Award achieves the modern awards objective. Further, Ai Group contends that the HSU's claim is unfair to employers in various ways:[615]

- the proposed clause would appear to apply even where an employee elects not to use equipment, clothing or protective effects provided by an employer for the very purpose of ensuring that an employee's clothing and personal effects are protected from damage and/or soiling

- the proposed clause requires reimbursement 'at the reasonable replacement value' entitling an employee to replace the value of clothing or personal effects that they have *elected* to wear during the course of their employment, irrespective of their

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[610] Ibid.

[611] Ibid at para 62.

[612] ABI Submission, 12 July 2019 at para 10.8.

[613] ABI Submission, 26 February 2020 at para 90.

[614] Joint Union Submission, 10 February 2020 at para 27.

[615] Ai Group submission, 26 February 2020 at para 149.

value and even though they may not be essential for the purposes of enabling the employee to undertake their work (e.g. designer brand glasses)

- the scope of the clause is broad; it applies wherever there is any damage or soiling, even if the extent of the damage or soiling does not necessitate or warrant the replacement of the clothing or other item (for example, because it can be cleaned or repaired), and

- the proposed clause does not require an employee to provide proof of the 'reasonable replacement value' or absolve an employer from their liability to reimburse an employee where such proof is not provided.

[856] AFEI opposes the claim and submits that the proposed variation would result in 'uncertainty and inappropriate additional cost to employers and that the issue is more appropriately addressed at the enterprise level through bargaining'.[616]

[857] AFEI makes the following points in opposing the claim:[617]

- in some circumstances an employee could receive compensation where no loss has arisen

- the proposal does not require that the employee actually purchases the clothing which has been damaged or soiled, or even that the employee owned the clothing. Hence, the employee could seek payment to cover a cost they have not incurred

- the proposal allows an employee to claim an uncapped amount of compensation for the replacement of clothing or personal affects

- the proposal does not require the employee to provide evidence that the damage occurred during the course of employment and did not involve negligence by the employee

[858] NDS opposed the claim but did not advance any submissions in support of its position; though it does comment on the evidentiary findings sought by the HSU.

[859] Business SA acknowledged that:[618]

- not all workplaces provide uniforms, or the uniform provided will be a company shirt and not pants and there is a requirement for employees to wear some of their own clothing, and

- employees covered by the SCHADS Award may undertake work that results in the soiling or damage of clothing, such as using harsh cleaning chemicals or from bodily fluids.

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[616] AFEI Submission, 23 July 2019 at para 154.

[617] AFEI Submission, 23 July 2019 at paras 149 – 152.

[618] Business SA Submission, 15 July 2019 at paras 6 – 7.

[860] Business SA submits that:

> 'It is not unusual for employees to wear their own clothes to work and general wear and tear of such clothing should not be the liability of the employer. Employees are expected to take all reasonable care necessary to protect their clothing.'[619]

[861] As to the wording of any proposed clause Business SA submits that the standard wording for award terms dealing with the reimbursement of clothing is that used in the *Manufacturing and Associated Industries and Occupations Award 2020* (Manufacturing Award). We return to this issue later.

B Evidence

[862] The HSU contends that the reality of work in the industry, particularly for home carers and disability support workers, is that employees wear their own clothes to work and are at risk of their clothing being soiled or damaged in the course of their duties.[620] Relying on the evidence of Ms Waddell,[621] Ms Wilcock,[622] and Mr Sheehy[623] the HSU contends that care work is likely to damage employees' clothing and seeks a finding to that effect.

[863] Mr Sheehy is the Manager, Aged Care and Disabilities with the HSU NSW Branch and in that role deals with HSU members and employers in the home care sector covered by the SCHADS Award. Mr Sheehy gave evidence that:

- some employers in the industry do not provide any, or sufficient, uniforms to their employees working in home care[624]
- the nature of the work done by home carers means that clothes become damaged, dirty or worn quickly,[625] and
- workers in the industry are performing all types of personal care – getting people dressed, showering, preparing food, feeding clients and dealing with bodily fluids.[626]

[864] Ms Waddell is employed as a Community Care worker for HammondCare; her role involves assisting clients with all their daily activities of living, including socialisation, personal care and home maintenance. This includes showering, dressing, administering medication from Webster packs, house cleaning, cooking, shopping, caring for their pets, leisure activities and community engagement. At [33] – [34] of her statement Ms Waddell says:

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[619] Business SA Submission, 15 July 2019 at para 9.

[620] Exhibit HSU27 – Witness Statement of Pamela Wilcock, 15 February 2019 at para 11; Exhibit HSU4 – Witness Statement of Heather Waddell, 15 February 2019 at para 36.

[621] Exhibit HSU4 – Witness Statement of Heather Waddell, 15 February 2019.

[622] Exhibit HSU27 – Witness Statement of Pamela Wilcock, 15 February 2019.

[623] Exhibit HSU26 - Witness Statement of Robert Sheehy, 15 February 2019.

[624] Exhibit HSU26 - Witness Statement of Robert Sheehy, 15 February 2019 at para 14.

[625] Exhibit HSU26 - Witness Statement of Robert Sheehy, 15 February 2019 at para 15.

[626] Exhibit HSU26 - Witness Statement of Robert Sheehy, 15 February 2019 at para 16.

> 'We don't get uniforms at our work so we have to wear our own clothes. These get damaged and worn out very quickly with the kind of work we do. With cleaning we have to use the cleaning products the client wants us to use or has available. Often this is harsh chemicals like bleach that can splash and ruin our clothes. Clothing can also get spoiled with bodily fluids.
>
> Hammond Care does provide single use aprons and goggles that we can use, for example when dealing with bodily fluids. These are kept at head office and we'd need to drive to head office before our shift to pick them up if we are rostered to them. I don't do this because the head office is usually in the opposite direction of my clients, and it doesn't work out economically to make that trip.'[627]

[865] Ms Wilcock is also employed as a Community Care worker with HammondCare; her role involves helping out clients with personal care including showers, toileting, applying creams. At [12] – [14] of her statement Ms Wilcock says:

> 'My role involves a lot of cleaning. We also make our clients' beds, and sometimes they request us to make up other beds in the house as well.
>
> When cleaning we have to use whatever cleaning products the client has in their home. We usually end up using harsh chemicals like bleach. Using those products can ruin our clothes. Hammond Care does provide us with protective clothing and gloves.
>
> We also have to often have to clean bodily fluids or urine. Often we're not dealing just with clients but with their pets as well, and I've had to clean urine and faeces from a dog that the client isn't able to care for.'[628]

[866] Mr Elrick also gave evidence relevant to this claim. In his role as an area organiser for the HSU Victoria No.2 Branch, Mr Elrick regularly visits worksites and engages with members about issues they are experiencing at work. At [38] – [44] of his statement, Mr Elrick says:

> 'When supporting a person with a disability it is best to be dressed casually as it creates less barriers between the client and support worker, and makes clients feel comfortable and at ease, it assists in avoiding unwanted attention in the public. inclusion. I'm only aware of a few disability services employers who require uniforms to be worn.
>
> Uniforms are common in the home care services which undertake a cleaning heavy practice…
>
> Clients with behaviours of concern will often damage clothing to the point they need replacing.
>
> There are other ways a worker's clothing also suffers greater wear and tear in the course of work. If you are cleaning you may spill or splash cleaning products on your clothes which causes fading and a breakdown of the clothing. In services that require medical supports, a worker will often want to have two separate wardrobes, one for work and one for personal. Work clothes will often be looser fitting for ease during manual handling, and washed more regularly due to close proximity with bodily fluids.

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[627] Exhibit HSU4 – Witness Statement of Heather Waddell, 15 February 2019 at paras 33 – 34.

[628] Exhibit HSU27 – Witness Statement of Pamela Wilcock, 15 February 2019 at paras 12 - 14.

> Some employees will have extra pairs of shoes that they use while showering clients. The additional pair of shoes are just a pair that can get wet and be dried out over the shift, to avoid having to wear wet shoes all days.
>
> Many worksites will provide surgical booties although these aren't always effective of stopping water from a shower.'[629]

[867] ABI submits that the evidence is somewhat mixed in relation to practices in the home care sector and that the evidence as to the frequency with which employees' clothing or uniforms become damaged is limited and vague:[630]

(a) Mr Elrick states that 'Uniforms are common in the home care services which undertake a cleaning heavy practice'[631]

(b) the witnesses employed by Wesley Mission are provided with uniforms,[632] whereas Mr Sheehy states that some employers in the home care industry do not provide any uniforms, and the witnesses employed by HammondCare are not provided with uniforms[633]

(c) Mr Elrick makes a generic assertion, unsupported by any specific evidence, that clients will 'often damage clothing to the point they need replacing'[634]

(d) Mr Elrick also outlines a couple of ways in which an employee's clothing may get damaged. However, these appear to be more in the vein of hypothetical scenarios or hearsay rather than testimony of real events that actually occurred[635]

(e) Ms Wilcock gave evidence that she is required to use cleaning products which can 'ruin our clothes', however she then states that HammondCare 'does provide us with protective clothing and gloves',[636] and

(f) Ms Waddell gave evidence that her clothes 'get damaged and worn out very quickly'[637], however she does not provide any specific examples of that occurring, information about what items of clothing have been damaged, when the last time this occurred, etc.

[868] We note here that the Unions do not agree with ABI's characterisation of Mr Elrick's evidence and submit that his evidence was not 'hypothetical' but based on his 7 years'

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[629] Exhibit HSU3 - Witness Statement of William Elrick, 14 February 2019 at paras 38 – 39, 41 – 44.

[630] ABI Submission, 19 November 2019 at paras 9.8 – 9.9.

[631] Exhibit HSU3 - Witness Statement of William Elrick, 14 February 2019 at para 39.

[632] Exhibit UV6 - Witness Statement of Belinda Sinclair, 16 January 2019 at para 18.

[633] Exhibit HSU26 - Witness Statement of Robert Sheehy, 15 February 2019 at para 14.

[634] Exhibit HSU3 - Witness Statement of William Elrick, 14 February 2019 at para 41.

[635] Exhibit HSU3 - Witness Statement of William Elrick, 14 February 2019 at para 42.

[636] Exhibit HSU27 – Witness Statement of Pamela Wilcock, 15 February 2019 at para 13.

[637] Exhibit HSU4 – Witness Statement of Heather Waddell, 15 February 2019 at para 33.

experience in disability support and social and community services roles, as well as his experience as a union organiser in the SACS sector. Nor did the Unions agree with ABI's characterisation of the evidence of Ms Wilcock and Ms Waddell.

[869] Ai Group challenges the breadth of the proposition advanced by the HSU and aspects of the evidence relied on in support of that proposition. Ai Group submits that the evidence cited does not establish the *likelihood* of care work causing damage to employees' clothing.

[870] AFEI also submits that the evidence does not support a finding that 'many employees, particularly support workers in home care and disability services, wear their own clothes to work and are not provided with a uniform':

> 'For example, Mr Elrick, although not a support worker himself, observes that uniforms are common in the home care sector, Ms Sinclair, a home care worker, is provided with shirts to wear by her employer and also paid a uniform allowance, and Mr Sheehy, who is not a support worker, concedes that some employers in the home care sector provide uniforms whilst others do not.'[638] (footnotes omitted)

[871] AFEI also submits that the evidence of Ms Waddell and Ms Wilcock, who both work for the same employer, does not support the variation proposed, as both Ms Waddell and Ms Wilcock confirm that they are provided with protective clothing by their employer.[639]

[872] NDS accepts the finding proposed by the HSU to the extent there is likely to be some truth to the proposition that care work could cause damage to clothing, but challenges the significance of the proposed finding in the context of the existing Award provisions relating to uniforms and laundry.[640]

[873] We begin our consideration of the evidentiary findings by addressing some of the employer observations about the evidence.

[874] ABI points to Mr Elrick's evidence and in particular to his statement that 'Uniforms are common in the home care services which undertake a cleaning heavy practice'.[641] We acknowledge that there is some tension between Mr Elrick's evidence and that of other witnesses, but note that Mr Elrick's statement that 'Uniforms are common' is qualified by the reference to 'services which undertake a cleaning heavy practice'. Hence Mr Elrick's evidence is not that *all* home care services provide uniforms. We would also note that in his role as a HSU organiser Mr Elrick primarily deals with members and employers in the social and community sector, as opposed to the home care sector.

[875] ABI also contends that, although limited, the evidence suggests that employers provide various forms of personal protective equipment for use by employees such as 'protective clothing', 'gloves', 'single use aprons' and 'goggles'. Ai Group advances a similar submission.

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[638] AFEI Submission, 11 February 2020 at 2-62.

[639] AFEI Submission, 11 February 2020 at 2-63.

[640] NDS Submission, 7 February 2020 at para 3.4.

[641] Exhibit HSU3 - Witness Statement of William Elrick, 14 February 2019 at para 39.

[876] In support of this contention ABI points to the fact that some protective clothing is available to employees at HammondCare. However, we note that at paragraph [34] of her statement, Ms Waddell states:

> 'Hammond Care does provide single use aprons and goggles that we can use, for example when dealing with bodily fluids. These are kept at head office and we'd need to drive to head office before our shift to pick them up if we are rostered to them. I don't do this because the head office is usually in the opposite direction of my clients, and it doesn't work out economically to make that trip.'[642]

[877] Further, Mr Jeffrey Wright, the CEO of HammondCare, confirmed during the course of cross-examination that HammondCare home care employees were required to travel from home directly to their first client, rather than reporting to HammondCare's premises first:

> 'And just in terms of the mechanics of doing the job, is it the case that home care workers are required to report in to HammondCare's premises every day, and then they move out to do their jobs from there?---No. That wouldn't be practical.
>
> They are required to go directly to the client's home?---First client.'[643]

[878] On the basis of this evidence it appears that personal protective equipment may *not* be practically available to *some* employees, as they have to pick up such equipment in their own time and cover the cost of travel themselves.

[879] We agree with the observation by a number of the employer parties that the evidence in respect of this claim is limited; however despite these limitations a number of propositions are largely uncontentious.

[880] We agree with ABI's contention that the limited evidence suggests that it is common for support workers in the disability services sector to not wear uniforms when undertaking work and that:

> 'The benefits of such an approach include that it helps to break down barriers between support workers and clients and avoids unwanted attention when in public.'[644]

[881] We also agree with the employers that the HSU's assertion that employees' clothes '*frequently* become damaged, soiled or worn' given the nature of the work they do, overstates the evidence. However, it is likely that *some* employees will have their clothing damaged or soiled because of the work they are required to undertake.

C Consideration

[882] It seems to us that an award variation is warranted to provide for the reimbursement of reasonable costs associated with the cleaning or replacement of personal clothing which has been soiled or damaged in the course of employment. The issue then becomes the form of such an award term.

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[642] Exhibit HSU4 – Witness Statement of Heather Waddell, 15 February 2019 at para 34.

[643] Transcript, 17 October 2019, PN2580-PN2581.

[644] Exhibit HSU3 - Witness Statement of William Elrick, 14 February 2019 at para 38.

[883] As mentioned earlier, Business SA advanced a submission regarding the wording of any proposed clause and referred to what it described as the 'standard wording' dealing with the reimbursement of damaged clothing in the Manufacturing Award.[645] Business SA referred to clause 32.2(d) of the Manufacturing Award which states:

> '**(d) Damage to clothing, spectacles, hearing aids and tools**
>
> **(i)** Compensation must be made by an employer to an employee to the extent of the damage sustained where, in the course of work, clothing, spectacles, hearing aids or tools of trade are damaged or destroyed by fire or molten metal or through the use of corrosive substances. The employer's liability in respect of tools is limited to the tools of trade which are ordinarily required for the performance of the employee's duties. Compensation is not payable if an employee is entitled to workers compensation in respect of the damage.
>
> **(ii)** Where an employee as a result of performing any duty required by the employer, and as a result of negligence of the employer, suffers any damage to or soiling of clothing or other personal equipment, including spectacles and hearing aids, the employer is liable for the replacement, repair or cleaning of such clothing or personal equipment including spectacles and hearing aids.'

[884] In Background Paper 1 we posed the following question to all other parties:

> *Q42. 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?*

[885] In a joint submission of 10 February 2020 the Unions state that they would not oppose a clause similar to that in the Manufacturing Award being inserted into the SCHADS Award, subject to removing the qualification where the damage is suffered as a consequence of the *negligence* of the employer. The Unions submit:

> 'negligence should not be the touchstone for reimbursement for damaged clothing or equipment. The fact that such loss is suffered in the course of the employment should be sufficient to ground an entitlement to reimbursement'.[646]

[886] AFEI and Ai Group contend that there is no warrant for inserting such a term. AFEI goes on to observe that the term in the Manufacturing Award:

> '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.'[647]

[887] ABI submits that a sufficient evidentiary case has not been advanced that would justify the insertion of a clause of this type and that:

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[645] Business SA submission, 12 July 2019, at para 11.

[646] Joint Union Submission, 10 February 2020 at para 242.

[647] AFEI Submission, 11 February 2020 at 2-65.

> 'The Manufacturing Award regulates very different industries and occupations to the SCHCDS Award, and so in that sense it is not an appropriate 'benchmark' in relation to an issue such as damage to clothing, etc.
>
> The clause in the Manufacturing Award also has quite a confined operation, in that it only applies where prescribed items are "damaged or destroyed by fire or molten metal or through the use of corrosive substances". This means that, by way of example, an employer would not be liable to compensate an employee for damaged spectacles where they drop them on a concrete floor. However, if the clause is migrated to the SCHCDS Award, it is not clear what industry-specific limitation would be adopted. For that reason, our clients are concerned that the adoption of this clause may drastically broaden the operation of the clause compared to how it currently operates under the Manufacturing Award.
>
> There are also particular peculiarities to the clause in question. For example, it is unclear how subclauses (i) and (ii) interrelate and operate, given that sub-clause (i) appears to be quite broad and so would capture most circumstances that might arise under sub-clause (ii). As a general proposition, we do not consider that the Manufacturing Award clause is an appropriate clause to borrow from.'[648]

[888] NDS submits that the existing award provision regarding uniforms and laundry is sufficient but goes on to submit:

> 'However, if the award were to be varied to address the HSU claim in relation to clothing other than uniforms, the proposed clause could be a reasonable starting point for drafting, subject to addressing concerns such as those raised by Ai Group and AFEI. Those concerns relate to identifying what the value of the clothing is, what extent of damage is necessary to require replacement, and confirming that the damage is work related.'[649] (footnotes omitted)

[889] We are not attracted to the variation of the SCHADS Award to insert a provision in the same terms as clause 32.2(d) of the Manufacturing Award, largely for the reasons identified by ABI and AFEI. Nor do we think that negligence should be a prerequisite to reimbursement of soiled or damaged clothing.

[890] We direct that the parties confer about the form of a suitable variation, reflecting the views expressed above. A conference will be convened to facilitate those discussions.

6.3 THE UWU CLAIM

[891] As mentioned earlier, the SCHADS Award provides that in circumstances where an employee is required by their employer to wear a uniform the employer must supply the employee 'with an adequate number of uniforms appropriate to the occupation', free of cost. The Award does not prescribe what an 'adequate number of uniforms' is; what is 'adequate' will depend on the circumstances.

[892] The UWU seeks to insert a new clause 20.3(b) as follows:[650]

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[648] ABI Submission, 10 February 2020, p 62.

[649] NDS Submission, 7 February 2020, p 12.

[650] UWU Submission, 15 February 2019 at para 58.

> '(b) An adequate number of uniforms should allow an employee to work their agreed hours of work in a clean uniform without having to launder work uniforms more than once a week.'

[893] In short, employers would be required to provide employees with enough uniforms to allow employees to go the full week without needing to launder their work uniforms more than once per week.

A Submissions

[894] The UWU submits:

> 'Employees covered by the Award should be provided with enough uniforms to ensure that they are able to attend work in a clean uniform, without having to wash their uniforms more than once a week.
>
> The evidence indicates that there are employees in this sector who are not provided with an adequate number of uniforms.'[651]

[895] The UWU contends that the variation proposed is 'in line with' the modern awards objective, specifically:[652]

- s.134(1)(a): the variation would assist the low paid to meet their needs; employees covered by the SCHADS Award can generally be considered 'low paid' and many work part-time, and
- s.134(1)(c): participation in the workforce is 'facilitated by the dignity in having a clean uniform'.

[896] Ai Group, Business SA and AFEI all advanced submissions opposing the claim.

[897] ABI submits that a sufficient case has not been made out for the proposed variation and does not accept the contention advanced by the UWU that 'the decision as to what constitutes an 'adequate' amount of uniforms is often made solely by the employer'.[653] ABI submits that the Award terms are clear, and the obligation requires an objective assessment as to the adequacy of the number of uniforms to be provided, having regard to the particular circumstances. If there is any dispute about the number of uniforms provided by a particular employer, the matter can be resolved through the application of the dispute resolution procedure provided for in the Award including, if necessary, the involvement of the Commission.

B Evidence

[898] ABI submits that the evidence as to the number of uniforms provided by employers is limited. For example:

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[651] UWU Submission, 15 February 2019 at paras 54 – 55.

[652] UWU Submission, 15 February 2019 at para 59.

[653] ABI Submission, 12 July 2019 at para 10.11.

- Mr Sheehy states that 'Other employers will provide only one t-shirt a year', however the identity of these employers is not disclosed, and no further detail is provided, and

- Ms Sinclair gave evidence that she was initially provided with only 2 shirts upon commencement of employment, however was then given an additional shirt and then a further 3 additional shirts after requesting additional uniforms from her employer (such that she then had a total of 6 shirts).

[899] ABI contends that there is no evidence that would support a finding that the current terms of the Award are not operating satisfactorily and nor is there evidence of any disputes having been initiated in relation to the provision or non-provision of uniforms.[654]

[900] The UWU claim rests on the following propositions:

1. Employees in this sector may be required by their employer to wear a uniform.[655]

2. Employees may not be provided with an adequate number of uniform items.[656]

3. Where an employee is not provided with an adequate number of uniforms, the employee may have to wash their uniforms multiple times a week.[657]

[901] The only evidence referred to by the UWU in support of these propositions is that of Ms Belinda Sinclair.[658]

[902] Ms Sinclair is employed by Wesley Mission as a part-time home care worker on a contract that guarantees her a minimum of 30 hours work per fortnight. Ms Sinclair works 5 days a week, Monday to Friday. Ms Sinclair's evidence was that she was initially provided with 2 uniform shirts which identified her as a Wesley Mission care worker.[659] Wesley Mission has a uniform policy that care workers must wear the shirts when attending clients. After requesting more shirts, on a number of occasions, she was eventually provided with 5 uniform shirts. Ms Sinclair was also paid a laundry allowance each fortnight.

[903] The evidence relied upon does not make good the UWU's proposition that employees are not being provided with an adequate number of uniform items. The UWU has failed to establish a sufficiently cogent merit case in support of its proposed variation. We dismiss the UWU's claim.

7 OVERTIME FOR PART-TIME AND CASUAL WORKERS CLAIM

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[654] ABI Submission, 19 November 2019 at paras 9.13 – 9.14.

[655] Exhibit UV6 - Witness Statement of Belinda Sinclair, 16 January 2019, at para 18.

[656] Ibid at [19].

[657] Ibid.

[658] Exhibit UV6 - Witness Statement of Belinda Sinclair, 16 January 2019.

[659] Exhibit UV6 - Witness Statement of Belinda Sinclair, 16 January 2019, at paras 18 – 21; Transcript, 15 October 2019 at PN628-PN641.

7.1 BACKGROUND

[904] Before turning to the HSU's claim it is important to put the issues raised in a broader context, beginning with the nature of part-time employment itself.

[905] The most significant expansion of award part-time employment provisions occurred as a result of the *1995 Personal Carer's Leave Test Cast – Stage 2 decision.*[660]

[906] In that decision the Full Bench determined that part-time work provisions should, on application, be introduced into awards which did not already have them and that the adequacy and relevance of existing provisions should be reviewed against the characteristics of the particular industry or enterprise covered by the award.[661] The Full Bench determined that 2 matters needed to be considered in the development of 'fair and equitable' part-time work provisions, namely:

(i) it was necessary to ensure that part-time employees were provided with pro-rata entitlements to the benefits available to full-time employees, including equitable access to training and career path opportunities, and

(ii) *part-time work needs to be clearly distinguished from casual employment*. While the provision of pro rata benefits is one means of providing such a distinction, other measures are also needed. Part-time work provisions should specify the minimum number of weekly hours to be worked and provide some regularity in the manner in which those hours are worked.

[907] The part-time employment provision inserted in the *Hospitality Industry - Accommodation, Hotels, Resorts and Gaming Award 1995* because of the *Award Simplification Decision*[662] became a model clause adopted in many awards. Its features were described in a Full Bench decision[663] issued as part of the award modernisation process conducted pursuant to Part 10A of the *Workplace Relations Act 1996* (Cth) as follows:

> 'The provision characterises a regular part-time employee as an employee who works less than full-time hours of 38 per week, has reasonably predictable hours of work and receives, on a pro rata basis, equivalent pay and conditions to those of full-time employees who do the same kind of work. It requires a written agreement on a regular pattern of work, specifying at least the hours worked each day, which days of the week the employee will work and the actual starting and finishing times each day, with variation in writing being permissible. All time worked in excess of mutually arranged hours is overtime.'[664]

[908] At a conceptual level part-time employment is weekly employment for an agreed number of hours per week (or per roster cycle) which is less than full-time hours and which includes all the benefits of full-time employment, paid on a pro-rata basis. The general principle that part-time employees are entitled to the benefits of full-time employment albeit

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[660] (1995) 62 IR 48.

[661] Ibid, p 72.

[662] H0008 Dec 1533/97 M Print P7500.

[663] *Award Modernisation* [2009] AIRCFB 826.

[664] *Award Modernisation* [2009] AIRCFB 826 at [136].

on a pro-rata basis is well established and is reflected in the Act with respect to national employment standard entitlements and unfair dismissal rights, and in the SCHADS Award (see clause 10.3(b)).

[909] The other relevant contextual consideration is the fact that the part-time provisions in the SCHADS Award have been the subject of recent consideration in the *Part-time and Casual Employment Common Issue Proceedings* as part of the Review. In those proceedings ABI sought to amend the current part-time employment provision to allow greater flexibility in the way in which the hours of work for part-time employees are fixed.

[910] The amendments sought by ABI in those proceedings are shown in mark-up below:

> '**10.3 Part-time employment**
>
> (a) A part-time employee is one who is engaged to work less than 38 hours per week or an average of less than 38 hours per week and who has reasonably predictable hours of work.
>
> (b) The terms of this award will apply to part-time employees on a pro rata basis on the basis that the ordinary weekly hours of work for full-time employees are 38.
>
> (c) Subject to clause 10.3(d), ~~B~~ before commencing employment, the employer and the employee will agree in writing on ~~a~~ the regular pattern of work including the number of hours to be worked each week, the days of the week the employee will work and the starting and finishing times each day. Any agreed variation to the regular pattern of work will be recorded in writing.
>
> (d) Despite anything else in this clause 10.3, an employer and an employee may agree not to fix the employee's hours of work if the employee is engaged to provide supports to clients in circumstances where the client has discretion to vary when the support is provided. In these circumstances:
>
> (i) before commencing employment the employer and the employee will agree in writing on:
>
> (A) the number of hours to be worked each week (or the average number of hours); and
>
> (B) the days and/or times of the week that the employee is not available to work (if any);
>
> (ii) the employee's hours will be set by the employer in accordance with clause 25.5, save that the employee will not be required to work on those days or at those times referred to in clause 10.3(d)(i)(B).
>
> (iii) Any agreed variation to the employee's availability or to the number of hours to be worked must be recorded in writing.'

[911] ABI's proposed variation, in its final form, was only directed at those aspects of the disability service provision which were said to be subject to client control and thus where the employer had the least control over the hours required to be worked. In respect of part-time employees in that area, ABI proposed an employment model in which the employer would have the ability to roster hours in accordance with clause 25.5, subject to providing an agreed

guaranteed number of weekly hours and such working hours being rostered at periods when the employee had agreed to be available to work.

[912] The *Part-time and Casual Employment* Full Bench rejected ABI's application on the basis that it was not satisfied that the provision proposed by ABI was necessary to achieve the modern awards objective.[665] The reasons given by the Full Bench for concluding that the proposed variation was not necessary include, relevantly:

> 'that the current provision as it is applied in practice is reasonably flexible. Although the pattern of hours of work must be fixed in a written agreement established at the commencement of the employment, they may thereafter be changed by agreement to meet either temporary exigencies or permanent changes in service demand. The evidence before us did not disclose any significant difficulty in obtaining the agreement of employees to alter their hours to meet changing circumstances, although we accept that the need for the agreement to be obtained and then recorded in writing does impose an administrative burden to some extent. Further, clause 28.2(b)(iii) allows for part-time workers to work additional hours up to 10 in a day or 38 in a week or 76 in a fortnight without the payment of any overtime penalty rate, so that there is a considerable capacity to assign additional hours that may arise at short notice to employees without the cost exceeding what the NDIA price structure will allow. The evidence showed that employees are generally willing to work such additional hours if it does not interfere with fixed private commitments; for example, in the case of a person with a disability attending a social event which ran over time, the employee involved readily agreed to stay on for the additional time until it ended.[666] (Emphasis added)

[913] While the *Part-time and Casual Employment* Full Bench rejected ABI's application it went on to observe that there was merit in clarifying the operation of the part-time clause:

> 'However, having regard to the evidence before us, we do consider that there is merit in clarifying that an agreed part-time work arrangement does not necessarily have to provide for the same guaranteed number of hours in each week. At the commencement of the employment, or subsequently by agreement in writing, we consider that it would be open for the employer and the employee to enter into an arrangement which provides, for example, that the employee worked 20 hours and 30 hours in alternating weeks, or that a specified higher number of hours would be worked at particular times of the year (such as during a season of sports events which the participant wished to attend). An arrangement of that nature would have the stability and predictability desired by the part-time employee, whilst allowing the part-time arrangement to meet the service requirements of particular NDIS plans. To the extent that the current part-time provision in the SCHCDSI Award does not allow this (which we doubt), we consider that the modern awards objective would be best met in respect of the disability services sector if the provision was amended accordingly. ABI will be directed to prepare a draft determination to implement this conclusion, and we will receive further submissions from interested parties if there is disagreement about the form that the award variation should take.'[667]

[914] The Full Bench subsequently varied the part-time clause in the SCHADS Award:[668]

> '1. By deleting clause 10.3(c) and inserting the following:

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[665] *Part-time and Casual Employment Case* at [637].

[666] *Part-time and Casual Employment Case* at [637].

[667] Ibid at [641].

[668] PR598488.

(c) Before commencing employment, the employer and employee will agree in writing on:

(i) on a regular pattern of work including the number of hours to be worked each week, and

(ii) the days of the week the employee will work and the starting and finishing times each day.

2. By inserting a new clause 10.3(d) as follows:

(d) The agreed regular pattern of work does not necessarily have to provide for the same guaranteed number of hours in each week

3. By inserting a new clause 10.3(e) as follows:

(e) The agreement made pursuant to clause 10.3(c) may subsequently be varied by agreement between the employer and employee in writing. Any such agreement may be ongoing or for a specified period of time.'

[915] The current part-time clause provides:

'**10.3 Part-time employment**

(a) A part-time employee is one who is engaged to work less than 38 hours per week or an average of less than 38 hours per week and who has reasonably predictable hours of work.

(b) The terms of this award will apply to part-time employees on a pro rata basis on the basis that the ordinary weekly hours of work for full-time employees are 38.

(c) Before commencing employment, the employer and employee will agree in writing on:

(i) on a regular pattern of work including the number of hours to be worked each week, and

(ii) the days of the week the employee will work and the starting and finishing times each day.

(d) The agreed regular pattern of work does not necessarily have to provide for the same guaranteed number of hours in each week

(e) The agreement made pursuant to clause 10.3(c) may subsequently be varied by agreement between the employer and employee in writing. Any such agreement may be ongoing or for a specified period of time.'

7.2 THE CLAIM

[916] The HSU seeks to vary clause 28.1(b)(ii) – (iii) as follows:[669]

> '28.1(b)(ii) All time worked by part-time or casual employees which exceeds ~~10~~ 8 hours per day, will be paid at the rate of time and a half for the first two hours and double time thereafter, except on Sundays when overtime will be paid for at the rate of double time, and on public holidays at the rate of double time and a half.
>
> 28.1(b)(iii) ~~Time worked up to the hours prescribed in clause 28.1(b)(ii) will, subject to clause 28.1(b)(i), not be regarded as overtime and will be paid for at the ordinary rate of pay (including the casual loading in the case of casual employees).~~ All time worked by part-time employees which exceeds the hours agreed in clause 10.3(c) will be treated as overtime and paid at the rate of time and a half for the first two hours and double time thereafter, except on Sundays when overtime will be paid for at the rate of double time, and on public holidays at the rate of double time and a half.'

[917] There are 2 discrete aspects to the HSU's claim:

(i) the variation of clause 28.1(b)(ii) so that casual and part-time employees are paid at overtime rates for all time worked in excess of 8 hours per day instead of the current threshold of 10 hours per day; and

(ii) the variation of clause 28.1(b)(iii) so that part-time employees are paid at overtime rates for all time worked in excess of the hours agreed in clause 10.3(c). Clause 10.3(c) provides that before commencing employment the employer and part-time employee must enter into an agreement in writing on a regular pattern of work, including the number of hours to be worked each week; the days of the week the employee will work; and the start and finish times each day.

[918] The first part of the claim is straightforward, it simply seeks to reduce the threshold number of hours to be worked per day before overtime rates are payable for part-time and casual employees.

[919] As to the second part of the claim, it is necessary to understand the context. Clause 28.1(b)(iii) allows for part-time employees to work hours in addition to their agreed guaranteed minimum hours. It is convenient to refer to such hours as 'additional hours' and to the hours provided in the part-time employment agreement under clause 10.3(c) as 'guaranteed hours'. We set out the terms of clause 10.3 above. A part-time employee may work a combination of guaranteed hours and additional hours totalling up to 10 in a day or 38 in a week or 76 in a fortnight without the payment of any overtime penalty rate. The variation proposed by the HSU would remove that flexibility.

[920] The submissions and witness evidence relevant to this claim are set out at **Attachment K**.

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[669] HSU Amended Draft Determination, 15 February 2019.

7.3 THE SUBMISSIONS

[921] The HSU contends that its claim is 'designed to address the inconsistency in the Award as between full-time and part-time employees'.[670]

[922] The HSU advances the general argument that 'the way in which overtime functions under the Award for part-time employees does not meet the modern awards objective, which recognises (at s.134(1)(da) of the Act), the need to provide additional remuneration for employees working overtime; or employees working irregular or unpredictable hours'.[671] Four more specific arguments are advanced in support of the claim:

1. The claim '…is designed to address the inconsistency in the Award as between full-time and part-time employees. The former are paid overtime for work in excess of rostered ordinary hours (i.e. 8 hrs); the latter aren't entitled to overtime until they have worked 10 hours in the course of a day'. The HSU submits that given the proportion of part-time workers performing care work; the demands of that work; and the capacity to minimise paid hours of work by the use of broken shifts, there is no warrant for a different approach towards the payment of overtime to part-time workers.[672]

2. Part-time employees should be entitled to overtime for work beyond their agreed pattern of work. The absence of any penalty associated with the performance of such work creates a structural incentive to underestimate the hours of work required of a part-time employee at the time of engagement and/or rostering, and to utilise part-time workers like a pool of casual employees.[673]

3. Work performed by carers in private homes and in the community providing personal or domestic assistance for elderly clients or clients with a disability is both physically and mentally taxing. The demanding nature of the work is said to be compounded by the travel involved in the performance of the work; and, during long shifts the lack of opportunity, or appropriate facility, for workers to take proper breaks and rest.[674]

4. The Award already provides considerable flexibility for employers by providing for all hours of part-time employees up to 38 hours in the course of a week or 76 hours in the course of a fortnight to be paid at single time. This allows employers to utilise part-time care workers on additional days to those they are contracted or rostered. However, where hours extend on any particular day, the rates of pay applicable to such hours should compensate for their unsociable, unpredictable and irregular nature with an overtime loading.[675]

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[670] HSU Submission, 18 November 2019 at para 105.

[671] HSU Submission, 15 February 2019 at para 45.

[672] HSU Submission, 18 November 2019 at paras 105–106.

[673] HSU Submission, 15 February 2019 at para 46.

[674] HSU Submission, 15 February 2019 at para 47.

[675] HSU Submission, 18 November 2019 at paras 105–106.

[923] The claim is opposed by ABI, NDS, AFEI and Ai Group.

7.4 EVIDENCE

[924] In its submission of 18 November 2019 the HSU seeks the following findings in support of its claim:[676]

1. The Commission would be satisfied that working in a face to face contact role with clients with disability or requiring assistance due to their age, is likely to be physically and mentally taxing work. Ms Waddell described once working a 9 hour shift with a single client, during which period she had no lunch or tea break, and only the opportunity to quickly eat her lunch while continuing to provide care to the client.[677]

2. Mr Lobert describes the demands of the work as follows:

   'It can be difficult working one on one with someone with a disability for 7 hours or more. Because the work is one on one, you can't have a break, you can't get away and you can't switch off.'[678]

3. Home care workers are often required to shower clients, assisting clients in and out of confined spaces in private homes, which have not been specially designed to facilitate personal care and assistance.[679] They also provide other forms of domestic assistance, which can be more physically demanding, wearing on the body and tiring than many forms of personal care.[680]

4. Given the manner in which employees routinely work broken shifts, frequently breaking shifts several times during the course of a day, it is unlikely part-time workers would accrue 10 hours of paid work in the course of a day.

5. In Mr Steiner's case, he is routinely on duty for much longer than the time he paid for; often working for more than 10 hours in a day, but not being paid for all of that time.[681]

6. In Mr Quinn's case, as set out above, even on a day where his work commenced at 7.30a.m. and concluded just after midnight, he did not accrue 10 hours of work in total.[682]

7. The SCHADS 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

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[676] HSU Submission, 18 November 2019 at 107 – 113.

[677] Exhibit HSU4 - Witness Statement of Heather Waddell, 15 February 2019 at para 27.

[678] Exhibit HSU29 – Witness Statement of Bernie Lobert, 15 February 2019 at para 21.

[679] Exhibit HSU27 – Witness Statement of Pamela Wilcock, 15 February 2019 at para 10.

[680] Exhibit HSU28 - Witness Statement of Thelma Thames, 15 February 2019 at paras 6 – 7.

[681] Exhibit ASU2 – Witness Statement of Robert Steiner, 15 October 2019 at para 17.

[682] Exhibit HSU31 – Witness Statement of Scott Quinn, 3 October 2019 at para 43.

week or 76 hours in the course of a fortnight to be paid at single time. This allows employers to utilise part-time care workers on additional days to those they are contracted or rostered. However, where hours extend on any particular day, the rates of pay applicable to such hours should compensate for their unsociable, unpredictable and irregular nature with an overtime loading.

[925] Items 2, 5 and 6 are not proposed findings but simply summarise the evidence of particular witnesses. Item 7 is not a proposed finding of fact it is a submission.

[926] As to proposed finding 1 we accept that such work can be physically and mentally taxing, but, as ABI submits, the degree of exertion will depend on a range of contextual factors including the particular work, the client and the employee.[683] We note that in support of the proposed finding the HSU only refers to the evidence of Ms Waddell and that her evidence only relates to a single shift. At [27] of her statement, Ms Waddell says:

> 'On one occasion I recall working a nine hour straight shift. I drove to a client in Ulladulla and was there from 7am to 4pm, and was with the client the whole time.'[684]

[927] We note that the hours worked by Ms Waddell were within the scope of her 'available hours' which are 7am to 7pm, 5 days a week.[685]

[928] To the extent it is suggested that Ms Waddell worked without a break we note that clause 27 relevantly provides:

> '**27.1 Meal breaks**
>
> … (b) Where an employee is required to work during a meal break and continuously thereafter, they will be paid overtime for all time worked until the meal break is taken.
>
> **27.2 Tea breaks**
>
> (a) Every employee will be entitled to a paid 10 minute tea break in each four hours worked at a time to be agreed between the employer and employee.
>
> (b) Tea breaks will count as time worked.'

[929] We also note that the Act directly addresses the adverse consequences associated with working excessive hours by providing a right to refuse to work unreasonable hours. Section 62(1) provides:

> '(1) An employer must not request or require an employee to work more than the following number of hours in a week unless the additional hours are reasonable:
>
> (a) for a full-time employee—38 hours; or
>
> (b) for an employee who is not a full-time employee—the lesser of:

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[683] ABI Submission, 10 February 2020 at para 62.

