Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Further Final Submission

Social, Community, Home Care and Disability Services Industry Award 2010 (AM2018/26)

10 February 2020

AM2018/26 SOCIAL, COMMUNITY, HOME CARE AND DISABILITY SERVICES INDUSTRY AWARD 2010

1. INTRODUCTION

1. The Australian Industry Group (**Ai Group**) files this submission in response to the directions issued by the Fair Work Commission (**Commission**) on 5 December 2019 (**Directions**), a statement[1] published on 6 January 2020 and a background paper published on the same date (**Background Paper**); regarding the 4 yearly review of the *Social, Community, Home Care and Disability Services Industry Award 2010* (**Award**).

2. Our submission is structured as follows:

   - **Section 2**: Submissions in reply to the unions' submissions of November 2019 regarding their travel time claims. These submissions are made in accordance with paragraphs [2](a), [2](b) and [2](c) of the Directions.

   - **Section 3**: Submissions in reply to the HSU's submissions of November 2019 regarding their minimum engagement claims. These submissions are made in accordance with paragraphs [2](a), [2](b) and [2](c) of the Directions.

   - **Section 4**: Submissions in reply to the HSU's submissions of November 2019 regarding their claims concerning overtime entitlements for casual and part-time employees. These submissions are made in accordance with paragraphs [2](a), [2](b) and [2](c) of the Directions.

   - **Attachment A**: Our responses to the Background Paper. These submissions are made in accordance with paragraph [2](d) of the Directions.

3. All page numbers mentioned in this submission are by reference to the Court Book unless otherwise specified.

[1] *4 yearly review of modern awards – Social, Community, Home Care and Disability Services Industry Award 2010* [2020] FWC 58.

2. RESPONSE TO UNION SUBMISSIONS – TRAVEL TIME CLAIMS

4. We have set out our opposition to the various claims pertaining to travel in previous submissions. We here respond to the specific issues raised by the unions in their November submissions relating to this subject matter.

Response to the UWU's Submissions

5. We deal firstly with various proposed findings and further submissions advanced by the UWU in their 18 November submission in respect of their travel time claims.

6. At paragraph 15 of their submissions, the union contend that a key feature of the duties of employees in home care and certain types of disability services work is the provision of services in the clients' homes. Whilst this is uncontentious, the proposition in the subsequent sentence that "for this to occur, the employee must travel to and between clients at the direction of the employer" is overly simplistic and fails to grapple with the way work is structured in the industry and the nature of the travel actually undertaken. The extent to which employees travel "between" clients and whether this does or should constitute 'work' warrants detailed consideration when weighing the merits of the proposed variations.

7. We do not contest that in some situations, employees do travel between clients at the direction of their employer as part of the work that they are employed to perform. This may occur by virtue of an express instruction to the employer or it may be a product of the scheduling of client visits.

8. In other situations, whilst employees must, as a matter of practicality, undertake some travel to attend a second site after visiting a different client earlier in the day, they are not required by virtue of either express obligation or necessity to undertake the travel at the direction of their employer. Relevantly, the employer is not able to and does not seek to instruct the employee as to matters such as the route of travel to be undertaken or even the time of the travel. Indeed, the evidence demonstrates that in some circumstances employees travel to a separate location (such as their home) in the intervening period between clients

and this will undoubtedly cause the employee to undertake a different course of travel in order to attend the second site.[2] Such variables will impact upon how much time an employee will spend travelling.

9. Time spent travelling to and between clients will not always constitute 'work' for the purposes of the Award or other relevant industrial regulation. It will not always occur in the course of employment and as such rightly does not, and should not, attract a payment as though it is work. Whether time spent travelling in connection with the performance of work requires a consideration of any express contractual arrangement between the parties, as well as the extent to which an employee performs such travel at the direction of the employer.

10. Ai Group raises these issues because it is, in our submission, neither fair, or appropriate in the context of regulation of employment conditions through an award, to require an employer to pay an employee for time and activities that fall outside of the course of employment and consequently the employer's direct control.