[684] Exhibit HSU4 – Witness Statement of Heather Waddell, 15 February 2019 at para 27.

[685] Exhibit HSU4 – Witness Statement of Heather Waddell, 15 February 2019 at para 7.

(i) 38 hours; and

(ii) the employee's ordinary hours of work in a week.'

[930] Section 62(2) gives an employee a right to refuse to work additional hours 'if they are unreasonable'. The criteria for determining whether additional hours are reasonable or unreasonable are set out in s.62(3) of the Act.

[931] The cases which have applied these provisions make it clear that an employer cannot simply require an employee to work additional hours without regard to the employee's personal circumstances.[686] What is 'reasonable' is necessarily assessed on a case-by-case basis, by reference to the employee's circumstances and the employer's business in accordance with the terms of s.62(3) of the Act.[687]

[932] As to proposed finding 3, it may be accepted that employees provide 'other forms of assistance', but it is unclear what 'other forms of assistance' are said to be 'physically demanding', 'wearing on the body' and/or 'tiring'. The HSU only cites the evidence of one witness in support of the proposed finding – Ms Thames. Ms Thames is employed by an Aged Care provider and her role involves assisting clients in aged care. At [6] of her statement Ms Thames says:

> 'A lot of my work now is domestic assistance. The employer tells us this is because clients now get more choice in their aged care packages and these are the tasks the clients want us to do. I find domestic assistance to be more physically demanding, wearing on the body and tiring than personal care. A few years ago, the domestic assistance shifts would be limited to 3 a week. Now we usually have 3 domestic assistance shifts a day.'[688]

[933] For the reasons given, a finding in the form sought does not advance the HSU's claim.

[934] The evidentiary basis of proposed finding 4 is unstated, but it appears to be based on the evidence of Mr Steiner and Mr Quinn, both of whom gave evidence of performing broken or split shifts.[689] Of course that evidence cannot be said to substantiate a finding in relation to part-time employees who do not perform broken shifts (which are more common amongst employees performing disability services work and home care employees).[690]

[935] But even if we accept the proposition that part-time workers are unlikely to accrue 10 hours of paid work in a day; how does that finding advance the HSU's argument? Do we reduce the overtime threshold to the point where part-time employees are likely to have accrued sufficient hours to be entitled to overtime pay? And, if so, what is that point and what are the merits of adopting such a course?

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[686] See *ALDI Foods Pty Ltd v TWU* (2012) 227 IR 120; *Premier Pet Pty Ltd trading as Bay Fish v Brown (No 2)* [2013] FCA 167; and *Sagona v R & C Piccoli Investments Pty Ltd & Ors* [2014] FCCA 875.

[687] *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* [2015] FCAFC 25 at [173].

[688] Exhibit HSU28 – Witness Statement of Thelma Thames, 15 February 2019 at para 6.

[689] Exhibit ASU2 – Witness Statement of Robert Steiner, 15 October 2019 at para 14; Exhibit HSU31 – Witness Statement of Scott Quinn, 3 October 2019 at para 27.

[690] SCHADS Award, clause 25.6.

[936] In a later joint submission filed by the HSU, ASU and UWU on 10 February 2020, the findings sought were expressed in slightly different terms to those sought in the HSU's 18 November 2019 submission:

> '13. The Unions seek the following findings in relation to its claim to vary the overtime provisions for part-time and casual employees:
>
> a. employers in the home care and social and community services sectors rely on part-time employees regularly working additional hours above their contracted weekly or fortnightly hours.[691]
>
> b. employers gave evidence that high numbers of additional hours worked by employees did not give rise to a review of employees' guaranteed hours.[692]
>
> c. under current award provisions there is little incentive for employers to review employees' guaranteed hours.
>
> d. under current award provisions, full-time employees work up to 8 ordinary hours per shift, and can only work a 10 hour shift by agreement.[693] However, part-time and casual employees can be required to work 10 hour shifts without agreement, without payment of overtime.[694]
>
> e. for part-time and casual employees working broken shifts, current award provisions means they are rarely entitled to overtime when working over a 10 hour span, unless they work beyond the 12 hour span for a broken shift.'[695]

[937] Items (c) and (d) above are not proposed findings of fact, they are submissions. As to item (d), to the extent that there may be some ambiguity as to whether part-time employees can be *required* to work additional hours we think clause 28.1(b)(iii) should be amended to make it clear that part-time employees have a right to refuse to work additional hours at ordinary time rates. We return to this matter later.

[938] Item (e) is similar to Item 4 in the findings proposed in the HSU's submission of 18 November 2019 and we have dealt with it at [934]– [935] above.

[939] We accept proposed finding (a), noting that it does not appear to have been opposed by the employer parties and is a reasonable inference to draw from the evidence of a few of the employers' witnesses.

[940] Proposed finding (b) is relevant to the HSU's structural incentive argument and reads as follows:

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[691] Exhibit ABI9 – Witness Statement of Joyce Wang, 12 July 2019 at paras 46 - 48; Transcript, 18 October 2019, cross-examination of Joyce Wang at PN3572 – PN 3605; Transcript, 17 October 2019, cross-examination of Jeffery Wright at PN2652 – PN2658; Exhibit ABI3 – Witness Statement of Jeffrey Wright, 12 July 2019 at para 35.

[692] Transcript, 18 October 2019, cross-examination of Joyce Wang at PN3605; Transcript, 17 October 2019, cross-examination of Jeffery Wright at PN2659 - PN2667.

[693] SCHADS Award, clause 25.1.

[694] SCHADS Award, clause 28.1(b)(ii)-(iii).

[695] SCHADS Award, clause 25.6(c).

> 'employers gave evidence that high numbers of additional hours worked by employees did not give rise to a review of employees' guaranteed hours.[696]

[941] We would observe at the outset that item (b) does not, in terms, express a particular finding - it simply refers to the evidence given by 'employers'. The evidence of 2 employers is cited in support of the stated proposition, Ms Wang and Mr Wright. The relevant passage from Ms Wang's cross-examination is set out below:

> 'Do you see that as problematic, the number of additional hours required in paragraphs 46 and 47 of your statement?---I don't quite really understand what your question is, sorry.
>
> Well, the part-time employees are contracted with a particular number of hours - - -?---Yes.
>
> - - - but it seems that there is a large number of additional hours that they're being required to work or they're being asked to work and so it's on a voluntary basis, I presume?---Yes. Obviously when we receive the client's request, we ask the workers to work more hours.
>
> Yes?---Only when they agree, we roster them to work the additional hours.
>
> Does CASS consider that need to fill so many additional hours a problem in terms of its management of its labour force?---For this one we actually have talked to the manager of Home Ageing Services and disability services, but they told me it's very difficult for them because the clients have so many changes. If we guarantee more hours for the part-time workers, actually we may face the situation we don't have enough work for them in some occasion.
>
> So I take it from that that CASS hasn't considered as one strategy to deal with this issue increasing the guaranteed hours for part-time workers?---No.'[697]

[942] The relevant passage from Mr Wright's cross-examination is set out below:

> 'Can I ask you, has HammondCare given any thought to reviewing the definite hours that it offers to part-timers?---Well, couple of things: (1) we offer contract hours and additional hours. We offer additional hours, and care workers actually try and do what they can to get additional hours within their availability, of course. And it's part of - and even in our enterprise agreement there's a provision there for part-timers, if they're regularly doing, that they can renegotiate their contract hours up. So it is a fluid situation. And the hours - it gives the flexibility for both HammondCare and the care workers to meet client needs, pick up additional hours, and I suppose the - I will let you ask more questions.
>
> No. Sorry, please go on if you - - - ?---Just from the overtime, and it's finishing off that clause, and if we were to pay overtime for those 14,000 hours for the month, that's $175,000 or a couple of million dollars in a year in terms of a cost if it was to be at half time extra.
>
> So just going through your answer, then, do I take it then that the answer to my question is, 'No, HammondCare hasn't gone back to review whether it should offer some additional guaranteed hours to part-timers in response to that number of additional hours?---When you say guaranteed, do you mean contract hours?

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[696] Transcript, 18 October 2019, cross-examination of Joyce Wang, PN3605; Transcript, 17 October 2019, cross-examination of Jeffery Wright, PN2659 - PN2667.

[697] Transcript, 18 October 2019 at PN3600-PN3605.

> Yes?---Yes, we review them. And that's an obligation in our enterprise agreement that we do that.
>
> No, I'm not talking about that process of review. I'm saying as a consequence of racking up that many hours in the month of May, did that cause HammondCare to think, 'Oh, maybe we need to get some people onto some greater guaranteed hours per week'?---(1) We were able to meet those additional hours through our care workers who want them, so it serves the operational purpose. In terms of recruiting additional staff, that's operating in a different environment, because additional staff are difficult to obtain in the current environment. For instance, that's why we say on our enterprise agreement we offer a broken shift allowance. That's one of the differentiators we use to separate us from other providers. Our care workers are - - -
>
> Do I take it that the answer - - - ?--- - - - happier to get those additional hours, and we look to review their contract hours, and we do look at recruiting additional staff where we need to.
>
> All right. But does that mean that the answer to my question is: 14,000 additional hours in May didn't lead to HammondCare reviewing the amount of guaranteed hours it offers its part-time workforce?---I would just agree with you - agree with your answer, given the explanation - - -
>
> If they in fact did, please let me know. If HammondCare in fact did that, please let me know?---I only know from operations that they review hours all the time. So they've got to match the care hours with the staffing hours, so there's always a match there. If we run out of hours to meet the care needs, then obviously that's a recruitment need. So that's up to a site, an office manager or area manager to review its hours constantly: do we need to recruit extra staff to meet the care hours; or are there sufficient hours on those additional hours that are presently picked up by staff who are happy to pick them up? So to come back to answer your question, an area manager would review its hours on a monthly basis in its operational area.
>
> All right. But you don't have any direct knowledge of this having taken place?---No.[698]

[943] It is apparent from Ms Wang's evidence that 1 employer, CASS, has not considered increasing the guaranteed hours provided to part-time employees as a response to the number of additional hours offered. Mr Wright's evidence is less definitive. He describes the situation as 'fluid' and refers to HammondCare's obligation under its enterprise agreement for part-timers to 'renegotiate their contract hours up'. The evidence relied on is hardly definitive and is insufficient to support any general finding that employers in the sector do not review the guaranteed hours of part-time employees on the basis of the number of additional hours worked.

[944] The various employer organisations proposed the following 4 findings:

1. Employers regularly offer part-time employees additional hours in excess of their guaranteed hours.[699]

2. Many part-time employees would like to receive more hours of work.[700]

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[698] Transcript, 17 October 2019 at PN2659-PN2667.

[699] ABI Submission, 19 November 2019 at 7.7.

3. Part-time employees are not being forced to work additional hours.[701]

4. For services delivered under the NDIS, the cost modelling which was used to devise the price caps imposed by the NDIA does not account for overtime rates of pay.[702]

[945] The proposed findings were uncontested and are supported by the evidence. As to the proposition that employers regularly offer part-time employees additional hours:

- Ms Ryan, Chief Executive Officer of Community Care Options Limited (Community Care) gave evidence that Community Care's 82 part-time employees are typically employed on 15-22 hours per week contracts and that most part-time employees work above their contracted hours. As to these 'additional' hours Ms Ryan says:

> 'The reason for this is that we can identify between 15 and 22 hours per week is sustainable, but cannot commit to any more, if clients get sick or go into hospital for extended periods it can be difficult to fill staff contracts …
>
> Most part-time employees are offered additional hours of work. Employees are not required to accept the additional work, this is mutually agreed. The majority of our part-time employees work above their contracted hours, with many working in excess of 30 hours per week. There are times however when we pay staff for their contracted hours, and they have not worked that many hours.
>
> In the past year, part-time employees have worked 95 000 hours above their contracted hours.'[703]

- Ms Wang, Senior Executive Officer of Human Resources Management of CASS Care Limited (CASS), gave evidence that CASS regularly offers part-time employees work in excess of their contracted hours. In the month of June 2019 about 88% of part-time support workers in 'Home Ageing Services' worked additional hours, ranging from 5 to 15 hours; and 100% of 'Disability Service' part-time employees worked additional hours ranging from 5 to 20 hours.[704] In the course of cross-examination Ms Wang agreed that the majority of Home Ageing Services and Disability Service part-time employees work additional hours,[705] and

- Mr Wright, People Services Operations Manager of HammondCare, gave evidence that HammondCare offers part-time employees additional hours, within their agreed availability, in excess of their guaranteed minimum hours in their contract.

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[700] AFEI Submission, 19 November 2019 at A-3; Ai Group Submission, 18 November 2019 at 7; ABI Submission, 19 November 2019 at 7.9.

[701] AFEI Submission, 19 November 2019 at A-4.

[702] ABI Submission, 19 November 2019 at 7.10.

[703] Exhibit ABI6 - Witness Statement of Deborah Ryan, 12 July 2019 at paras 21, 55 – 57.

[704] Exhibit ABI9 – Witness Statement of Joyce Wang, 12 July 2019 at paras 45 – 48.

[705] Transcript, 18 October 2019 at PN3578-PN3584.

> HammondCare employs 2,350 part-time employees and during May 2019 provided in excess of 14,000 additional hours to those employees.[706]

[946] The proposition that part-time employees want to work additional hours was supported by the evidence of Ms Thames,[707] Ms Fleming[708] and Ms Stewart.[709]

[947] The evidence of Mr Wright,[710] Ms Wang[711] and Ms Sinclair[712] supports the proposition that part-time employees are not coerced to work additional hours.

[948] The proposition that the NDIA cost modelling used to devise the price caps under the NDIS does not account for overtime rates of pay, is uncontested.[713]

[949] The proposed findings are also consistent with the findings made by the *Part-time and Casual Employment* Full Bench (see section 7.1 above from [904]).

[950] We will make the findings in the terms set out at [944] above.

7.5 CONSIDERATION

[951] As we have mentioned, the HSU's claim is said to be designed 'to address the inconsistency in the Award as between full-time and part-time employees'.[714] The premise of that proposition is that full-time employees 'are paid overtime for work in excess of rostered ordinary hours (i.e. 8 hours); the latter (i.e. part-time employees) aren't entitled to overtime until they have worked 10 hours in the course of a day'.[715] For the reasons which follow we find this argument unpersuasive. On analysis the premise of the proposition advanced by the HSU is incorrect. To explain our conclusion we need to set out the relevant terms which apply to full-time and part-time employees.

[952] The ordinary hours of work for full-time employees are set out in clause 25.1:

> '**25.1 Ordinary hours of work**
>
> (a) The ordinary hours of work will be 38 hours per week or an average of 38 hours per week and will be worked either:
>
> (i) in a week of five days in shifts not exceeding eight hours each;

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[706] Exhibit ABI3 – Witness Statement of Jeffrey Wright, 12 July 2019 at paras 14, 34 – 35. Also see Exhibit ABI5 – Witness Statement of Graham Shanahan, 28 June 2019 at para 30, Exhibit ABI7 – Witness Statement of Scott Harvey, 2 July 2019 at 50; Exhibit ABI8 – Witness Statement of Wendy Mason, 17 July 2019 at para 52.

[707] Exhibit HSU28 – Witness Statement of Thelma Thames, 15 February 2019 at para 9.

[708] Exhibit UV4 – Witness Statement of Deon Fleming, 16 January 2019 at para 17.

[709] Exhibit UV1 – Witness Statement of Trish Stewart, 17 January 2019 at para 11. See also Transcript, 17 October 2019, cross-examination of Jeffrey Wright at PN2659.

[710] Transcript, 17 October 2019 at PN2727.

[711] Transcript, 18 October 2019 at PN3603.

[712] Transcript, 15 October 2019 at PN612-PN613.

[713] NDIS Price Guide 2019-20, 1 July 2019, CB2796.

[714] HSU Submission, 18 November 2019 at para 105.

[715] Ibid.

(ii) in a fortnight of 76 hours in 10 shifts not exceeding eight hours each; or

(iii) in a four week period of 152 hours to be worked as 19 shifts of eight hours each, subject to practicality.

(b) By agreement, the ordinary hours in clause 25.1(a) may be worked up to 10 hours per shift.'

[953] The span of hours for day workers (i.e. non shiftworkers) is set out in clause 25.2(a):

'**(a) Day worker**

The ordinary hours of work for a day worker will be worked between 6.00 am and 8.00 pm Monday to Sunday.'

[954] Clause 28.1 provides that full-time employees are entitled to be paid at overtime rates for 'all work done in addition to their rostered ordinary hours on any day'. It is clear from clause 25.1(b) that full-time employees may, by agreement, work up to 10 ordinary hours per shift.

[955] The short point is that full-time employees may agree to work up to 10 hours per shift and those hours will be regarded as ordinary hours and will *not* be paid at overtime rates, provided such work is performed between 6.00 am and 8.00 pm Monday to Sunday. As set out at [556]our *provisional* view is that hours worked outside this span would be subject to payment at overtime rates. We now turn to the provisions which apply to part-time employees.

[956] Before commencing employment, the employer and part-time employee are required to enter into an agreement in writing on:

(i) a regular pattern of work including the number of hours to be worked each week; and

(ii) the days of the week the employee will work and the starting and finishing times each day (clause 10.3(c)).

[957] This agreement may subsequently be varied by agreement in writing and any such agreement may be ongoing or for a specified period of time (clause 10.3(e)).

[958] Further, as we have mentioned, clause 28.1(b)(iii) allows for part-time employees to work additional hours (up to a total of 10 in a day or 38 in a week or 76 in a fortnight) without the payment of any overtime penalty rate. And, as NDS submits, the existing 10 hour daily threshold for overtime for employees (clause 28.1(b)(ii)) mirrors the maximum span available to full-time employees (clause 25.1(b)).[716]

[959] It is clear that part-time employees may *agree* to work up to 10 hours per shift and that such a shift will be regarded as ordinary hours and will *not* be paid at overtime rates, subject

[716] NDS Submission, 7 February 2020 at para 22.

to that shift being within the same spread of hours applicable to full-time employees. The same applies to full-time employees – they too may agree to work up to 10 hours per shift and those hours are regarded as ordinary hours. A part-time employee may also agree before commencing employment to work a 10 hour shift as part of a regular pattern of work (see clause 10.3(c)), or by a variation to that initial agreement (see clause 10.3(e)).

[960] It follows that, contrary to the HSU's contention, there is no inconsistency, as between full-time and part-time employees – in each case the employees' agreement is required before they can be rostered on a 10 hour shift paid at ordinary time rates. Where part-time employees accept additional hours such that they work a 10 hour shift, they do not suffer any greater disutility than a full-time worker working the same hours.

[961] As to the HSU's other merit arguments, set out at [922] above, we note that proposition 3 is dependent on findings made on the evidence and that proposition 4 is illogical.

[962] The evidence does not provide a sufficiently cogent basis for the variation proposed. While aspects of the work performed by employees covered by the SCHADS Award can be physically and mentally taxing that fact does not, of itself warrant the variation proposed. In reaching that conclusion we have had regard to the Award provisions which deal with breaks and that s.62 of the Act directly addresses the adverse consequences associated with working excessive hours by providing a right to refuse to work unreasonable hours.

[963] The essence of proposition 4 is that we should amend clause 28.1(b)(ii) so that part-time employees are paid at overtime rates for all time worked in excess of 8 hours per day *because* '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'. The argument is disingenuous because the second part of the HSU's claim seeks to remove the very flexibility it relies on in support of the first part of its claim. We deal below with the HSU's structural incentive argument.

[964] We reject this aspect of the HSU's claim. We are not persuaded that the variation proposed is necessary to ensure that the SCHADS Award achieves the modern awards objective. We now turn to the second aspect of the HSU's claim which seeks to remove flexibility afforded by clause 28.1(b)(iii).

[965] The HSU also contends that the absence of any penalty associated with the performance of work beyond a part-time employee's guaranteed hours 'creates a structural incentive to underestimate the hours of work required of a part-time employee at the time of engagement and/or rostering, and to utilise part-time workers like a pool of casual employees.'

[966] We accept the proposition that the current overtime provisions in respect of part-time employees provide an incentive for employers to minimise the guaranteed minimum hours to be worked by a part-time employee (i.e. under clause 10.3(c)(i)). It seems to us that the central issue in contention is whether the solution proposed by the HSU – the removal of the flexibility afforded by clause 28.1(b)(iii) – is necessary to ensure that the SCHADS Award achieves the modern awards objective. For the reasons which follow we are not satisfied that the variation proposed is *necessary* in the requisite sense.

[967] The premise of the HSU's claim is that the removal of the 'structural incentive' will result in part-time employees being provided with greater guaranteed hours. There is a certain logic to this proposition but whether it is realised depends on the extent to which work demands fluctuate and the risk aversion of each employer. From a practical perspective, the regular pattern of hours agreed in clause 10.3(c) is likely to be hours which the employer can reasonably predict will be needed on an ongoing basis. It would be reasonable for employers to be cautious in their predictions of hours of work that can be offered as a regular pattern of work on a permanent basis, particularly in the circumstances that NDIS service fees are paid to the service provider on delivery of the service (rather than on service-booking).

[968] In response to this aspect of the HSU's claim the employers submit that the imposition of overtime rates in circumstances where part-time employees work additional hours would:

- act as a deterrent to employers offering additional hours to part-time employees, and
- likely result in employers employing fewer part-time employees (in favour of either full-time employees or casual employees).

[969] The employers rely on the evidence of a few witnesses in support of these propositions.[717]

[970] The Unions criticised this evidence on the basis that it was vague and uncertain.[718] We accept that there is some substance to this criticism. But, of necessity, evidence as to the likely consequences of a particular regulatory change will often be speculative. Despite the limitations in the evidence we accept that the variation proposed by the HSU is likely to change the organisation of work in the industry and that the imposition of overtime rates will act as a deterrent to employers offering additional hours to part-time employees. At least in the short term, a variation in the terms proposed by the HSU may result in additional hours being worked by casual employees; as the relative cost premium will be less; albeit this would result in substantial additional employment costs.

[971] Granting this aspect of the HSU's claim would remove a flexibility from the SCHADS Award which the Commission has acknowledged is calibrated to meet industry needs. As noted by the *Part-time and Casual Employment* Full Bench, the current Award terms provide 'considerable capacity to assign additional hours that may arise at short notice to employees without the cost exceeding what the NDIA price structure will allow'.[719] Significantly, under the NDIS an employer cannot recover the overtime cost of a part-time employee's additional hours.[720]

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[717] For example, Exhibit ABI9 – Witness Statement of Joyce Wang, 12 July 2019 at para 49; Exhibit ABI8 – Witness Statement of Wendy Mason, 17 July 2019 at para 53; Exhibit ABI3 – Witness Statement of Jeffrey Wright, 12 July 2019 at para 37; Exhibit HSU28 - Witness Statement of Thelma Thames, 15 February 2019 at para 9; Exhibit UV1 – Witness Statement of Trish Stewart, 17 January 2019 at para 11; Transcript, 17 October 2019 at PN2659, PN2663-PN2664.

[718] Joint union submission, 10 February 2020 at para 19.

[719] *Part-time and Casual Employment Case* at [637].

[720] NDIS Price Guide 2019-20, 1 July 2019, CB2796.

[972] The evidence is that many part-time employees want to (and do) work additional hours and there is no evidence to suggest that part-time employees are being forced to work additional hours. These findings are relevant because granting the claim will create a disincentive for employers to make additional hours available to part-time employees (as opposed to casual employees).

[973] In our view the HSU has failed to advance a sufficiently cogent case for the change sought. We reject this aspect of the HSU's claim. That said, we accept that the current part-time overtime provisions create a structural incentive for employers to set the guaranteed hours offered to part-time employees at the time of engagement, at artificially low levels. The evidence clearly establishes that employers regularly offer part-time employees work in excess of their guaranteed hours. But we are not persuaded that the solution proposed by the HSU is appropriate. What then is to be done?

[974] As mentioned earlier, ABI is opposed to the proposed introduction of additional overtime entitlements for part-time employees when working agreed additional hours or when working more than 8 hours a day. However, ABI submitted that it is *not* opposed to a variation that would provide a mechanism for reviewing and adjusting a part-time employee's hours of work where they are regularly working more than their guaranteed minimum number of hours:

> 'To the extent that the Commission forms the view that the Award contains any 'structural incentive' to set part-time employees' hours of work at artificially low levels, one approach to addressing that issue might be to introduce a mechanism for reviewing employees' hours upon request and adjusting their guaranteed hours to a more realistic reflection of their actual working patterns, subject to an ability for employers to refuse on reasonable business grounds.'[721]

[975] ABI observed that the proposed approach has been adopted in the context of enterprise bargaining in this sector and drew our attention to a number of enterprise agreements in the aged care and home care sector that contain a clause in the following form (or similar):[722]

> **Review of part time hours**
>
> (a) At the request of an employee, the hours worked by the employee will be reviewed annually. Where the employee is regularly working more than their guaranteed minimum number of hours then such hours shall be adjusted by the employer, and recorded in writing to reflect the hours regularly worked.
>
> (i) The hours worked in the following circumstances will not be incorporated in the adjustment:
>
> A. If the increase in hours is as a direct result of an employee being absent on leave, such as for example, annual leave, long service leave, parental leave, workers compensation; and

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[721] ABI Submission, 12 July 2019 at 8.26.

[722] For example: The Presbyterian Aged Care, NSWNMA and HSU NSW Enterprise Agreement 2017-2020; BaptistCare NSW & ACT Aged Care Enterprise Agreement 2017; McLean Care Ltd (NSW), NSWNMA and HSU NSW Enterprise Agreement 2017-2020; The Lutheran Aged Care Albury NSWNMA and HSU NSW Enterprise Agreement 2017-2020; Diocese of Lismore Care Services, NSWNMA and HSU NSW Enterprise Agreement 2017-2020.

B. if the increase in hours is due to a temporary increase in hours, for example, due to the specific needs of a resident or client.

(ii) In addition to those matters covered in sub-clause x.x(a)(i) changes to hours for Home Care employees may be affected by:

A. continuity of funding;

B. client numbers; and

C. client preferences for services including their ability to choose particular care workers.

(iii) The employer will not unreasonably refuse to change the hours of a Home Care employee based on the circumstances in subclause x.x(a)(ii) unless there is an imminent change to any of those circumstances.

[976] The above mechanism provides an opportunity for employees who regularly work in excess of their contracted hours to request that their hours be reviewed and increased on an annual basis, and employers cannot unreasonably refuse such a request.

[977] ABI submits that such an approach would satisfactorily address the concerns raised by the HSU. We agree.

[978] Terms of the type identified by ABI are a common feature of enterprise agreements operating in the sectors covered by the SCHADS Awards.

[979] An Information Note prepared by the Commission's research section has been published alongside this decision.[723] The Information Note reviewed the part-time clauses in health sector enterprise agreements approved between 1 January 2019 and 31 March 2021. Relevantly the review found:

- 731 health sector agreements were approved between 1 January 2019 and 31 March 2021
- the SCHADS Award was the relevant award for the purposes of the BOOT in 142 of these health sector agreements, and
- 37 of the 142 SCHADS agreements contained a 'review of part time hours' clause.

[980] In the Information Note a 'review of part time hours clause' refers to a term of an enterprise agreement that provides a mechanism for part-time employees to request that their guaranteed minimum hours be reviewed and adjusted to reflect their actual working pattern on a regular basis.

[981] Attachment A to the Information Note sets out extracts of the 'review of part-time hours clause' in the 37 SCHADS agreements approved between 1 January 2019 and 31 March 2021 that contain such a clause.

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[723] AM2018/26 - Information note - Review of part-time hours clauses in Enterprise Agreements.

[982] The prevalence of these provisions implies an acknowledgement of their utility and may inform the structure of an appropriate award term. We note that in formulating the model cashing out of annual leave term the Commission had regard to the extent and form of such provisions in enterprise agreements.[724] The prevalence of such terms in enterprise agreements demonstrated that there was some demand for provisions of that type and served to illustrate the range of safeguards which may be appropriate.[725]

[983] We are, of course, conscious of the need for caution when referring to the terms of enterprise agreements in the context of a review of modern awards. The legislative context is quite different. Enterprise agreements are negotiated by the parties and approved by the Commission against various statutory criteria. A different legislative context applies to the review of modern awards. As the Full Bench observed in the *Modern Awards Review 2012 – Penalty Rates* decision:

> 'The approach adopted in enterprise agreements and preserved enterprise awards are relevant considerations in this Transitional Review, however we also note that care should be exercised when assessing that material in the context of reviewing the modern award safety net. Enterprise agreements are negotiated by parties and approved by the Commission against various statutory criteria. These include the better off overall test in s.193. However many of the instruments being referred to in these proceedings are based on safety net instruments other than the relevant modern awards. Further, and in any event, in approving agreements the Commission is not making an assessment as to whether the instrument meets the modern awards objective or would be appropriate in circumstances other than those applying at the enterprise concerned.'[726]

[984] We also note that similar mechanisms are provided in the *Hospitality Industry (General) Award 2020* (Hospitality Award) and the *Restaurant Industry Award 2020* (Restaurant Award). The general scheme in each of those awards is that:

1. At the time of engagement the employer and part-time employee must reach an agreement in writing about:

   (a) the number of hours of work which is guaranteed to be provided and paid to the employee each week or, where the employer operates a roster, the number of hours of work which is guaranteed to be provided and paid to the employee over the roster cycle (the guaranteed hours); and

   (b) the days of the week on which, and the hours on those days during which, the employee is available to work the guaranteed hours (the employee's availability).

2. Any change to a part-time employee's guaranteed hours may only be made with the written consent of the employee, and the employer may roster a part-

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[724] *4 yearly review of modern awards – Annual leave* [2015] FWCFB 3406.

[725] *4 yearly review of modern awards – Annual leave* [2015] FWCFB 3406 at [242] – [267].

[726] [2013] FWCFB 1635 at [229].

time employee to work their guaranteed hours and any additional hours, subject to a number of limitations. In particular, a part-time employee:

(a) must not be rostered to work any hours outside the employee's availability; and

(b) the employee must not be rostered to work in excess of 11.5 hours or fewer than 3 hours in a day; and

(c) must have 2 days off each week.

3. A part-time employee is entitled to overtime rates for work in excess of 38 hours per week; or 11.5 hours in a day; or the employee's rostered hours.

4. In other words, part-time employees are paid at ordinary time rates of pay for their guaranteed hours and for additional hours rostered within the employees' availability.

[985] Clauses 10.8 – 10.10 of the Restaurant Award provide a right to request an increase in guaranteed hours, as follows:

> '10.8 If a part-time employee has regularly worked a number of ordinary hours in excess of their guaranteed hours for at least 12 months, then they may request in writing that the employer agree to increase their guaranteed hours.
>
> 10.9 If the employer agrees to a request under clause 10.8, then the employer and the part-time employee must vary the agreement made under clause 10.4 to reflect the employee's new guaranteed hours. The variation must be recorded in writing before it occurs.
>
> 10.10 The employer may only refuse a request under clause 10.8 on reasonable business grounds. The employer must notify the part-time employee in writing of a refusal and the grounds for it.'

[986] Clauses 10.8 – 10.10 of the Hospitality Award are in the same terms.

[987] Having reviewed the part-time employment terms in the SCHADS Award and having regard to the evidence and submissions, it is our *provisional* view that the Award be varied in 2 respects:

(i) to make it clear that working additional hours is voluntary; and

(ii) to introduce a mechanism whereby a part-time employee who regularly works additional hours may request that their guaranteed hours be reviewed and increased, and their employer cannot unreasonably refuse such a request.

8 24-HOUR-CARE CLAIM

8.1 BACKGROUND

A The claim

[988] The UWU and the HSU seek to delete clause 25.8 which provides:

> **'25.8 24 hour care**
>
> This clause only applies to home care employees.
>
> (a) A 24 hour care shift requires an employee to be available for duty in a client's home for a 24 hour period. During this period, the employee is required to provide the client with the services specified in the care plan. The employee is required to provide a total of no more than eight hours of care during this period.
>
> (b) The employee will normally have the opportunity to sleep during a 24 hour care shift and, where appropriate, a bed in a private room will be provided for the employee.
>
> (c) The employee engaged will be paid eight hours work at 155% of their appropriate rate for each 24 hour period.'

[989] The Unions also seek a consequential amendment to clause 25.7(a). The UWU seeks to amend the clause as follows:[727]

> **'25.7 Sleepovers**
>
> (a) A sleepover means when an employer requires an employee to sleep overnight at premises where the client for whom the employee is responsible is located (including respite care) ~~and is not a 24 hour care shift pursuant to clause 25.8 or an excursion pursuant to clause 25.9.8~~.'

[990] The HSU seeks to amend the clause as follows:

> **25.7 Sleepovers**
>
> (a) A sleepover means when an employer requires an employee to sleep overnight at premises where the client for whom the employee is responsible is located (including respite care) and is not ~~a 24 hour care shift pursuant to clause 25.8 or~~ an excursion pursuant to clause 25.9.[728]

[991] The Unions' submissions are set out in the *September 2019 Decision*[729] and need not be repeated here. In summary, the submissions advanced in support of the deletion of clause 25.8 are:

- the clause is unclear, in that it provides no certainty regarding the hours of work of an employee or the sleeping arrangements to be applied

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[727] UWU Draft determination, 7 November 2018.

[728] HSU Draft determination, 9 November 2018.

[729] *September 2019 Decision* at [86] – [95].

- the clause is rarely used
- the entire engagement is 'work' and should be remunerated as such
- the clause does not adequately compensate employees, or provide for remuneration at a 'discounted rate', for the time they are required to be available for work
- the clause may breach s.323 of the Act because it permits an employer to require an employee to work for a 24-hour period but does not require the employer to pay the employee in full for that work
- the clause creates situations where an employee is effectively liable to work in excess of the notional hours attributed to the engagement, and the hours that such engagements will 'require' the employee to work are not foreseeable, and
- leaving employees for lengthy periods on duty dealing with complex interpersonal matters is problematic.

[992] ABI, NDS and AFEI oppose the claims to delete clause 25.8 and the consequential amendment to clause 25.7.

[993] During its submissions, ABI observed that there may be a lack of clarity in respect of some aspects of the operation of the current clause, in particular:

- the clause is silent as to what happens when an employee is required to work more than 8 hours of work
- there is a lack of certainty about the hours of work of an employee, and
- the clause is unclear regarding aspects relating to sleeping.[730]

[994] ABI acknowledges that the clause does not specify what happens where an employee is required to perform more than 8 hours' work during a 24-hour-care shift. It also notes that there is a degree of tension in the provision in that an employee is required to be available for duty for a 24-hour period and yet an employee is required to provide a total of no more than 8 hours of care during the period. ABI submits that although an employee is not required to perform any more than 8 hours' work there may be occasions where additional work (if an employee agrees to perform it) is required which would be regulated by the overtime provisions.

[995] During oral argument Mr Scott, on behalf of ABI, indicated that his clients would not oppose the following amendments to the 24-hour-care clause:[731]

- the language in clause 25.7(c) being inserted into the 24-hour-care clause
- to the extent that an employee is required to perform more than 8 hours work then that work being treated as overtime and paid in accordance with clause 28

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[730] ABI Submission, 5 April 2019 at 6.22 – 6.30.

[731] Transcript, 17 April 2019 at PN1997-PN2000.

- an amendment to the effect that a broken shift can only be worked by agreement with the employee, and
- an amendment to clause 31.2 to make it clear that employees who regularly work 24-hour-care shifts receive an additional week's leave.

[996] The NDS opposed the deletion of the 24-hour-care provision and submitted that the ambiguity in the clause may be addressed by an amendment that:

- the 55% loading is payment for any additional work required of up to 2 hours, and
- overtime be payable for all work performed beyond that amount.[732]

[997] NDS contended that such a variation would be preferable to deleting a clause that facilitates the provision of a type of support that is of value to aged and disabled people in certain circumstances.

[998] The submissions and witness evidence relevant to the 24-hour-care claim is set out at **Attachment L**.

B The September 2019 Decision

[999] In the *September 2019 Decision* we rejected the HSU's contention that the 24-hour-care clause is 'rarely used' and found that 24-hour-care shifts are used in the industry and, further, that while only a minority of employers used the 24-hour-care clause, those who do use the clause do so regularly. Given the history and current utilisation of the 24-hour-care clause we expressed the view that it was appropriate that we adopt a cautious approach to the claim that the clause be deleted.[733]

[1000] In the *September 2019 Decision* we went on to express the *provisional* view that the clause be retained but noted that the existing clause did *not* provide a fair and relevant minimum safety net and that it required amendment:

> '[103] We acknowledge there are deficiencies in the 24 hour care clause. As submitted by the HSU (and effectively conceded by ABI and the NDS) the clause lacks clarity and fails to address some important matters regarding the practical operation of the clause. In addition to the matters mentioned at [97] to [99] above we would add that the mechanism whereby an employee may refuse to work more than 8 hours when on a 24 hour care shift is unclear.'[734]

[1001] We then set out the following process to address the issues raised:[735]

1. The interested parties were to confer with respect to the amendments to be made to the clause to ensure that it achieves the modern awards objective.

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[732] NDS Submission, 5 April 2019 at para 26.

[733] *September 2019 Decision* at [102].

[734] *September 2019 Decision* at [103].

[735] [2019] FWCFB 6067 at [105].

2. The discussions between the parties were to be facilitated by Commissioner Lee and a conference convened for that purpose.

3. Arising out of the discussions and conferences a Joint Report would be prepared setting out the extent of agreement and any remaining matters in dispute (and noting that in the event that the parties were unable to reach a substantial measure of agreement we would revisit our *provisional* view regarding the proposed deletion of the term).

4. Interested parties were to be given an opportunity to make submissions in relation to the Joint Report and in support of their preferred position.

5. We would list the matter for further oral hearing, if we decided that it was the appropriate course.

[1002] Conferences were held on 28 October and 7 November 2019 to discuss the amendments required to ensure that the 24-hour-care clause achieves the modern awards objective. Commissioner Lee published a Draft Report on 14 November 2019 and a Report on 3 December 2019. The Report sets out the positions of the parties.

[1003] The Report identifies 4 areas of apparent agreement in respect of the ABI and Unions' draft clauses:

- the Unions indicate that clause 25.8(a) of the ABI preferred draft reflects the terms of the current Award provision and do not propose any amendment to this clause
- the Unions agree that it is appropriate that a 24-hour-care shift should only be worked by agreement as per 25.8(b) of ABI's preferred draft
- the Unions indicate that clause 31.2(a) of the ABI preferred draft reflects the terms of the current Award provision and do not propose any amendment to this clause, and
- the Unions agree that employees who regularly work 24-hour-care shifts should be classified as a shift worker for the purposes of the NES. For clarity, the Unions propose that 'regularly' is defined within sub-clause 31.2(b):

> 'For the purposes of this sub clause, an employee will regularly work 24 hour care shifts if the employee works four or more 24 hour care shifts during the yearly period in respect of which their annual leave accrues'

[1004] Directions were then issued on 5 December 2019 requiring (among other things) that interested parties file submissions in support of the parties' preferred position on changes to the 24-hour-care clause as set out in the Report of 3 December 2019.

[1005] The submissions filed in February 2020 (see [26] and [27] above) addressed the ABI and Union proposals.

8.2 CONSIDERATION

[1006] We begin our consideration of the parties' respective submissions by returning to our *provisional* view that a 24-hour-care clause be retained, albeit in an amended form. In a joint submission the ASU, HSU and UWU submitted, for the same reasons as were advanced in their earlier Tranche 1 submissions, that we should:

> 'consider phasing the clause out of the Award over the course of 3 years. That will allow sufficient time for that cohort of employers who utilize the clause to make alternative arrangements, such as by engaging in enterprise bargaining for appropriate terms and conditions to cover such work patterns.'[736]

[1007] In the event the clause was to remain in the Award the Unions proposed a series of amendments which are set out in the draft determination at Attachment A to their submission and described at paragraphs [293] – [311] of that submission. We return to the Unions' proposed amendments later.

[1008] As mentioned earlier, the Unions' submissions in support of the deletion of the 24-hour-care clause are set out in the *September 2019 Decision* and are summarised at [999] above. As we said in the *September 2019 Decision* we reject the HSU's contention that the 24-hour-care clause is 'rarely used'. The results of a survey of the members of the employer organisations (the Survey) in these proceedings show that around 1 in 10 enterprises (11.2%) which responded to the Survey used 24-hour shifts between 1 March 2018 and 1 March 2019. As pointed out by AFEI:

> 'Given that 24 hour shift provisions only apply to home care employees, the 11.2% of all respondents using 24 hour shifts could be as high as one third of all home care respondents.'[737]

[1009] In the Tranche 1 proceedings the UWU and ASU contended that the Survey was 'methodologically flawed principally because of the manner in which the sample was constructed'.[738] The short point put was that the Survey was of members of various employer organisations and that there was no way of knowing whether the membership of those organisations was representative of all employers covered by the SCHADS Award.

[1010] We dealt with that submission in the *September 2019 Decision*:

> 'We accept that on the material before us the survey results cannot be said to be representative of all employers covered by the SCHADS Award and, accordingly, the results cannot properly be extrapolated to the relevant population. That said, the Survey Results are the best evidence available to us in respect of certain issues. In particular, the results provide an indication of the utilisation of 24 hour shifts and the pattern of engagement of casual employees amongst a substantial number of employers covered by the SCHADS Award.

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[736] Joint Union Submission, 10 February 2020 at para 291.

[737] AFEI Submission, 3 July 2019 at para 11.

[738] Transcript, 16 July 2019 at PN18.

> It seems to us that the Survey Results are particularly relevant to the claim by the HSU to delete the 24 hour care clause and the Union claims to increase the rates of pay payable to casual employees when working overtime and on weekends and public holidays.'[739]

[1011] In the *September 2019 Decision* we found that 24-hour-care shifts are used in the industry and, while only a minority of employers used the 24-hour-care clause, those who do utilise the clause do so regularly. Of those providers that do use the 24-hour-care clause, the survey results show that on average the number of times they rostered a home care employee to work a 24-hour shift was 304 per year.[740] So, while not every employer uses the clause, those who do utilise 24-hour shifts do so regularly.

[1012] We have not been persuaded to depart from our *provisional* view. The Survey results indicate 24-hour-care shifts are used in the home sector. As NDS submits, the retention of a 24-hour-care provision, albeit with appropriate amendment, is preferable to the deletion of a provision which facilitates a type of support that is of value to aged and disabled people in certain circumstances.

[1013] We confirm our *provisional* view that the 24-hour-care provision be retained, but that the existing clause requires amendment. We now turn to consider the amendments required. We turn first to ABI's proposal.

[1014] ABI advanced a proposed variation to clauses 25.8 and 31.2 of the Award which aim to rectify the deficiencies with the current clause which were identified in the *September 2019 Decision*. ABI's proposed variations are set out at [179] of its 10 February 2020 submission, as amended by its submission of 11 March 2020 (at [64] – [65]) in response to our Statement[741] of 4 March 2020. ABI proposes that clauses 25.8 and 31.2 be deleted and replaced with:

> **'25.8 24 hour care**
>
> This clause only applies to home care employees.
>
> (a) A 24 hour care shift requires an employee to be available for duty in a client's home for a 24 hour period. During this period, the employee is required to provide the client with the services specified in the care plan. The employee is required to provide a total of no more than eight hours of care during this period.
>
> (b) An employer may only require an employee to work a 24 hour care shift by agreement.
>
> (c) The employee will normally have the opportunity to sleep during a 24 hour care shift and, employees will be provided with a separate room with a bed, use of appropriate facilities (including staff facilities where these exist), and free board and lodging for each night when the employee sleeps over.
>
> (d) The employee engaged will be paid eight hours work at 155% of their appropriate rate for each 24 hour period.

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[739] *September 2019 Decision* at [33] – [34].

[740] AM2018/26, Survey – SCHADS Award, 2019, Question 14.

[741] [2020] FWCFB 1185.

(e) If the employee is required to perform more than eight hours' work during a 24 hour care shift, that work shall be treated as overtime and paid at the rate of time and a half for the first two hours and double time thereafter, except on Sundays when overtime will be paid for at the rate of double time, and on public holidays at the rate of double time and a half. An employer and employee may utilise the TOIL arrangement in accordance with clause 28.2.

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

31.2 Quantum of leave

For the purpose of the NES, a shiftworker is:

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

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

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

[1015] In Part D of its submission of 10 February 2020, ABI summarises the key aspects of its proposal, as follows:[742]

1. The inclusion of a requirement that employers may only require an employee to work a 24 hour care shift by agreement. This will have the effect of prohibiting an employer from rostering an employee for a 24 hour care shift unless that employee has specifically agreed to work 24 hour care shifts. It is acknowledged that 24 hour care shifts are a nonstandard type of shift, and so it is appropriate that employees have the ability to opt-out of working such shifts.

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

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

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

   ABI submits that the facilities outlined in its proposal are an appropriate minimum standard. While it will often be the case that employees will be

[742] ABI Submission, 10 February 2020 at paras 182 – 191.

provided with additional facilities, we do not consider that a more formulaic or prescriptive entitlement is appropriate in the context of a minimum legislated standard applying across the industry nationally.

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

   ABI submits that this proposal is broadly consistent with the existing overtime provisions for full-time, part-time and casual employees under clauses 28.1(a) and (b), save that the overtime rate is triggered where work is performed in excess of 8 hours for casual and part-time employees, rather than 10 hours as specified in clause 28.1(b)(ii).

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

5. The inclusion of a new clause 25.8(f) to provide that employee may refuse to work more than 8 hours were the requirement to do so is unreasonable.

[1016] ABI also notes that in the *September 2019 Decision* we expressed the view that, given the 'history and the current utilisation of the 24-hour-care clause', it is 'appropriate to adopt a cautious approach'. ABI submits that its proposal reflects a cautious approach and rectifies the deficiencies identified by the Commission in relation to the existing 24-hour-care clause, but does not propose any further significant alteration to the existing clause.

[1017] ABI contends that there is no evidentiary or merit basis for any further material amendment to the provision.

[1018] AFEI submitted a draft clause concerning the 24-hour provision as part of the Conference proceedings before Commissioner Lee, as shown in Annexure A to Commissioner Lee's Report. The differences between the AFEI and ABI draft clauses were also noted in the Commissioner's Report.

[1019] AFEI subsequently withdrew its objections to clause (f) of the ABI draft, concerning working 'additional hours' but remained opposed to ABI's proposal to extend the additional annual leave entitlement to employees who regularly work 24-hour shifts, where employees would not otherwise meet the threshold set out in clause 31.2(a).[743]

[743] AFEI Submission, 11 February 2020 at para 3-7.

[1020] We have considered the differences between AFEI's position and ABI's preferred draft as set out in Commissioner Lee's Reports, but are not persuaded to make the alterations proposed by AFEI.

[1021] NDS supports the draft clause proposed by ABI and submits that it addresses the issues identified in the *September 2019 Decision* and, in addition, submitted that new clause 25.8(b) provides additional protection for employees by requiring that a 24-hour-care shift may only be worked by agreement with the employee and that clause 31.2, regarding quantum of leave, provides an additional benefit for employees who regularly work 24-hour-care shifts.[744]

[1022] NDS submits that the ABI draft clause 31.2(b) needs to be amended to clarify the meaning of 'regular'. NDS proposes the amendment read:[745]

> '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.'

[1023] In Background Paper 3 we invited the other parties to indicate whether they supported or opposed NDS' proposal to clarify the meaning of 'regular'.

[1024] The Unions responded to the question posed in Background Paper 3 by opposing the NDS proposal and instead proposed that clause 31.2 provide for an additional week of leave after just 4 such shifts in a year. The Unions advance the following submission in support of their proposal:

> 'A 24 hour care shift has greater disutility for employees than the performance of shift work on weekends. Under the Award, weekend work is subject to a maximum span of 8 hours (or 10 hours by agreement, or for part time and casual employees), with overtime payable for hours worked beyond that. This means that employees will have time to sleep, rest and recover in their own home between shifts. Weekend work is also subject to the provision that employees should receive meal and rest breaks during the shift.
>
> Under the current Award, an employee will only 'normally' have an opportunity to sleep. There are no penalties for circumstances when an employee is continuously woken up during sleep to attend to the client, or is required to perform work at intervals which prevent the employee having an uninterrupted appropriate period of sleep. There is also no requirement for the employee to be provided with breaks during the shift, or during the periods when "work" (as contemplated in the clause) is being performed.
>
> Even if these matters were addressed, an employee working a 24 hour care shift faces a higher level of disutility because they must be away from family, friends and their own personal obligations for a period of 24 hours. This is a significant period of time in which to be performing work.
>
> It is appropriate that 'regular' be defined as the HSU and the UWU have advanced, that is, as the performance of 4 or more 24 hour care shifts across an year.'[746]

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[744] NDS Submission, 7 February 2020 at para 43 – 44.

[745] NDS Submission, 7 February 2020 at para 46.

[746] Joint Union Submission, 10 March 2020 at paras 81 – 84.

[1025] ABI responded that it did not consider it necessary to clarify the meaning of 'regular' on the basis that:

> 'This phraseology is a common feature of the modern awards system in respect of the definition of 'shiftworker' for the purposes of the entitlement to an additional week's annual leave. The phrase exists in a number of modern awards and has done so without any obvious issue since 2010.'[747] (footnote omitted)

[1026] However, if the Commission was minded to include a definition, ABI suggested the language in what is now clause 22.1(b) of the *Supported Employment Services Award 2020*, which prescribes that the term 'regularly rostered' means 'that is, not less than 10 in any 12 month period'.

[1027] In its response AFEI remained opposed to ABI's proposal to extend the additional annual leave entitlement to employees who regularly work 24-hour shifts and, for that reason, it opposed the NDS proposal.

[1028] It is convenient to deal with this issue here, as the Unions' proposed clause also includes the provision of an additional weeks' annual leave for employees who regularly work 24-hour-care shifts. The difference between the Unions' proposal and that advanced by ABI (and supported by NDS) is the number of 24-hour-care shifts required to be worked in a 12 month period in order to qualify for the additional weeks' annual leave. As we have mentioned, AFEI opposes any extension of the additional annual leave entitlement to employees who regularly work 24-hour shifts.

[1029] Contrary to AFEI's submission we are satisfied that the provision of such an entitlement is appropriate. A 24-hour-care shift entails significant disutility. An employee working such a shift is required to be away from their family and friends for a period of 24 hours – significantly longer than an ordinary working day. Such employees should receive an additional annual leave entitlement in circumstances where they 'regularly' work 24-hour-care shifts. Further, contrary to ABI's submission, we are of the view that it is appropriate to clarify the meaning of 'regular' in this context. Clause 31.2(a) already provides such clarification and it is appropriate that it also be clarified in clause 31.2(b), to provide employers and employees with certainty, and to avoid potential disputation.

[1030] As we have mentioned, ABI proposes that the term 'regularly works' in proposed clause 31.2(b) be defined to mean not less than *ten* 24-hour-care shifts in any 12 month period. The Unions contend that 'regularly works' should be defined to mean *four* 24-hour-care shifts in any 12 month period.

[1031] The determination of the threshold number of 24-hour-care shifts to access the additional one week's annual leave calls for the exercise of a broad evaluative judgment, taking into account all of the elements of ABI's proposed clause and the disutility associated with a 24-hour-care shift. It is not an issue that lends itself to precise quantification.

[1032] In determining the appropriate threshold it is relevant to look at the threshold applicable to shiftworkers in clause 31.2(a) and to contrast the disutility of working on

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[747] ABI Submission, 11 March 2020 at para 62.

weekends versus that associated with 24-hour-care shifts. Clause 31.2(a) provides, in conjunction with s.87(1)(b), that employees who work 'for more than *four ordinary hours* on *10 or more weekends*' in a 12 month period are entitled to one additional week's annual leave.

[1033] In ABI's draft clause a 24-hour-care shift requires an employee to be available for duty in a client's home for a 24-hour period *and* to provide up to 8 hours of care during this period. It also needs to be borne in mind that employees working a 24-hour-care shift are paid for 8 hours work at 155% of their appropriate rate for each 24-hour period.

[1034] It seems to us that the threshold should be less than the ten 24-hour-care shifts proposed by ABI; but more than the 4 shift threshold proposed by the Unions. Balancing the various considerations we have decided that the threshold should be eight 24-hour-care shifts in any 12 month period which appropriately compensates for the disutility incurred. We now turn to the other elements of ABI's proposed clause and the Unions' proposal.

[1035] As we have mentioned, in the *September 2019 Decision* we identified a number of deficiencies in the current 24-hour-care shift clause, namely:

- the clause is silent as to what happens when an employee is required to work more than 8 hours of work
- there is a lack of certainty about the hours of work of an employee
- the clause is unclear regarding aspects relating to sleeping
- it does not specify that an employee may refuse to work more than 8 hours on a 24-hour shift, and
- it does not specify that employees are to be provided with a safe and clean place to sleep.

[1036] ABI's proposed clause addresses most of these deficiencies (we return shortly to the lack of clarity relating to sleeping). The central issue in contention is whether the manner in which the ABI proposed clause has addressed the relevant issue is consistent with the establishment of a fair and relevant minimum safety net, as required by s.134 of the Act. The Unions contend that ABI's proposed clause fails to achieve the modern awards objective. The Unions' proposed 24-hour-care clause is in the following terms:[748]

> **'25.8 – 24 hour care**
>
> This clause only applies to home care employees.
>
> **(a)** A **24 hour care** shift requires an employee to be available for duty in a client's home for a 24 hour period. During this period, the employee is required to provide the client with the services specified in the care plan. The employee is required to provide a total of no more than eight hours of care during this period, and may not be required to perform duties outside the scope of the care plan or be unreasonably required to provide more than eight hours of care.

[748] Joint Union Submission, 10 February 2020, Attachment A.

(b) For the purposes of this clause, "care" shall mean the performance of any task that assists a client with daily living.

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

(d) During a 24 hour care shift, the employee will be afforded the opportunity to sleep for a continuous period of eight hours (the "sleep break") during a 24 hour care shift and will be provided with:

(i) a separate and securely lockable room with a peephole or similar in the door, a bed and a telephone and internet connection in the room; and

(ii) a bed, bedside lamp and clean linen;

(iii) access to food preparation facilities; and

(iv) access to appropriate temperature control and

(v) free board and lodging.

(e) The sleep break shall not commence earlier than 10pm and shall not finish later than 7am.

(f) An employee required to work a 24 hour care shift will be paid the sleepover allowance prescribed by clause 25.7.

(g) In the event that:

(i) the sleep break is interrupted by the client for any reason, whether to deliver services specified in the care plan or not; or

(ii) the employee is otherwise required to provide more than eight hours of care;

the employee shall be paid double time for the period of such interruption or the provision of such care, with a minimum payment of one hour, provided that nothing in this clause shall be regarded as obliging an employee to perform duties outside the scope of the care plan or provide more than eight hours of care where such requirement is unreasonable.

(h) In addition to the above, for each 24 hour period, the employee will be paid:

(i) 16 hours at 155% of their appropriate rate and;

(ii) three meal allowance payments prescribed by clause 20.3.

(i) An employee who regularly works 24 hour care shifts during the yearly period in respect of which their annual leave accrues will be deemed to be a shiftworker for the purpose of entitlement to annual leave pursuant to the NES.

(j) For each 24 hour care shift, the employee will be treated for all purposes as having performed 24 ordinary hours of work.

(k) An employee will be allowed, at their election, a break of not less than 10 hours between the end of one 24 hour care shift and the start of another period of work.'

[1037] The clause attached to the Union's submission of 10 February 2020 differs from the clause submitted on 13 November 2019 in the following ways:

(a) Clause 25.8(a) has been amended to add the terms 'and may not be required to perform duties outside the scope of the care plan or be unreasonably required to provide more than eight hours of care.', and

(b) Clause 25.8(g) has been amended to add the terms 'provided that nothing in this clause shall be regarded as obliging an employee to perform duties outside the scope of the care plan or provide more than eight hours of care where such requirement is unreasonable.'

[1038] The various features of the proposed clause are discussed in the Joint Union submission dated 10 February 2020 at [293] – [311].

[1039] ABI, NDS and AFEI are opposed to the Unions' proposed variations to the 24-hour-care clause. ABI submits:

> 'The Unions propose such significant changes to the existing 24 hour care clause that it would effectively render 24 hour care shifts obsolete. For example, the Unions' proposal involves more than doubling the amount payable to employees when working such shifts.
>
> There is no warrant for such a radical variation. This is particularly the case in light of the Commission's observation in its 2 September 2019 decision that, given the "history and the current utilisation of the 24 hour care clause", it is "appropriate to adopt a cautious approach".
>
> The Unions' proposal would have significant deleterious impacts on the provision of important care to vulnerable members of the community in their home. It will inhibit the ability of organisations to provide continuity of care, and impact the amount of care that could be provided to consumers within their allocated budgets. It would also likely have the effect of preventing employees who prefer to work 24 hour care shifts from being able to earn a reasonable amount of money in a single block of time, leading to a further fragmentation of working hours in the sector.'[749]

[1040] Similarly, AFEI opposes the Unions' proposed clause on the basis that it 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.'[750]

[1041] We now turn to address the main differences between the ABI and Unions' proposals.

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[749] ABI Submission, 26 February 2020 at paras 96 – 98.

[750] AFEI Submission, 11 February 2020 at paras 3 - 4.

'Unpaid hours of work'

[1042] The Unions submit that the 'most significant deficiency' with the current 24-hour-care clause is that it does not remunerate employees for 'the whole time' they are required to be present at a workplace. In essence the Unions contend that all time that an employee is at a client's home and available for duty is 'work' and should be paid as such. Proposed clause 25.8(j) gives effect to this position.

[1043] We disagree with the position advanced by the Unions. We agree with ABI, that at a conceptual level, there is no difference between the 24-hour-care clause and clause 25.7 of the Award which regulates sleepovers. Under clause 25.7, an employee may be required to sleep overnight at premises where the client for whom the employee is responsible is located. However, the sleepover period is not 'time worked' but is compensated by way of a sleepover allowance. The employee is also entitled to further payment where they are required to 'perform work' during the sleepover period.

[1044] As noted by ABI, the position advanced by the Unions in respect of the 24-hour-care clause is difficult to reconcile given their position in respect of the sleepover clause. The Unions do not seek to vary the existing sleepover arrangements, save for pursuing a variation to the facilities to be provided to employees when working sleepovers.

[1045] Further, the existing 24-hour-care clause provides for a 155% loading payable on the 8 hours of working time for each 24-hour-care shift, which is intended to compensate employees for the disutility associated with working 24-hour-care shifts.

[1046] The Unions state at [294] of their submission dated 10 February 2020 that 'the circumstances of an employee working a 24 hour care shift compare unfavourably with a worker on call as the worker's freedom of movement is limited for the entire period of the 24 hour shift'. However, this assertion is inconsistent with the submissions made by the Unions about the 'remote response' proposal. In its submission of 19 November 2019, the ASU submits that:

> 'Being recalled to work from home does not fully ameliorate the negative impacts of working being recalled to work. Dr Muurlink notes that that being on-call at home could be, if anything worse than being on-call at other locations, possibly because the presence of family interfered with the worker's ability to implement sleep patterns that would conform with on-call requirements.'[751]

[1047] As ABI puts it, 'the Unions cannot have it both ways'.[752]

[1048] As to the quantum of remuneration proposed under the Unions clause, we are not satisfied that it is 'fair' to provide that employees are to be paid *16 hour's pay* at 155% of the appropriate rate in circumstances where:

- the employee is only required to perform 8 hours' work, and

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[751] ASU Submission, 19 November 2019 at para 100.

[752] ABI Submission, 26 February 2020 at para 108.

- the employee is entitled to be paid at double time for any work performed in excess of 8 hours (with a minimum payment of one hours' pay).

[1049] This aspect of the Unions' proposal and the proposal that each 24-hour shift is treated for all purposes as the performance of 24 ordinary hours of work would impose a substantial, and unwarranted, cost on employers.

'Care work'

[1050] At proposed clause 25.8(a) the Unions' propose that an employee 'may not be required to perform duties outside the scope of the care plan'. In support of this proposal the Unions submit that:

> 'the proximity of the worker makes it likely they will be requested to perform tasks outside the scope of the plan. The definition assists to clarify the scope of duties the worker is obliged to perform.'[753]

[1051] The Unions submission does not refer to any evidence in support of the proposition that it is 'likely' that employees on 24-hour-care shifts would be asked to perform duties outside the scope of the care plan. We are not satisfied that it is necessary to define 'care' in the manner proposed by the Unions.

Sleep break

[1052] Clause 25.8(d) of the Unions proposal seeks to address the lack of clarity in the current clause regarding sleeping during a 24-hour-care shift, as follows:

> '(d) During a 24 hour care shift, the employee will be afforded the opportunity to sleep for a continuous period of eight hours (the "sleep break") during a 24 hour care shift and will be provided with:
>
> (i) a separate and securely lockable room with a peephole or similar in the door, a bed and a telephone and internet connection in the room; and
>
> (ii) a bed, bedside lamp and clean linen;
>
> (iii) access to food preparation facilities; and
>
> (iv) access to appropriate temperature control and
>
> (v) free board and lodging.'

[1053] In its reply submission ABI does not oppose the proposed amendment to the existing clause to provide that 'during a 24-hour-care shift, the employee will be afforded the opportunity to sleep for a continuous period of eight hours.'

[1054] We agree with ABI, this aspect of the Unions' proposal is a sensible addition to the clause. We will amend ABI's proposed clause 25.8(c) accordingly.

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[753] Joint Union Submission, 10 February 2020 at para 299.

[1055] The balance of the Unions' proposed clause at 25.8(d) (see [1036] above) is opposed by the employers. In particular, they do not agree with the aspects of the Unions' proposal regarding the facilities to be provided to employees, or the time parameters within which the sleep period must occur, or the payment regime where the sleep period is interrupted.

[1056] In respect of the issue of sleeping facilities the 2 proposals are contrasted in the table below.

The Unions	**ABI**
(d) During a 24 hour care shift, the employee will be afforded the opportunity to sleep for a continuous period of eight hours (the "sleep break") during a 24 hour care shift and will be provided with: (i) a separate and securely lockable room with a peephole or similar in the door, a bed and a telephone and internet connection in the room; and (ii) a bed, bedside lamp and clean linen; (iii) access to food preparation facilities; and (iv) access to appropriate temperature control and (v) free board and lodging.	(c) The employee will normally have the opportunity to sleep during a 24 hour care shift and, employees will be provided with a separate room with a bed, use of appropriate facilities (including staff facilities where these exist), and free board and lodging for each night when the employee sleeps over.

[1057] We note that the Unions' proposal appears to assume a level of control over the premises at which the 24-hour-care shift takes place. This will not necessarily be the case. The employer will not always have the ability (or the legal right) to make the kind of physical alterations which the Unions' proposal may require. The employer will not always own the premises at which the shift occurs. The premises may be an individual client's residence or a rented facility.

[1058] We are satisfied that some amendments should be made to ABI's proposed clause 25.8(c), as follows:

> '(c) The employee must ~~will normally have~~ be afforded the opportunity to sleep for a continuous period of eight hours during a 24 hour care shift and employees will be provided with a separate room with a bed and clean linen, the use of appropriate facilities (including access to food preparation facilities and staff facilities where these exist), and free board and lodging for each night when the employee sleeps over.'

[1059] We are not persuaded to prescribe the other facilities proposed by the Unions as they may require alterations to the client's home and impose significant costs which are not warranted on the basis of the evidence before us.

[1060] As to the proposed time parameters within which the sleep period must occur (Unions' proposed clause 25.8(e)), there is limited evidence before us as to the specific arrangements currently in place in the sector, and accordingly we propose to take a cautious approach to the imposition of prescriptive arrangements as to when the sleep period must occur. In our view there is no probative evidence such as to warrant the prescription proposed.

[1061] In relation to the proposed payment regime for where sleep is interrupted, ABI's proposed clause 25.8(e) has the effect of treating such work as overtime. In our view no further change is necessary.

Sleepover allowance

[1062] In its reply submission ABI accepts the apparent logic of employees receiving the equivalent of the sleepover allowance under clause 25.7 when working 24-hour-care shifts but submits that if a sleepover allowance is introduced, it logically follows that the 155% loading should be reduced by the equivalent amount.

[1063] We agree. Clause 25.8 already contains a loading which compensates employees for any disutility associated with working 24-hour-care shifts, including the need to be available for duty in a client's home for a 24-hour period; we do not propose to make the change proposed by the Unions.

Additional care work

[1064] The Unions propose that if an employee's sleep is interrupted or the employee is required to provide more than 8 hours of care they shall be paid at double time.

[1065] We fail to see why employees should receive a payment of double the appropriate rate for time in excess of 8 hours spent providing care in circumstances where, under the Unions' proposal, they would already receive 16 hours' pay at 155% of the appropriate rate. In our view the overtime proposal advanced by ABI adequately deals with this issue.

Meal breaks

[1066] The Unions' proposed clause 25.8(h)(ii) provides that for each 24-hour period an employee is to be paid 'three meal allowance payments prescribed by clause 20.3'. The Unions' rationale for this proposal is:

> 'to compensate for the fact that they are not necessarily able to leave the client's premises and have actual meal breaks'.[754]

[1067] There is no evidence to support the Unions' assertion that employees 'are not necessarily able to leave the client premises and have actual meal breaks'. We are not persuaded to make the change sought.

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[754] Joint Union Submission, 10 February 2020 at para 308.

Breaks between shifts

[1068] The Unions' proposed clause (k) provides:

> '(k) An employee will be allowed, at their election, a break of not less than 10 hours between the end of one 24 hour care shift and the start of another period of work.'

[1069] In its reply submission ABI does not oppose this aspect of the Unions' proposal, but goes on to submit that, from a practical perspective, such a provision needs to be accompanied by:[755]

> (a) a requirement that the employee provide adequate notice of their election for such a rest break, so as to not disrupt an established roster
>
> (b) in the alternative, clause 25.5(d)(ii) will need to be broadened to enable the employer to change an established roster in response to employees making such an election, and
>
> (c) in respect of part-time employees, a provision explicitly stating that the requirements of clause 10.3(e) do not apply in these circumstances.

[1070] We agree that an employee should be entitled to a break of not less than 10 hours between the end of one 24-hour-care shift and the commencement of another period of work. However we are not persuaded that the variation proposed by the Unions is necessary given the terms of clause 25.4(a), which states:

> **'25.4 Rest breaks between rostered work**
>
> **(a)** An employee will be allowed a break of not less than 10 hours between the end of one shift or period of work and the start of another'.

[1071] We propose to vary clauses 25.8 and 31.2 as follows:

> **25.8 24 hour care**
>
> This clause only applies to home care employees.
>
> (a) A 24-hour care shift requires an employee to be available for duty in a client's home for a 24 hour period. During this period, the employee is required to provide the client with the services specified in the care plan. The employee is required to provide a total of no more than 8 hours of care during this period.
>
> (b) An employer may only require an employee to work a 24-hour care shift by agreement.
>
> (c) The employee will be afforded the opportunity to sleep for a continuous period of eight hours during a 24-hour care shift and employees will be provided with a separate room with a bed and clean linen, the use of appropriate facilities (including access to

[755] ABI Submission, 26 February 2020 at para 123.

food preparation facilities and staff facilities where these exist), and free board and lodging for each night when the employee sleeps over.

(d) The employee will be paid 8 hours work at 155% of their appropriate rate for each 24-hour period.

(e) If the employee is required to perform more than 8 hours' work during a 24-hour care shift, that work shall be treated as overtime and paid at the rate of time and a half for the first 2 hours and double time thereafter, except on Sundays when overtime will be paid for at the rate of double time, and on public holidays at the rate of double time and a half. An employer and employee may utilise the TOIL arrangement in accordance with clause 28.2.

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

31.2 Quantum of leave

For the purpose of the NES, a shiftworker is:

(a) an employee who works for more than 4 ordinary hours on 10 or more weekends during the yearly period in respect of which their annual leave accrues; or

(b) an employee who works at least eight 24-hour care shifts in accordance with clause 25.8;

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

[1072] We now turn to deal with the s.134 considerations.

[1073] Section 134(1)(a) requires that we consider the 'relative living standards and the needs of the low paid'. A threshold of two-thirds of median full-time wages provides a suitable benchmark for identifying who is 'low paid', within the meaning of s.134(1)(a) of the Act. As mentioned earlier a significant proportion of employees covered by the SCHADS Award may be regarded as 'low paid' within the meaning of s.134(1)(a). The 'needs of the low paid' is a consideration which weighs in favour of the variations we propose to make.

[1074] Section 134(1)(b) requires that we consider 'the need to encourage collective bargaining'. It is likely that employee and employer decision-making about whether to bargain is influenced by a complex mix of factors, not just the content of the 24-hour-care clause. 134(1)(b) speaks of 'the need to *encourage* collective bargaining'. We are not persuaded that the variations we propose to make would '*encourage* collective bargaining', it follows that this consideration does not provide any support for the proposed variations.

[1075] Section 134(1)(c) of the Act requires that we consider 'the need to promote social inclusion through increased workforce participation'. Obtaining employment is the focus of s.134(1)(c). On the limited material before us, the impact of the variations proposed on total employment is not likely to be significant. We regard this consideration as neutral.

[1076] It is convenient to deal with the considerations in ss.134(1)(d) and (f) together.

[1077] Section 134(1)(f) of the Act is not confined to a consideration of the impact of the exercise of modern award powers on 'productivity, employment costs and the regulatory burden'. It is concerned with the impact of the exercise of those powers 'on business'.

[1078] If the variations we propose are made then employment costs would increase. This consideration tells against the variations proposed.

[1079] We accept that the variations proposed will increase employment costs and may reduce flexibility. These considerations weigh against making the variations proposed.

[1080] Section 134(1)(da) requires that we take into account the 'need to provide additional remuneration' for, relevantly:

> '(i) employees working overtime; or …
>
> (ii) employees working unsocial…hours
>
> (iii) employees working shifts; …'

[1081] The proposed variations will provide additional remuneration for working overtime, unsocial hours and shifts. This consideration weighs in favour of the variations proposed.

[1082] Section 134(1)(g) requires that we consider, relevantly, the 'need to ensure a simple, easy to understand … modern award system'. The current clause lacks clarity and the variations provide clarity. This consideration weighs in favour of the variations proposed.

[1083] The considerations in s.134(1)(e) and (h) are not relevant in the present context. No party contended to the contrary. Further, we regard s.134(1)(g) of the Act as a neutral consideration.

[1084] The modern awards objective is to 'ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions', taking into account the particular considerations identified in ss.134(1)(a)–(h). We have taken into account those considerations, insofar as they are relevant to the matter before us, and have decided to vary the SCHADS Award in the manner proposed above. We deal with the transitional arrangements associated with these variations later in our decision.

9. SLEEPOVER CLAIM

9.1 BACKGROUND

[1085] Clause 25.7(c) currently deals with the facilities to be afforded to an employee performing a sleepover shift:

> '(c) The span for a sleepover will be a continuous period of eight hours. Employees will be provided with a separate room with a bed, use of appropriate facilities (including staff facilities where these exist) and free board and lodging for each night when the employee sleeps over.'

[1086] The HSU submits that clause 25.7(c) is vague and should be amended to ensure that appropriate facilities are provided when employees are required to perform a sleepover shift.[756] The HSU's claim would result in the following variations to clause 25.7(c):[757]

> '**(c)** The span for a sleepover will be a continuous period of eight hours. Employees will be provided with:
>
> **(i)** a separate and securely lockable room with a peephole or similar in the door, ~~with~~ a bed and a telephone connection in the room; and
>
> **(ii)** suitable sleeping requirements such as a lamp and clean linen;
>
> **(iii)** use of appropriate facilities (including staff facilities where these exist); and
>
> **(iv)** free board and lodging for each night when the employee sleeps over.'

[1087] Items (i) and (ii) above represent variations to the current award provision.

[1088] The submissions and witness evidence relevant to the sleepover claim are set out at **Attachment M**.

9.2 SUBMISSIONS

[1089] In support of the proposal the HSU submits:

> 'The clause should be amended to ensure appropriate facilities are provided when employees are required to perform a sleepover shift. Such shifts are compensated modestly.'[758]

[1090] The HSU also relies on what it submits is the unchallenged evidence of William Elrick[759] about how the current provision can operate in practice:

> 'the sleepover arrangements in many workplaces aren't conducive to a good sleep. For a period while I was undertaking sleepovers where bed was located in the office. The head of the bed was coming out of the cupboard that had the doors removed, the office had hums from the computer and fax, along with a bright light from the handset of the house phone. I have had reports from other members who have had to sleepover with the sleepover door open, having to deal with uncomfortable beds, and various other issues that result in poor sleep.[760]

[1091] The HSU submits that the circumstances described by Mr Elrick 'involve a risk to personal security and safety and are unlikely to provide an environment for proper rest and repose'.[761]

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[756] HSU Submission, 18 November 2019 at paras 48 – 49.

[757] HSU Amended Draft Determination, 15 February 2019.

[758] HSU Submission, 15 February 2019 at para 73.

[759] Exhibit HSU3 – Witness Statement of William Elrick, 14 February 2019.

[760] Exhibit HSU3 – Witness Statement of William Elrick, 14 February 2019 at para 27.

[761] HSU Submission, 18 November 2019 at para 151.

[1092] ABI opposes the claim and relies on Part 13 of its reply submission of 12 July 2019 and its submission of 19 November 2019, in summary:

- the basis for the variation is unclear - the HSU has failed to articulate why it is that they consider the current clause to be deficient

- the current Award refers to providing employees with 'use of appropriate facilities' – which is a sensible formulation as it is sufficiently flexible to apply to a broad range of circumstances. What is 'appropriate' will vary depending on the circumstances of a particular situation. Given that the SCHADS Award is an industry wide minimum safety net instrument covering employers operating in a diverse range of sectors and catering to a broad customer base, it is not appropriate to prescribe in any greater detail the specific items to be provided to every employee performing sleepover shifts, and

- there is very little evidence before the Commission that would provide an evidentiary basis for granting the claim. Only 2 employee witnesses gave evidence that they work sleepovers.[762] Further, that evidence is quite general in nature. Neither of those 2 witnesses gave any specific evidence about the facilities provided to them when working sleepover shifts. Notably, nor did they raise any concern about the adequacy of those facilities. The only exception to this is Mr Elrick, who is a union official.

[1093] ABI submits that it cannot be said that the variation is self-evident and, therefore, in the absence of any probative evidence substantiating the issues the HSU seek to address, the claim should be dismissed.[763]

[1094] Ai Group opposes the claim for the following reasons:[764]

- the HSU has failed to mount a case warranting the variation proposed. No meaningful reasoning for the variation is advanced. The HSU does not assert that the variation is necessary to achieve the modern awards objective and does not refer to any of the relevant s.134 considerations

- the evidentiary material advanced by the Union does not establish that the kind of amenities specified in clause 25.7(c) are actually warranted in the context of all circumstances in which a sleepover occurs

- the claim seeks, at least in part, to inappropriately deal with safety issues through an 'extremely simplistic mechanism'. Employer obligations relating to the management of the safety of their employees at work is comprehensively dealt with under specialised laws dealing with workplace health and safety obligations for employers. It is not desirable or necessary, in the sense contemplated by s.138, for the award system to regulate such matters in a piecemeal manner

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[762] Exhibit ASU10 – Witness Statement of Augustino Encabo, 13 February 2019 at para 27; Exhibit ASU2 – Witness Statement of Robert Steiner, 15 October 2019 at para 13.

[763] ABI Submission, 12 July 2019 at para 13.12.

[764] Ai Group Submission, 13 July 2019 at paras 482 - 490.

- compliance with the proposed variation to clause 25.7(c) would be problematic from a practical perspective. The provision assumes a level of control over particular premises that does not accord with the practical realities of the industry. An employer will not always own the premises at which a sleepover occurs. For example, the premises may be an individual client's residence, or it may be a rented facility. In such circumstances an employer will not always have the capacity or legal right to make the kind of physical modifications proposed

- the reference to '*suitable sleeping requirements such as a lamp and clean linen*' is imprecise. The provision does not provide for an exhaustive list of items or conditions that might be said to constitute suitable sleeping requirements or any indication as to the basis upon which the requirements might be regarded as 'suitable'. The inclusion of such wording would be fertile ground for disputation and inconsistent with the need to ensure a simple and easy to understand modern award system

- to the extent that the proposed variation seeks to impose new and potentially expensive obligations upon employers, it is axiomatic that a consideration of s.134(1)(f) (the likely impact of any exercise of modern award powers on business) would weigh against granting the claim, and

- the inclusion of terms establishing these new obligations is beyond power. Ai Group cannot identify any provision of the Act that would permit a modern award to include provisions of the nature proposed.

[1095] NDS opposes the HSU's sleepover claim,[765] but makes no submission in support of its position.

[1096] AFEI opposes the claim, submitting that it is without merit and that the HSU has not explained any aspect of its argument for including such a degree of prescription concerning facilities to be provided to employees who work sleepover shifts. AFEI submits that, to the extent that the HSU's concerns may be motivated by work health and safety concerns, employers are already obliged to ensure, as far as reasonably practicable, the health and safety of its workers. If these obligations are not met there are avenues for reporting concerns to work health and safety regulators.[766]

[1097] AFEI also observes that during the Award Simplification process the AIRC removed non-allowable matters from awards, such as provisions relating to amenities considered to be overly prescriptive'.[767] To illustrate this point AFEI refer to the removal of the following provision from *The Hospitality Industry – Accommodation, Hotels, Resorts and Gaming Award 1995*:[768]

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[765] NDS Submission, 19 November 2019.

[766] AFEI Submission, 23 July 2019 at para 163.

[767] AFEI Submission, 23 July 2019 at para 163 citing *Award Simplification Decision* H0008 Dec 1533/97 M Print P7500.

[768] AFEI Submission, 23 July 2019 at para 163 citing *Award Simplification Decision* H0008 Dec 1533/97 M Print P7500 at Attachment E.

> 'An employer shall provide a separate dressing room each for male and female employees, adequately lighted and ventilated with suitable floor coverings and floor space to be sufficiently roomy to accommodate all employees likely to use it at the one time; a table and adequate seating accommodation for staff to partake of meals, and lounge or settee and steel or vermin-proof lockers; adjacent thereto wash basins and showers with hot and cold water and toilets for staff use.'

[1098] AFEI advances the following submission in relation to the removal of the above provision from *The Hospitality Industry – Accommodation, Hotels, Resorts and Gaming Award 1995*:

> 'The approach taken by the AIRC reflects that the determination of which specific amenities should be provided for employees is more appropriately addressed at the workplace level rather than in Award prescription. This allows more individualised consideration of the circumstances in identifying amenity needs, such as the nature of the client's profile, the location at which the sleepover will be performed, the employee's level of training and skill, and other amenities already provided to the employee.'[769]

9.3 EVIDENCE

[1099] The HSU relies on the evidence of Mr Elrick.[770]

[1100] At the time he gave his evidence Mr Elrick was an organiser for the HSU. Prior to commencing his employment with the HSU in March 2016 Mr Elrick held a few roles in the social and community services sector. Mr Elrick's evidence in respect of sleepovers is set out at [24] – [27] of Exhibit HSU3. Mr Elrick was not cross-examined in respect of this part of his evidence.[771]

[1101] Mr Elrick's evidence in respect of his experience with 'sleepovers' is of limited assistance. As ABI submits, it is not clear which employer Mr Elrick's experience related to, or when it was said to have occurred, or whether he complained or otherwise raised concerns with his employer at the time, and/or how the situation was resolved if he did raise it.

[1102] Further, Mr Elrick's evidence includes:

- a generalised assertion that 'the sleepover arrangements in many workplaces aren't conducive to a good sleep',[772] and
- a reference to a previous experience whereby he undertook sleepovers at a site where the bed was in the office.[773]

[1103] The evidence before us is of limited assistance; but the central question is not whether there is evidence of widespread failure to provide the claimed facilities and items, but

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[769] AFEI Submission, 23 July 2019 at para 164.

[770] Exhibit HSU3 – Witness Statement of William Elrick Statement, 14 February 2019.

[771] Transcript, 15 October 2019 at PN1066-PN1084.

[772] Exhibit HSU3 – Witness Statement of William Elrick Statement, 14 February 2019 at para 27.

[773] Exhibit HSU3 – Witness Statement of William Elrick Statement, 14 February 2019 at para 27.

whether, as a matter of merit, the variation proposed is necessary to ensure the SCHADS Award achieves the modern awards objective.

9.4 CONSIDERATION

[1104] We begin our consideration by observing that we do not find AFEI's reliance on the Award Simplification decision persuasive. The AIRC removed the The Hospitality Industry – Accommodation, Hotels, Resorts and Gaming Award 1995 provision on the basis that it was not an 'allowable matter' within the meaning of s.89A(2) of the *Workplace Relations Act 1996* (Cth). The provision removed was quite different to the claim before us – it dealt with dressing rooms for hospitality employees whereas the present matter concerns sleepover shifts – and the legislative context is quite different.[774]

[1105] We next turn to Ai Group's submission that the inclusion of the claimed terms is beyond power.