11. Moreover, where travel to or between clients occurs in the context of a break, various practical difficulties or issues potentially arise that undermine the proposition that an employer should or could be expected to pay for such travel in the manner proposed by the UWU. Relevantly, the evidence reveals the following interconnected issues that would need to be dealt with if a clause were to require payment for time an employee spends travelling between clients on a break in circumstances where they do not travel directly and immediately from one client to the next:

    (a) The need for work to be structured so that there are non-productive breaks between client visits;

[2] See for example the evidence under cross examination of Ms Stewart at transcript of proceedings on 15 October 2019 at PN468 and Mr Fleming at PN527

(b) The existence of variables that impact upon the time such travel takes and make it difficult to predict (such as traffic);[3]

(c) The fact that employees are free to, and sometimes do, travel to separate locations of their choosing whilst on a break between visiting clients[4] and as such do not necessarily travel the most direct route available between clients;

(d) The foreseeable difficulties that would be faced by an employer trying to monitor how long such travel takes; and

(e) The potential inability for employers to recover such travel costs given pricing constraints at play under the NDIS.

12. In advancing these points we contend that it is not appropriate for an award to impose upon an employer a requirement to pay for travel between client visits by guessing at what might *hypothetically* constitute 'reasonable travel time' between clients. Nor should an employer be required to pay for time spent travelling on a route that is not the direct route between clients or that is undertaken at a time of the employee's choosing.

13. The union's assertion at paragraph 23 that, "the notion that travel time cannot be paid as it is difficult to calculate is counter factual: several employer witnesses indicated that they already pay travel time" should not be accepted. The union submission somewhat 'guilds the lily' in terms of the nature of some of the evidence that they point to in support.

14. Some of the evidence cited in support of the union's proposed finding actually supports the proposition that employers do not pay for travel where there is a broken shift or where an employee is not required to travel directly between clients.

[3] See for example the evidence under cross examination of Ms Stewart at transcript of proceedings on PN459 – PN460.

[4] See for example the evidence under cross examination of Ms Stewart at transcript of proceedings on 15 October 2019 at PN468 and Mr Fleming at transcript of proceedings on 15 October 2019 at PN527.

15. For example:

    (a) The evidence of Mr Wright cited is, in actuality, to the effect that in the context of his organisation travel time is only paid when it is undertaken between clients and there isn't a broken shift between those clients.[5]

    (b) The evidence of Ms Ryan appears to ultimately be that employees engaged by her organisation are paid for their time travelling between clients and receive an allowance for kilometres travelled, except for where there is a break in the shift. If there is a break in the shift and the employee returns home in between visiting clients, they are not paid for their time travelling between clients on either side of the break but are paid for the kilometres between the two clients.[6] Employees engaged by Ms Ryan's organisation are not paid for travel to or from their first or last client for the day.

16. At paragraph 18 of its submissions, the UWU proposes a finding that there are the following different approaches to the payment of travel time by employers in the industry:

    (a) Some employers will pay for travel time;

    (b) Some employers will pay for travel time in between consecutive client engagements but not in between broken shifts; and

    (c) Some employers do not pay for travel time and such employers classify such time spent travelling between client engagements as a "break" in broken shifts, regardless of whether or not those client engagements are consecutive.

17. The finding at paragraph 18(a), as it is framed, should not be made.

[5] Transcript of proceedings on 17 October 2019 at PN2612.

[6] Transcript of proceedings on 18 October 2019 at PN3059.

18. It can be accepted that the evidence cited in support of paragraph 18(a) does suggest that some employers do or have paid something in relation to travel undertaken between clients. The cited evidence does not however justify a finding that employers pay for *all* time employees *actually* spend travelling by reference to the amount of time they actually spend travelling.

19. The UWU rely on the evidence of Ms Stewart and the evidence under cross examination of Mr Shanahan, an employer witness in the aged care sector.

20. Firstly, Ms Stewart's evidence on the point is ultimately that she understands that for a period "the rostering staff used Google maps to get an estimate for how long the travel should take and this was how the pay was calculated". This does not reflect evidence that she was paid for her travel time, at least not by reference to the time she actually spent travelling. Rather, it is evidence of an understanding that her pay was based on her *estimated* travel time.

21. Ms Stewart's evidence under cross examination was also to the effect that she cannot be certain how long it will take her to reach a client on any given day due to traffic and that travel was often subject to delays.[7] Under cross examination Ms Stewart also agreed that she sometimes visited destinations unrelated to her work in between clients.[8] Rather than supporting the proposed finding, the evidence of Ms Stewart demonstrates the difficulties with requiring employers to pay employees by reference to time for travel that occurs between clients, except perhaps in circumstances where client visits are structured consecutively and immediately after each other.