[1106] In order for the Commission to have the requisite jurisdiction to vary the Award in the manner proposed, we must be satisfied, among other things, that:

(i) the subject matter of the proposed term is one which falls within the scope of s.139 of the Act; or

(ii) the proposed term is permitted by s.142, in that it is incidental to a term permitted by s.139(1) of the Act *and* is essential for the purpose of making a particular term operate in a practical way.

[1107] The HSU contends that the source of power for the proposed change is s.139(1)(c) of the Act which provides:[775]

> '(1) A modern award may include terms about any of the following matters:
>
> (c) arrangements for when work is performed, including hours of work, rostering, notice periods, rest breaks and variations to working hours.'

[1108] Contrary to the HSU's submission we are *not* satisfied that proposed clauses 25.7(c)(i) – (iv) are about arrangements for when work is performed. They are about provisions which must be made when a certain type of work (i.e. a sleepover shift) is performed. This characterisation may be contrasted with the first sentence of clause 25.7(c) which *is* about when work is performed.

[1109] It follows that to be within power the claimed term must be permitted by s.142(1) of the Act, which states:

> 'Incidental terms
>
> (1) A modern award may include terms that are:

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[774] See [2017] FWCFB 5258 at [137] – [148].

[775] Joint Union Submission, 10 February 2020 at para 283.

(a) incidental to a term that is permitted or required to be in the modern award; and

(b) essential for the purpose of making a particular term operate in a practical way.'

[1110] The *October 2017 Plain Language – Standard Clauses decision*[776] dealt extensively with the proper construction of s.142(1) of the Act[777] and we adopt that analysis. In summary:

- s.142(1) is not in itself an additional power for the inclusion of terms in a modern award that cannot be appropriately linked to a permitted term

- there is little discernible difference between the word 'essential' and the word 'necessary' when used in the context of a provision such as s.142(1)(b). In *Shop, Distributive and Allied Employees Association v National Retail Association (No.2)*,[778] Tracey J considered the proper construction of the word 'necessary' in s.157 at [35]–[37] and [46] of his decision. The observations of Tracey J, in particular the distinction between that which is 'necessary' and that which is merely desirable is apposite to our consideration of what is 'essential' in the context of s.142(1)(b). Further, we agree with His Honour's observation that reasonable minds may differ as to whether a particular incidental term is 'essential' for the purpose of making a particular term operate in a practical way, and

- s.142(1)(b) uses the expression 'for the purpose of making a particular term *operate in a practical way'*. The Macquarie Dictionary defines the word 'practical' as 'consisting of involving or resulting from practice or action: a *practical application of a rule*'. The expression 'for the purpose of making a particular term operate *in a practical way*' is an expression of slightly wider import than that used in the former s.89A(2). A broader range of terms may be said to be for the purpose of making a particular term operate in 'a practical way' than would fall within the scope of the expression 'for the effective operation of the award'. Further, the expression should be construed as a composite term, rather than focussing on the individual elements of s.142(1)(b).[779]

[1111] We return later to the question of whether the variation we would propose to make is permitted by s.142 of the Act.

[1112] A similar claim to the HSU in respect of the 'sleepover' clause is advanced concerning to the 24-hour-care clause. We deal with that claim at section [8] of this decision. In respect of the claim to vary the 24-hour-care clause we decide that some amendments should be made to ABI's proposed clause 25.8(c):

'(c) The employee must ~~will normally have~~ be afforded the opportunity to sleep for a continuous period of eight hours during a 24 hour care shift and~~,~~ employees will be provided with a separate room with a bed and clean linen, the use of appropriate facilities (including

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[776] [2017] FWCFB 5258.

[777] Ibid at [132] – [150].

[778] (2012) 205 FCR 227.

[779] [2018] FWCFB 3009 at [57].

access to food preparation facilities and staff facilities where these exist), and free board and lodging for each night when the employee sleeps over.'

[1113] If the same result were applied in respect of the sleepover clause, clause 25.7(c) would be amended as follows:

'(c) The span for a sleepover will be a continuous period of eight hours. Employees will be provided with a separate room with a bed and clean linen, the use of appropriate facilities (including access to food preparation facilities and staff facilities where these exist) and free board and lodging for each night when the employee sleeps over.'

[1114] As a matter of merit, we are satisfied that it is appropriate to make such a variation.

[1115] We are not persuaded to prescribe the other facilities proposed by the HSU as they may require alterations to the relevant premises and impose significant costs which are not warranted based on the material before us.

[1116] As observed in the *October 2017 Plain Language – Standard Clauses decision*, reasonable minds may differ as to whether a particular incidental term is 'essential' for the purpose of making a term operate in a practical way. However, having regard to the context and the nature of sleepover shifts we are satisfied that, once varied as we propose, clause 25.7(c) will be incidental to a permitted term (i.e. the first sentence of clause 25.7(c)) and essential for the purpose of making that term operate in a practical way.

[1117] We now deal with the s.134 considerations.

[1118] Section 134(1)(a) of the Act requires that we consider the 'relative living standards and the needs of the low paid'. A threshold of two-thirds of median full-time wages provides a suitable benchmark for identifying who is 'low paid', within the meaning of s.134(1)(a). As mentioned earlier, a significant proportion of employees covered by the SCHADS Award may be regarded as 'low paid' within the meaning of s 134(1)(a) of the Act. The 'needs of the low paid' is a consideration which weighs in favour of the variation of clause 25.7(c) in the manner we propose.

[1119] Section 134(1)(b) requires that we consider 'the need to encourage collective bargaining'. We are not persuaded that the variation we propose to make would '*encourage* collective bargaining', it follows that this consideration does not provide any support for the proposed variation.

[1120] Section 134(1)(c) requires that we consider 'the need to promote social inclusion through increased workforce participation'. Obtaining employment is the focus of s.134(1)(c). The impact of the variation proposed on total employment is not likely to be significant. We regard this consideration as neutral.

[1121] It is convenient to deal with the considerations in ss.134(1)(d) and (f) together.

[1122] Section 134(1)(f) of the Act is not confined to a consideration of the impact of the exercise of modern award powers on 'productivity, employment costs and the regulatory burden'. It is concerned with the impact of the exercise of those powers 'on business'.

[1123] If the variation we propose is made then employment costs may increase, albeit not significantly. This consideration weighs against the variation proposed, but not to any great extent.

[1124] The considerations in s.134(1)(da), (e) and (h) are not relevant in the present context. No party contended otherwise. Further, we regard s.134(1)(g) of the Act as a neutral consideration.

[1125] The central issue in these proceedings is whether the existing provision in respect of sleepover shifts provides a 'fair and relevant minimum safety net'. In substance, the submission put by the Unions is that the existing term is not fair to those employees who perform such work. We agree.

[1126] The modern awards objective is to 'ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions', taking into account the particular considerations identified in ss.134(1)(a)–(h) of the Act. We have taken into account those considerations, to the extent that they are relevant to the matter before us and have decided to vary the SCHADS Award as proposed above (at [1113]).

10. MOBILE PHONE ALLOWANCE CLAIM

10.1 THE CLAIM AND SUBMISSIONS

[1127] Clause 20.6 of the SCHADS Award currently states:

> '20.6 Telephone allowance
>
> Where the employer requires an employee to install and/or maintain a telephone for the purpose of being on call, the employer will refund the installation costs and the subsequent rental charges on production of receipted accounts.'

[1128] Initially the UWU and HSU made claims to vary clause 20.6.[780] In a joint submission dated 10 February 2020 the Unions stated the HSU's mobile phone allowance claim was withdrawn, and that it adopted the UWU's claim.[781]

[1129] The UWU initially proposed that clause 20.6 be varied as set out below:

> 'Where the employer requires an employee to install and/or maintain a telephone or mobile phone for the purpose of being on call, for the performance of work duties or to access work related information the employer will refund the installation costs and the subsequent rental charges on production of receipted accounts.'[782] (emphasis added)

[1130] ABI and others raised concerns about the drafting of the UWU's claim, in particular that employers will be required to reimburse all personal use by the employee.[783] Business SA

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[780] See UWU Submission, 15 February 2019 at paras. 81-110; HSU Submission, 15 February 2019 at paras. 59-60; HSU Amended Draft Determination, 15 February 2019.

[781] Joint Union Submission, 10 February 2020 at para 274. See also Transcript, 11 March at PN319-PN325.

[782] UWU Submission, 15 February 2019 at para 84.

[783] ABI Submission, 12 July 2019 at paras 9.28 – 9.35.

and AFEI raised similar concerns, although Business SA acknowledged that employees are, at times, required to use personal mobile phones in the course of their employment.[784]

[1131] To address some of the drafting concerns raised by the employer parties, the UWU filed a revised draft determination with its further submissions in reply dated 3 October 2019. The revised draft determination provides an employer with 2 options in respect to reimbursing an employee for the cost of a mobile phone:

- the employer can provide a mobile phone, or
- the employer can reimburse reasonable costs associated with use of the employee's own mobile phone incurred in the course of employment.

[1132] The UWU's revised draft variation determination seeks to delete clause 20.6 and insert the following:

> '**20.6 Telephone allowance**
>
> (a) Where the employer requires an employee to install and/or maintain a telephone for the purpose of being on call, the employer will refund the installation costs and the subsequent rental charges on production of receipted accounts.
>
> (b) Where the employer requires an employee to use a mobile phone for the purpose of being on call, for the performance of work duties or to access work related information, the employer will either:
>
> (i) provide a mobile phone fit for purpose and cover the cost of any subsequent charges; or
>
> (ii) provide a mobile phone and reimburse subsequent costs on the production of receipts, or
>
> (iii) reimburse the employee for the cost of the phone and its use according to clause (c).
>
> (c) Where the employer requires the employee to use the employee's own mobile phone in the course of employment:
>
> (i) where the mobile telephone is provided under a mobile phone plan from a telecommunications provider, the employer and employee must agree in writing on the amount of reasonable reimbursement payable by the employer to the employee for the use of the employee's mobile phone in the course of employment provided that such reimbursement must not be less than 50% of the cost of the employee's monthly mobile phone plan, up to a maximum monthly phone plan of $100; or
>
> (ii) where the mobile phone is a pre-paid mobile phone, the employer and employee must agree in writing on the amount of reasonable reimbursement payable by the employer to the employee for the use of the employee's pre-paid mobile phone.

[784] Business SA Submission, 12 July 2019 at para 24; AFEI Submission, 23 July 2019 at para 144.

(d) If requested, the employee must provide the employer with a copy of the mobile phone plan associated with the mobile telephone to be used by the employee in the course of employment.

(e) If the employee enters into a new mobile phone plan or arrangement with a telecommunications provider entitling the employee to a different allowance under this subclause, the new allowance will become payable from the first full pay period after the date the employee provides the employer with a true copy of the new mobile phone plan.'

[1133] The submissions and witness evidence relevant to the mobile phone allowance claim are set out at **Attachment N**.

[1134] The UWU's submissions in support of its claim are set out at [81]-[110] of its submission of 4 February 2019. In essence, the UWU submits that the current telephone allowance is 'anachronistic' and 'does not reflect the current ubiquity of mobile 'smart' phone use and their status as work tools'.[785] In addition to the witness evidence, the following points are advanced:

1. The Australian Communications and Media Authority released data on 30 November 2018 indicating that 5.78 million Australians, about 31% of the population, have no fixed landline at home.[786]

2. Digital disruption was the subject of a 2016 PC Research Report which explicitly drew a link between the greater use of technology and improved productivity and workplace participation.[787]

[1135] The UWU also submits that granting its claim will assist the low paid to better meet their needs:

> 'Much of the work covered by the Award can be classified as low paid and the cost of purchasing and maintaining a mobile phone because the employer demands its employees use this technology is a significant imposition and a cost which the employer should properly make some contribution towards.'[788]

[1136] The UWU goes on to submit:

> 'The allowance as proposed would also provide certainty to employers that any direction to possess and use a mobile phone as a tool of work is a lawful and reasonable direction. It is unarguable that any work direction to use a personal mobile phone without some reimbursement provision for expenses is not 'reasonable'.'[789]

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[785] UWU Submission, 15 February 2019 at para 101.

[786] Ibid at para 92.

[787] Ibid at paras 93 - 94.

[788] Ibid at para 109.

[789] Ibid.

[1137] The UWU also contends that 'such an allowance can be characterised apt to '*promote flexible modern work practices and the efficient and productive performance of work,*' and greater workforce participation (ss 134(1)(d) and (c)'.[790]

[1138] The UWU submits that there is evidence indicating the variation of the SCHADS Award to insert a mobile phone allowance in the terms of its claim is necessary. A mobile phone for workers under the SCHADS Award providing services in the community is said to be a vital '*tool of trade'* and required, in effect, at the direction of employers.[791]

[1139] In short, the UWU submits:

> 'In light of the expense of purchasing and maintaining a mobile phone and its status as a tool of trade; it is appropriate that a reimbursement allowance as proposed is part of the safety net of this modern award.'[792]

[1140] The various employer parties oppose the claim.

10.2 EVIDENCE

[1141] In the *Aged Care Substantive Claims Decision* the Full Bench rejected a claim by United Voice and the HSU to vary the Aged Care Award to provide for a mobile phone allowance, in the following terms:

> '**15.8 Phone allowance**
>
> Where the employer requires an employee to use a mobile phone for the purpose of being on call, for the performance of work duties, to access their work roster or for other work purposes, the employer will either:
>
> (i) provide a mobile phone and cover the cost of any subsequent charges; or
>
> (ii) refund the cost of purchase and the subsequent charges on production of receipted accounts.'[793]

[1142] The Aged Care Full Bench rejected the claim in the following terms:

> '[65] In addition to the paucity of evidence and the absence of cogent merit arguments in support of the claim there are a range of issues arising from the drafting of the proposed award term. These deficiencies are detailed in ABI's submission and we need not repeat all of them here; it suffices to set out one of the deficiencies identified:
>
> > 'the clause does not require an employer to reimburse an employee for only the work-related costs associated with the use of a mobile phone. It requires the employer to cover all costs, both up-front costs and "subsequent charges". This is plainly unreasonable.

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[790] Ibid at para 110.

[791] UWU Submission, 18 November 2019 at para 57.

[792] UWU Submission, 15 February 2019 at para 108.

[793] *Aged Care Substantive Claims Decision* at [47].

> In practice, if the claim was to be successful, an employee could be required by their employer to use their mobile phone once per week to check their work roster, and the employer would automatically be obliged to cover both the purchase costs of the mobile device and the subsequent charges relating to the device. There would be nothing preventing the employee from taking out the most expensive mobile phone plan, using it virtually exclusively for personal use, and requiring the employer to foot the bill.'

[66] We agree with the above submission. United Voice's attempts to respond to the identified deficiencies in the drafting of the proposed term were unconvincing…

[67] We would add that the claim fails to come to grips with the problem of disaggregating the work related and private use proportions of costs associated with mobile phone use. This is a particular problem given the nature of some of the mobile phone plans in the market. Counsel for ABI encapsulated the problem, in these terms:

> 'If someone has a $99 plan and its 2 gig of data and unlimited calls and the employee makes 10 calls that month, how do you apportion the cost?'

[68] In summary, the case put by United Voice was unsupported by evidence, lacked rigour and failed to establish the requisite merit to warrant the variation proposed. Further, the formulation of the proposed clause was deficient in numerous respects and reflected the lack of care and effort that characterised the case put on behalf of United Voice. We are not satisfied that it is necessary to vary the Aged Care Award in the manner proposed in order to achieve the modern awards objective.'[794]

[1143] The submissions put in support of the Unions' claim in the matter before us are broadly similar to those advanced in support of the Aged Care Award claim above. However, in the *Aged Care Substantive Claims* matter the Unions did not file *any* evidence in support of their claim; that is not the case in the matter before us.

[1144] In our view the evidence in respect of this issue supports the following findings:

1. A very high proportion of Australian adults own a mobile phone or a smart phone:

   - approximately 83%, or 15.97 million Australian adults, own a smart phone,[795] and
   - approximately 96%, or 18.57 million Australian adults, own a mobile phone.[796]

2. We infer from finding (1) that most employees covered by the SCHADS Award would own a smart phone.

3. Many employers have an expectation that employees in home care and disability services have access to, and use, a mobile phone for various work-related purposes including to:

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[794] *Aged Care Substantive Claims Decision* at [65] – [68].

[795] ABI Submission, 12 July 2019 at para 9.13, referring to the Australian Communications and Media Authority, Communications Report 2017-2018, 30 November 2018, p 33.

[796] Ibid.

- take directions from their employer[797]
- access work-related apps to maintain records on clients, confirm attendance and input other work-related data[798]
- update their employer of issues with clients[799]
- access and read client care plans[800]
- call clients who may not answer the door to their home[801]
- undertake medication checks with clients[802]
- advise clients when running late[803]
- be advised of roster changes via call or text[804]
- check emails relating to roster changes or work-related communications,[805] and
- report workplace hazards/incidents.[806]

4. Some employers covered by the SCHADS Award provide their employees with mobile phones.[807]

5. While some employees covered by the SCHADS Award are required to use their personal mobile phones during work,[808] we accept Mr Elrick's evidence that

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[797] Transcript, 17 October 2019, cross-examination of Jeffrey Wright at PN2584; Transcript, 18 October 2019, cross-examination of Graham Shanahan at PN2867-PN2870.

[798] Exhibit HSU3 – Witness Statement of William Elrick, 14 February 2019 at paras 31 - 33; Transcript, 17 October 2019, cross-examination of Jeffrey Wright at PN2587-PN2588; Transcript, 18 October 2019, cross-examination of Graham Shanahan at PN2865; Transcript, 18 October 2019, cross-examination of Joyce Wang at PN3554-PN3559.

[799] Transcript, 18 October 2019, cross-examination of Graham Shanahan at PN2872.

[800] Exhibit UV1 – Witness Statement of Trish Stewart, 17 January 2019 at para 22.

[801] Exhibit UV6 - Witness Statement of Belinda Sinclair, 16 January 2019 at para 15.

[802] Exhibit UV1 – Witness Statement of Trish Stewart, 17 January 2019 at para 20; Exhibit UV4 – Witness Statement of Deon Fleming, 16 January 2019 at para 29.

[803] Exhibit UV1 – Witness Statement of Trish Stewart, 17 January 2019 at para 20; Exhibit UV4 – Witness Statement of Deon Fleming, 16 January 2019 at para 27; Exhibit UV6 - Witness Statement of Belinda Sinclair, 16 January 2019 at para 15.

[804] Exhibit UV6 - Witness Statement of Belinda Sinclair, 16 January 2019 at para 16.

[805] Exhibit UV4 – Witness Statement of Deon Fleming, 16 January 2019 at para 27; Exhibit UV6 - Witness Statement of Belinda Sinclair, 16 January 2019 at para 17; Transcript, 15 October 2019, cross-examination of Deon Fleming, at PN539; Transcript, 18 October 2019, cross-examination of Jeffrey Wright at PN2586; Transcript, 18 October 2019, cross-examination of Graham Shanahan at PN2870.

[806] Exhibit UV6 - Witness Statement of Belinda Sinclair, 16 January 2019 at para 15.

[807] Exhibit HSU27 – Witness Statement of Pamela Wilcock, 15 February 2019 at para 19; Exhibit HSU4 – Witness Statement of Heather Waddell, 15 February 2019 at para 31; Exhibit HSU28 - Witness Statement of Thelma Thames, 15 February 2019 at para 22. There was also evidence of employers providing employees with a 'tablet computer' and not a mobile phone (see Exhibit UV4 – Witness Statement of Deon Fleming, 16 January 2019 at para 25). However, Mr Lobert stated that none of his three employers provide their employees with a mobile phone (see Exhibit HSU29 – Witness Statement of Bernie Lobert at para 20). Ms Sinclair and Ms Stewart are also not provided with a mobile phone by their employers (see Exhibit UV6 - Witness Statement of Belinda Sinclair, 16 January 2019 at para 16; Exhibit UV1 – Witness Statement of Trish Stewart, 17 January 2019 at para 21).

'generally speaking, most workers will only use their personal phone for the purposes of being contacted for shifts, and *not* during work'.[809]

6. Employees use their personal mobile phones for both personal and work purposes. The proportions used for personal and work purposes varies[810] and there was limited evidence in relation to the extent of usage by employees of mobile phones for work purposes. The totality of evidence in relation to the extent of mobile phone usage by employees is as follows:

    (a) Ms Fleming gave evidence that she uses her phone for work-related reasons 'regularly' and stated that she 'would make approximately 10 calls per week on the mobile'[811]

    (b) Ms Sinclair gave evidence that she would 'normally make two to eight calls each working week',[812] and

    (c) Ms Stewart gave evidence that she normally makes 2 to 3 calls per working day.[813]

7. Employees' costs in respect of their mobile phone ownership and/or use varies considerably. For example, Ms Fleming's mobile phone bill is approximately $65 per month;[814] while Ms Stewart's mobile phone bill is approximately $170 per month.[815]

[1145] We note the UWU also sought findings in the following terms:

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

(a) not all employees in this industry have a smartphone, and not all employees have a phone with the capabilities to access the relevant apps as required by their employer;[816]

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[808] Ms Wilcock, Ms Waddell and Mr Lobert all stated that they are required to use either the company-issued mobile phone (in the case of Ms Wilcock and Ms Waddell) or their personal mobile phone (in the case of Mr Lobert) in the course of their duties (see Exhibit HSU27 – Witness Statement of Pamela Wilcock, 15 February 2019 at para 19; Exhibit HSU4 – Witness Statement of Heather Waddell, 15 February 2019 at para 31; Exhibit HSU29 – Witness Statement of Bernie Lobert at para 20).

[809] See Exhibit HSU3 – Witness Statement of William Elrick Statement, 14 February 2019 at para 30.

[810] See Transcript, 15 October 2019, cross-examination of Trish Stewart at PN440-PN452; Transcript, 15 October 2019, cross-examination of Deon Fleming at PN534-PN540.

[811] Exhibit UV4 – Witness Statement of Deon Fleming, 16 January 2019 at para 29.

[812] Exhibit UV6 - Witness Statement of Belinda Sinclair, 16 January 2019 at para 15.

[813] Exhibit UV1 – Witness Statement of Trish Stewart, 17 January 2019 at para 20.

[814] Exhibit UV4 – Witness Statement of Deon Fleming, 16 January 2019 at para 27.

[815] Exhibit UV1 – Witness Statement of Trish Stewart, 17 January 2019 at para 21.

[816] Exhibit UV4 – Witness Statement of Deon Fleming, 16 January 2019 at para 27; Exhibit HSU3 - Witness Statement of William Elrick, 14 February 2019 at para 31; Transcript, 15 October 2019, cross-examination of William Elrick at PN1075-PN1080.

(b) employees are in effect directed by their employer to upgrade to a smartphone, or upgrade their smartphone, in order to be able to access apps required by the employer;[817]

(c) employees may have to pay for a higher level plan than they otherwise would;[818] and

(d) the work-related cost of an appropriate mobile phone can be a significant portion of the overall cost, and in some cases, equally as significant as the costs of personal use.'[819]

[1146] We do not propose to make these findings. In our view there is insufficient evidence to support some of the findings proposed and in respect of others the proposed finding provides an incomplete, and misleading, picture. As to proposed finding (a), while that may be correct that not all employees in the industry have a smartphone or a phone with the capabilities to access the relevant apps as required by their employer, the evidence overwhelmingly suggested that most employees have a smartphone with the appropriate capabilities. As to proposed finding (b), the proposed finding is based on the evidence of only 1 employee, which provides an insufficient basis for the general finding sought. As to proposed finding (c), while it may be hypothetically correct that some employees may have to pay for a higher level plan than they otherwise would, there is insufficient evidence to support a general finding in the terms proposed. As to proposed finding (d), the evidence does not support a finding that the work-related cost of an appropriate mobile phone can be a significant portion of the overall cost.

10.3 CONSIDERATION

[1147] As we have mentioned, the Unions contended, in essence, that the mobile phone is a vital 'tool of the trade' for employees covered by the SCHADS Award and is effectively required by their employees.

[1148] As a general proposition, if an employer directs an employee to purchase and maintain a particular item of equipment for work use (such as mobile phone) it is reasonable that the employer reimburses that employee for the reasonable costs incurred in complying with that direction. But this case illustrates the difficulties which arise when seeking to apply that general proposition.

[1149] As we have mentioned, the evidence overwhelmingly suggested that most employees covered by the SCHADS Award own a smart phone. In its submissions of 3 October 2019, the UWU acknowledges that most employees own a mobile phone but submits that this does not remove the need for a mobile phone allowance because:

'There are costs associated with using a mobile phone for work, whether that is direct charges for work-related use, having to pay for a higher plan to ensure work-related use is covered, or increased wear and tear on the device.'[820]

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[817] Exhibit UV4 – Witness Statement of Deon Fleming, 16 January 2019 at para 27.

[818] Exhibit UV1 – Witness Statement of Trish Stewart, 17 January 2019 at para 21; Transcript, 15 October 2019, cross-examination of Trish Stewart at PN453-PN455.

[819] Transcript, 15 October 2019, cross-examination of Trish Stewart at PN440-PN445; Transcript, 15 October 2019, cross-examination of Deon Fleming at PN533-PN538.

[1150] The difficulty for those supporting the claim is that the evidence that SCHADS Award employees are required to use mobile phones in the course of their employment is quite limited. Additionally, there is no probative evidence about the actual cost incurred by employees who use their personal mobile phone for work-related purposes. Indeed, there are very real practical problems with estimating the costs incurred in using your own phone for work-related purposes.

[1151] Mobile phone plans often provide unlimited local calls and text messages and capped data usage for a flat monthly free. Ms Stewart and Ms Fleming gave evidence that their mobile phone plans had these characteristics.[821] In such circumstances the customer is not charged for individual standard phone calls or text messages. In these circumstances it is not possible to estimate the cost of work-related use. This is particularly problematic for the proponents of the claim because proposed clause 20.6(c)(i) would require an employer to pay half the cost of an employee's mobile phone plan.

[1152] The inherent difficulty in framing an award term dealing with mobile phone usage for work-related purposes is one reason why such terms are not common in modern awards.

[1153] In this regard we note that Ai Group contends that the variation proposed is 'out of step' with the way in which the modern awards system typically deals with the matter of telephones, including mobile telephones. Ai Group submits that the vast majority of awards do not make any provision for telephones and those which do, appear to contemplate only landline telephones.[822] The award provisions which either deal expressly with mobile phones or are drafted such that they may apply to mobile phone usage include various limitations which are not replicated in the claim. For example:

(a) the Commercial Sales Award 2020,[823] Contract Call Centres Award 2020,[824] and Telecommunications Services Award 2020[825] entitle an employee to reimbursement for the reasonable cost of purchasing a phone only where the employee does not already have a telephone. These awards entitle an employee to reimbursement for the reasonable cost of purchasing a mobile phone; not to all costs incurred by purchasing a mobile phone

(b) the Real Estate Industry Award 2020 requires the payment of only reasonable reimbursement, as agreed between the employee and employer,[826] and

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[820] UWU Submission, 3 October 2019 at para 37.

[821] Transcript, 15 October 2019 at PN445-PN449, PN547.

[822] See for example clause 20.3(d) of the *Air Pilots Award 2020*, clause B.1.10 of the *Aircraft Cabin Crew Award 2020*, clause 15.3(d) of the *Broadcasting and Recorded Entertainment Award 2020*, clause 22.3(f) of the *Health Professionals and Support Services Award 2020*, clause 18.3(b) of the *Medical Practitioners Award 2020*, clause 31.2 of the *Plumbing and Fire Sprinklers Award 2010* and clause 18.2(b) of the *Rail Industry Award 2020.*

[823] Clause 17.2(e).

[824] Clause 18.3(b).

[825] Clause 18.4(b).

[826] Clause 17.7.

(c) the Stevedoring Industry Award 2020 provides for the payment of a set weekly allowance, as prescribed by the award.[827]

[1154] The requisite merit for the proposed variation has not been made out. It is plainly unfair to impose an obligation on employers to meet at least half of the cost of an employee's monthly mobile phone plan in circumstances where there is no probative evidence about the actual cost incurred by the employees who use their personal mobile phone for work-related purposes.

[1155] In addition to the absence of probative evidence about the cost of work-related use and the limited evidence as to the extent to which employees are required to use their personal mobile phone for work, the following matters have also led us to dismiss the claim:

- the evidence is confined to care workers, which is the focus of the Unions' submissions, yet the proposed variation applies to *all* employees covered by the SCHADS Award

- there is no evidence regarding the types of mobile phone plans which are available and their costs. The absence of such evidence renders an assessment of the monthly cap in proposed clause 20.6(c)(i) problematic

- the claim would require employers to contribute to the cost of a mobile phone which the employee has already purchased for private use, and

- on its terms the proposed variation applies to part-time and casual employees. Hence employers would be required to pay half the monthly cost of a mobile phone plan for an employee who may only perform 4 hours work per week.

[1156] We dismiss the claim.

11 COMMUNITY LANGUAGE ALLOWANCE CLAIM

11.1 BACKGROUND

[1157] The ASU's community language allowance claim was originally part of the Tranche 1 proceedings. In its original form the claim sought to insert a new clause 20.10 in the SCHADS Award to provide for a community language skills allowance payable to employees when they use a language other than English in the course of their duties.

[1158] During proceedings on 16 April 2019, we sought further information regarding other industrial instruments that contain community language allowances. On 1 May 2019 we directed ASU and Ai Group to file any agreed material they considered relevant by 17 May 2019. Interested parties were given an opportunity to respond to the joint material filed by ASU and Ai Group.

[1159] Also during the proceedings on 16 April 2019, Ai Group tendered the CLAS Handbook 2018: a 6-page document issued by Multicultural NSW of the NSW

[827] Clause 18.2(i).

Government.[828] This document outlines that NSW Government agencies must provide language assistance programs for people who do not speak English well, or at all, to access government services. The Handbook suggests that the Community Language Allowance Scheme (CLAS) assists agencies to provide those language services by remunerating employees who are selected for CLAS and use community language skills as part of or in addition to their normal duties.

[1160] In relation to the CLAS, we sought further information regarding the scheme including:

- How does the scheme operate?
- How does the scheme intersect with employers who operate under this Award?
- Are there similar schemes operating in other states?
- If so, what are the relevant funding arrangements?
- Further information regarding the accreditation process and arrangements for community language skills.

[1161] We also asked parties to consider and make submissions as to whether community language skills are contemplated within the existing classification structure.

[1162] The joint submissions of ASU and Ai Group identified 39 instruments that contained language allowance provisions. Of this agreed list, 26 appear to be enterprise collective agreements, 5 are modern enterprise awards and the remaining 8 are NSW and South Australian state awards.

[1163] On 26 April 2019, the Commission issued a Background Document setting out the provisions from modern awards and modern enterprise awards which contained references to translators and interpreters or contained some form of language allowances.

[1164] Parties were directed to file any submission in relation to the Background Document addressing whether the information was correct and the relevance of the information to the claim.

[1165] On 2 September 2019, we issued a Decision[829] stating that we did not intend to determine the ASU's claim as part of our determination of the Tranche 1 claims and that a further Background Paper would be prepared summarising the submissions, evidence and other material before us. We also indicated we would issue a Statement setting out how we proposed to finalise our consideration of this claim.

[1166] A Statement[830] and Background Paper were published on 4 December 2019 (the 4 December 2019 Background Paper). The 4 December 2019 Background Paper set out a

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[828] Exhibit AIG4 – Handbook from Multicultural New South Wales website.

[829] *September 2019 Decision*.

[830] [2019] FWC 8251.

summary of the ASU's submissions in support of the claim, a summary of the evidence and a summary of the employer submissions as at that point in time.

[1167] A conference of interested parties was held on 17 December 2019 to discuss the ASU's claim. Further to that conference additional directions were made and the ASU filed an amended claim on 7 February 2020.

[1168] The submissions and witness evidence relevant to the community language allowance claim are set out at **Attachment O**.

11.2 THE CLAIM

[1169] The ASU seeks the insertion of the following clause:[831]

> '20.10 Community Language and Signing Work
>
> (a) An employee who, in the course of their normal duties, uses a language other than English to provide services to speakers of a language other than English, or use sign language to provide services to those with hearing difficulties, shall be paid an allowance of 4.90% of the standard rate per week.
>
> (b) The allowance in 20.10(a) will apply to eligible part time and casual employees on a pro rata basis on the basis that the ordinary weekly hours of work for full-time employees are 38.'

[1170] The ASU submits that the purpose of the claimed allowance is to provide additional remuneration to employees who use languages other than English (including sign language) because this work is not contemplated in the classifications of the SCHADS Award.

[1171] The amended claim seeks to address issues raised by the various employer organisations and narrow the scope of the issues between the parties, in particular:

1. The amended variation clarifies to whom the allowance would apply, namely an employee 'who, in the course of their normal duties, uses a language other than English to provide services to speakers of a language other than English' or provide services in sign language to those with hearing difficulties.

2. The amended variation eliminates the distinction between occasional and regular use of community language skills.

3. The allowance is set at 4.90 per cent of the standard rate, equivalent to the allowance for occasional use in the original draft determination.

4. The allowance applies pro-rata to part-time and casual employees on the basis that ordinary weekly hours of a full-time employee are 38.

5. The obligation in the original draft determination for an employer to provide accreditation has been deleted.

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[831] ASU Submission 7 February 2020 at para 4.

[1172] The ASU notes the submissions of various employer parties that only accredited interpreters should be entitled to the payment of this allowance and rejects that submission. In its Reply Submission of 4 June 2019 and oral submissions at the hearing on 16 April 2019, the ASU notes that many skilled and experienced employees in the SACS sector lack formal qualifications because many people find work in the sector *after* having been client or a beneficiary of an organisation. This is said to be reflected in the classification structure for SACS employees; even at the highest classification levels (Levels 7 and 8) there is no requirement for employees to hold any formal qualifications.

[1173] The ASU submits that the Commission should find that employers require the use of community language skills and that most employees who use those skills do not have accreditation. If formal accreditation was made a prerequisite for being paid the allowance, employers would simply continue using the community language skills of their unaccredited employees without being required to pay the allowance, accordingly it would be unfair to impose such a requirement.

11.3 THE SUBMISSIONS

[1174] The ASU filed the following submissions in relation to its original claim:

- 7 November 2018 (draft determination only)
- 18 February 2019
- 15 April 2019 (amended draft determination only)
- 17 May 2019 (joint submission with Ai Group regarding industrial instruments containing community language allowances)
- 17 May 2019 (in response to Directions of 1 May 2019)
- 4 June 2019 (in response to Directions of 1 May 2019).

[1175] The ASU and the other Unions did not file any submissions following the filing of the ASU's amended claim on 7 February 2020.[832]

[1176] In its submissions of 18 February 2019, the ASU submits that the provision of a community language skills allowance would:

- recognise and endorse the fundamental principles of the ERO, which recognises equal pay for equal work in the social and community services sector
- improve the position of community sector organisations to meet the policy challenges in ensuring access and equity for Australia's culturally and linguistically diverse population

[832] Other than in response to Question 1 of Background Paper 3 which asked the parties to advise what evidence they sought to rely upon for the community language allowance claim. See Joint Union Submission, 10 March 2020 at p 4.

- assist in the provision of the highest standard of effective professional communication, programmes and services that are responsive to the needs of all Australians

- be an efficient and effective use of limited resources in the community sector, allowing less reliance upon external translators and interpreters, and

- be capacity building for the community sector workforce, which is currently the fastest growing sector in the country.

[1177] The ASU contends that the provision of a community language skills allowance would promote flexible modern work practices and the efficient and productive performance of work by attracting skilled staff to the social and community sector, thereby reducing the costs associated with the sector's reliance on interpreters.

[1178] The ASU submits that the ability to communicate in more than one language is a highly sought skill in the social and community sector, which is not contemplated by the classifications of the SCHADS Award.

[1179] The ASU submits that due to the nature of the work performed by employees in the social and community sector, it is very common for organisations to seek employees who are bilingual, even if the position description does not specify this as a requirement, to ensure that they can service their diverse client base. The ASU contends that organisations value their bilingual employees as they recognise that a superior professional service can be provided, especially to complex and traumatised clients and communities where the establishment of a professional counselling or trusting relationship is essential.

[1180] The ASU submits that awards that provide remuneration for employees for their use of language skills are relevant to its application because they show that:[833]

- many awards in the community, local government, public services and private sectors provide for language skill related allowances, but

- there is no standard rate of remuneration for the use of language skills in modern awards

- there is no standard way of describing the use of language skills in modern awards, and

- many awards provide allowances for language skills without requiring accreditation as a condition of payment.

[1181] The ASU submits the following examples[834] from the list contained in the Background Document to support its contention:

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[833] ASU Submission, 17 May 2019 at para 20.

[834] Award titles and clause references have been updated to reflect the current modern awards.

- the *Health Professionals and Support Services Award 2020* provides for an 'occasional interpreting allowance' at clause 22.2(c) which is paid where an employee, who is not employed as a full-time interpreter, is required to perform interpreting duties. No accreditation is required under this clause and the allowance is 0.11% of the standard rate per occasion (currently $1.05), capped at 1.27% of the standard rate per week (currently $12.14)

- the *Aboriginal and Torres Strait Islander Health Workers and Practitioners and Aboriginal Community Controlled Health Services Award 2020* provides for an annual 'bilingual qualification allowance' at clause 18.1 which is paid to employees with a recognised proficiency in English as well as 'any one of the languages normally used by the employer's customers/clients' who is 'regularly required in the course of their duties to use one or more of those languages', and

- the *Airline Operations – Ground Staff Award 2020* provides for a 'foreign language allowance' at clause 20.2(e) which is paid when an employee 'is required by the employer to speak a foreign language'. There is no requirement for accreditation.[835]

[1182] Finally, in its submission of 4 June 2019, the ASU submits that employers in the social and community sector report difficulty finding and retaining adequately skilled staff due to competition with the public sector, which can offer better pay and conditions, including a community language skills allowance. It submits that providing a community language skills allowance equal to that paid to government employees would enhance opportunities for the sector to attract the best possible employees.

[1183] The various employer interests oppose the claim.

[1184] The NDS primarily relies on its previous submissions opposing this claim[836] and notes that the revised claim partially addresses some of the drafting concerns raised by various parties. However, NDS submits that the concept of using language skills '*in the course of their normal duties*' still suffers from a lack of precision and that the deletion of the requirement around accreditation removes an unclear administrative burden but does not resolve the question of how to determine whether an employee has language skills that they are required to use that would justify the imposition of an allowance.

[1185] Further, the NDS submits that the quantum of the allowance remains too high. NDS' earlier submission compared rates of pay for interpreters set by other modern awards and demonstrated that the SCHADS Award already includes pay rates that are approximately equivalent,[837] and went on to analyse how the existing classification structure already comprehends this level of skill and responsibility.[838] NDS contends that in the disability sector there is the added difficulty of how to charge clients for this allowance when the

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[835] Each of these awards have now been varied during the 4 yearly review, the current award titles are: *Health Professionals and Support Services Award 2020, Aboriginal and Torres Strait Islander Health Workers and Practitioners and Aboriginal Community Controlled Health Services Award 2020 and Airline Operations – Ground Staff Award 2020.* Clause references have been amended in the new awards.

[836] NDS Submission, 5 April 2019 at paras 8 – 17; NDS Submission, 17 May 2019 at paras 2 – 8, 19 – 31.

[837] NDS Submission, 17 May 2019 at paras 3 – 7.

[838] NDS Submission, 17 May 2019 at paras 19 – 31.

language skills may only be required for a minority of clients who are supported by the worker.

[1186] Ai Group advance 5 points in opposition to the amended claim:

1. A strikingly unfair aspect of the proposed new clause is that its application is not limited to circumstances where an employee uses their secondary language skills *at the direction of their employer*. Given the multicultural nature of Australian society, many employers now engage employees who happen to possess secondary language skills. It is likely the case that in some instances such employees may, by virtue of coincidence rather than design or intent, be required to work with clients who speak the same other language.

2. The claim does not limit the application of the clause to circumstances where the use of the secondary language adds value to the work of the employee. Without in any way calling for the introduction of a new allowance of the nature proposed, Ai Group submits that, if a claim for a new allowance were to be entertained, any resulting clause should be limited in its application to circumstances where an employer has expressly requested or required an employee to use the relevant skills. This will mitigate the adverse effect on some employers by enabling them to manage or control their exposure to such a claim. It will also reduce the prospect of the employee receiving an additional payment under the safety net in circumstances where there is no real increase in the value of their work flowing from their exercise of relevant language skills.

3. There is no requirement that employees possess any particular level of competence in their use of the secondary language. The Award should not require payment simply because an employee exercises some rudimentary skills in a particular language other than English. This would be unfair to their employer. Any provision of the nature proposed by the ASU should stipulate an objective measure of proficiency which must be passed for the allowance to be payable.

4. It is unclear what justification there is for the particular quantum of allowance proposed. This is entirely unsatisfactory given the amount that the ASU has proposed for the allowance.

5. It is unclear whether an employee is only to receive the allowance in the week that they use the skill or whether it is payable on a regular or ongoing basis. It would be obviously unfair for an employer to be required to pay an allowance on an ongoing basis for only occasional use.

[1187] ABI submits that the ASU's proposed new clause is materially different to that which they have pursued since November 2018 and that the ASU's assessment of the differences between the 2 proposals is also incomplete.

[1188] ABI contends that the ASU submission fails to articulate any reason for most of the changes and that the ASU's approach effectively requires employer parties to 'guess' the

intention or rationale for certain changes in the ASU's position without the benefit of any written submissions addressing their new proposal.

[1189] ABI submits that the new ASU proposal differs from the original proposal in several significant respects:

1. The allowance is proposed to apply to a different category of employees. The original proposal was expressed to apply to 'employees using a community language skill as an adjunct to their normal duties'. However, the new proposal is expressed to apply to an employee who, 'in the course of their normal duties', uses a language other than English or provides services in sign language. No explanation is provided by the ASU for this change, other than a general comment that the purpose of the claimed allowance is to provide additional remuneration to employees who use languages other than English (including sign language).

2. The proposal removes the two classes of allowance (for 'occasional' and 'regular' use of the skill) and replaces those with a single allowance payable where an employee uses a language other than English or sign language 'in the course of their duties'. Again, no explanation is offered by the ASU for this change.

3. The proposal removes the limitation on the work anticipated to be performed by employees as initially contained in clause 20.10.5 of the ASU's original proposal, which stated that the relevant employees 'convey straightforward information relating to services provided by the employer, to the best of their ability'. Again, no explanation is offered by the ASU for this change. For example, it is not clear whether the clause is now intended to capture a broader class of employees (such as qualified interpreters and translators). In any event, that appears to be the effect.

4. The proposal removes the words initially contained in clause 20.10.5 of the ASU's original proposal, which stated that the relevant employees 'do not replace or substitute for the role of a professional interpreter or translator'. Yet again, no explanation at all is offered by the ASU for this change. Put simply, it is unclear why this wording has been removed.

5. The ASU's new proposal removes the words contained in clause 20.10.6 of the ASU's original proposal, which stated that 'Such employees shall record their use of community language skills'. Yet again, no explanation at all is offered by the ASU for this change. This is an unexplained and material departure from the ASU's original proposed clause.

6. The ASU's new proposal removes the proposed clause 20.10.7 in its entirety. That clause dealt, at least in part, with the issue of accreditation. However, it also dealt with additional issues which have been stripped out of the ASU's new proposal. These items are:

    (a) a requirement that relevant employees 'be prepared to be identified as possessing the additional skill(s)', and

(b) a requirement that the employees make themselves 'available to use the additional skill(s) as required by the employer'

Yet again, no explanation at all is offered by the ASU for this change. This is an unexplained and material departure from the ASU's original proposed clause. The ASU have failed to advance any submission at all in support of this change.

7. The ASU's new proposal removes the accreditation process in the sense that there is no longer any process under the proposed clause for an employee to satisfy the employer that they have the skill for which the allowance would be payable. Again, this is a material departure from the ASU's original proposal.

8. The proposal introduces pro-rating of the entitlement in respect of part-time and casual employees.

[1190] ABI accepts that the new ASU proposal does 'narrow the scope' of *some* issues in dispute between the parties but submits that it is also evident that the new ASU proposal has the opposite effect in some respects, and actually expands the issues in dispute (and creates new issues in dispute) as compared to their original proposal.

[1191] The areas in which the ASU's new proposal are said to expand the issues in dispute are as follows:

- it has the effect of capturing a greater number of employees by reason of the removal of the notion of the skill being used as an 'adjunct' to the employee's duties

- the removal of the notion of employees conveying 'straightforward information' further extends the scope of the proposed clause

- the removal of the notion that the employees did not 'replace or substitute' professional interpreter or translators appears to again extend the scope of the proposed clause

- the removal of the record keeping obligation creates a new issue in dispute between the parties, and

- the removal of any process of accreditation creates a further issue in dispute between the parties.

[1192] ABI submits that, in the interests of fairness, the ASU should not be permitted to pursue a new proposal that materially departs from their original proposal and which expands upon the issues in dispute between the parties.

[1193] ABI also notes that the evidence relied upon in support of the ASU's new claim is the evidence of witnesses heard during the Tranche 1 hearing in April 2019 and submits that given the material departure by the ASU of the variation sought:

> 'it is questionable whether that evidence can still be relied upon in support of the new variation, or whether the Commission may need to consider recalling the witnesses. This provides another reason why the Commission should not permit the ASU to pursue its new proposal'.

[1194] ABI opposes the amended ASU claim and continues to rely on its reply submissions of 5 April 2019 in respect of the claimed introduction of a community language allowance,[839] the oral submissions made during the Tranche 1 hearing, the further submission of 19 May 2019, and further reply submission of 3 June 2019.

[1195] Turning to the specific terms of the new ASU proposal, ABI contends that the proposed clause is deficient in the following respects:

1. The entitlement to an allowance is triggered where an employee 'uses' a second language or sign language to provide services to particular individuals. ABI submits the trigger for an allowance of this type should be the employer 'requiring' or 'directing' an employee to use their second language, rather than the employee simply deciding to use it.

2. The proposed variation does not include any requirement for employees to have their community language skill accredited by an appropriate body as a precondition of receiving the allowance. The removal of any requirement for accreditation has the consequence of there being no objective basis for an employee to be assessed as having the skill, and no capacity or process for the employer to determine whether the employee has the skill.

3. The accreditation issue gains even more importance under the ASU's new proposal given that the wording about the employees not 'replac[ing] or substitut[ing] for the role of a professional interpreter or translator' has been removed. It now appears that the ASU intends for these employees to effectively replace professional translation services but without any accreditation requirement.

4. ABI submits there is no explanation as to how the ASU arrived at the quantum of the allowance sought, nor sufficient evidence that would allow the Commission to make a proper assessment as to the value of the skill. It says the ASU has failed to articulate the rationale for the quantum of the allowance claimed and no submission has been made in respect of why the amount sought is an appropriate amount.

[1196] AFEI opposes the amended claim and continues to rely on its written submissions filed on 8 April 2019 and 22 May 2019. In response to the amended claim, AFEI advances the following 7 points:[840]

1. Many of the concerns identified in its submissions[841] in respect of the original claim continue to apply in respect of the amended claim, including:

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[839] See Part 8 of that reply submission, noting that certain aspects of that submission are no longer applicable to the new ASU claim.

[840] AFEI Submission, 26 February 2020 at para 1.67.

- the effect of the clause would mean that the payment of the allowance would apply irrespective of whether the employer has requested or required the employee to use a language other than English or use sign language, and in circumstances where the employer has no verification of the employee's actual skill level

- the limited evidence relied upon by the ASU in support of this claim

- eligibility for the allowance would apply without the requirement for the employee to have a qualification and or proof of proficiency, and

- the allowance claimed is significantly higher than, and disproportionate to most interpreter/language/translator allowances in other modern awards and modern enterprise awards,

2. There are issues with proportionality regarding the quantum that is being sought. For example, a social and community services employee level 2 who uses a language other than English in the course of their normal duties (persons at this level can hold a diploma) would be earning more than a social and community services employee level 3 (persons at this level include graduates with a 3 or 4 year degree).

3. In respect of the lack of proof of formal qualifications or accreditation required from the employee prior to the applicability of the proposed allowance, the ASU submit that such an imposition would be unfair. However, verification of the utility of the skill is an important factor in establishing the value of the skill. Like the first aid allowance, at clause 20.4 of the award, the employee must hold a certificate as one of the prerequisites prior to the first aid allowance becoming applicable. A similar requirement should apply to proposed clause 20.10.

4. The amended claim could have far-reaching consequences and include an employee who speaks a language other than English only once or twice or a person who can recite a single phrase in a language other than English (for example "what is your name?"), in the course of the employee's normal duties who would then be entitled to the allowance on a weekly basis. Such a consequence would be inconsistent with section 134(f) of the Act.

5. There are issues with how usage of the language would be monitored given that a significant number of employees under the SCHADS Award in the social and community and home care stream work one-to-one with clients.

6. This claim adds to the complexity of an already very complex award (for example, the resulting effect of this claim could be employers issuing directions to employees (who can speak a language other than English) to not speak in the other language to ensure that the allowance is only payable in

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[841] AFEI Submission, 8 April 2019 at paras 31 – 33; AFEI Submission, 22 May 2019 at paras 13 – 15, 18 – 19.

circumstances where the second language is actually required by the employer. In addition, the extra formalities, obligations and administrative burden on employers are inconsistent with section 134(g) of the Act in regard to the need to ensure a simple, easy to understand, stable and sustainable modern award system.

7. The evidence does not establish that the proposed clause 20.10 is necessary to achieve the modern awards objective.

11.4 THE EVIDENCE

[1197] The ASU submits that the Commission should find that employers require the use of community language skills and that most employees who use those skills do not have accreditation.

[1198] The ASU submits that the evidence before the Commission demonstrates that the SACS sector has relied on the community language skills of its employees without requiring accreditation for a significant period of time and that it would be unfair to require accreditation as a condition for payment of the allowance, since employers have actively sought out accredited employees. Furthermore, it contends that any requirement for accreditation would add undue administrative burden on the employer.

[1199] The ASU relies on the following evidence in respect of the community language claim:

- witness Statement and oral evidence of Dr Ruchita[842]
- witness Statement and oral evidence of Ms Nadia Saleh[843]
- witness statement and oral evidence of Lou Bacchiella,[844] and
- witness statement and oral evidence of Natalie Lang.[845]

[1200] The evidence relied upon by the ASU is summarised below.

Dr Ruchita[846]

[1201] Dr Ruchita is a Family Violence Case Manager at inTouch Multicultural Centre Against Family Violence (inTouch) who, in addition to English, speaks Hindi, Punjabi and Urdu. Dr Ruchita has worked in the family violence sector for almost 10 years.

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[842] Exhibit ASU11 – Witness Statement of Dr Ruchita, 14 February 2019; Transcript, 16 April 2019 at PN526-PN588.

[843] Exhibit ASU12 – Witness Statement of Nadia Saleh, 14 February 2019; Transcript, 16 April 2019 at PN592-PN644.

[844] Exhibit ASU14 – Witness Statement of Lou Bacchiella, 13 February 2019; Transcript, 16 April 2019 at PN709-PN792.

[845] Exhibit ASU13 – Witness Statement of Natalie Lang, 18 February 2019; Transcript, 16 April 2019 at PN648-PN700.

[846] For summary of Dr Ruchita's evidence, see generally Background Paper, *4 yearly review of modern awards – Award stage – Group 4 – Social, Community, Home Care and Disability Services Industry Award 2010 – Substantive Claims*, 4 December 2019 at [11] – [17].

[1202] At [14] of her statement Dr Ruchita says:

> 'In my previous role as a Bilingual Facilitator, I liaised with many Indian communities in Hindi and Punjabi. Family violence is a highly sensitive and taboo topic in the Indian community. As such, establishing trust with these communities before we provide information about these topics is important. It is also important to understand the cultural dynamics of these communities. I felt that speaking to the communities in their languages enabled me to build connections and establish trust more readily. If you are talking to someone in their language, it is much easier for them to understand what you are saying. Even if they do not accept what I am saying, I can read the reasons for their reluctance more readily and engage with them in a meaningful way. It would not have been easy to build trust if someone who did not speak Hindi or Punjabi liaised with these communities. It would also not be feasible to engage an interpreter for this type of worker because it requires spontaneous conversation and would be too expensive.'

[1203] As to professional interpreters and translators, Dr Ruchita said that the work of interpreters was very important at inTouch, however there were also some disadvantages with using interpreters, namely:[847]

1. It is time consuming for inTouch to engage an interpreter each time they needed to speak with clients, especially given that a Family Violence Case Manager can provide phone and face-to-face support for up to 15-20 clients a day. Further, Dr Ruchita said that in using an interpreter, the meaning of the information exchanged could get lost in translation, oftentimes because the interpreter does not have the legal vocabulary to properly explain the process and/or concepts. As a result, Dr Ruchita said that she cannot be certain that her clients have been properly informed.

2. Dr Ruchita said that interpreters are not experts in family violence and that while they can interpret the language, they are unable to understand the client's circumstances that would enable the client to be effectively supported. Furthermore, clients feel more comfortable and trusting of someone they know and regularly speak to.

3. Some clients are reluctant to engage with interpreters, particularly if their language is spoken by very few communities in Australia as the interpreter can be known to the client or be from their community.

4. The quality of interpreters can vary. Dr Ruchita described engaging interpreters who provided their opinion in addition to providing their interpreting services.

[1204] The fact that Dr Ruchita was multilingual was a core part of her role.[848]

Ms Nadia Saleh[849]

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[847] Exhibit ASU11, Witness Statement of Dr Ruchita, 14 February 2019 at paras 19 – 22.

[848] Transcript, 16 April 2019, cross-examination of Dr Ruchita at PN567-PN577.

[1205] Ms Nadia Saleh is a Manager of Child, Youth and Family Services at the Riverwood Community Centre; in addition to English, she speaks a number of Arabic languages.

[1206] The Riverwood Community Centre is a non-government organisation which provides a range of services to residents in Riverwood, in south-west Sydney, and surrounding suburbs. At [17] of her statement Ms Saleh notes that more than half of the population of Riverwood were born outside of Australia: 62% of the population speak English, only about 30% spoke English at home.[850]

[1207] Ms Saleh said that she has been using her community language, Arabic, for her entire career and currently 'nearly every day, but not all day'[851] at work. She described Arabic as a common language for people from a wide range of countries including Algeria, Egypt, Morocco, Saudi Arabia, Sudan, Somalia, Syria, Jordan, Iraq, Lebanon and Yemen, all of which have communities living in the Riverwood and surrounding areas and who access services at the Riverwood Community Centre. As such, Ms Saleh said that Arabic is an integral or essential part of her job,[852] and that she used it according to the needs of the community and the individual.[853]

[1208] Ms Saleh also said that she can be called upon by other services and government agencies to provide translating services. She said that while telephone interpreters are available for this work, staff members of these agencies prefer to refer clients to an Arabic-speaking person the client is already familiar with.

[1209] Ms Saleh said that she manages a team of 25-30 people who use their community language skills in the same way she does.[854]

[1210] As to interpreters, Ms Saleh said that while they played 'an important and vital role' in the centre's service, government funding is very restricted and does not always cover the cost of interpreters:

> 'We would not be able to meet the needs of our community, if we did not have a staff with diverse community language skills. But even this diversity does not meet our needs one hundred percent. We often rely on community language speakers from other services at the Riverwood Community Centre to help us. For instance, other services at the Riverwood Community Centre often ask me to help them by using my community language skills. For instance, it is common for the Aged Services team to ask for my help working with Arabic-speaking clients who have trouble speaking English.

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[849] For summary of Ms Saleh's evidence, see generally Background Paper, *4 yearly review of modern awards – Award stage – Group 4 – Social, Community, Home Care and Disability Services Industry Award 2010 – Substantive Claims*, 4 December 2019 at [18] – [25].

[850] Also see Transcript, 16 April 2019, cross-examination of Nadia Saleh at PN623.

[851] Transcript, 16 April 2019, cross-examination of Nadia Saleh at PN610.

[852] Transcript, 16 April 2019, cross-examination of Nadia Saleh at PN613.

[853] Transcript, 16 April 2019, cross-examination of Nadia Saleh at PN613, PN620, PN622.

[854] Exhibit ASU12 – Witness Statement of Nadia Saleh, 14 February 2019 at para 30.

> There is a real need in my organisation for workers with practice skills and community languages. When we advertise new jobs, we specify that community language skills are desirable.'[855]

[1211] And further 'the use of professional translation and interpretation services can make it more complicated for us to do our job due to cultural barriers and sensitive issues'.[856]

[1212] At [36] of her statement Ms Saleh says:

> 'Being able to speak a community language also means I am able to engage with community members who would otherwise be hard to reach. These are vulnerable people who often have multiple barriers affecting their ability to seek assistance. As a bilingual support worker I can gain access that would otherwise be unavailable, especially with those very critical and sensitive cases involving domestic and family violence. I am able to raise and address these issues with vulnerable community members in a way that would not be possible for someone without knowledge of the language and culture'.

Ms Natalie Lang[857]

[1213] Ms Natalie Lang is the Branch Secretary of the ASU in its NSW and ACT Branch.

[1214] At [10] of her statement Ms Lang says:

> 'Not-for-profit community organisations employ highly skilled staff to deliver their programmes. In many instances the individuals, families and communities to which those services are being delivered include people who do not speak, read or write in English and/or may have other communication issues which means that their access to essential services is seriously compromised or impossible. This skill is often enhanced by a deep understanding of cultural issues associated with the language(s) in which the employee is proficient. Because of the nature of the work that is done by employees in the community sector, it is therefore very common for organisations to seek to employ people who are bilingual, even if the advertised position description to be filled does not specify a requirement for this skill.'

[1215] We note here that the above statement is not much more than generalised assertion. It lacks particularity and fails to provide a proper basis for the assertions made.

[1216] Ms Lang then refers to 'some examples of the use of community languages' amongst the ASU's membership by reference to the circumstances of 3 individuals: 'Collin', 'Emilie' and 'Karim'.[858] The individuals referred to in Ms Lang's statement did not give evidence in the proceedings. Ms Lang's description of the work undertaken by these individuals and the comments attributed to them is hearsay. We propose to give this part of Ms Lang's evidence very little weight.

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[855] Exhibit ASU12 – Witness Statement of Nadia Saleh, 14 February 2019 at paras 31 – 32.

[856] Exhibit ASU12 – Witness Statement of Nadia Saleh, 14 February 2019 at para 37.

[857] For summary of Ms Lang's evidence, see generally Background Paper, *4 yearly review of modern awards – Award stage – Group 4 – Social, Community, Home Care and Disability Services Industry Award 2010 – Substantive Claims*, 4 December 2019 at [33] – [36].

[858] Exhibit HSU13 – Witness Statement of Natalie Lang, 18 February 2019 at paras 12 – 14.

Mr Lou Bacchiella[859]

[1217] Mr Lou Bacchiella is the CEO of Metro Assist, formerly the Migrant Resource Centre, in the inner-west suburbs of Sydney. The Centre services culturally and linguistically diverse (CALD) communities with services and programs in migrant and refugee settlement, family services, financial inclusion, employment support and health awareness.

[1218] The centre employs 71 staff who speak around 24-25 languages,[860] with the 3 most common being Chinese, Hindi and Arabic. At [12] of his statement Mr Bacchiella says:

> 'Clients accessing our services often have complex needs. Our support for the client is greatly enhanced when we are able to engage with the client in their own language. The complex case work that is involved in migrant settlement and family services requires community language speakers and we engage with clients in their language to try and build rapport and trust. This is part of the fundamentals of case work. Our clients have experienced trauma such as being evicted or being separated from family and the fact that we can jump in and help them straight away is hugely satisfying for clients. Clients often have to divulge deeply private and personal information and doing so in their own language makes this process much less confronting.'[861]

[1219] He described the use of community languages as being an essential and integral part of the job[862] as support for the client is greatly enhanced when workers can engage with the client in their own language.

[1220] At [18] – [22] of his statement Mr Bacchiella deals with interpreters:

> 'We engage interpreters where necessary, but they are costly and not suitable in all situations.
>
> There are a number of interpreting services available, but we need to pay to use them. Our latest funding contracts stipulates that interpreter services need to come out of our organisational budget. This means that using an interpreter is a burden to the organisation. Some matters are too simple for an interpreter to be practical. For instance, an in-house language speaker can assist a client to fill in a form or help with documentation immediately. We can solve these problems in minutes. Otherwise, we would need to send the documentation to an interpretive service.
>
> It is often unsuitable to use an interpreter while doing casework. For example, when performing case work in someone's home, it is extremely difficult introducing a third party interpreter. You need to book the interpreter to turn up at the same time as the case worker. Usually, you cannot choose your interpreter. It is likely that the interpreter that shows up will not have a rapport with the client. Then, you must expect the client have their intimate details relayed through a third party. Building a rapport with a client is a fundamental of casework. It means your client can open up and get the support they need.
>
> Metro Assist do a lot of community education and engagement. We are going out and talking to different ethnic groups having the people with the right language skills is critical and is

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[859] For summary of Mr Bacchiella's evidence, see generally Background Paper, *4 yearly review of modern awards – Award stage – Group 4 – Social, Community, Home Care and Disability Services Industry Award 2010 – Substantive Claims*, 4 December 2019 at [26] – [32].

[860] Transcript, 16 April 2019, cross-examination of Mr Bacchiella at PN718.

[861] Exhibit ASU14 – Witness Statement of Lou Bacchiella, 13 February 2019 at para 12.

[862] Transcript, 16 April 2019, cross-examination of Lou Bacchiella at PN725.

certainly not something we can afford to pay interpreters to do. Interpreters are not suited to community engagement work such as the health awareness programs. Interpreters are a clunky way to engage with groups. Often, using an interpreter places an onerous burden on the client because they have to wait for service. It is also certainly off putting for them to seek help and talk about very private matters with the interpreter present. If you have an in-house language speaker, you can assist your client more quickly and effectively, and they are more inclined to engage with the service.

The biggest benefit of having bi-lingual workers is that client is more open to discussing their issues with a case worker directly in their language rather than having a third party interpreter in the room. Clients often refuse to have an interpreter in the room. This is particularly common with clients from smaller emerging communities concentrated in specific suburbs. These communities will have tight knit networks. Clients will feel uneasy with an interpreter, because they are worried about their privacy. Our caseworkers have the training to put these clients at ease and build rapport – but this is most effective if they speak the client's language. Caseworkers are always conscious of privacy and confidentiality requirements.'

[1221] Mr Bacchiella addresses the benefits of a community language allowance in the award at [23] – [28] of his statement:[863]

'The nature of the community sector means that we are underpaid and under-resourced.

I am only able to offer my employees the Award rates of pay and conditions due to funding restraints. This is because our funding only covers the SCHDS Award pay and conditions. This means that Metro Assist does not currently offer any financial reward to employees for using or attaining community language skills. However, if the Award changed, our funders would be obliged to increase funding to reflect the Award to cover the cost.

I find that it difficult to recruit and retain experienced and qualified staff with the appropriate language skills at the at the Award rate of pay. We are always competing with government, particular FACS, for employees and people will leave the community sector for a better paying job at FACS. I understand that the Commonwealth and New South Wales governments pay an allowance where bilingual staff use their skills at work.

I am concerned that I am not able to provide the necessary services as client cases, especially become more complex. We are also precluded from tendering for some programs because those programs require an employee with a relevant master's degree. It is hard to attract someone with those qualifications at the rates of pay I can offer. It is nearly impossible to find someone with the appropriate qualifications *and* a community language skill.

We need to increase pay and conditions to attract staff to our sector. If we can acknowledge the cultural and language skills through an allowance, this will benefit the sector as an enticement to come into these roles. The allowance would help me recruit and retain skilled and qualified staff. I also believe it would make the Social and Community Sector more attractive to students looking to work in community services. The benefit to my organisation of having a community languages paid an allowance under the Award would far outweigh the cost.

I have been shown a copy of the draft variation proposed by the Australian Services Union. I support the Fair Work Commission making the proposed variation to the Award.'

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[863] The reference to 'FACS' in this part of Mr Bacchiella's statement means 'Family and Community Services'.

[1222] We note here that much of this aspect of Mr Bacchiella's evidence is really in the nature of a submission, rather than evidence.

[1223] The ASU did not identify the particular findings it sought based on the evidence. It appears from the ASU's submission that the following findings are advanced:

1. The ability to communicate in more than one language is a skill that is highly sought after in potential employees in the social and community sector. It is very common for organisations to seek to employ people who are bilingual, even if the advertised position description to be filled does not specify a requirement for this skill.[864]

2. Employers in the social and community sector actively seek out bilingual workers to ensure that they can service their diverse communities. Engaging bilingual workers is more efficient and cost-effective than using translation services or fee-for-service interpreters.

3. The value of bilingual workers in the community sector is recognised as providing a superior professional service to clients and the community, particularly where a community organisation works with complex and traumatised clients and communities.[865]

4. Community organisations make extensive use of professional interpreters and translators to assist people who find themselves unable to communicate effectively with essential community services. Most community organisation access interpreters through external interpreting services or by engaging individual interpreters on a fee for service or casual basis.[866]

5. While there are times where professional interpreters and translators must be used, it is a far more efficient for social and community sector organisations to utilise bilingual staff for much of their work. Interpreters are expensive. It is often time consuming, or even impossible, to arrange a professional interpreter for a meeting or appointment.[867]

6. In many circumstances it is undesirable to use an interpreter, because they are not usually specially trained social and community workers.[868]

7. It is common for family and other community members to be asked to assist clients. Sometimes, unqualified employees who speak a required language, such as administrative staff, are asked to interpret.[869]

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[864] ASU Submission, 18 February 2019 at para 39.

[865] Ibid at para 42.

[866] Ibid at para 43.

[867] Ibid at para 45.

[868] Ibid at para 46.

[869] Ibid at para 50.

8. Employers in the social and community sector report difficult finding adequately skilled staff.[870]

[1224] The evidence relied upon in support of these proposed findings was limited to:

- 2 employees who work in multicultural-focussed businesses[871]
- 1 employer from a similar organisation (Metro Assist, formerly known as Metro Migrant Resource Centre),[872] and
- Ms Lang, an ASU official.[873]

[1225] In relation to Ms Lang's evidence, much of it was either hearsay or in the nature of a general, unparticularised assertion.

[1226] In our view the evidence relied upon cannot properly be said to be representative of the industry covered by the SCHADS Award. Nor does it provide a sufficient basis to make good the findings advanced by the ASU in support of the claim.

[1227] We accept that instances may arise where some employees use their knowledge of languages other than English in the course of their duties, but the evidence advanced does not enable a proper assessment of the extent to which such skills are utilised across the industry, much less establish that the skills are vital to the social and community sector generally.

[1228] While certain employers may value the ability of an employee or prospective employee to speak a community language other than English, the evidence does not provide a basis for finding that the use of a community language is an issue that arises across the social and community sector or even a substantial part of the sector.

11.5 CONSIDERATION

[1229] As we have mentioned, variations to modern awards must be justified on their merits. Significant changes where merit is reasonably contestable should be supported by an analysis of the relevant legislative provisions and, where feasible, probative evidence. The ASU case has comprehensively failed to meet these requirements. There is scant analysis of the relevant legislative provisions and the evidentiary case falls well short of what is required.

[1230] The variation proposed is not one which is obvious as a matter of industrial merit such that it is unnecessary to advance probative evidence in support. Allowances payable to employees who are required in the course of their work to speak a language other than English are not a common feature of the modern awards system. Only 6 modern awards contain a language allowance. On that basis, there should be a more compelling reason for including such a term in a modern award.

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[870] Ibid at para 52.

[871] Dr Ruchita and Ms Nadia Saleh.

[872] Mr Lou Bacchiella.

[873] Ms Natalie Lang.

[1231] The ASU has failed to advance a sufficient merit case for the variation proposed. In addition we note that:

- there is no explanation as to how the ASU arrived at the quantum of the allowance sought, nor sufficient evidence that would allow the Commission to make a proper assessment as to the value of the skill, and

- the proposed variation does not include any requirement for employees to have their community language skill accredited by an appropriate body as a precondition of receiving the allowance. The absence of any requirement for accreditation has the consequence that there is no objective basis for an employee to be assessed as having the skill, and no capacity or process for the employer to determine whether the employee has the skill.

[1232] Further, the entitlement to the proposed allowance is triggered where an employee 'uses' a second language or sign language to provide services to particular individuals. ABI submits the trigger for an allowance of this type should be the employer 'requiring' or 'directing' an employee to use their second language, rather than the employee simply deciding to use it. We agree with ABI.

[1233] We dismiss the ASU's claim.

[1234] For completeness we note that the extent to which the current classification structure already contemplates the use of language skills was contested in the proceedings. Given the view we have taken of the evidence and merits it has been unnecessary to resolve that controversy. If this claim is reagitated that matter should be determined as a threshold issue.

12 EQUAL REMUNERATION ORDER ISSUE

12.1 BACKGROUND

[1235] On 26 November 2020, we issued a Statement[874] (the November 2020 statement) in AM2020/100 relating to the equal remuneration order (ERO) issued on 22 June 2012 under Part 2-7 of the Act in the social, community and disability services industry throughout Australia.

[1236] The existence of the ERO is noted in the SCHADS Award at clause 15:

> 'NOTE: 1. A transitional pay equity order taken to have been made pursuant to item 30A of Schedule 3A to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) has effect in accordance with that item. Transitional pay equity orders operate in Queensland as provided for in items 30A (6) and (7).
>
> 2. An equal remuneration order [PR525485] also applies to employees in the classifications in Schedule B and Schedule C of this modern award.'

[1237] From 1 December 2020, the final instalment from the ERO (modern award rate plus the final equal remuneration payment) applies for Social and Community Services and Crisis

[874] [2020] FWCFB 6333.

Accommodation classifications, which are found in Schedules B and C of the SCHADS Award.

[1238] In the November 2020 statement we expressed the *provisional* view that the final rates of pay from the ERO should be incorporated into Schedules B and C of the SCHADS Award. Interested parties were given an opportunity to make submissions in relation to the *provisional* view. Submissions were received from:

- AFEI on 21 December 2020
- Ai Group on 21 December 2020 and 20 January 2021
- ASU on 15 January 2021
- HSU on 21 December 2020 and 19 February 2021
- NDS on 21 December 2020.

[1239] NDS agrees with the *provisional* view but submits that the draft determination does not provide for any cross referencing between clause 15 and the proposed insertions at Schedules B and C. It submits that this creates a problem because the final rates, which constitute part of the ordinary rates of pay, are not readily visible for a reader of the SCHADS Award without prior knowledge of the ERO. NDS submit that this could be resolved by replacing the tables showing minimum weekly wages at clause 15 with the draft tables proposed as the new Schedules B.9 and C.5. In the alternative they submit that the current note could be amended to read as follows:

> 'An equal remuneration order [PR525485] also applies to employees in the classifications in Schedule B and Schedule C of this modern award, and the final rates of pay which form an employee's ordinary rate of pay are set out in Schedules B.9 and C.5.'[875]

[1240] The HSU and ASU both support the *provisional* view.

[1241] However, the ASU submits that the rates set out in the draft determination should be amended to include the wage rates that apply to employees covered by the Transitional Pay Equity Order (TPEO). These are special pay rates for some SACS and crisis accommodation employees in Queensland who are employed by non-constitutional corporations that existed immediately before 1 January 2010:

> 'Employers covered by the TPEO are also covered by the Equal Remuneration Order if they're in the social and community services or crisis accommodation streams of the Social and Community Services Award. The higher of the two rates applies. The consequence of this is that the wage schedules proposed by the Commission do not apply to all employees covered by Schedules B and Schedule C. Some employees will be entitled to a higher rate of pay that applies due to the operation of the TPEO.
>
> This should be reflected in the table of pay rates published by the Fair Work Commission.'[876]

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[875] NDS Submission, 21 December 2020 at para 11.

[876] ASU Submission, 15 January 2021 at paras 7 – 8.

[1242] We do not propose to include the TPEO rates as suggested by the ASU. We will retain note 1 to clause 15 which draws attention to the TPEO for those employees who may still be covered by it.

[1243] The ASU also agree with the submission of the NDS that the current note in clause 15 should be amended. The wording suggested by the ASU is:

> 'An equal remuneration order [PR525485] and a transitional pay equity order also apply to employees in the classifications in Schedule B and Schedule C of this modern award, and the final rates of pay which form an employee's ordinary rate of pay are set out in Schedules B.9 and C.5.'[877]

[1244] AFEI and Ai Group both oppose the *provisional* view.

[1245] AFEI advances 4 reasons for their objection as follows:[878]

1. Schedules B and C of the SCHADS Award are operative terms of the Award. Incorporating the equal remuneration order rates into Schedules B and C would therefore result in the equal remuneration order rates becoming operative terms of the Award. That outcome would be inconsistent with the conclusion reached by the five-member Full Bench that the order should stand alone.

2. In reaching its conclusion that the order should stand alone, the Full Bench in its February 2012 Decision considered the positions of the parties. The five member Full Bench's conclusion that the order should stand alone was not expressed as being solely due to the equal remuneration order containing transitional provisions. The fact that the transitional provisions have come to an end are not a sufficient basis to alter the conclusion reached by the Full Bench in its February 2012 Decision.

3. The draft determination does not include all terms of the order which continue in effect from 1 December 2020. The proposed variation could therefore give rise to claims in relation to the independent operation of the modern award terms. Even if the award contained the full terms of the equal remuneration order, this would result in unnecessary overlapping entitlements.

4. The equal remuneration order was made under s302 of the Act, being separate statutory powers to those for making or varying a modern award. It is therefore appropriate that the entitlement to the equal remuneration rates arises solely from that order.

[1246] AFEI submit that the note at clause 15 could be amended to draw the reader's attention to clause 6 of the ERO:

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[877] ASU Submission, 15 January 2021 at para 9.

[878] AFEI Submission, 21 December 2020 at para 4.

> 'An equal remuneration order [PR525485] also applies to employees (other than SACS Level 1) in the classifications at Schedule B and C. From 1 December 2020, Clause 6 of the equal remuneration order requires a specified percentage amount to be paid in addition to the rates in Clause 15 of the Award.'[879]

[1247] In their submission of 21 December 2020, Ai Group opposed the *provisional* view. The reasons for Ai Group's objection are set out in a further submission dated 20 January 2021. Ai Group's primary concern appears to be that the proposed variation would alter the legal obligations imposed upon employers to whom the Award applies and to employers who are covered by the Award but subject to an enterprise agreement, they submit:

> 'The extent of such concerns, however, depend in part upon whether the amendments to Schedule B and C to the SCHCDS Award will create award derived entitlements to be paid the relevant rates, or whether they will merely provide an articulation of the rates that are required to be paid pursuant to the combined operation of the Award and the ERO. It appears to us that the proposed award provisions would require the payment of the new rates. That is, the clause would not merely serve to make parties aware of the rates that are payable pursuant to the ERO.
>
> The basis for our opposition to the proposed course of action can be characterised as arising firstly from a concern that the Full Bench does not have power to make the specific variations proposed and secondly, from a contention that the Full Bench should not be satisfied that the variation is necessary to meet the modern awards objective or, to the extent that it may be relevant, the minimum wages objective.'[880]

[1248] In support of their contention that we should not be satisfied that the variation is necessary to meet the modern awards objective or, to the extent that it may be relevant, the minimum wages objective, Ai Group advances the following considerations:[881]

- there are difficulties that will flow from the interaction between the current terms of the SCHADS Award and the proposed variations
- the absence of any provision enabling employers to absorb over-award payments into the proposed rates, in a manner comparable to what is currently provided for under the ERO
- the potentially detrimental, and arguably unfair, effect on employers covered by enterprise agreements of increasing award derived rates flowing from s.206 of the Act and the potential for the variation to discourage employers from engaging in collective bargaining, and
- the absence of any articulated justification for why the proposed variation is necessary to ensure that the meets the Award modern awards objective and the lack of any evidentiary material that would enable a proper consideration of factual matters relevant to the matters identified in s.134. This point is pertinent given the merits of the proposal are, for reasons we identify in this submission, contestable

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[879] AFEI Submission, 21 December 2020 at para 5.

[880] Ai Group Submission, 20 January 2021 at paras 5 – 6.

[881] Ai Group Submission, 20 January 2021 at para 8.

and because the proceedings leading to making of the ERO did not necessitate or otherwise involve the Commission taking into account whether the rates prescribed in the ERO are necessary to ensure that the Award achieves the modern awards objective.

[1249] Ai Group advances an alternative approach, as follows:

'Despite Ai Group's articulated concerns about the proposed amendment of the Award to require payment of rates higher than those specified in clauses 15 – 17, we recognise that there is merit in further assisting parties to identify the rates of pay that are required to be paid as a consequence of the combined operation of the instrument and the ERO.

To this end, we suggest that a less contentious course of action may be to include a provision in the nature of a 'note' in the Award that both refers the reader to the ERO and potentially contains a link to a document prepared and update by the Commission setting out the rates that are required to be paid as a product of the operation of ERO. The crucial point is that any such note should be framed in a manner that makes it clear that the payment of these amounts is not an award derived obligation.

Such a provision would, in our view, be permissible under s. s.142, given that in practice a party applying the Award would need to be aware of such rates in order to apply various provisions of the Award in a manner that conforms with the requirements of the ERO.

This approach would be somewhat analogous to the inclusion of various notes now included in awards referencing or otherwise alerting a reader to provision of the Act that are in some way relevant to matters dealt with under awards. Alternatively, we propose that the proposed variations should not be made at this stage and that such matters potentially be given further consideration in the context of the foreshadowed proceedings relating to the redrafting of the instrument in plain language.'[882]

[1250] In their reply submission dated 19 February 2021, the HSU opposes the alternate approach proposed by Ai Group and submit that 'such an approach is no substitute for a clear, easily understandable award setting out of the rates applicable to employees covered by Schedules B and C of the SCHCDSI Award.'

12.2 CONSIDERATION

[1251] We have decided to depart from our *provisional* view. It seems to us that there is a reason to doubt our power to include the ERO rates in a way that creates an award derived entitlement to be paid the relevant rates.

[1252] We turn first to the submissions of Ai Group and AFEI in relation to the Commission's power to vary the award to include the rates at Schedules B and C.

[1253] AFEI notes that when the ERO was made the Full Bench decided that the order should 'stand alone' from the SCHADS Award and our provisional view would be inconsistent with that conclusion. Ai Group submits that 's 139 of the Act may not permit an award to include terms that are essentially about rates that are a product of an ERO'.

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[882] Ai Group Submission, 20 January 2021 at paras 45 – 48.

[1254] As mentioned by AFEI the 1 February 2012 decision of the Full Bench in the *Equal Remuneration Case – 2010- 2012* addressed this issue:

> 'The final matter is whether the order should form part of the award or stand alone. Most parties took the view that the order should stand alone. Of the parties who addressed the operation of the better off overall test for enterprise agreements, most took the view that the benefit of the order would be protected by the terms of s.306 of the Act regardless of the operation of the better off overall test. We agree. The order should stand alone. Steps will be taken to include a notation in the modern award alerting readers to the existence of the order.'[883]

[1255] The interaction between Part 2-7 (dealing with EROs) and Parts 2-3 and 2-6 (dealing with modern awards and modern award minimum wages) was considered by the Full Bench in the *Equal Remuneration Decision 2015*:[884]

> 'The third limitation concerns the power to vary a modern award.
>
> Ai Group and ACCI and others contend that while the power to make an equal remuneration order is expressed in broad terms (i.e. 'make any order it considers appropriate') this should not be interpreted as extending to the making of an order varying a modern award. As Ai Group put it:
>
> > 'Put simply, Ai Group contends that an ERO and modern awards are intended by the FW Act to constitute different forms of industrial regulation which are aimed at achieving different and discrete purposes'.
>
> We agree. As we observed earlier (at [42]), the relevant legislative context may operate to limit an expression of wide possible connotation. In the context of the FW Act Part 2–3 (and Part 2–6 to the extent it deals with modern award minimum wages) constitutes a code for the making and variation of modern awards. It is clear from the legislative context that the making of equal remuneration orders under Part 2–7 is intended to be quite separate from modern awards, which form part of the safety net of minimum terms and conditions under the FW Act.
>
> As a general proposition where a particular procedure is designated to achieve something other procedures are impliedly excluded, reflected in the maxim *expressum facit cessare tacitum*.
>
> In Anthony Hordern and Sons Ltd v The Amalgamated Clothing and Allied Trades Union of Australia Gavan Duffy CJ and Dixon J said:
>
> > 'When the Legislature explicitly gives a power by a particular provision which prescribes the mode in which it shall be exercised and the conditions and restrictions which must be observed, it excludes the operation of general expressions in the same instrument which might otherwise have been relied upon for the same power.'
>
> Similarly, in R v Wallis; Ex parte Employers Association of Wool Selling Brokers Dixon J said:
>
> > '[A]n enactment in affirmative words appointing a course to be followed usually may be understood as importing a negative, namely, that the same matter is not to be done according to some other course.'