22. For completeness, we note that there is no evidence before the Commission of the accuracy of services such as Google Maps and we contend that it would not be appropriate for the Full Bench to accept that a third party platform would be a suitable mechanism for calculating time travelled between two points for the purposes of determining amounts payable under an award.

[7] Transcript of proceedings on 15 October 2019 at PN459 – PN460.

[8] See for example transcript of proceedings on 15 October 2019 at PN464.

23. The other employee witness that the union relies upon in support of this finding is Deon Fleming. Mr Fleming worked for the same employer as Ms Stewart and it might be said that it is consequently likely that his pay for travel was calculated in the same way as hers. Nonetheless, while Mr Fleming's evidence was that he was paid for time travelling between clients, he was "unsure how this time was calculated by the rostering team."

24. In relation to the cited evidence of Mr Shanahan, we acknowledge that his evidence under cross examination appears to be that employees are paid for travel time between clients, but he does not identify how this is calculated. It is also not apparent that his evidence establishes what occurs when or if there is a break in a shift.

25. On balance, a more accurate articulation of the findings that may be made in relation to the evidence about payment for time spent travelling between clients would be:

    (a) Some employers pay employees for the time spent travelling between consecutive clients where this occurs without any break. That is, where the employee is required to travel directly and immediately between clients. This is perhaps best articulated through the oral evidence of the HSU official Mr Friend.[9]

    (b) Some employers pay an employee an amount for the performance of travel but this may be based on an estimate of the notional time that it would take to travel between clients or some other arrangement.[10]

    (c) Many employers do not pay for time spent travelling to the second or subsequent clients (this appears to be uncontentious).

[9] PN1503 to 1517

[10] See for example the cross examination of Ms Wang at PN3498

26. At paragraph 21 of its submission, the union seeks a finding that, "the non-payment of travel time results in lower wages for already low paid workers." They cite evidence of Trish Stewart and Dr Fiona Macdonald in support of the finding.

27. In response to the proposed finding we observe that the absence of an obligation to pay for travel undertaken in connection with work but not in the course an employee's work does not lower an employee's wages. It simply means that they *might* be paid less than they otherwise would if there was an obligation to pay for such time. However, any such assertion is obviously speculative and presumes that all other variables will remain constant.

28. The result of 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 so as to negate or minimise an. The article by Dr McDonald (which is relied upon by the UWU and other unions) provides some support for this proposition. The article identifies that just two of the employees interviewed for the article were paid for travel directly between clients and states;

> The two women who were paid for the time they spent travelling directly between clients had paid time in their enterprise agreement with the same long-standing service provider. Our interviewees informed us, and it was later confirmed, that this provider had ceased providing disability support services because they could not afford to do so under NDIS.[11]

29. The article, which the UWU relies upon, suggests that imposing a requirement to pay for travel time may impact upon work practices and may have unintended adverse consequences for the availability of work for employees.

30. We nonetheless acknowledge that the weight that can be afforded to the article by Dr McDonald is negligible. The article seeks to derive insights from the work diaries over a period of just 3 days of just 10 disability support workers performing work under the NDIS in a single regional area. As is acknowledged in the article,

[11] Page 2917.

"the 10 DSW cannot be seen as representative of all Disability Support Workers."[12]

31. The article is also dated given the research was essentially undertaken in 2016 and there has of course been a range of changes to the NDIS funding arrangements since that time.

32. A further difficulty is that the article is based on the responses or diary entries of unnamed employees of unnamed employers. It is in the nature of hearsay and particularly problematic as none of the employees were proffered 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.

33. At paragraph 24 of its submissions, the union seeks a finding that under the NDIS the identified periods of travel time are claimable by providers. The proposed finding is misleading and should not be accepted. At best, such travel time can only be claimed where the client agrees.

34. The UWU identifies that there was no probative employer evidence that modelled the costs of their claim.[13] However, they then go on to advance a speculative and erroneous assertion that this is "presumably because several of the employer witnesses already paid for travel time as travel time is rightly payable as ordinary hours of work under the current award."[14] In this regard we note as follows:

    (a) The evidence cited does not establish that all of the relevant employers actually pay for travel time (at least not by reference to the time spent travelling), as already identified.

    (b) The position at law is not that all time spent travelling is payable under the Award. Nor is accurate to describe such times as 'ordinary hours of work'.

[12] Page 2914.

[13] UWU submission of 18 November 2019 at paragraph 26.