---

[883] [2012] FWAFB 1000 at [78].

[884] [2015] FWCFB 8200.

> In that case the Court held that a section of an Act that indicated the manner in which an arbitrator was to deal with a particular issue precluded the arbitrator dealing with that matter in accordance with more general procedures provided for in that Act.'[885] (footnotes omitted)

[1256] Taking into consideration these decisions, we have decided that the more appropriate course is to include the ERO rates as a note to clause 15. This will provide an appropriate balance between giving employees easy access to their rates and the concerns raised by Ai Group and AFEI.

[1257] In adopting this course we note that it is common ground that there is merit in assisting SCHADS employers and employees to identify the rates of pay that are required to be paid as a consequence of the combined operation of the SCHADS Award and the ERO.

[1258] Consistent with ss.46 and s.13(3) of the *Acts Interpretation Act 1901*[886] it is our intention that the information included in the new note will not be taken to be a part of the Award, it will however direct those covered by the award to the existence of the ERO.

[1259] It is our *provisional* view that notes 1 and 2 be moved to the end of clause 15 and that note 2 be amended as follows:

> Note 2: An equal remuneration order [PR525485] also applies to employees in the classifications in Schedule B—Classification Definitions—Social and Community Services Employees and Schedule C—Classification Definitions—Crisis Accommodation Employees of this modern award. The final rates of pay resulting from the equal remuneration order are set out below. The 'current hourly wage' in the tables below form employees' ordinary rates of pay for all purposes.
>
> **Equal remuneration rates for applicable Social and Community Services employees, from 1 December 2020**

	Clause	Minimum weekly rate	Final Rate Percentage	Final weekly wage	Final hourly wage
Classification		**$**	**%**	**$**	**$**
Social and community services employee level 2	15.2				
Pay point 1		877.60	123	1079.45	28.41
Pay point 2		905.10	123	1113.27	29.30
Pay point 3		932.60	123	1147.10	30.19
Pay point 4		957.60	123	1177.85	31.00
Social and community services employee level 3	15.3				
Pay point 1 (associate		957.60	126	1206.58	31.75

[885] *Equal Remuneration Decision 2015* [2015] FWCFB 8200 at [231] – [237].

[886] The *Acts Interpretation Act 1901* applies as at 25 June 2009 in accordance with s.40A of the Act.

	Clause	Minimum weekly rate	Final Rate Percentage	Final weekly wage	Final hourly wage
diploma/advanced certificate)					
Pay point 2		985.10	126	1241.23	32.66
Pay point 3 (3 year degree)		1006.10	126	1267.69	33.36
Pay point 4 (4 year degree)		1026.70	126	1293.64	34.04
Social and community services employee level 4	15.4				
Pay point 1		1054.20	132	1391.54	36.62
Pay point 2		1081.80	132	1427.98	37.58
Pay point 3		1109.60	132	1464.67	38.54
Pay point 4		1134.30	132	1497.28	39.40
Social and community services employee level 5	15.5				
Pay point 1		1162.00	137	1591.94	41.89
Pay point 2		1186.90	137	1626.05	42.79
Pay point 3		1214.60	137	1664.00	43.79
Social and community services employee level 6	15.6				
Pay point 1		1242.30	140	1739.22	45.77
Pay point 2		1269.70	140	1777.58	46.78
Pay point 3		1297.20	140	1816.08	47.79
Social and community services employee level 7	15.7				
Pay point 1		1324.70	142	1881.07	49.50
Pay point 2		1352.50	142	1920.55	50.54
Pay point 3		1380.00	142	1959.60	51.57
Social and community services employee level 8	**15.8**				
Pay point 1		1407.50	145	2040.88	53.71
Pay point 2		1435.10	145	2080.90	54.76
Pay point 3		1462.90	145	2121.21	55.82

Equal remuneration rates for Crisis Accommodation employees, from 1 December 2020

	Clause	Minimum weekly rate	Final Rate Percentage	Final weekly wage	Final hourly wage
Classification		**$**	**%**	**$**	**$**
Crisis accommodation employee Level 1	15.3				

	Clause	Minimum weekly rate	Final Rate Percentage	Final weekly wage	Final hourly wage
Classification		**$**	**%**	**$**	**$**
Pay point 1 (associate diploma/advanced certificate)		957.60	126	1206.58	31.75
Pay point 2		985.10	126	1241.23	32.66
Pay point 3 (3 year degree)		1006.10	126	1267.69	33.36
Pay point 4 (4 year degree)		1026.70	126	1293.64	34.04
Crisis accommodation employee level 2	15.4				
Pay point 1		1054.20	132	1391.54	36.62
Pay point 2		1081.80	132	1427.98	37.58
Pay point 3		1109.60	132	1464.67	38.54
Pay point 4		1134.30	132	1497.28	39.40
Crisis accommodation employee level 3	15.5				
Pay point 1		1162.00	137	1591.94	41.89
Pay point 2		1186.90	137	1626.05	42.79
Pay point 3		1214.60	137	1664.00	43.79
Crisis accommodation employee level 4	15.6				
Pay point 1		1242.30	140	1739.22	45.77
Pay point 2		1269.70	140	1777.58	46.78
Pay point 3		1297.20	140	1816.08	47.79

[1260] These proposed amendments will be included in the draft variation determination arising from this decision. Interested parties will be given an opportunity to comment on that draft variation determination and on our *provisional* view.

13 NEXT STEPS

[1261] In this section we set out the next steps regarding the finalisation of the Tranche 2 claims.

[1262] At the outset we note that we have rejected the following claims:

1. UWU's claim to vary clause 25.5(d) – change in roster (see [613] – [616])

2. ABI's claim to vary clause 25.5(d)(ii) – change in roster (see [640] – [642])

3. UWU's claim to insert a new clause 20.3(b) – clothing and equipment (see [903][903])

4. HSU's claim to vary clauses 28.1(b)(ii) – (iii) – Overtime for part-time and casual employees (see [959] – [973])

5. UWU's claim to vary clause 20.6 - Mobile phone allowance (see [1154] – [1156])

6. ASU's claim to insert a new clause 20.10 - Community language allowance (see [1229] – [1233]), and

7. HSU claim that there be *no* client cancellation clause in the SCHADS Award (see [792]– [794]).

[1263] We have decided to make the following variations to the SCHADS Award:

Broken shifts and minimum engagements

[1264] In relation to broken shifts and minimum payment periods, at [368] – [377], [488] – [491], we decided to:

1. Introduce a minimum engagement for part-time employees by deleting clause 10.4(c) and inserting a new clause 10.5 to provide the following minimum payment for part-time and casual employees:

    - social and community service employees (except when undertaking disability work) – 3 hours' pay, and

    - all other employees – 2 hours' pay.

2. Vary clause 25.6 to:

    - define a broken shift as a shift consisting of 2 separate periods of work with a single unpaid 'break' (other than a meal break)

    - clarify how this interacts with the new minimum payment clause, and

    - to accommodate the occasional need for a broken shift to involve more than 1 break subject to:

        - a maximum of 2 unpaid 'breaks' in the shift

        - the agreement of the employee, and

        - an additional payment.

[1265] A draft determination giving effect to these decisions is set out at **Attachment P**.

[1266] For the reasons set out in section 5.3 (see [547] – [556]), we have expressed the following *provisional* views:

1. The additional remuneration for working a broken shift under clause 25.6 of the SCHADS Award should be an allowance calculated as a percentage of the standard weekly rate.

2. An employee working a '1 break' broken shift under clause 25.6 should receive a broken shift allowance of 1.7% of the standard rate, per broken shift ($17.10 per broken shift).

3. The broken shift allowance payable for a 2 break broken shift should be set at 2.5% of the standard rate ($25.15 per broken shift).

4. An employee who is a day worker performing work outside of the ordinary span of hours (including as part of a period of work in a broken shift) is entitled to overtime for such work.

[1267] The draft determination at **Attachment P** also incorporates the above *provisional* views.

[1268] As to the UWU's claim that the SCHADS Award be varied to specify that the 'break' in the broken shift 'must exceed one hour' we concluded that a cogent merit basis for the claim has not been made out. We also concluded that the variations we have determined in respect of limiting the number of breaks in a broken shift and in the minimum payment clause will change rostering practices, including the duration of a 'break' in a broken shift. In these circumstances we decided that any prescription as to the duration of the break is premature. The issue can be revisited after the changes we will make have been in operation for at least 12 months.

[1269] As set out at [376] above, we also proposed to provide ABI (and any other interested party) an opportunity to present further arguments and evidence in support of its proposal for a one hour minimum engagement for staff meetings and training / professional development.

Travel Time

[1270] A conference will be convened to seek the views of interested parties in relation to the issues raised at [587] – [589].

Roster changes

[1271] At [643] we expressed the view that there is merit in varying clause 25.5(d) to permit the variation of a roster by mutual agreement in circumstances where the variation is proposed by an employee to accommodate an agreed shift swap with another employee. It is our *provisional* view that clause 25.5(d)(ii) be varied as follows:

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

(A) if the change is proposed by an employee to accommodate an agreed shift swap with another employee; or

(B) to enable the service of the organisation to be carried on where another employee is absent from duty on account of illness, or in an emergency.

Remote response/recall to work

[1272] At [722] we concluded that it is necessary to introduce an award term dealing with remote response work and made the following general observations about such a term:

1 A shorter minimum payment should apply in circumstances where the employee is being paid an 'on call' allowance.

2. There is merit in ensuring that each discrete activity (such as a phone call) does not automatically trigger a separate minimum payment.

3. A definition of 'remote response work' or 'remote response duties' should be inserted into the Award. We note that ABI proposes the following definition:

> 'In this award, remote response duties means the performance of the following activities:
>
> (a) Responding to phone calls, messages or emails;
>
> (b) Providing advice ("phone fixes");
>
> (c) Arranging call out/rosters of other employees; and
>
> (d) Remotely monitoring and/or addressing issues by remote telephone and/or computer access.'[887]

4. The clause should include a mechanism for ensuring that the time spent by an employee working remotely is recorded and communicated to their employer.

[1273] Our *provisional* view is that the minimum payment for remote response work performed between 6.00am and 10.00pm should be 30 minutes and the minimum payment between 10.00pm and 6.00am should be 1 hour. However, we note that there is an inter-relationship between the minimum payment period and the rate of payment.

[1274] The rate of pay applicable to remote response work (as opposed to the minimum payment) is problematic. A conference will be convened to discuss the issues raised at [734] – [738]).

Client cancellation

[1275] The ABI proposal is that clause 25.5(f) be replaced with the following provision:[888]

> '**(f) Client cancellation**

[887] ABI Submission, 10 February 2020, p 58.

[888] ABI Submission, 10 February 2020, p 70.

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

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

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

B. cancel the rostered shift.

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

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

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

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

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

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

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

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

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

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

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

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

[1276] We have decided to vary the SCHADS Award in the manner proposed by ABI subject to 2 amendments:

1. First, it is our *provisional* view that proposed clause 25.5(f)(v) be amended as follows:

   (v) The make up time arrangement can only be used where the employee was notified of the cancelled shift at least ~~after arriving at the relevant place of work to perform~~12 hours prior to the scheduled commencement of the shift. In these cases, clause 25.5(f)(iv)(A) applies.

2. Secondly, amending clause 25.5(f)(vii)(B) to delete '3 months' and insert '6 weeks'.

[1277] The use of the word 'shift' in this context may require further consideration. A shift suggests all of the work performed on a particular day, which may consist of a number of client engagements.

[1278] We also note that ABI is to give further consideration to the 'double dipping' point (see [825] – [827] above).

Clothing and equipment

[1279] At [882] we expressed the view that an Award variation is warranted to provide for the reimbursement of reasonable costs associated with the cleaning or replacement of personal clothing which has been soiled or damaged in the course of employment.

[1280] We direct that the parties confer about the form of a suitable variation, reflecting the views expressed above. The Commission will convene a conference to facilitate those discussions.

Overtime for part-time workers

[1281] Having reviewed the part-time employment terms in the SCHADS Award and having regard to the evidence and submissions, it is our *provisional* view that the Award be varied in 2 respects:

- to make it clear that working additional hours is voluntary, and
- to introduce a mechanism whereby a part-time employee who regularly works additional hours may request that their guaranteed hours be reviewed and increased, and their employer cannot unreasonably refuse such a request.

[1282] A term giving effect to our *provisional* view has been included in the draft variation determination set out at **Attachment P**.

24-hour-care clause

[1283] In the *September 2019 Decision* we found that 24-hour-care shifts are used in the industry and, while only a minority of employers used the 24-hour-care clause, those who do utilise the clause do so regularly. We have not been persuaded to part from our provisional view and confirm our *provisional* view that a 24-hour-care provision be retained, but that the

existing clauses require amendment. We have decided to vary clauses 25.8 and 31.2 as follows:

25.8 24-hour care

This clause only applies to home care employees.

(a) A **24-hour care** shift requires an employee to be available for duty in a client's home for a 24 hour period. During this period, the employee is required to provide the client with the services specified in the care plan. The employee is required to provide a total of no more than 8 hours of care during this period.

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

(c) The employee will be afforded the opportunity to sleep for a continuous period of 8 hours during a 24-hour care shift and employees will be provided with a separate room with a bed and clean linen, the use of appropriate facilities (including access to food preparation facilities and staff facilities where these exist) and free board and lodging for each night when the employee sleeps over.

(d) The employee will be paid 8 hours' work at 155% of their appropriate rate for each 24-hour period.

(e) If the employee is required to perform more than 8 hours' work during a 24-hour care shift, that work shall be treated as overtime and paid at the rate of time and a half for the first 2 hours and double time thereafter, except on Sundays when overtime will be paid for at the rate of double time, and on public holidays at the rate of double time and a half. An employer and employee may utilise the TOIL arrangement in accordance with clause 28.2.

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

31.2 Quantum of leave

For the purpose of the NES, a shiftworker is:

(a) an employee who works for more than 4 ordinary hours on 10 or more weekends during the yearly period in respect of which their annual leave accrues; or

(b) an employee who works at least eight 24-hour care shifts in accordance with clause 25.8;

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

[1284] This variation has been included in the draft determination set out at **Attachment P**.

Sleepover

[1285] We have decided to vary clause 25.7(c) – Sleepovers as follows:

> (c) The span for a sleepover will be a continuous period of 8 hours. Employees will be provided with a separate room with a bed and clean linen, the use of appropriate facilities (including access to food preparation facilities and staff facilities where these exist) and free board and lodging for each night when the employee sleeps over.

[1286] This variation has been included in the draft variation determination set out at **Attachment P**.

Equal Remuneration Order issue

[1287] We have decided to depart from our *provisional* view. The ERO rates will be set out as a note to clause 15. This will be included in the draft determination set out at **Attachment P**.

Further submissions

[1288] Interested parties are to file any submissions and evidence in respect of the draft variation determination at **Attachment P** and our *provisional* views referred to above by **4.00pm (AEST) Tuesday, 22 June 2021**.

[1289] Such submissions should also address the operative date of the proposed variations. Our *provisional* view is that an operative date of **1 October 2021** is appropriate.

[1290] All submissions must be sent by email in both PDF and word formats to amod@fwc.gov.au.

[1291] A Conference will be convened on **Thursday, 27 May 2021** at **10:30am (AEST)** to discuss each of:

- the travel time claim
- remote response/recall to work, and
- clothing and equipment claims.

[1292] A Hearing will be listed on **Wednesday, 30 June 2021**. At this Hearing, interested parties will be provided with an opportunity to make oral submissions in response to the submissions and evidence received relating to the draft determination and the *provisional* views referred to above.

[1293] Notices of Listing for the Conferences and Hearings will be issued shortly.

PRESIDENT

Appearances:

S Bull for United Workers' Union with *N Dabarera.*
L Doust for the Health Services Union with *R Liebhaber.*
B Ferguson for the Australian Industry Group with *R Bhatt.*
S Lo for the Australian Federation of Employers and Industries.
G Miller for the Australian Manufacturing Workers' Union.
M Pegg for National Disability Services.
M Robson for the Australian Services Union with *J Nucifora* and *M Rizzo.*
K Scott for Australian Business Industrial and the New South Wales Business Chamber; Aged and Community Services Australia and Leading Age Services Australia with *M Tiedeman.*

Hearing details:

2019.
Sydney, Melbourne:
October,11, 14–18;
December 5.

2020.
Sydney, Melbourne:
March 11;
July 9.

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ATTACHMENT A – EXHIBIT LIST

Set out below is the final and complete list of exhibits tendered at the Tranche 2 Full Bench hearings.[889]

EXHIBIT NO.	DATE TENDERED	TENDERED BY	DESCRIPTION	TRANSCRIPT REFERENCE
ABI & NSWBC				
ABI1	16 Oct 2019	ABI	Hammondcare Residential Care and Hammondcare at Home enterprise agreement 2018	PN1378
ABI2	18 Oct 2019	ABI	Statement of Darren Mathewson 12 July 2019	PN3392
ABI3	18 Oct 2019	ABI	Statement of Jeffrey Wright 12 July 2019	PN3392
ABI4	18 Oct 2019	ABI	Schedule of ABI evidence not read in relation to Graham Shanahan, Deb Ryan, Scott Harvey, Wendy Mason and Joyce Wang	PN3393
ABI5	18 Oct 2019	ABI	Statement of Graham Shanahan 28 June 2019	PN3392
ABI6	18 Oct 2019	ABI	Statement of Deb Ryan 12 July 2019	PN3392
ABI7	18 Oct 2019	ABI	Statement of Scott Harvey 2 July 2019	PN3392
ABI8	18 Oct 2019	ABI	Statement of Wendy Mason 17 July 2019	PN3392
ABI9	18 Oct 2019	ABI	Statement of Joyce Wang 12 July 2019	PN3392
ABI10	18 Oct 2019	ABI	Transcript of Cross-examination of Olav Muurlink	PN3388

[889] This list has been revised to accommodate any inconsistent referencing throughout the course of the proceedings. For completeness, this list also includes materials relevant to the community language allowance claim that were tendered during the Tranche 1 hearings.

ABI11	18 Oct 2019	ABI	Transcript of cross-examination of Scott Quinn	PN3389
ABI12	18 Oct 2019	ABI	NDIA Support Catalogue	PN3390
ABI13	18 Oct 2019	ABI	NDIA Efficient Cost Model Spreadsheet	PN3391
ABI14	11 Mar 2020	ABI	ABI Supplementary Submission and Questions of 11/03/2020	PN101

EXHIBIT NO.	DATE TENDERED	TENDERED BY	DESCRIPTION	TRANSCRIPT REFERENCE
Australian Federation of Employers & Industries				
AFEI1	11 Mar 2020	AFEI	AFEI Submissions and Questions	PN107

EXHIBIT NO.	DATE TENDERED	TENDERED BY	DESCRIPTION	TRANSCRIPT REFERENCE
Ai Group				
AIG1	15 Oct 2019	AIG	Rosters – **subject to confidentiality order**	PN515
AIG2	11 Mar 2020	AIG	Ai Group Supplementary Submissions and Questions, Background Paper 2	PN102
AIG3	11 Mar 2020	AIG	Ai Group Background Paper 3	PN105
AIG4	16 Apr 2019	AIG	Handbook from Multicultural New South Wales Website	PN685

EXHIBIT NO.	DATE TENDERED	TENDERED BY	DESCRIPTION	TRANSCRIPT REFERENCE
Australian Services Union				
ASU1	15 Oct 2019	ASU	Statement of Deborah Anderson dated 2 September 2019	PN980
ASU2	16 Oct 2019	ASU	Statement of Robert Steiner dated 15 October 2019	PN1549
ASU3	17 Oct 2019	ASU	Endeavour Foundation Annual	PN2026

			Report 2017-18	
ASU4	17 Oct 2019	ASU	Stanford Report	PN2220
ASU5	18 Oct 2019	ASU	Schedule of employer objections to statements of Emily Flett and Augustino Encabo	PN3380
ASU6	18 Oct 2019	ASU	Statement of Judith Wright dated 12 September 2019	
ASU7	18 Oct 2019	ASU	Statement of Tracy Kinchin dated 24 June 2019	
ASU8	18 Oct 2019	ASU	Statement of Emily Flett dated 22 September 2019	
ASU9	18 Oct 2019	ASU	Statement of Richard Rathbone dated 13 February 2019	
ASU10	18 Oct 2019	ASU	Statement of Augustino Encabo dated 13 February 2019	
ASU11	16 Apr 2019	ASU	Statement of Dr Ruchita 14 February 2019	PN539
ASU12	16 Apr 2019	ASU	Statement of Nadia Saleh 14 February 2019	PN597
ASU13	16 Apr 2019	ASU	Statement of Natalie Lang 18 February 2019	PN652
ASU14	16 Apr 2019	ASU	Statement of Lou Bacchiella 13 February 2019	PN714

EXHIBIT NO.	DATE TENDERED	TENDERED BY	DESCRIPTION	TRANSCRIPT REFERENCE
Health Services Union				
HSU1	15 Oct 2019	HSU	Statement of Mark Farthing dated 15 February 2019	PN822
HSU2	15 Oct 2019	HSU	Further Statement of Mark Farthing dated 16 September 2019	PN826
HSU3	15 Oct 2019	HSU	Statement of William Darren Elrick dated 15 February 2019	PN1068

HSU4	16 Oct 2019	HSU	Statement of Heather Waddell dated 15 February 2019	PN1362
HSU5	16 Oct 2019	HSU	Statement of Christopher Friend dated 15 February 2019	PN1500
HSU6	16 Oct 2019	HSU	Parts of Christopher Friend's statement not read	PN1844
HSU7	17 Oct 2019	HSU	Schedule of Fees For Home Care Services At Hammondcare	PN2570
HSU8	17 Oct 2019	HSU	Contract of Employment for Hammondcare Home Care At Home Employees	PN2591
HSU9	17 Oct 2019	HSU	Extract from Annual Financial Report 2017-2018 Report Of Hammondcare	PN2682
HSU10	17 Oct 2019	HSU	Extracts from the HammondCare Consolidated Financial Report for the year ended 30 June 2015	PN2701
HSU11	18 Oct 2019	HSU	HSS Part time contract	PN2864
HSU12	18 Oct 2019	HSU	NSW HSS Fees	PN2925
HSU13	18 Oct 2019	HSU	Full-time staff trial – Table of hours worked	PN2980
HSU14	18 Oct 2019	HSU	CCO Schedule of rates	PN3012
HSU15	18 Oct 2019	HSU	Same Day Cancellation Log – **subject to confidentiality order**	PN3040
HSU16	18 Oct 2019	HSU	Community Care Options Home Care Agreement Template *(the instruction sheet is only the first page)*	PN3079
HSU17	18 Oct 2019	HSU	Pro forma contract template	PN3194
HSU18	18 Oct 2019	HSU	Baptist Care Agreement NSW & ACT Aged Care Enterprise Agreement 2017	PN3219
HSU19	18 Oct 2019	HSU	Baptist Care Commonwealth Home Support Programme (CHSP) pro-forma Service Agreement	PN3225
HSU20	18 Oct 2019	HSU	Baptist Care Home Care	PN3248

			Agreement (Level 1)	
HSU21	18 Oct 2019	HSU	Baptist Care at Home Price Guide 2019	PN3291
HSU22	18 Oct 2019	HSU	Baptist Care Annual Financial Report	PN3301
HSU23	18 Oct 2019	HSU	CASS Financial Report 30 June 2018	PN3455
HSU24	18 Oct 2019	HSU	CASS Directors Report	
HSU25	18 Oct 2019	HSU	Statement of Fiona Macdonald dated 15 February 2019	
HSU26	17 April 2019	HSU	Statement of Robert Sheehy dated 15 February 2019	PN1669
HSU27	17 April 2019	HSU	Statement of Pamela Wilcock dated 15 February 2019	
HSU28	17 April 2019	HSU	Statement of Thelma Thames dated 15 February 2019	PN1443
HSU29	17 April 2019	HSU	Statement of Bernie Lobert dated 15 February 2019	PN1444
HSU30	17 April 2019	HSU	Statement of James Eddington dated 15 February 2019	PN1669
HSU31	18 Oct 2019	HSU	Statement of Scott Quinn dated 16 December 2015	
HSU32	18 Oct 2019	HSU	Supplementary Statement of Scott Quinn dated 3 October 2019	
HSU33	11 Mar 2020	HSU	HSU Supplementary Submission and Questions	PN288

EXHIBIT NO.	DATE TENDERED	TENDERED BY	DESCRIPTION	TRANSCRIPT REFERENCE
National Disability Services				
NDS1	17 Oct 2019	NDS	Witness statement of David Moody dated 12 July 2019	
NDS2	17 Oct 2019	NDS	Statement of Steven Miller dated 28 June 2019	PN1988
NDS3	17 Oct 2019	NDS	Parts of David Moody's statement	PN1914

			not read	
NDS4	11 Mar 2020	NDS	NDS Submissions re Background Papers 2 and 3	PN106

EXHIBIT NO.	DATE TENDERED	TENDERED BY	DESCRIPTION	TRANSCRIPT REFERENCE
United Voice				
UV1	15 Oct 2019	UV	Statement of Trish Stewart dated 17 January 2019	PN433
UV2	15 Oct 2019	UV	Supplementary statement of Trish Stewart dated 1 April 2019	PN433
UV3	15 Oct 2019	UV	Further Statement of Trish Stewart 1 October 2019	PN433
UV4	15 Oct 2019	UV	Statement of Deon Fleming dated 16 January 2019	PN498
UV5	15 Oct 2019	UV	Supplementary Statement of Deon Fleming dated 28 March 2019	PN498
UV6	15 Oct 2019	UV	Statement of Belinda Sinclair dated 16 January 2019	PN592
UV7	17 Oct 2019	UV	Statement of Melissa Coad dated 16 September 2019	PN1930
UV8	17 Oct 2019	UV	Statement of Jared Marks dated 3 October 2019	PN1933
UV9	18 Oct 2019	UV	Bundle of Home Care Price Guide materials: - Documents from the Commonwealth Government's *myagedcare.gov.au* website - Provider witness price guides displayed on *myagedcare* - Provider witness general price information displayed on *myagedcare*	PN3421

ATTACHMENT B – LIST OF SUBMISSIONS

	Party	Submission	Date
Australian Business Industrial and others			
	ABI	Draft Determination	2 April 2019
	ABI	Submission	5 April 2019
	ABI	Submission	19 May 2019
	ABI	Submission	3 June 2019
	ABI	Submissions	2 July 2019
	ABI	Submissions	12 July 2019
	ABI	Submission in reply	13 September 2019
	ABI	Submission in reply	12 October 2019
	ABI	Amended Draft Determination	15 October 2019
	ABI	Submission in reply	13 September 2019
	ABI	Submission	20 September 2019
	ABI	Closing submissions	19 November 2019
	ABI	Final Submission	10 February 2020
	ABI	Final reply submission	26 February 2020
	ABI	Submission: Supplementary questions	11 March 2020
	ABI	Submission - Background Paper 3	17 March 2020
	ABI	Submission in reply	10 August 2020
Australian Federation of Employers and Industry			
	AFEI	Submissions	22 May 2019
	AFEI	Submissions	8 April 2019
	AFEI	Submissions	3 July 2019
	AFEI	Submissions in reply	23 July 2019
	AFEI	Submissions	17 September 2019
	AFEI	Submissions	23 September 2019
	AFEI	Submissions	19 November 2019
	AFEI	Submissions in reply	19 November 2019
	AFEI	Final submissions	11 February 2020
	AFEI	Final submissions in reply	26 February 2020
	AFEI	Submissions – Background Papers 2 & 3	11 March 2020
	AFEI	Submission – Background Paper 3	17 March 2020
	AFEI	Submissions	10 August 2020
The Australian Industry Group			
	Ai Group	Submission	8 April 2019
	Ai Group	Further submission	2 May 2019

	Ai Group	Reply submission	13 July 2019
	Ai Group	Reply submission	16 September 2019
	Ai Group	Reply submission – Employer claims	26 September 2019
	Ai Group	Submission	18 November 2019
	Ai Group	Further final submission	10 February 2020
	Ai Group	Final reply submission	26 February 2020
	Ai Group	Submission – Background Paper 2	11 March 2020
	Ai Group	Submission – Background Paper 3	11 March 2020
	Ai Group	Submission – Background Paper 3	20 March 2020
	Ai Group	Reply submission	13 August 2020
Australian Municipal, Administrative, Clerical and Services Union			
	ASU	Draft Determination	7 November 2018
	ASU	Submission	18 February 2019
	ASU	Draft Determination – Community Language Allowance	15 April 2019
	ASU	Submission	17 May 2019
	ASU	Submission	4 June 2019
	ASU	Submission	2 July 2019
	ASU	Submission in reply	16 September 2019
	ASU	Submission	23 September 2019
	ASU	Submission in reply	2 October 2019
	ASU	Submission	19 November 2019
	ASU	Submission	7 February 2020
	ASU	Submission[890]	10 February 2020
	ASU	Reply submissions[891]	26 February 2020
	ASU	Submission – Background Papers 2 & 3[892]	10 March 2020
	ASU	Submission – Background Paper 3	23 March 2020
	ASU	Submission[893]	20 July 2020
Business SA			
	BSA	Submissions in reply	12 July 2019
Health Services Union of Australia			
	HSU	Draft Determination	9 November 2018
	HSU	Submissions	15 February 2019

[890] This was a joint submission between the ASU, HSU and UWU.

[891] This was a joint submission between the ASU, HSU and UWU.

[892] This was a joint submission between the ASU, HSU and UWU.

[893] This was a joint submission between the ASU, HSU and UWU.

	HSU	Submission in reply	16 September 2019
	HSU	Supplementary submission in reply	2 October 2019
	HSU	Supplementary submission in reply	3 October 2019
	HSU	Submission	4 October 2019
	HSU	Submission[894]	13 November 2019
	HSU	Submission	18 November 2019
	HSU	Submission[895]	10 February 2020
	HSU	Reply submissions[896]	26 February 2020
	HSU	Submission – Background Papers 2 & 3[897]	10 March 2020
	HSU	Submission – Background Paper 3	17 March 2020
	HSU	Submission[898]	20 July 2020
People with Disability Australia and Disabled Peoples Organisations Australia			
		Submission	17 September 2019
JOBS AUSTRALIA			
	JA	Submission	15 October 2018
	JA	Draft determination[899]	7 November 2018
	JA	Submission in reply	5 April 2019
National Disability Services			
	NDS	Submission	8 April 2019
	NDS	Submission[900]	16 May 2019
	NDS	Submission	17 March 2019
	NDS	Submission	2 July 2019
	NDS	Submission	16 July 2019
	NDS	Submission	16 September 2019
	NDS	Submission	19 November 2019
	NDS	Submission	7 February 2020
	NDS	Submission	26 February 2020
	NDS	Submission – Background Papers 2 & 3	10 March 2020
	NDS	Submission in reply	10 August 2020
United Workers' Union			

[894] This was a joint submission with the UWU.

[895] This was a joint submission between the ASU, HSU and UWU.

[896] This was a joint submission between the ASU, HSU and UWU.

[897] This was a joint submission between the ASU, HSU and UWU.

[898] This was a joint submission between the ASU, HSU and UWU.

[899] Jobs Australia subsequently confirmed its support for submissions in reply to made by NDS. See Jobs Australia Submission, 5 April 2019.

[900] This was an agreed submission from AFEI, ASU and NDS.

	UWU	Draft Determination	7 November 2018
	UWU	Submission	15 February 2019
	UWU	Supplementary submission	1 April 2019
	UWU	Submission on NDIS	17 May 2019
	UWU	Submission	3 July 2019
	UWU	Submission in reply	13 September 2019
	UWU	Further submission in reply	3 October 2019
	UWU	Court book	4 October 2019
	UWU	Submission[901]	13 November 2019
	UWU	Submission on findings sought	18 November 2019
	UWU	Submission[902]	10 February 2020
	UWU	Reply submissions[903]	26 February 2020
	UWU	Submission – Background Papers 2 & 3[904]	10 March 2020
	UWU	Submission – Background Paper 3	18 March 2020
	UWU	Submission[905]	20 July 2020

AM2020/100 – Equal Remuneration Case

	Party	**Submission**	**Date**
	AFEI	Submissions	21 December 2020
	NDS	Submission	21 December 2020
	Ai Group	Submission	21 December 2020
	HSU	Submission	21 December 2020
	ASU	Submission	15 January 2021
	Hsu	Reply submission	19 February 2021
	Ai Group	Submission	20 January 2021

[901] This was a joint submission with the HSU.

[902] This was a joint submission between the ASU, HSU and UWU.

[903] This was a joint submission between the ASU, HSU and UWU.

[904] This was a joint submission between the ASU, HSU and UWU.

[905] This was a joint submission between the ASU, HSU and UWU.

ATTACHMENT C – SUBMISSIONS AND EVIDENCE – MINIMUM ENGAGEMENT CLAIM

Part A - Index of evidence relied upon by parties

Documents

#	EXHIBIT NO.	DOCUMENT
1	ABI2	Witness Statement of Darren Mathewson - ABI - whole
2	ABI3	Witness Statement of Jeffrey Wright - ABI - paras 38-42 - AFEI - paras 37-43 - NDS - paras 44-46
3	ABI5	Witness Statement of Graham Shanahan - ABI - paras 34-39 - NDS - paras 33-40
4	ABI6	Witness Statement of Deb Ryan - ABI - paras 61-67, 72
5	ABI7	Witness Statement of Scott Harvey - ABI - paras 57-60 - NDS - paras 53-60
6	ABI8	Witness Statement of Wendy Mason - ABI - paras 57-63, 71 - NDS - paras 55-72
7	ABI9	Witness Statement of Joyce Wang - ABI - para 56 - NDS - paras 65-67
8	AIG1	Staff Roster - Ai Group - Whole
9	ASU2	Witness Statement of Robert Steiner - Ai Group - paras 14-15 - HSU - paras 15-16, CB1223 - NDS - paras 15-16
10	ASU4	Stanford Report - ABI - para 11 - HSU - CB1459-1471

#	EXHIBIT NO.	DOCUMENT
11	ASU9	Witness Statement of Richard Rathbone - ABI - paras 10-12 - Ai Group - Attachment
12	ASU10	Witness Statement of Augustino Encabo - ABI - paras 13, 15
13	HSU1	Witness Statement of Mark Farthing - HSU - CB2926-2932
14	HSU3	Witness Statement of William Elrick - HSU - para 19; CB2935 - ABI - para 19 - Ai Group - paras 19-23; CB2935-2936
15	HSU4	Witness Statement of Heather Waddell - ABI – para 4 - AFEI - para 22 - Ai Group - paras 21-22; CB2958 - HSU - paras 11-12; CB2956-2960 - NDS - paras 21-25
16	HSU5	Witness Statement of Christopher Friend - Ai Group - paras 47-49, 57 - HSU - paras 46-55; CB 2945-2951
17	HSU25	Witness Statement of Fiona Macdonald - Ai Group - FM-2; CB2917, CB2916-2917 - HSU - CB2910-2915
18	HSU26	Witness Statement of Robert Sheehy - Ai Group - paras 7-8; CN2941-2942 - HSU - paras 7-8; CB 2941-2944
19	HSU27	Witness Statement of Pamela Wilcock - ABI - para. 9 - HSU - CB2952-2955
20	HSU28	Witness Statement of Thelma Thames - ABI - paras 5, 12 - Ai Group - para 12; CB2962 - HSU - paras 12-13; CB 2961-2964

#	EXHIBIT NO.	DOCUMENT
21	HSU29	Witness Statement of Bernie Lobert - AFEI - para 11 - Ai Group - para 22 - HSU - paras 12-13; CB2965-2968
22	HSU30	Witness Statement of James Eddington - Ai Group - para 23; CB2973 - HSU - para 22; CB 2973
23	HSU31	Witness Statement of Scott Quinn - Ai Group - paras 20-27; CB2989 - HSU - para 20; CB 2988-3050
24	HSU32	Supplementary Witness Statement of Scott Quinn - AI Group - paras 10, 34; CB3053 - HSU - paras 10-24; CB3051-3079
25	NDS1	Witness Statement of David Moody - HSU - paras 53-58; CB4405-4406[906]
26	NDS2	Witness Statement of Steven Miller - HSU - paras 23-26; CB4410-4411 - NDS - paras 40-50
27	UV1	Witness Statement of Trish Stewart - NDS - para 12 - Ai Group - paras 12-13, 15; CB4603-4604, Annexure B, CB4613-4634
28	UV4	Witness Statement of Deon Fleming - NDS - paras 19-21 - Ai Group - paras 19-21; CB4482
29	CB2835	Draft determination - HSU - CB2835-2836
30		NDIA Efficient Cost Model for Disability Support Workers - ABI - CB489, CB500.

[906] Note that paragraphs 54, 56 and 58 of NDS1 – Witness Statement of David Moody were withdrawn during the course of the proceedings.

#	EXHIBIT NO.	DOCUMENT
31		Stewart and Brown – *Aged and Financial Performance Survey* – Sector Report – Financial Year 2018* - ABI - CB503.

* ABI filed updated versions of the Stewart & Brown reports on 10 August 2020.

Oral evidence

#	TRANSCRIPT	WITNESS
32	Transcript, 15 October 2019	Oral evidence of Belinda Sinclair - AFEI - PN739
33	Transcript, 18 October 2019	Oral evidence of Deborah Gaye Ryan - ABI - PN3050 - Ai Group - PN3047-PN3048, PN3052
34	Transcript, 15 October 2019	Oral evidence of Deon Fleming - AFEI - PN518, PN525, PN527
35	Transcript, 17 October 2019	Oral evidence of Dr James Stanford - HSU - PN2272-PN2277
36	Transcript, 18 October 2019	Oral evidence of Graham Shanahan - AFEI - PN2885
37	Transcript, 16 October 2019	Oral evidence of Heather Waddell - AFEI - PN1453-PN1455 - Ai Group - PN1456
38	Transcript, 16 October 2019	Oral evidence of Robert Steiner - AFEI - PN1562, PN1566, PN1568, PN1555-1556, PN1558-1559 - Ai Group - PN1562-PN1568 - NDS - PN1552-PN1569
39	Transcript, 17 October 2019	Oral evidence of Steven Miller - AFEI - PN2050 - NDS - PN2033-2039, PN2049-2053
40	Transcript, 15 October 2019	Oral evidence of Trish Stewart - AFEI - PN461, PN464, PN468, PN469
41	Transcript, 18 October 2019	Oral evidence of Wendy Mason - AFEI - PN3315 - NDS - PN3314-3315

Part B - Index of party submissions

#	DATE	PARTY	DOCUMENT
1	15 February 2019	UWU	Submission
2	15 February 2019	HSU	Submission and amended draft determination
3	12 July 2019	ABI	Submission in reply – union claims – Attachment C
4	12 July 2019	BusinessSA	Submission in reply – union claims – Attachment C
5	13 July 2019	Ai Group	Submission in reply
6	16 July 2019	NDS	Submission in reply – union claims – Attachment C
7	23 July 2019	AFEI	Submission in reply – union claims – Attachment C
8	3 October 2019	HSU	Submission in reply – employer response
9	18 November 2019	HSU	Submission – claims pressed, findings and evidence
10	18 November 2019	Ai Group	Submission – claims pressed, findings and evidence
11	19 November 2019	ABI	Submissions
12	19 November 2019	NDS	Submission
13	19 November 2019	AFEI	Submission
14	7 February 2020	NDS	Submission – response to background paper 2
15	10 February 2020	Ai Group	Submission – response to background paper 2
16	10 February 2020	Unions	Submission – response to background paper 2
17	10 February 2020	ABI	Submission – response to background paper 2
18	11 February 2020	AFEI	Submission – response to background paper 2
19	26 February 2020	Ai Group	Submission in reply
20	26 February 2020	AFEI	Submission in reply
21	26 February 2020	ABI	Submissions in reply
22	26 February 2020	NDS	Submissions in reply
23	26 February 2020	Unions	Submissions in reply
24	10 March 2020	Unions	Joint Submissions – Response to Background Papers 2 and 3
25	10 March 2020	NDS	Submissions – NDS Response to Questions in

#	DATE	PARTY	DOCUMENT
			Background Paper 3
26	11 March 2020	AFEI	Submissions – Response to Questions in Background Paper 3
27	11 March 2020	ABI	Submissions – Supplementary Questions
28	11 March 2020	Ai Group	Submissions – Ai Group Response to Questions in Background Paper 3
29	20 July 2020	Unions	Joint submissions
30	10 August 2020	ABI	Reply Submission
31	13 August 2020	Ai Group	Reply Submission

ATTACHMENT D – SUBMISSIONS AND EVIDENCE – BROKEN SHIFTS CLAIMS

Part A – Index of evidence relied upon by parties

Documents

#	EXHIBIT NO.	DOCUMENT
1	ABI2	Witness statement of Darren Matthewson - ABI - CB211 - AFEI - para 48; CB211-469
2	ABI3	Witness statement of Jeffrey Wright - ABI - paras 44-46; CB470 - AFEI - paras 18, 37, 42-43 - NDS - paras 44-46 - UWU - paras 41, 45
3	ABI5	Witness statement of Graham Shanahan - ABI - para 37 - AFEI - paras 33-34 - NDS - paras 33-40
4	ABI6	Witness statement of Deb Ryan - ABI - paras 67, 70 - AFEI - paras 60, 62, 65 - ASU - CB190 - HSU - para 64; CB198
5	ABI7	Witness statement of Scott Harvey - AFEI - paras 53, 57-58 - ASU - CB162 - NDS - paras 53-60 - UWU - paras 56-59
6	ABI8	Witness statement of Wendy Mason - ABI - paras 57-59, 67, 72; CB477 - AFEI - paras 60-61, 71 - NDS - paras 55-72 - UWU - paras 71-72
7	ABI9	Witness statement of Joyce Wang - ABI - para 65-67; CB200 - AFEI - paras 51, 53 - NDS - paras 65-67
8	ABI13	NDIA Efficient Cost Model - ABI - CB501
9	ASU2	Witness statement of Robert Steiner - Ai Group - paras 14-15 - ASU - Whole - HSU - CB1223 - NDS - paras 15-16

		- UWU - paras 15-20
10	ASU4	Stanford Report - ASU - Expert report - HSU - para 8, 11, 29, 54(c); CB1459-1447
11	ASU7	Witness statement of Tracy Kinchin - ASU - CB1190
12	ASU9	Witness statement of Richard Rathbone - Ai Group - CB1178-1185 - ASU - CB1171
13	ASU10	Witness statement of Augustino Encabo - Ai Group - para 34; CB1140 - ASU - CB1137
14	HSU1	Witness statement of Mark Farthing - HSU - CB2926-2932
15	HSU3	Witness statement of William Elrick - AFEI - para 21 - Ai Group - para 20, 21, 23; CB2936 - HSU - paras 18-23; CB2935-2936
16	HSU4	Witness statement of Heather Waddell - ABI - para 23 - AFEI - para 22 - Ai Group - paras 5-7, 12; CB2956-2958 - HSU - CB2956-2960 - NDS - paras 21-25
17	HSU5	Witness statement of Christopher Friend - ABI - para 49 - Ai Group - paras 47-49, 57; CB2949-2950 - HSU - CB2945-2951
18	HSU25	Witness statement of Fiona Macdonald - Ai Group - CB2916-2917 - ASU - Annexure FM-2; CB2772 - HSU - CB2910-2922 - UWU - Annexure FM-2
19	HSU26	Witness statement of Robert Sheehy - ABI - para 7 - Ai Group - para 7-8; CB2941 - HSU - CB2941-2944
20	HSU27	Witness statement of Pamela Wilcock - HSU - CB2952-2955
21	HSU28	Witness statement of Thelma Thames - Ai Group - para 15; CB2963 - HSU - CB2961-2964

22	HSU29	Witness statement of Bernie Lobert - AFEI - para 21 - Ai Group - para 22; CB2973 - HSU - CB2965-2968
23	HSU30	Witness statement of James Eddington - ABI - para 23 - Ai Group - para 23; CB2973 - HSU - CB2973-2974
24	HSU31	Witness statement of Scott Quinn - Ai Group - paras 20-29, 40; CB2990-2991 - HSU - CB2988-3050
25	HSU32	Supplementary witness statement of Scott Quinn - Ai Group - paras 10, 21, 27-28, 34; CB3053-3055 - HSU - CB3051-3079
26	NDS1	Witness statement of David Moody - HSU - CB4405-4406
27	NDS2	Witness statement of Steven Miller - HSU - CB4410-4411 - NDS - paras 40-50
28	UV1	Witness statement of Trish Stewart - AFEI - paras 6, 7, 9 - Ai Group - paras 12-13, 15; CB4603-4604, CB4613-34 - NDS - para 12 - UWU - paras 13-19, Annexure B
29	UV2	Supplementary witness statement of Trish Stewart - UWU - paras 7-8
30	UV3	Further Witness Statement of Trish Stewart - AFEI - para 7 - UWU - paras 3-5, 7-17
31	UV4	Witness statement of Deon Fleming - Ai Group – para 19-21, Annexure B; CB4482 - HSU - para 21; CB4482 - NDS - paras 19-21 - UWU - paras 18-24, Annexure B
32	UV5	Supplementary witness statement of Deon Fleming - UWU - para 6
33	UV6	Witness statement of Belinda Sinclair - AFEI - para 12 - HSU - paras 12-14; CB4571, CB4591-4601 - UWU - paras 12-14, Annexure B
34	UV7	Witness statement of Melissa Coad

		- AFEI - para 16; CB4713-4719 - UWU - paras 28-30
35	UV8	Witness statement of Jared Marks - UWU - paras 1-23, 25, 27-35
36	CB1686	Dr Olav Muurlink – "*Predictability and control in working schedules*" - ASU - CB1686
37	CB4416	Draft determination - UWU - paras 5-6; CB4416
38	CB2835	Draft determination - HSU - CB2835-2838
39	CB489	NDIA Efficient Cost Model for Disability Support Workers - ABI - CB489
40	CB1884	NDIS Costs Productivity Commission - ASU - CB1884
41	CB2796	NDIS Price Guide 2019-2020 - ASU - CB2796
42	CB1828	NDS – Australian Disability Workforce Report - ASU - CB1828
43	CB181	Witness statement of Andrew Collins (**not tendered**) - AFEI - paras 44-45
44		Supplementary witness statement of Steven Miller (**not tendered**) - NDS - paras 3-7
45		Supplementary witness statement of Wendy Mason (**not tendered**) - ABI - paras 8-18
46		Stewart & Brown – Aged and Financial Performance Survey – Sector Report Financial Year 2018* - ABI - CB503
47		Stewart & Brown – Aged and Financial Performance Survey – Sector Report – December 2018* - ABI - pp 5, 6, 27, 29; CB541

* ABI filed updated versions of the Stewart & Brown reports on 10 August 2020.

Oral evidence

#	TRANSCRIPT	WITNESS
48	Transcript, 15 October 2019	Oral evidence of Belinda Sinclair - AFEI - PN711, PN713, PN739
49	Transcript, 18	Oral evidence of Deborah Gaye Ryan

	October 2019	- AI Group - PN3047-PN3048, PN3052, PN3086 - ASU - PN3050, PN3086-PN3092 - UWU - PN3050, PN3086-PN3092
50	Transcript, 15 October 2019	Oral evidence of Deon Fleming - AFEI - PN518-PN525, PN527, PN529 - Ai Group - PN525, PN527
51	Transcript, 18 October 2019	Oral evidence of Graham Shanahan - AFEI - PN2885 - Ai Group - PN2881
52	Transcript, 16 October 2019	Oral evidence of Heather Waddell - AFEI - PN1453-PN1455 - Ai Group - PN1465 - ASU - PN1342
53	Transcript, 17 October 2019	Oral evidence of James Stanford - ASU - PN2216-PN2289 - HSU - PN2215, PN2272-PN2277 - UWU - PN2274
54	Transcript, 17 October 2019	Oral evidence of Jeffrey Wright - AFEI - PN2623 - Ai Group - PN2623 - ASU - PN2543-PN2570, PN2619 - UWU - PN2543-2570, PN2619
55	Transcript, 18 October 2019	Oral evidence of Joyce Wang - Ai Group - PN3537
56	Transcript, 16 October 2019	Oral evidence of Robert Steiner - AFEI - PN1555-PN1556, PN1558-PN1559, PN1562, PN1566, PN1568 - Ai Group - PN1562-PN1568, PN1570, PN1572 - ASU - PN1534-PN1613 - HSU - PN1533 - NDS - PN1552-PN1569
57	Transcript, 17 October 2019	Oral evidence of Steven Miller - AFEI - PN2050, PN2070 - ASU - PN2034-PN2069 - NDS - PN2033-PN2039, PN2049-PN2053
58	Transcript, 15 October 2019	Oral evidence of Trish Stewart - AFEI - PN461, PN464, PN469-PN473 - Ai Group - PN461, PN464
59	Transcript, 18 October 2019	Oral evidence of Wendy Mason - AFEI - PN3315 - Ai Group - PN3315 - NDS - PN3314-PN3315 - UWU - PN3231-PN3236

Part B – Submissions

#	DATE	PARTY	DOCUMENT
1	15 February 2019	UWU	Submission
2	15 February 2019	HSU	Submission and amended draft determination
3	18 February 2019	ASU	Submission
4	1 April 2019	UWU	Supplementary submission
5	8 April 2019	Ai Group	Submission in reply
6	2 July 2019	ASU	Submission
7	12 July 2019	ABI and ors	Submission in reply – union claims – Attachment C
8	12 July 2019	BusinessSA	Submission in reply – union claims – Attachment C
9	16 July 2019	NDS	Submission in reply – union claims – Attachment C
10	23 July 2019	AFEI	Submission in reply – union claims – Attachment C
11	13 September 2019	ABI and ors	Submission in reply – union claims – travel time
12	16 September 2019	NDS	Submission in reply – union claims – travel time
13	16 September 2019	Ai Group	Submission in reply – union claims – travel time
14	17 September 2019	AFEI	Submission in reply – union claims – travel time
15	2 October 2019	ASU	Submission in reply – employer response
16	3 October 2019	HSU	Submission in reply – employer response
17	3 October 2019	UWU	Submission in reply – employer response and amended draft determination
18	18 November 2019	UWU	Submission – claims pressed, findings and evidence
19	18 November 2019	HSU	Submission – claims pressed, findings and evidence
20	18 November 2019	Ai Group	Submission – claims pressed, findings and evidence
21	19 November 2019	ASU	Submission – claims pressed, findings and evidence

#	DATE	PARTY	DOCUMENT
22	19 November 2019	ABI and ors	Submission – claims pressed, findings and evidence
23	19 November 2019	NDS	Submission – claims pressed, findings and evidence
24	19 November 2019	AFEI	Submission – claims pressed, findings and evidence
25	7 February 2020	NDS	Submission – final
26	10 February 2020	Ai Group	Submission – final
27	10 February 2020	ABI and ors	Submission – final
28	10 February 2020	Unions (joint)	Submission – final
29	11 February 2020	AFEI	Submission – final
30	26 February 2020	Ai Group	Submission in reply – final
31	26 February 2020	NDS	Submission in reply – final
32	26 February 2020	AFEI	Submission in reply – final
33	26 February 2020	ABI and ors	Submission in reply – final
34	26 February 2020	Unions (joint)	Submission in reply – final
35	10 March 2020	Unions (joint)	Submission – background papers 2 & 3
36	10 March 2020	NDS	Submission – background papers 2 & 3
37	11 March 2020	AFEI	Submission – background papers 2 & 3
38	11 March 2020	ABI and ors	Submission – background papers 2 & 3
39	17 March 2020	AFEI	Submission – background paper 3 – Attachment 1
40	17 March 2020	ABI and ors	Submission – background paper 3 – Attachment 1
41	18 March 2020	UWU	Submission – background paper 3 – Attachment 1
42	20 March 2020	Ai Group	Submission – background paper 3 – Attachment 1
43	23 March 2020	ASU	Submission – background paper 3 – Attachment 1

ATTACHMENT E – SUBMISSIONS AND EVIDENCE – TRAVEL TIME CLAIMS

Part A – Index of evidence relied upon by parties

Documents

#	EXHIBIT NO.	DOCUMENT
1	ABI8	Witness Statement of Wendy Mason - AFEI - para 71
2	ABI2	Witness Statement of Darren Mathewson - ABI - CB211
3	ASU1	Witness Statement of Deborah Anderson - ASU - CB1394
4	ASU2	Witness Statement of Robert Steiner - AFEI - paras 11, 16 - Ai Group - para 14 - ASU - whole - HSU - paras 11; CB1223 - NDS - paras 15-16 - UWU - paras 10-11, 15
5	ASU4	Stanford Report - UWU - paras 26-30 - AFEI - CB1467 - ASU - whole
6	ASU7	Witness Statement of Tracey Kinchin - Ai Group - para 16 - ASU - CB1190
7	ASU9	Witness Statement of Richard Rathbone - Ai Group - para 17, 34 - ASU - CB1171
8	ASU10	Witness Statement of Augustino Encabo - Ai Group - para 34 - ASU - CB1137
9	HSU1	Witness Statement of Mark Farthing - HSU - CB2926-2932
10	HSU2	Further Witness Statement of Mark Farthing - HSU - para 10(d); CB2982 - UWU - para 21
11	HSU3	Witness Statement of William Elrick - HSU - CB2933-2940

#	EXHIBIT NO.	DOCUMENT
12	HSU4	Witness Statement of Heather Waddell - Ai Group - para 13 - HSU - paras 10-14; CB2956-2960 - NDS - paras 10-14
13	HSU5	Witness Statement of Christopher Friend - Ai Group - para 47 - HSU - paras 65-72; CB2946-2951
14	HSU25	Witness Statement of Fiona Macdonald - Ai Group - CB2916; Annexure FM-2 - ASU - CB2772, Annexure FM-2 - HSU - CB2909-2923 - NDS - CB2917-2920 - UWU - Annexure FM-2
15	HSU26	Witness Statement of Robert Sheehy - HSU - para 9; CB2941-2944
16	HSU27	Witness Statement of Pamela Wilcock - HSU - CB2952-2955
17	HSU28	Witness Statement of Thelma Thames - Ai Group - paras 15-16 - HSU - paras 14-19; CB2961-2964 - NDS - paras 13-16
18	HSU29	Witness Statement of Bernie Lobert - Ai Group - para 15 - HSU - paras 5-6; CB2965-2968
19	HSU30	Witness Statement of James Eddington - HSU - paras 20-21; CB2969-2980
20	HSU31	Witness Statement of Scott Quinn - Ai Group - paras 28-29 - HSU - CB2988-3050
21	HSU32	Supplementary Witness Statement of Scott Quinn - Ai Group - paras 10, 18, 21, 25, 27-28 - HSU - paras 10, 27-30; CB3051-3079 - NDS - paras 14-29
22	UV1	Witness Statement of Trish Stewart - Ai Group - paras 16, 20 - NDS - paras 3-8 - UWU - paras 13-16; Annexures A & B

#	EXHIBIT NO.	DOCUMENT
23	UV2	Supplementary Witness Statement of Trish Stewart - ABI - para 5 - Ai Group - para 6 - UWU - paras 3-8
24	UV3	Further Witness Statement of Trish Stewart - UWU - paras 2-6, 13-17
25	UV4	Witness Statement of Deon Fleming - Ai Group - para 22 - UWU - paras 9, 18-24; Annexures A & B
26	UV5	Supplementary Witness Statement of Deon Fleming - ABI - para 5 - UWU - paras 5-8
27	UV6	Witness Statement of Belinda Sinclair - AFEI - para 26 - UWU - paras 12-14; Annexure B
28	UV8	Witness Statement of Jared Marks - Ai Group - CB4720-4723 - UWU - paras 1-23, 25, 27-35
29	UV9	Bundle of Home Care Price Guide materials - HSU - whole - UWU - pp 15, 34, 40, 42, 44, 45, 46
30	CB4416	Draft determination - UWU - para 7; CB4416
31	CB2835	Draft determination - HSU - CB2835-2838
32	CB1686	Muurlink Report - ASU - CB1686
33	CB501	NDIA Efficient Cost Model - ABI - CB501
34	CB489	NDIA Efficient Cost Model for Disability Support Workers - ABI - CB489
35	CB1884	NDIS Costs Productivity Commission Paper - ASU - CB1884
36	CB2796	NDIS Price Guide 2019-20 - AFEI - para 12; CB2796 - ASU - para 12; CB2796 - HSU - CB4321-4368 - UWU – p 12; CB2796

#	EXHIBIT NO.	DOCUMENT
36	CB1828	NDS - Australian Disability Workforce Report - ASU - CB1828
38		Business Equipment Industry F17s - ASU - whole
39		Stewart and Brown – Aged and Financial Performance Survey – Sector Report – Financial Year 2018* - ABI - CB503
40		Stewart and Brown – Aged and Financial Performance Survey – Sector Report – December 2018* - ABI - CB541

* ABI filed updated versions of the Stewart & Brown reports on 10 August 2020.

Oral evidence

#	TRANSCRIPT	WITNESS
41	Transcript, 16 October 2019	Oral evidence of Belinda Sinclair - AFEI - PN678
42	Transcript, 16 October 2019	Oral evidence of Christopher Friend - Ai Group - PN1506, PN1514-PN1515
43	Transcript, 18 October 2019	Oral evidence of Deborah Gaye Ryan - ASU - PN3050-PN3059 - UWU - PN3050-PN3059
44	Transcript, 16 October 2019	Oral evidence of Deon Fleming - AFEI - PN525, PN527-PN532 - Ai Group - PN525, PN527, PN531 - UWU - PN525-PN532
45	Transcript, 18 October 2019	Oral evidence of Graham Shanahan - ABI - PN2855, PN2887, PN2890 - Ai Group - PN2879, PN2885, PN2890 - UWU - PN2865-PN2866, PN2887-PN2890
46	Transcript, 16 October 2019	Oral evidence of Heather Waddell - AFEI - PN1389, PN1391, PN1392, PN1395, PN1398, PN1402, PN1405, PN1407-1409 - NDS - PN1386-PN1414
47	Transcript, 17 October 2019	Oral evidence of James Stanford - ASU - PN2216-PN2289 - UWU - PN2229-PN2279

48	Transcript, 18 October 2019	Oral evidence of Joyce Wang - ABI - PN3505-PN3517, PN3557-PN3558 - Ai Group - PN3534, PN3536-PN3540 - ASU - PN3505-PN3517, PN3557-PN3558 - UWU - PN3505- PN3517, PN3557- PN3558
49	Transcript, 16 October 2019	Oral evidence of Robert Steiner - ABI - PN1569-PN1574 - AFEI - PN1572 - Ai Group - PN1570, PN1572-PN1574 - ASU - PN1534-PN1613 - NDS - PN1552-PN1569
50	Transcript, 18 October 2019	Oral evidence of Scott Harvey - Ai Group - PN3141-PN3142
51	Transcript, 17 October 2019	Oral evidence of Steven Miller - Ai Group - PN2039, PN2057-PN2059, PN2070
52	Transcript, 16 October 2019	Oral evidence of Trish Stewart - ABI - PN459-PN460; PN468 - AFEI - PN460, PN461, 464, 468. - Ai Group - PN458-PN460, PN468 - UWU - PN459-PN468
53	Transcript, 18 October 2019	Oral evidence of Wendy Mason - UWU - PN3210-PN3213

Part B – Submissions

#	DATE	PARTY	DOCUMENT
1	15 February 2019	UWU	Submission
2	15 February 2019	HSU	Submission and amended draft determination
3	1 April 2019	UWU	Supplementary submission and draft determination
4	2 July 2019	ASU	Submission
5	13 September 2019	ABI & NSWBC	Submission in reply – union claims
6	16 September 2019	NDS	Submission in reply – union claims
7	16 September 2019	Ai Group	Submission in reply – union claims
8	17 September 2019	AFEI	Submission in reply – union claims
9	2 October 2019	ASU	Submission in reply – employer response

10	3 October 2019	HSU	Submission in reply – employer response
11	3 October 2019	UWU	Submission in reply – employer response and amended draft determination
12	18 November 2019	UWU	Submission – claims pressed, findings and evidence
13	18 November 2019	HSU	Submission – claims pressed, findings and evidence
14	18 November 2019	Ai Group	Submission – claims pressed, findings and evidence
15	19 November 2019	ABI & NSWBC	Submission – claims pressed, findings and evidence
16	19 November 2019	NDS	Submission – claims pressed, findings and evidence
17	19 November 2019	ASU	Submission – claims pressed, findings and evidence
18	19 November 2019	AFEI	Submission – claims pressed, findings and evidence
19	7 February 2020	NDS	Submission – final
20	10 February 2020	Ai Group	Submission – final
21	10 February 2020	ABI & NSWBC	Submission – final
22	10 February 2020	Unions (joint)	Submission – final
23	11 February 2020	AFEI	Submission – final
24	26 February 2020	Ai Group	Submission in reply – final
25	26 February 2020	NDS	Submission in reply – final
26	26 February 2020	AFEI	Submission in reply – final
27	26 February 2020	ABI & NSWBC	Submission in reply – final
28	26 February 2020	Unions (joint)	Submission in reply – final
29	10 March 2020	Unions (joint)	Submission – background papers 2 & 3
30	11 March 2020	Ai Group	Submissions
31	11 March 2020	AFEI	Submission – background papers 2 & 3
32	17 March 2020	AFEI	Submission – background paper 3 – Attachment 1

33	17 March 2020	ABI & NSWBC	Submission – background paper 3 – Attachment 1
34	18 March 2020	UWU	Submission – background paper 3 – Attachment 1
35	20 March 2020	Ai Group	Submission – background paper 3 – Attachment 1
36	23 March 2020	ASU	Submission – background paper 3 – Attachment 1

ATTACHMENT F – SUBMISSIONS AND EVIDENCE – VARIATIONS TO ROSTERS CLAIMS

Part A – Index of evidence relied upon by parties

Documents

#	EXHIBIT NO.	DOCUMENT
1	ABI2	Witness Statement of Darren Mathewson - ABI - CB211
2	ABI6	Witness Statement of Deb Ryan - ABI - paras 41, 62
3	ASU2	Witness Statement of Robert Steiner - ASU - Whole
4	ASU4	Stanford Report - ASU – Whole
5	ASU7	Witness Statement of Tracy Kinchin - ASU - CB1190
6	ASU8	Witness Statement of Emily Flett - ASU - paras 14, 19-20; CB1427
7	ASU9	Witness Statement of Richard Rathbone - ASU - CB1171
8	ASU10	Witness Statement of Augustino Encabo - ASU - paras 19-21; CB1137
9	HSU5	Witness Statement of Christopher Friend - HSU - para 3; CB2947 - AIG - para 30; CB2947 - ABI - paras 11, 13, 36
10	HSU27	Witness Statement of Pamela Wilcock - ABI - para 21 - AIG - para 11; CB2953 - HSU - para 11; CB2953
11	HSU28	Witness Statement of Thelma Thames - ABI - para 11 - AIG - para 11; CB2962 - HSU - para 16; CB2962

#	EXHIBIT NO.	DOCUMENT
12	HSU32	Supplementary Witness Statement of Scott Quinn - ABI - paras 16, 36
13	UV1	Witness Statement of Trish Stewart - ABI - paras 10-11 - AFEI - para 10 - AIG - para 10; CB4603 - UWU - paras 9-12
14	UV4	Witness Statement of Deon Fleming - ABI - para 15 - AFEI - para 15 - AIG - para 15-17; CB4481-CB4482 - UWU - paras 13-17
15	UV6	Witness Statement of Belinda Sinclair - ABI - para 22-25 - AFEI - para 22 - AIG - para 22; CB4573 - UWU - paras 22-26
16	CB4416	Draft determination - UWU - para 4; CB4416
17	CB501	NDIA Efficient Cost Model - ABI - CB501
18	CB489	NDIA Efficient Cost Model for Disability Support Workers - ABI - CB489
19	CB1686	*Predictability and control in working schedules* – Dr Olav Muurlink - ASU - CB1686
20		Stewart and Brown – *Aged and Financial Performance Survey* – Sector Report – Financial Year 2018* - ABI - CB503
21		Stewart and Brown – *Aged and Financial Performance Survey* – Sector Report – December 2018* - ABI - CB541

* ABI filed updated versions of the Stewart & Brown reports on 10 August 2020.

Oral evidence

#	TRANSCRIPT	EVIDENCE
22	Transcript, 15 October 2019	Oral evidence of Belinda Sinclair - AFEI - PN606, PN717-PN725 - UWU - PN599-PN616, PN745
23	Transcript, 17 October 2019	Oral evidence of Dr James Stanford - ASU - PN2216–PN2289

Part B - Index of party submissions

#	DATE	PARTY	DOCUMENT
1	15 February 2019	UWU	Submission
2	2 April 2019	ABI	Draft determination
3	2 July 2019	ABI	Submission
4	2 July 2019	NDS	Submission
5	3 July 2019	AFEI	Submission
6	12 July 2019	ABI	Submission in reply
7	13 July 2019	Ai Group	Submission in reply
8	16 July 2019	NDS	Submission in reply
9	23 July 2019	AFEI	Submission in reply
10	13 September 2019	UWU	Submission in reply
11	16 September 2019	ASU	Submission in reply – ABI claims
12	16 September 2019	HSU	Submission in reply – ABI claims
13	26 September 2019	Ai Group	Submission in reply – ABI claims
14	3 October 2019	UWU	Submission in reply
15	15 October 2019	ABI	Amended draft determination
16	18 November 2019	Ai Group	Submission
17	18 November 2019	UWU	Submission
18	19 November 2019	ASU	Submission

#	DATE	PARTY	DOCUMENT
19	19 November 2019	AFEI	Submission
20	19 November 2019	NDS	Submission
21	19 November 2019	ABI	Submission
22	7 February 2020	NDS	Submission – final – tranche 2
23	10 February 2020	Unions	Submission - final
24	10 February 2020	ABI	Submission – final – further amended draft determination
25	10 February 2020	Ai Group	Submission - final
26	11 February 2020	AFEI	Submission - final
27	26 February 2020	AFEI	Submission in reply - final
28	26 February 2020	Ai Group	Submission in reply - final
29	10 March 2020	Unions	Submission – background papers 2 & 3
30	11 March 2020	ABI	Submission – background papers 2 & 3
31	11 March 2020	AFEI	Submission – background papers 2 & 3
32	17 March 2020	AFEI	Submission – background paper 3
33	17 March 2020	ABI	Submission – background paper 3
34	18 March 2020	UWU	Submission – background paper 3
35	20 March 2020	AIG	Submission – background paper 3
36	23 March 2020	ASU	Submission – background paper 3
37	20 July 2020	Unions	Submission – Report
38	10 August 2020	ABI	Submission in reply
39	13 August 2020	Ai Group	Submission in reply

ATTACHMENT G – SUBMISSIONS AND EVIDENCE – REMOTE RESPONSE/RECALL TO WORK CLAIMS

Part A – Index of evidence relied upon by parties

Documents

#	EXHIBIT NO.	DOCUMENT
1	ABI2	Witness Statement of Darren Mathewson - ABI -CB211
2	ABI6	Witness Statement of Deb Ryan - ABI - CB190 -
3	ABI7	Witness Statement of Scott Harvey - ABI - CB162
4	ASU1	Witness Statement of Deborah Anderson - ASU - CB1394 - Ai Group - paras 23-24; CB1396
5	ASU4	Expert Report of Dr Jim Stanford - ASU - whole
6	ASU8	Witness Statement of Emily Flett - ASU - CB1427
7	CB489	NDIA Efficient Cost Model for Disability Support Workers - ABI - CB489
8	CB501	NDIA Efficient Cost Model - ABI - CB501
9	CB1124	Court Book – draft determination - ASU - CB1124
10	CB1686	*Predictability and control in working schedules* by Dr Olav Muurlink - ASU - pp 6, 11-12, 17; CB1686
11		Stewart and Brown – *Aged and Financial Performance Survey* – Sector Report – Financial Year 2018* - ABI - CB503
12		Stewart and Brown – *Aged and Financial Performance Survey* – Sector Report – December 2018* - ABI - CB541

* ABI filed updated versions of the Stewart & Brown reports on 10 August 2020.

Oral evidence

#	TRANSCRIPT	WITNESS
13	Transcript	Oral Evidence of Deborah Anderson - ABI - PN1005-PN1007 - Ai Group - PN991, PN1000-PN1004, PN1011-PN1013, PN1018 - ASU - PN981-PN1030
14	Transcript	Oral Evidence of Dr Jim Stanford - ASU - PN2216-PN2289

Part B - Index of party submissions

#	DATE	PARTY	DOCUMENT
1	15 February 2019	HSU	Submission
2	15 February 2019	HSU	Amended draft determination
3	2 April 2019	ABI	Draft determination
4	2 July 2019	NDS	Submission
5	2 July 2019	ABI	Submission
6	3 July 2019	AFEI	Submission
7	12 July 2019	ABI	Submission in reply
8	13 July 2019	Ai Group	Submission in reply
9	16 July 2019	NDS	Submission in reply
10	23 July 2019	AFEI	Submission in reply
11	13 September 2019	UWU	Submission in reply
12	16 September 2019	ASU	Submission in reply - ABI and others claims
13	23 September 2019	ASU	Submission in reply and draft determination
14	2 October 2019	HSU	Submission in reply
15	15 October 2019	ABI	Amended draft determination
16	18 November 2019	HSU	Submission
17	18 November 2019	Ai Group	Submission
18	18 November 2019	UWU	Submission

#	DATE	PARTY	DOCUMENT
19	19 November 2019	AFEI	Submission - findings
20	19 November 2019	ASU	Submission
21	19 November 2019	AFEI	Submission in reply
22	19 November 2019	NDS	Submission
23	19 November 2019	ABI	Submission
242	7 February 2020	NDS	Submission – final – tranche 2
5	10 February 2020	ABI	Submission – final – further amended draft determination
26	10 February 2020	Ai Group	Submission - final
27	10 February 2020	Unions	Submission - final
28	11 February 2020	AFEI	Submission - final
29	26 February 2020	Unions	Submission in reply - final
30	26 February 2020	ABI	Submission in reply - final
31	26 February 2020	Ai Group	Submission in reply - final
32	11 March 2020	Ai Group	Submission – background paper 3
33	17 March 2020	ABI	Submission – background paper 3
34	20 March 2020	Ai Group	Submission – background paper 3
35	23 March 2020	ASU	Submission – background paper 3
36	20 July 2020	Unions	Submission
37	10 August 2020	ABI	Submission in reply
38	13 August 2020	Ai Group	Submission in reply

ATTACHMENT H – REMOTE RESPONSE CLAUSES

Relevant extracts from the following awards

Yes [ ] No [ ]ocal Government Industry Award 2020

Clause 21.4(c)

(c) On-call, call-back and remote response

Clauses 21.4(a) and 21.4(b) will not apply where an employee works for less than 3 hours on-call, call-back or remote response on any one day in accordance with clauses 21.5 or 21.6.

Clause 21.6(d)

(d) Remote response

(i) An employee who is in receipt of an on-call allowance and available to immediately:

•respond to phone calls or messages;

•provide advice ('phone fixes');

•arrange call out/rosters of other employees; and

•remotely monitor and/or address issues by remote telephone and/or computer access,

will be paid the applicable overtime rate in clause 21 for the time actually taken in dealing with each particular matter.

(ii) An employee remotely responding will be required to maintain and provide to the employer a time sheet of the length of time taken in dealing with each matter remotely for each day starting from the first remote response. The total overtime paid to an employee for all time remotely responding in any day commencing from the first response will be rounded up to the nearest 15 minutes.

Local Government (State) Award 2020 (NSW)

Clause 20E

E. REMOTE RESPONSE

(i) An employee who is in receipt of an on call allowance and available to immediately:

(a) respond to phone calls or messages;

(b) provide advice ('phone fixes');

(c) arrange call out/rosters of other employees; and

(d) remotely monitor and/or address issues by remote telephone and/or computer access,

will be paid the applicable overtime rate for the time actually taken in dealing with each particular matter, except where the employee is recalled to work (Note: subclause 20C(vi) applies where an on-call employee is recalled to work).

(ii) An employee remotely responding will be required to maintain and provide to the employer a time sheet of the length of time taken in dealing with each matter remotely for each day commencing from the first remote response. The total overtime paid to an employee for all time remotely responding in any day commencing from the first response will be rounded up to the nearest 15 minutes.

(iii) The employer may, by agreement, make an average payment equivalent to an agreed period of time per week where the employee is regularly required to remotely respond as defined in subclause (i) of this clause.

Water Industry Award 2020

Clause 20.4(d)

(d) Clause 20.4 will not apply where an employee works for less than 3 hours on-call, call-back or remote response on any one day in accordance with clauses 20.5 or 20.6.

Clause 20.6(d)

(d) Remote response

An employee who is in receipt of an on-call allowance and available to immediately:

(i) respond to phone calls or messages;

(ii) provide advice ('phone fixes');

(iii) arrange call out/rosters of other employees; and

(iv) remotely monitor and/or address issues by remote telephone and/or computer access,

will be paid the applicable overtime rate for the time actually taken in dealing with each particular matter.

(e) An employee remotely responding may be required to maintain and provide to the employer a time sheet of the length of time taken in dealing with each matter remotely for each day commencing from the first remote response. The total overtime paid to an employee for all time remotely responding in any day commencing from the first response will be rounded up to the nearest 15 minutes.

Business Equipment Award 2020

Clause 20.4(d)

(d) The provisions of clause 20.4 will not apply in circumstances where an employee provides technical service or technical support over the telephone or via remote access arrangements. Clause 20.7 may apply instead..

Clause 20.6(c)

(c) The provisions of clause 20.6 will not apply to call-backs or in circumstances where an employee provides technical service or technical support over the telephone or via remote access arrangements.

Clause 20.7

20.7 Technical service/support

(a) An employee required to work overtime providing technical service or technical support over the telephone or via remote access arrangements will be paid for each occasion that such work is carried out:

(i) for a minimum of half an hour at the appropriate overtime rate where such work commences between 5.00 am and 10.00 pm; or

(ii) for a minimum of one hour at the appropriate overtime rate where such work commences after 10.00 pm and before 5.00 am except where the overtime is continuous (subject to a meal break) with the commencement or completion of ordinary hours.

(**b**) Provided that, the employee will not be required to work the full half an hour or one hour as the case may be if the work which the employer requires to be performed is completed within a shorter period.

(c) Notwithstanding the above, where an employee is required to carry out further overtime work within the half an hour or one hour guarantee period, the half an hour or one hour minimum for the first work period will be cancelled and the employee will be paid up to the commencement of the second or subsequent work period.

(d) Overtime worked in circumstances specified in clause 20.7 will not be regarded as overtime for the purposes of clauses 20.4 and 20.5.

Contract Call Centres Award 2020

Clause 20.4(c)

(c) The provisions of clause 20.4 will not apply to call-backs or in circumstances where an employee provides service or support over the telephone or via remote access arrangements where the time worked is less than 3 hours during the call-back or each call-back. However, where the total number of hours worked on more than one call-back is 4 hours or more then the provisions of clause 20.4(b) will apply.

Clause 20.6(d)

(d) The provisions of clause 20.6 will not apply in circumstances where an employee provides service or support over the telephone or via remote access arrangements.

Clause 20.7

20.7 Remote service/support

(a) An employee required to work overtime providing service or support over the telephone or via remote access arrangements must be paid for each occasion that such work is carried out:

(i) for a minimum of half an hour at the appropriate overtime rate where such work commences between 5.00 am and up to 10.00 pm;

(ii) for a minimum of one hour at the appropriate overtime rate where such work commences after 10.00 pm and up to midnight; or

(iii) for a minimum of one and a half hours at the appropriate overtime rate where such work commences after midnight and before 5.00 am;

except where the overtime is continuous (subject to a meal break) with the commencement or completion of ordinary hours.

(b) The employee will not be required to work the full half an hour or one hour or one and a half hours if the work which the employer requires to be performed is completed within a shorter period.

(c) If an employee has completed the job and finished work but is required to perform further work within the half hour, one hour or one and a half hours, the balance of the minimum period for that job will be cancelled and the employee will only be paid up to the commencement of the next work period. The employee will then be entitled to be paid for a minimum of half hour, one hour or one and a half hours as the case may be for the next work period.

(d) Overtime worked in circumstances specified in clause 20.7 will not be regarded as overtime for the purposes of clause 20.4 where the time worked is

less than 3 hours during the work period or each work period. Provided that where the total number of hours worked on more than one work period is 4 hours or more then the provisions of clauses 20.4(b) will apply.

(e) Overtime worked in circumstances specified in clause 20.7 will not be regarded as overtime for the purposes of clause 20.6.

ATTACHMENT I – SUBMISSIONS AND EVIDENCE – CLIENT CANCELLATION CLAIMS

Part A – Index of evidence relied upon by parties

Documents

#	EXHIBIT NO.	DOCUMENT
1	ABI2	Witness Statement of Darren Mathewson - ABI - whole
2	ABI3	Witness Statement of Jeffrey Wright - ABI - paras 25-29, 38; CB470 - NDS - paras 25-31
3	ABI5	Witness Statement of Graham Shanahan - ABI - paras 20-27; CB155 - NDS - paras 20-28
4	ABI6	Witness Statement of Deb Ryan - ABI - paras 46-50; CB190 - NDS - paras 46-53
5	ABI7	Witness Statement of Scott Harvey - ABI - paras 32-43; CB162 - ASU - CB162, CB166 - NDS - paras 32-48
6	ABI8	Witness Statement of Wendy Mason - ABI - paras 40-42; CB477 - NDS - paras 40-48
7	ABI9	Witness Statement of Joyce Wang - ABI - paras 35-40; CB200 - ASU - CB200 - NDS - paras 25-42
8	ASU4	Expert Report of Dr Jim Stanford - ASU – whole
9	HSU1	Witness Statement of Mark Farthing - HSU - CB2926-2932
10	HSU2	Further Witness Statement of Mark Farthing ASU - paras 6-10, 23-32 - HSU - CB2981-2987 - UWU – paras 6-10, 23-32
11	HSU3	Witness Statement of William Elrick - HSU - CB2933-2940

#	EXHIBIT NO.	DOCUMENT
12	HSU4	Witness Statement of Heather Waddell - HSU - CB2956-2960
13	HSU5	Witness Statement of Christopher Friend - Ai Group - para 30; CB2947 - HSU - CB2945-2951
14	HSU14	CCO Schedule of rates - HSU - whole
15	HSU15	Same Day Cancellation Log - HSU - whole - UWU - whole
16	HSU16	Community Care Options Home Care Agreement Template - UWU - whole
17	HSU19	Baptist Care Commonwealth Home Support Programme Proforma Service Agreement - UWU - whole - HSU - whole
18	HSU20	Baptist Care Home Care Agreement - HSU - whole - UWU - whole
19	HSU25	Statement of Fiona Macdonald - HSU - CB2909-2923
20	HSU26	Witness Statement of Robert Sheehy - HSU - CB2941-2944
21	HSU27	Witness Statement of Pamela Wilcock - Ai Group - para 11; CB2953
22	HSU28	Witness Statement of Thelma Thames - Ai Group – para 11; CB2962 - HSU - CB2961-2964
23	HSU32	Supplementary Witness Statement of Scott Quinn - HSU - CB3051-3079
24	NDS1	Witness Statement of David Moody - NDS - paras 64-66
25	NDS2	Witness Statement of Steven Miller - ASU - CB4408 - NDS - paras 40-50

#	EXHIBIT NO.	DOCUMENT
26	UV1	Witness Statement of Trish Stewart - Ai Group – para 10; CB4603 - UWU – para 10
27	UV4	Witness Statement of Deon Fleming - Ai Group - paras 15-16; CB4481 - UWU - paras 13-16
28	CB2835	Draft determination - HSU - CB2835-2838
29	CB501	NDIA Efficient Cost Model - ABI - CB501
30	CB489	NDIA Efficient Cost Model for Disability Support Workers - ABI - CB489, CB503
31	CB4321	NDIS Price Guide 2019-2020 - HSU - CB4321-4368 - UWU - pp 12-13; CB2796 - ASU - pp 12-13; CB2796
32	CB1686	*Predictability and control in working schedules* by Dr Olav Muurlink - ASU - CB1686
33		Stewart and Brown – *Aged and Financial Performance Survey – Sector Report* – Financial Year 2018* - ABI - CB503
34		Stewart and Brown – *Aged and Financial Performance Survey – Sector Report* – December 2018* - ABI - CB541

* ABI filed updated versions of the Stewart & Brown reports on 10 August 2020.