[14] UWU submission of 18 November 2019 at paragraph 26.

(c) The presumption as to the employer parties' motivations is patently speculative and, from Ai Group's perspective, wrong.

35. The union also submits that "the employer evidence has not indicated that there would be any excessive cost as a result of a travel time clause."[15] In response we note that various unions have asserted in the course of these proceedings that employees covered by the Award undertake significant periods of unpaid travel in the connection with their work. Indeed it is, in effect, a key finding that the UWU seeks that the Commission makes.[16] Accordingly the UWU cannot reasonably contend that the proposed variation would not potentially impose significant additional costs upon employers.

36. Whether the costs are "excessive" is a subjective consideration. We accordingly observe that for many employers operating under the NDIS profit margins are notoriously tight. In assessing the impact of the claim upon employers in the sector, the Commission should not assume that any increase in costs can be easily absorbed

37. If the union is asserting that the costs of the claim are not excessive it should put before the Commission evidence which substantiates this claim. Indeed, as the union is the proponent of a change the merits of which are obviously reasonably contestable, it should have put probative evidence before the Commission which enables a robust assessment of the cost of granting the claim.[17]

38. Ultimately, the absence of any cost modelling of the impact of the claim does render it difficult for the Commission to properly assess its potential impact on employers or the NDIS.

39. If the Commission is not satisfied that there is sufficient material before it to properly asses the impact of the unions' proposed variations it should decline to grant the variation. In the context of a Review undertaken by the Commission of

[15] UWU submission of 18 November 2019 at paragraph 28.

[16] UWU submission of 18 November 2019 at paragraph 9.

[17] This is consistent with approach to the Review contemplated in the *4 yearly review of modern awards - Penalty Rates* [2017] FWCFB 1001 at [269](2).

an Award to which employer associations are no longer a party, and proceedings arising from a union claim seeking a variation, there can be no onus upon employers to put such material before the Commission.

Response to the ASU's Submissions

40. We here respond to the findings sought by the ASU at paragraphs 77 – 87 of their 18 November 2019 submission.

41. At paragraph 77, the union seeks a finding that "disability support workers who provide in home supports are required to hold a driver's licence as [a] condition of employment [and are] expected to use their car for work travel." In support, they rely on the evidence of just one lay witness which of course cannot be accepted as giving probative evidence as to the employment conditions of all disability support workers in Australia. The Commission should not make the finding.

42. At paragraph 79 the union contends, in effect, that unpaid travel time, the absence of minimum engagements under the Award and the availability of broken shifts means that employees can work over lengthy spans of time with the majority of that time being potentially unpaid but "still effectively controlled by the employer". The Commission should not make such a finding. The break between active parts of a broken shift is not work, in the sense that it is not undertaken in the course of employment and it would not attract payment under the Award. Further it is misleading to suggest that such time is still effectively controlled by the employer. An employer does not have a right to control or direct an employee during this break and the evidence suggests that at least some employees use such breaks for their own private purposes.[18]

43. The Commission would not accept the proposed finding that the current award arrangements have the capacity *to* "create a perverse incentive for employers to operate over greater distances than might otherwise be the case."[19] The submission is speculative as to the potential motivations of employers and

[18] Ai Group submission dated 19 November 2019 at paragraph 34.

[19] ASU submission of 19 November 2019 at paragraph 80

cannot be established through the evidence of a single employee, as asserted by the union.

44. Regardless, the evidence of Mr Steiner which is cited in support of the proposed finding does not engage with the relevant point. It merely establishes that he visits clients in Maitland, Newcastle and Singleton areas. While he does attest to sometimes travelling for "more than an hour" to visit clients in the Hunter Valley,[20] we observe that this is, in part, a product of where he lives – a matter over which the employer has no control.

45. Moreover, the experience of an employee working in a regional area cannot be extrapolated so as to be in any way indicative of the experience of employees more broadly. Without seeking to engage unduly in speculation, it is perhaps unsurprising that disability services in regional areas may need to assist clients over a broader geographical area than in densely populated metropolitan areas or that employees in such areas may sometimes have comparatively longer commutes than employees in metropolitan areas. It cannot be assumed that such realities will be circumvented by amending the Award as proposed by the ASU or other unions.