Oral evidence

#	TRANSCRIPT	WITNESS
35	Transcript, 15 October 2019	Oral evidence of Belinda Sinclair - UWU - PN745
36	Transcript, 17 October 2019	Oral evidence of Darren John Mathewson - UWU - PN2421-PN2424
37	Transcript, 18 October 2019	Oral evidence of Deborah Gaye Ryan - UWU - PN3020-PN3032, PN3075-PN3080
39	Transcript	Oral Evidence of Dr Jim Stanford - ASU - PN2216-PN2289

39	Transcript, 18 October 2019	Oral evidence of Graham Joseph Shanahan - AFEI - PN2897 - HSU - PN2897 - UWU - PN2891-PN2897
40	Transcript, 17 October 2019	Oral evidence of Jeffrey Wright - AFEI - PN2651, PN2702, PN2704
41	Transcript, 18 October 2019	Oral evidence of Joyce Wang - AFEI - PN3612 - ASU - PN3554-PN3568
42	Transcript, 18 October 2019	Oral evidence of Scott Raymond Harvey - AFEI - PN3136 - ASU - PN3117-PN3140 - UWU - PN3117-PN3140
43	Transcript, 17 October 2019	Oral Evidence of Steven Miller - ASU - PN1992-PN2081
44	Transcript, 18 October 2019	Oral evidence of Wendy Mason - AFEI - PN3274; PN3321 - HSU - PN3226-PN3249 - UWU - PN3220-PN3249, PN3273-PN3280

Part B - Index of party submissions

#	DATE	PARTY	DOCUMENT
1	15 February 2019	HSU	Outline of submissions
2	15 February 2019	HSU	Amended draft determination
3	2 April 2019	ABI	Draft determination
4	2 July 2019	ABI	Submission
5	2 July 2019	NDS	Submission
6	3 July 2019	AFEI	Submission
7	12 July 2019	ABI	Submission in reply
8	16 July 2019	NDS	Submission in reply
9	23 July 2019	AFEI	Submission in reply
10	13 September 2019	UWU	Submission in reply
11	16 September 2019	HSU	Submission in reply – ABI claims

#	DATE	PARTY	DOCUMENT
12	16 September 2019	ASU	Submission in reply – ABI claims
13	26 September 2019	Ai Group	Submission in reply – ABI claims
14	4 October 2019	HSU	Supplementary submissions in reply
15	12 October 2019	ABI	Submission in reply – tranche 2
16	15 October 2019	ABI	Amended draft determination
17	18 November 2019	UWU	Submission
18	18 November 2019	Ai Group	Submission
19	18 November 2019	HSU	Submission
20	19 November 2019	ABI	Submission
21	19 November 2019	NDS	Submission
22	19 November 2019	AFEI	Submission in reply
23	19 November 2019	ASU	Submission
24	19 November 2019	AFEI	Submission - findings
25	7 February 2020	NDS	Submission – final – tranche 2
26	10 February 2020	Ai Group	Submission - final
27	10 February 2020	ABI	Submission – final – further amended draft determination
28	10 February 2020	Unions	Submission - final
29	11 February 2020	AFEI	Submission - final
30	26 February 2020	Unions	Submission in reply - final
31	26 February 2020	ABI	Submission in reply - final
32	26 February 2020	AFEI	Submission in reply - final
33	26 February 2020	NDS	Submission in reply - final
34	26 February 2020	Ai Group	Submission in reply - final
35	11 March 2020	ABI	Submission – background papers 2 & 3
36	11 March 2020	Ai Group	Submission – background paper 3
37	11 March 2020	AFEI	Submission – background papers 2 & 3

#	DATE	PARTY	DOCUMENT
38	17 March 2020	ABI	Submission – background paper 3
39	17 March 2020	AFEI	Submission – background paper 3
40	18 March 2020	UWU	Submission – background paper 3
41	20 March 2020	Ai Group	Submission – background paper 3
42	23 March 2020	ASU	Submission – background paper 3

ATTACHMENT J – SUBMISSIONS AND EVIDENCE – CLOTHING AND EQUIPMENT CLAIMS

Part A – Index of evidence relied upon by parties

Documents

#	EXHIBIT NO.	DOCUMENT
1	ABI2	Witness Statement of Darren Mathewson - ABI - CB211-469
2	HSU3	Witness Statement of William Elrick - ABI - paras 38-39, 41-42 - AFEI - para 39 - HSU - CB2933-2940
3	HSU4	Witness Statement of Heather Waddell - ABI - paras 33-34 - AFEI - para 34 - Ai Group - para 34 - HSU - paras 15-16, 33-34; CB2956-2960
4	HSU26	Witness Statement of Robert Sheehy - ABI - paras 14-15 - AFEI - para 14 - HSU - paras 14-16; CB2941-2944
5	HSU27	Witness Statement of Pamela Wilcock - ABI - para 13 - AFEI - para 90 - Ai Group - para 13 - HSU - paras 13-14; CB2952-2955
6	HSU28	Witness Statement of Thelma Thames - HSU - CB2961-2964
7	UV6	Witness Statement of Belinda Sinclair - ABI - para 18 - AFEI - para 18, para 20, Annexure B - Ai Group - paras 18-21 - UWU - para 18-21
8	CB489	NDIA Efficient Cost Model for Disability Support Workers - ABI - CB489-501
9	CB501	NDIA Efficient Cost Model - ABI - CB501-502

#	EXHIBIT NO.	DOCUMENT
10		Stewart and Brown – *Aged and Financial Performance Survey* – Sector Report – Financial Year 2018* - ABI - CB503-540
11		Stewart and Brown – *Aged and Financial Performance Survey* – Sector Report – December 2018* - ABI - CB541-584

* ABI filed updated versions of the Stewart & Brown reports on 10 August 2020.

Oral evidence

#	DATE	WITNESS
12	Transcript, 15 October 2019	Oral evidence of Belinda Sinclair - AFEI - PN628
13	Transcript, 17 October 2019	Oral evidence of Jeffrey Wright - HSU - PN2582-PN2582
14	Transcript, 18 October 2019	Oral evidence of Joyce Wang - Ai Group - PN3608

Part B – Submissions

#	Date	Party	Document
1	7 November 2018	UWU	Draft determination
2	9 November 2018	HSU	Draft determination
3	15 February 2019	HSU	Submission
4	15 February 2019	UWU	Submission
5	8 April 2019	Ai Group	Submission in reply
6	12 July 2019	ABI	Submission in reply
7	13 July 2019	Ai Group	Submission
8	15 July 2019	Business SA	Submission
9	23 July 2019	AFEI	Submission in reply
10	3 October 2019	UWU	Draft determination

#	Date	Party	Document
11	11 October 2019	ABI	Submission
12	18 November 2019	Ai Group	Submission
13	18 November 2019	HSU	Submission
14	18 November 2019	UWU	Submission
15	19 November 2019	ABI	Submission
16	19 November 2019	NDS	Submission
17	7 February 2020	NDS	Submission
18	10 February 2020	ABI	Submission
19	10 February 2020	Ai Group	Submission
20	10 February 2020	Joint Unions	Submission
21	11 February 2020	AFEI	Submission
22	26 February 2020	ABI	Submission in reply
23	26 February 2020	Ai Group	Submission in reply
24	26 February 2020	AFEI	Submission in reply
25	11 March 2020	AFEI	Submission
26	17 March 2020	ABI	Submission
27	17 March 2020	AFEI	Submission
28	17 March 2020	HSU	Submission
29	18 March 2020	UWU	Submission
30	20 March 2020	Ai Group	Submission

ATTACHMENT K – SUBMISSIONS AND EVIDENCE – OVERTIME FOR PART-TIME ND CASUAL WORKERS CLAIM

Part A – Index of evidence relied upon by parties

Documents

#	EXHIBIT NO.	DOCUMENT
1	ABI2	Witness Statement of Darren Mathewson - ABI - whole - CB211-470
2	ABI3	Witness Statement of Jeffrey Wright - ABI - whole - CB470-476 - AFEI - paras 35- 36
3	ABI5	Witness Statement of Graham Shanahan - ABI - whole - CB155-162 - AFEI – paras 29-32
4	ABI6	Witness Statement of Deb Ryan - ABI - whole - CB190-200 - AFEI - paras 54-59
5	ABI7	Witness Statement of Scott Harvey - ABI - whole - CB162-180 - AFEI - paras 49-52
6	ABI8	Witness Statement of Wendy Mason - ABI - whole - CB477-488
7	ABI9	Witness Statement of Joyce Wang - ABI - whole - CB200-210 - AFEI - paras 43-50
8	ASU10	Witness Statement of Augustino Encabo - ABI - para 21
9	ASU2	Witness Statement of Robert Steiner - HSU - para 17; CB1225
10	ASU9	Witness Statement of Richard Rathbone - ABI - paras 21-22
11	HSU25	Witness Statement of Fiona Macdonald - HSU - whole; CB2902-2925

#	EXHIBIT NO.	DOCUMENT
12	HSU26	Witness Statement of Robert Sheehy - HSU - whole, CB2941-2944
13	HSU27	Witness Statement of Pamela Wilcock - ABI - para 4 - HSU - para 10; CB2952-2955
14	HSU28	Witness Statement of Thelma Thames - ABI - para 9 - AFEI - para 9 - Ai Group – para 9; CB2962 - HSU - paras 6-7; CB2961-2964
15	HSU29	Witness Statement of Bernie Lobert - ABI - para 21 - HSU - para 21; CB2965-2968
16	HSU3	Witness Statement of William Elrick - HSU - whole, CB2933-2940
17	HSU30	Witness Statement of James Eddington - HSU whole, CB2969-2980
18	HSU31	Witness Statement of Scott Quinn - HSU - para 43; CB2988-3050 - ABI - paras 15, 30
19	HSU32	Supplementary Witness Statement of Scott Quinn - HSU - whole, CB3051-3079
20	HSU4	Witness Statement of Heather Waddell - ABI - para 20 - HSU - para 27; CB2956-2960
21	HSU5	Witness Statement of Christopher Friend - HSU - whole, CB2945-2951
22	UV1	Witness Statement of Trish Stewart - AFEI - para 11 - Ai Group - para 11; CB4603
23	UV4	Witness Statement of Deon Fleming - AFEI - para 17
24	CB181	Witness Statement of Andrew Collins - AFEI - paras 37-43

#	EXHIBIT NO.	DOCUMENT
25	CB489	NDIA Efficient Cost Model for Disability Support Workers - ABI - CB489-501
26		NDIA Efficient Cost Model ABI - CB501
27		Stewart and Brown - Aged and Financial Performance Survey – Sector Report - Financial Year 2018* - ABI - CB503-540.
28		Stewart and Brown – Aged and Financial Performance Survey – Sector Report – December 2018* ABI – CB541-585

* ABI filed updated versions of the Stewart & Brown reports on 10 August 2020.

Oral evidence

#	DATE	WITNESS
29	Transcript, 15 October 2019	Oral evidence of Belinda Sinclair - AFEI - PN612-PN613, PN674, PN717-PN723
30	Transcript, 18 October 2019	Oral evidence of Graham Shanahan - AFEI - PN2897
31	Transcript, 17 October 2019	Oral evidence of Jeffrey Wright - ABI - PN2659, PN2662-2664 - AFEI - PN2623, PN2659, PN2727, PN2702-PN2704
32	Transcript, 18 October 2019	Oral evidence of Joyce Wang - AFEI - PN3603, PN3604, PN3612 - Ai Group - PN3589-PN3604
33	Transcript, 18 October 2019	Oral evidence of Scott Harvey - AFEI - PN3136
34	Transcript, 18 October 2019	Oral evidence of Wendy Mason - AFEI - PN3274, PN3321

Part B - Submissions

#	Date	Party	Document
1	7 November 2018	UWU	Draft determination
2	9 November 2018	HSU	Draft determination

#	Date	Party	Document
3	15 February 2019	HSU	Draft determination
4	15 February 2019	HSU	Submission
5	15 February 2019	UWU	Submission
6	5 April 2019	ABI	Submission
7	5 April 2019	Business SA	Submission
8	8 April 2019	AFEI	Submission
9	8 April 2019	Ai Group	Submission
10	8 April 2019	NDS	Submission
11	3 July 2019	AFEI	Submission - survey
12	3 July 2019	Ai Group	Submission - survey
13	3 July 2019	UWU	Submission - survey
14	5 July 2019	ASU	Submission - survey
15	10 July 2019	ABI	Submission - survey
16	12 July 2019	ABI	Submission in reply
17	13 July 2019	Ai Group	Submission
18	23 July 2019	AFEI	Submission in reply
19	20 September 2019	ABI	Submission
20	20 September 2019	Ai Group	Submission
21	20 September 2019	VHIA	Submission
22	23 September 2019	AFEI	Submission
23	23 September 2019	HSU	Submission
24	23 September 2019	UWU	Submission
25	3 October 2019	UWU	Submission
26	3 October 2019	HSU	Submission
27	4 October 2019	HSU	Submission

#	Date	Party	Document
28	18 November 2019	Ai Group	Submission
29	18 November 2019	HSU	Submission
30	18 November 2019	UWU	Submission
31	19 November 2019	ABI	Submission
32	19 November 2019	AFEI	Submission
33	19 November 2019	NDS	Submission
34	19 November 2019	ASU	Submission
35	7 February 2020	NDS	Submission
36	10 February 2020	ABI	Submission
37	10 February 2020	Ai Group	Submission
38	10 February 2020	Joint Unions	Submission
39	11 February 2020	AFEI	Submission
40	26 February 2020	ABI	Submission
41	26 February 2020	Ai Group	Submission
42	26 February 2020	Joint Union	Submission
43	26 February 2020	AFEI	Submission
44	10 March 2020	Joint Union	Submission
45	10 March 2020	NDS	Submission
46	11 March 2020	ABI	Submission
47	11 March 2020	AFEI	Submission
48	11 March 2020	Ai Group	Submission
49	17 March 2020	AFEI	Submission
50	20 July 2020	Joint Unions	Submission
51	10 August 2020	ABI	Submission

ATTACHMENT L – SUBMISSIONS AND EVIDENCE – 24-HOUR-CARE CLAIM

Part A – Index of evidence relied upon by parties

Documents

#	EXHIBIT NO.	DOCUMENT
1	HSU3	Witness Statement of William Elrick - HSU – paras 28-29; CB2933-2940
2	HSU26	Witness Statement of Robert Sheehy - HSU – para 10; CB2941-2944
3	HSU30	Witness Statement of James Eddington - HSU – paras 51 - 54; CB2969-2980

Oral evidence

NA

Part B – Submissions

#	Date	Party	Document
1	15 October 2018	Jobs Australia	Submission
2	7 November 2018	Jobs Australia	Draft determination
3	7 November 2018	UWU	Draft determination
4	9 November 2018	HSU	Draft determination
5	15 February 2019	ASU	Submission
6	15 February 2019	UWU	Submission
7	5 April 2019	ABI	Submission
8	5 April 2019	Jobs Australia	Submission in reply
9	5 April 2019	NDS	Submission
10	8 April 2019	AFEI	Submission
11	3 July 2019	AFEI	Submission - survey
12	3 July 2019	UWU	Submission

#	Date	Party	Document
13	5 July 2019	ASU	Submission - survey
14	10 July 2019	ABI	Submission - survey
15	16 September 2019	ASU	Submission in reply
16	13 November 2019	UWU	Submission
17	21 November 2019	ABI	Submission
18	7 February 2020	NDS	Submission
19	10 February 2020	ABI	Submission
20	10 February 2020	Joint Unions	Submission
21	11 February 2020	AFEI	Submission
22	26 February 2020	ABI	Submission
23	26 February 2020	Joint Union	Submission
24	10 March 2020	Joint Union	Submission
25	10 March 2020	NDS	Submission
26	11 March 2020	ABI	Submission
27	11 March 2020	AFEI	Submission

ATTACHMENT M – SUBMISSIONS AND EVIDENCE – SLEEPOVER CLAIM

Part A – Index of evidence relied upon by parties

Documents

#	EXHIBIT NO.	DOCUMENT
1	ABI2	Witness Statement of Darren Mathewson - ABI - CB211-469
2	ASU2	Witness Statement of Robert Steiner - ABI – para 14
3	ASU10	Witness Statement of Augustino Encabo - ABI – para 27
4	HSU3	Witness Statement of William Elrick - ABI – para 27 - HSU - para 27; CB2933-2940
5	CB489	NDIA Efficient Cost Model for Disability Support Workers - ABI - CB-489-500
6	CB501	NDIA Efficient Cost Model - ABI - CB501-502
7		Stewart and Brown – Aged and Financial Performance Survey – Sector Report – Financial Year 2018* - ABI - CB503, CB541

* ABI filed updated versions of the Stewart & Brown reports on 10 August 2020.

Oral evidence

NA

Part B – Submissions

#	Date	Party	Document
1	7 November 2018	UWU	Draft determination
2	9 November 2018	HSU	Draft determination
3	15 February 2019	HSU	Submission
4	15 February 2019	UWU	Submission

#	Date	Party	Document
5	8 April 2019	Ai Group	Submission
6	12 July 2019	ABI	Submission in reply
7	13 July 2019	Ai Group	Submission
8	23 July 2019	AFEI	Submission in reply
9	16 September 2019	ASU	Submission in reply
10	18 November 2019	Ai Group	Submission
11	18 November 2019	HSU	Submission
12	19 November 2019	ABI	Submission
13	19 November 2019	NDS	Submission
14	19 November 2019	AFEI	Submission
15	7 February 2020	NDS	Submission
16	10 February 2020	ABI	Submission
17	10 February 2020	Ai Group	Submission
18	10 February 2020	Joint Unions	Submission
19	11 February 2020	AFEI	Submission
20	26 February 2020	ABI	Submission
21	26 February 2020	Ai Group	Submission
22	26 February 2020	AFEI	Submission
23	17 March 2020	ABI	Submission
24	20 July 2020	Joint Unions	Submission
25	10 August 2020	ABI	Submission

ATTACHMENT N – SUBMISSIONS AND EVIDENCE – MOBILE PHONE ALLOWANCE CLAIM

Part A – Index of evidence relied upon by parties

Documents

TAB	EXHIBIT NO	DOCUMENT
1	ABI2	Witness Statement of Darren Mathewson - ABI - CB211
2	ABI3	Witness Statement of Jeffrey Wright - ABI - CB470
3	ABI8	Witness Statement of Wendy Mason - ABI - CB477
4	ASU2	Witness Statement of Robert Steiner - HSU - CB1225
5	HSU3	Witness Statement of William Elrick - ABI - paras 30-31 - AFEI - para 30 - Ai Group - para 30 - HSU - paras 30-33; CB2933-2940 - UWU - paras 30-33
6	HSU4	Witness Statement of Heather Waddell - ABI - para 31 - Ai Group - para 31 - HSU - paras 31-32; CB2956-2960 - NDS - paras 31-32
7	HSU5	Witness Statement of Christopher Friend - HSU - CB2945-2951
8	HSU26	Witness Statement of Robert Sheehy - ABI - para 13 - AFEI - paras 12-13 - Ai Group - paras 12-13 - HSU - paras 11-13; CB2941-2944 - NDS - paras 11-13
9	HSU29	Witness Statement of Bernie Lobert - Ai Group - para 20 - ABI - paras 18, 20 - HSU - paras 18, 20; CB2965-2968
10	HSU27	Witness Statement of Pamela Wilcock - ABI - para 19 - Ai Group - para 19 - HSU - CB2952-2955 - NDS - paras 19-20

11	HSU28	Witness Statement of Thelma Thames - ABI - para 22 - Ai Group - para 22 - HSU - CB2961-2964 - NDS - para 22
12	HSU30	Witness Statement of James Eddington - HSU - CB2969-2980
13	HSU32	Supplementary Witness Statement of Scott Quinn - HSU - paras 23, 35; CB3051-3079
14	UV1	Witness Statement of Trish Stewart - ABI - paras 20-21 - AFEI - para 21 - Ai Group - paras 20-22 - NDS - paras 20-22 - UWU - paras 20-22
15	UV4	Witness Statement of Deon Fleming - ABI - paras 25, 27, 29 - AFEI - para 27 - Ai Group - para 27 - NDS - paras 25-30 - UWU - paras 25-30 -
16	UV6	Witness Statement of Belinda Sinclair - ABI - paras 15-16 - AFEI - para 15 - Ai Group - paras 15-17 - UWU - paras 15-17
17	CB4416	Draft determination - UWU - para 3; CB4416
18	CB2835	Draft determination - HSU - whole
19	CB501	NDIA Efficient Cost Model - ABI - CB501
20	CB489	NDIA Efficient Cost Model for Disability Support Workers - ABI - CB489
21		Stewart and Brown – Aged and Financial Performance Survey – Sector Report – Financial Year 2018* - ABI - CB503
22		Stewart and Brown – *Aged and Financial Performance Survey* – Sector Report – December 2018* - ABI - pp 5, 6, 27, 29; CB541

* ABI filed updated versions of the Stewart & Brown reports on 10 August 2020.

Oral evidence

#	TRANSCRIPT	WITNESS
23	Transcript, 16 October 2019	Oral evidence of Deborah Anderson - AFEI - PN1005, PN1011-PN1013
24	Transcript, 15 October 2019	Oral evidence of Deon Fleming - ABI - PN534-PN540 - AFEI - PN547-PN549 - Ai Group - PN534-PN537, PN547-PN549 - NDS - PN533-PN540 - UWU - PN533-PN549
25	Transcript, 18 October 2019	Oral evidence of Graham Joseph Shanahan - HSU - PN2865-PN2870 - UWU - PN2865-PN2872
26	Transcript, 16 October 2019	Oral evidence of Heather Waddell - NDS - PN1386-PN1414
27	Transcript, 17 October 2019	Oral evidence of Jefferey Wright - Ai Group - PN2585 - HSU - PN2584-PN2588 - UWU - PN2584-PN2588
28	Transcript, 18 October 2019	Oral evidence of Joyce Wang - UWU - PN3554-PN3568
29	Transcript, 15 October 2019	Oral evidence of Trish Stewart - ABI - PN440-PN452 - AFEI - PN441, PN448, PN452 - Ai Group - PN445-PN452 - NDS - PN445-PN456 - UWU - PN440-PN457
30	Transcript, 15 October 2019	Oral evidence of William Gordon Elrick - UWU - PN1075-PN1080

Part B - Index of party submissions

#	DATE	PARTY	DOCUMENT
1	15 February 2019	UWU	Submission
2	15 February 2019	HSU	Submission
3	13 July 2019	Ai Group	Submission in reply
4	12 July 2019	ABI	Submission in reply
5	12 July 2019	Business SA	Submission in reply
6	23 July 2019	AFEI	Submission in reply
7	3 October 2019	HSU	Submission in reply
8	3 October 2019	UWU	Submission in reply – revised claim
9	18 November 2019	UWU	Submission – findings sought and list of evidence
10	18 November 2019	Ai Group	Submission – list of evidence
11	18 November 2019	HSU	Submission – findings sought
12	19 November 2019	ABI	Submission – findings sought and list of evidence
13	19 November 2019	NDS	Submission – claims opposed and list of evidence
14	19 November 2019	AFEI	Submission – findings sought
15	7 February 2020	NDS	Submission – background paper
16	10 February 2020	Ai Group	Submission – background paper
17	10 February 2020	ABI	Submission – findings sought and background paper
18	10 February 2020	Unions (joint)	Submission – background paper
19	11 February 2020	AFEI	Submission – background paper
20	26 February 2020	Ai Group	Submission in reply – final
21	26 February 2020	NDS	Submission in reply – final

22	26 February 2020	AFEI	Submission in reply – final
23	26 February 2020	ABI	Submission in reply – final

ATTACHMENT O – SUBMISSIONS AND EVIDENCE – COMMUNITY LANGUAGE ALLOWANCE CLAIM

Part A – Index of evidence relied upon by parties

Documents

#	EXHIBIT NO.	DOCUMENT
1	ASU11	Witness Statement of Dr Ruchita - ASU - whole
2	ASU12	Witness Statement of Nadia Saleh - ASU - whole
3	ASU13	Witness Statement of Natalie Lang - ASU - whole
4	ASU14	Witness Statement of Lou Bacchiella - ASU - whole

Oral evidence

#	TRANSCRIPT	WITNESS
5	Transcript, 16 April 2019	Oral evidence of Dr Ruchita - ASU - PN526-PN588
6	Transcript, 16 April 2019	Oral evidence of Lou Bacchiella - ASU - PN709-PN792
7	Transcript, 16 April 2019	Oral evidence of Nadia Saleh - ASU - PN592-PN644
8	Transcript, 16 April 2019	Oral evidence of Natalie Lang - ASU - PN648-PN700

Part B - Index of party submissions

#	DATE	PARTY	DOCUMENT
1	7 November 2018	ASU	Draft determination
2	18 February 2019	ASU	Submission
3	5 April 2019	ABI	Submission in reply
4	5 April 2019	NDS	Submission in reply

#	DATE	PARTY	DOCUMENT
5	8 April 2019	Ai Group	Submission in reply
6	8 April 2019	AFEI	Submission in reply
7	15 April 2019	ASU	Draft determination – amended
8	17 May 2019	ASU and Ai Group	Joint submission – instruments with language allowances
9	17 May 2019	ASU	Submission
10	17 May 2019	NDS	Submission
11	19 May 2019	ABI	Submission
12	22 May 2019	AFEI	Submission
13	3 June 2019	ABI	Submission in reply
14	4 June 2019	ASU	Submission in reply
15	7 February 2020	ASU	Submission – amended claim & draft determination
16	26 February 2020	Ai Group	Submission in reply – ASU amended claim
17	26 February 2020	NDS	Submission in reply – ASU amended claim
18	26 February 2020	AFEI	Submission in reply – ASU amended claim
19	26 February 2020	ABI	Submission in reply – ASU amended claim
20	10 March 2020	Unions (joint)	Submission – background papers 2 & 3
21	10 March 2020	NDS	Submission – background papers 2 & 3
22	11 March 2020	AFEI	Submission – background papers 2 & 3
23	11 March 2020	Ai Group	Submission – background paper 3

ATTACHMENT P – DRAFT DETERMINATION

MA000100 PRXXXXXX

FairWork Commission

DRAFT DETERMINATION

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

Application to vary the Social, Community, Home Care and Disability Services Industry Award 2010
(AM2018/26 and AM2020/100)

SOCIAL, COMMUNITY, HOME CARE AND DISABILITY SERVICES INDUSTRY AWARD 2010
[MA000100]

Social, community, home care and disability services

JUSTICE ROSS, PRESIDENT
DEPUTY PRESIDENT CLANCY
COMMISSIONER LEE MELBOURNE, XX MONTH 2021

Four yearly review of modern awards – Award stage – Group 4A awards – substantive issues – Social, Community, Home Care and Disability Services Industry Award 2010.

A. Further to the decisions issued by the Full Bench of the Fair Work Commission on 4 May 2021 ([2021] FWCFB 2383) and XX MONTH 2021 ([2021] FWCFB XXXX), the above award is varied as follows:

1. By deleting clause 10.3 and inserting the following:

10.3 Part-time employment

(a) A part-time employee is one who is engaged to work less than 38 hours per week or an average of less than 38 hours per week and who has reasonably predictable hours of work.

(b) The terms of this award will apply to part-time employees on a pro-rata basis on the basis that the ordinary weekly hours of work for full-time employees are 38.

(c) Before commencing employment, the employer and employee will agree in writing on:

(i) a regular pattern of work including the number of ordinary hours to be worked each week (**the guaranteed hours**), and

(ii) the days of the week the employee will work and the starting and finishing times each day.

(d) The agreed regular pattern of work does not necessarily have to provide for the same guaranteed hours each week.

(e) The agreement made pursuant to clause 10.3(c) may subsequently be varied by agreement between the employer and employee in writing. Any such agreement may be ongoing or for a specified period of time.

(f) Nothing in clause 10.3(e) requires an employee to agree to any change in their guaranteed hours.

Commented [FWC1]: See decision at [987].

(g) Review of guaranteed hours

(i) Where a part-time employee has regularly worked more than their guaranteed hours for at least 12 months, the employee may request in writing that the employer vary the agreement made under clause 10.3(c) to reflect the ordinary hours regularly being worked.

(ii) The employer must respond in writing to the employee's request within 21 days.

(iii) The employer may refuse the request only on reasonable business grounds.

EXAMPLE: Reasonable business grounds to refuse the request may include that the reason that the employee has regularly worked additional agreed hours is temporary—for example where this is the direct result of another employee being absent on annual leave. For home care employees, reasonable business grounds to refuse a request may also include the lack of continuity of funding, changes in client numbers and client preferences.

Commented [FWC2]: This example is adapted from the ABI proposal.

(iv) Before refusing a request made under clause 10.3(g)(i), the employer must discuss the request with the employee and genuinely try to reach agreement on an increase to the employee's guaranteed hours that will give the employee more predictable hours of work and reasonably accommodate the employee's circumstances.

(v) If the employer and employee agree to vary the agreement made under clause 10.3(c), the employer's written response must record the agreed variation.

(vi) If the employer and employee do not reach agreement, the employer's written response must set out the grounds on which the employer has refused the employee's request.

(vii) Clause 10.3(g) is intended to operate in conjunction with clause 10.3(e) and does not prevent an employee and employer from agreeing to vary the agreement made under clause 10.3(c) in other circumstances.

Commented [FWC3]: This example is adapted from the ABI proposal.

2. By deleting clause 10.4(c).

3. By renumbering clause 10.5 as 10.6.

4. By inserting a new clause 10.5 as follows:

10.5 Minimum payments for part-time and casual employees

Commented [FWC4]: See decision at [377].

Part-time and casual employees will be paid for the following minimum number of hours, at the appropriate rate, for each shift or period of work in a broken shift:

(a) social and community services employees (except when undertaking disability services work)—3 hours;

(b) all other employees—2 hours.

5. By deleting Note 1 and Note 2 appearing at the beginning of clause 15.

6. By inserting the following note as a new paragraph after the end of clause 15:

NOTE 1: A **transitional pay equity order** taken to have been made pursuant to item 30A of Schedule 3A to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) has effect in accordance with that item. Transitional pay equity orders operate in Queensland as provided for in items 30A (6) and (7).

7. By inserting the following note as a new paragraph after the end of clause 15:

NOTE 2: An equal remuneration order [PR525485] also applies to employees in the classifications in Schedule B—Classification Definitions—Social and Community Services Employees and Schedule C—Classification Definitions—Crisis Accommodation Employees of this award. The final rates of pay resulting from the equal remuneration order are set out below. The 'current hourly wage' and 'current weekly wage' in the tables below form employees' ordinary rates of pay for all purposes:

Commented [FWC5]: See decision at [1259].

Equal remuneration rates for applicable Social and Community Services employees—from 1 December 2020

	Clause	Minimum weekly wage	Final ERO Rate Percentage	Current weekly wage	Current hourly wage
Classification		**$**	**%**	**$**	**$**
Social and community services employee level 2	15.2				
Pay point 1		877.60	123	1079.45	28.41
Pay point 2		905.10	123	1113.27	29.30
Pay point 3		932.60	123	1147.10	30.19
Pay point 4		957.60	123	1177.85	31.00

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	Clause	Minimum weekly wage	Final ERO Rate Percentage	Current weekly wage	Current hourly wage
Social and community services employee level 3	15.3				
Pay point 1 (associate diploma/advanced certificate)		957.60	126	1206.58	31.75
Pay point 2		985.10	126	1241.23	32.66
Pay point 3 (3 year degree)		1006.10	126	1267.69	33.36
Pay point 4 (4 year degree)		1026.70	126	1293.64	34.04
Social and community services employee level 4	15.4				
Pay point 1		1054.20	132	1391.54	36.62
Pay point 2		1081.80	132	1427.98	37.58
Pay point 3		1109.60	132	1464.67	38.54
Pay point 4		1134.30	132	1497.28	39.40
Social and community services employee level 5	15.5				
Pay point 1		1162.00	137	1591.94	41.89
Pay point 2		1186.90	137	1626.05	42.79
Pay point 3		1214.60	137	1664.00	43.79
Social and community services employee level 6	15.6				
Pay point 1		1242.30	140	1739.22	45.77
Pay point 2		1269.70	140	1777.58	46.78
Pay point 3		1297.20	140	1816.08	47.79
Social and community services employee level 7	15.7				
Pay point 1		1324.70	142	1881.07	49.50
Pay point 2		1352.50	142	1920.55	50.54
Pay point 3		1380.00	142	1959.60	51.57
Social and community services employee level 8	15.8				
Pay point 1		1407.50	145	2040.88	53.71
Pay point 2		1435.10	145	2080.90	54.76
Pay point 3		1462.90	145	2121.21	55.82

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Equal remuneration rates for Crisis Accommodation employees—from 1 December 2020

	Clause	Minimum weekly wage	Final Rate Percentage	Current weekly wage	Current hourly wage
Classification		**$**	**%**	**$**	**$**
Crisis accommodation employee Level 1	15.3				
Pay point 1 (associate diploma/advanced certificate)		957.60	126	1206.58	31.75
Pay point 2		985.10	126	1241.23	32.66
Pay point 3 (3 year degree)		1006.10	126	1267.69	33.36
Pay point 4 (4 year degree)		1026.70	126	1293.64	34.04
Crisis accommodation employee level 2	15.4				
Pay point 1		1054.20	132	1391.54	36.62
Pay point 2		1081.80	132	1427.98	37.58
Pay point 3		1109.60	132	1464.67	38.54
Pay point 4		1134.30	132	1497.28	39.40
Crisis accommodation employee level 3	15.5				
Pay point 1		1162.00	137	1591.94	41.89
Pay point 2		1186.90	137	1626.05	42.79
Pay point 3		1214.60	137	1664.00	43.79
Crisis accommodation employee level 4	15.6				
Pay point 1		1242.30	140	1739.22	45.77
Pay point 2		1269.70	140	1777.58	46.78
Pay point 3		1297.20	140	1816.08	47.79

8. By inserting clause 20.10 as follows:

20.10 Broken shift allowance

Commented [FWC6]: See decision at [547]-[556].

(a) An employee required to work a broken shift with 1 unpaid break in accordance with clause 25.6(a) will be paid an allowance of 1.7% of the standard rate, per broken shift.

(b) An employee who agrees to work a broken shift with 2 unpaid breaks in accordance with clause 25.6(b) will be paid an allowance of 2.5% of the standard rate, per broken shift.

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9. By deleting clause 25.5(d)(ii) and inserting the following:

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

(A) if the change is proposed by an employee to accommodate an agreed shift swap with another employee; or

(B) to enable the service of the organisation to be carried on where another employee is absent from duty on account of illness, or in an emergency.

10. By deleting clause 25.5(f) and inserting the following:

(f) Client cancellation

(i) Clause 25.5(f) applies where a client cancels or changes a scheduled home care or disability service, within 7 days of the scheduled service, which a full-time or part-time employee was rostered to provide.

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

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

(B) cancel the rostered shift.

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

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

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

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

(v) The make up time arrangement can only be used where the employee was notified of the cancelled shift at least 12 hours prior to the scheduled commencement of the shift. In these cases, clause 25.5(f)(iv)(A) applies.

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

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

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

Commented [FWC7]: See decision at [643].

Commented [FWC8]: This is the current 25.5(d)(ii) wording which has been retained.

Commented [FWC9]: See decision at [830], [822], [823] and [818].

(B) the make up time must be rostered to be performed within 6 weeks of the date of the cancelled shift;

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

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

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

11. By deleting clause 25.6 and inserting the following:

Commented [FWC10]: See decision at [488].

25.6 Broken shifts

This clause only applies to social and community services employees when undertaking disability services work and home care employees.

(a) Broken shift with 1 unpaid break

(i) An employer may only roster an employee to work a broken shift of 2 periods of work with 1 unpaid break (other than a meal break).

(ii) An employee rostered to work a broken shift with 1 unpaid break must be paid the allowance in clause 20.10(a).

(b) Agreement to work a broken shift with 2 unpaid breaks

(i) Despite clause 25.6(a), an employer and an employee may agree that the employee will be rostered to work a broken shift of 3 periods of work with 2 unpaid breaks (other than meal breaks).

(ii) An agreement under clause 25.6(b)(i) must be made on each occasion that the employee will be rostered to work a broken shift with 2 unpaid breaks.

(iii) An employee rostered to work a broken shift with 2 unpaid breaks must be paid the allowance in clause 20.10(b).

(c) Where a break in work falls within a minimum payment period in accordance with clause 10.5 then it is to be counted as time worked and does not constitute a break in a shift for the purposes of clause 25.6(a)(i) or clause 25.6(b)(i).

(d) Payment for a broken shift will be at ordinary pay with weekend and overtime penalty rates to be paid in accordance with clauses 26 and 28.

(e) The span of hours for a broken shift is up to 12 hours. All work performed beyond a span of 12 hours will be paid at double time.

(f) An employee must receive a minimum break of 10 hours between broken shifts rostered on successive days.

12. By deleting clause 25.7(c) and inserting the following:

(c) The span for a sleepover will be a continuous period of 8 hours. Employees will be provided with a separate room with a bed and clean linen, the use of appropriate facilities (including access to food preparation facilities and staff facilities where these exist) and free board and lodging for each night when the employee sleeps over.

13. By deleting clause 25.8 and inserting the following:

25.8 24-hour care

Commented [FWC11]: See decision at [1071].

This clause only applies to home care employees.

(a) A **24-hour care** shift requires an employee to be available for duty in a client's home for a 24-hour period. During this period, the employee is required to provide the client with the services specified in the care plan. The employee is required to provide a total of no more than 8 hours of care during this period.

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

(c) The employee will be afforded the opportunity to sleep for a continuous period of 8 hours during a 24-hour care shift and employees will be provided with a separate room with a bed and clean linen, the use of appropriate facilities (including access to food preparation facilities and staff facilities where these exist) and free board and lodging for each night when the employee sleeps over.

(d) The employee will be paid 8 hours' work at 155% of their appropriate rate for each 24-hour period.

(e) If the employee is required to perform more than 8 hours' work during a 24-hour care shift, that work shall be treated as overtime and paid at the rate of time and a half for the first 2 hours and double time thereafter, except on Sundays when overtime will be paid for at the rate of double time, and on public holidays at the rate of double time and a half. An employer and employee may utilise the TOIL arrangement in accordance with clause 28.2.

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

14. By deleting clause 28.1 and inserting the following:

28.1 Overtime rates

(a) Full-time employees

A full-time employee will be paid the following payments for all work done in addition to their rostered ordinary hours on any day or outside the span of hours (day workers only):

(i) disability services, home care and day care employees—for all authorised overtime on Monday to Saturday, payment will be made at the rate of time and a half for the first 2 hours and double time thereafter;

(ii) social and community services and crisis accommodation employees—for all authorised overtime on Monday to Saturday, payment will be made at the rate of time and a half for the first 3 hours and double time thereafter;

(iii) for all authorised overtime on a Sunday, payment will be made at the rate of double time;

(iv) for all authorised overtime on a public holiday, payment will be made at the rate of double time and a half; and

(v) overtime rates under this clause will be in substitution for, and not cumulative upon, the shift premiums prescribed in clause 29—Shiftwork and Saturday and Sunday work premiums prescribed in clause 26—Saturday and Sunday work.

(b) Part-time employees and casual employees

(i) All time worked by part-time or casual employees in excess of 38 hours per week or 76 hours per fortnight will be paid for at the rate of time and a half for the first 2 hours and double time thereafter, except that on Sundays such overtime will be paid for at the rate of double time and on public holidays at the rate of double time and a half.

(ii) All time worked by part-time or casual employees which exceeds 10 hours per day, will be paid at the rate of time and a half for the first 2 hours and double time thereafter, except on Sundays when overtime will be paid for at the rate of double time, and on public holidays at the rate of double time and a half.

(iii) Time worked up to the hours prescribed in clause 28.1(b)(ii) will, subject to clause 28.1(b)(i), not be regarded as overtime and will be paid for at the ordinary rate of pay (including the casual loading in the case of casual employees).

(iv) All time worked outside the span of hours by part-time and casual day workers will be paid for at the rate of time and a half for the first two hours

and double time thereafter, except that on Sundays such overtime will be paid for at the rate of double time and on public holidays at the rate of double time and a half.

Commented [FWC12]: See decision at [556]

(v) Overtime rates payable under clause 28.1(b) will be in substitution for and not cumulative upon the shift premiums prescribed in clause 29—Shiftwork and are not applicable to ordinary hours worked on a Saturday or Sunday.

15. By deleting clause 31.2 and inserting the following:

31.2 Quantum of leave

Commented [FWC13]: See decision at [1071]

For the purpose of the NES, a shiftworker is:

(a) an employee who works for more than 4 ordinary hours on 10 or more weekends during the yearly period in respect of which their annual leave accrues; or

(b) an employee who works at least eight 24-hour care shifts in accordance with clause 25.8;

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

16. By updating cross-references accordingly.

B. This determination comes into operation on **1 October 2021**. In accordance with s.165(3) of the *Fair Work Act 2009* this determination does not take effect in relation to a particular employee until the start of the employee's first full pay period that starts on or after **1 October 2021**.

PRESIDENT

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