46. We nonetheless accept that the imposition on employers of greater unrecoverable costs in relation to payment for travel or restrictions on existing flexibilities in relation to the breaking of shifts or minimum engagements may have a bearing on whether employers can or do agree to undertake certain work for clients in the NDIS context; the foreseeable result being that clients in remote areas may lose access to a service, an employer may lose revenue and employees may lose work. These are risks which would weigh against the granting of the claims.

[20] Statement of Steiner at paragraph 11.

47. The proposed finding that "unpaid travel time thus reduces the already low wages of disability workers" [21] should also not be accepted. Unpaid travel time does not *reduce* the wages of disability workers. It may of course be said that if the unpaid travel time was paid that their wages would be higher, but this assumes that all other variables remain constant. That is, for example, that an employer will respond to being subject to potentially unrecoverable costs by simply carrying on with current work arrangements. This is an unrealistic and naïve approach that overlooks the abovementioned risks. We have already addressed a similar argument advanced by the UWU.

48. At paragraph 82 the union asserts that, "the submission that it is too difficult to calculate the length of travel time is without basis." This is not a finding that can be accepted given the ASU and other unions have failed to identify how reasonable travel time can be calculated when the travel does not occur directly and immediately between consecutive clients.

49. The ASU propose a finding that "several employer lay witnesses already pay travel time". When careful regard is had to the evidence cited it becomes clear that the finding as framed cannot be accept. This situation is in reality more nuanced.

50. The ASU point in particular to the evidence of Ms Wang. Ms Wang's evidence under cross examination[22] is in truth that:

    (a) CASS do not pay for travel time to the first client or home after the last client.

    (b) CASS do not pay any kilometre allowance for travel to the first client or home after the last client.

[21] ASU submission dated 19 November 2019 at paragraph 81.

[22] Transcript of proceedings on 18 October 2019 at PN3497 – PN3542.

(c) In relation to circumstances where an employee visits multiple clients on the same day:

(i) When paying for travel between clients, CASS makes an assumption that the employee is travelling between the clients (presumably this overlooks any deviation that may as a matter of fact occur).

(ii) Pays for the distance that is travelled in kilometres.

(iii) Pays permanent workers an additional allowance for travel time which appears to be a product of a formula that they apply to convert the kilometres and their hourly rate. However, Ms Wang does not explain how the formula or calculations works and describes them, in effect, as "not very straight forward".[23]

51. The evidence of Mr Wright is actually that the time taken to travel between two clients is only payable where there is not a 'broken shift' between those clients.[24]

52. Mr Shanahan's cited evidence under cross examination does not reveal how they calculate the travel time between clients. The thrust of his evidence at the cited paragraph appears be that employees just get paid for all time from their first to last client on a shift.[25] An extra allowance is also paid where an employee is required to travel an exceptionally long distance to or from their first client, but it is not explained how this is calculated.[26] In other instances, travel to and from the first and last client appears not to be paid.

53. Ms Mason's cited evidence is to the effect that the organisation pays for travel time between clients but there is no explanation as how the payment is calculated or the time measured.[27] This issue of whether the payment is made in circumstances where an employee does not travel directly and immediately to consecutive clients is not ventilated. Travel to and from the first or last client is

[23] Transcript of proceedings on 18 October 2019 at PN3498.

[24] Transcript of proceedings on 17 October 2019 at PN2612.

[25] Transcript of proceedings on 18 October 2019 at PN2887 – PN2890.

[26] Transcript of proceedings on 18 October 2019 at PN2890.

[27] Transcript of proceedings on 18 October 2019 at PN3210 – PN3213.

not paid for in any way.[28] In any event, the evidence about the terms and conditions provided by Ms Mason's organisation, Baptist Care, is of limited relevance given her organisation is covered by an enterprise agreement.

54. We have dealt with the evidence of Ms Ryan earlier in these submissions.

55. At paragraphs 84 – 87 of their submissions, the ASU seek to establish that the phenomenon of unpaid travel time within the disability services sector "offends the principle of equal remuneration for work of equal or comparable value." The submission should not be accepted.

56. The evidence does not establish that the reason some travel undertaken in connection work covered by the Award is not paid is a consequence of gender related issues. Moreover, the ASU's contention that the "only distinguishing characteristic between travel in industries with paid travel time and the disability services is that those sectors are male dominated"[29] is an obviously baseless assertion that ought to be rejected.

57. It is trite to observe that the sectors covered by the Award are in various ways different from most industries in which modern awards apply. An obvious differentiating factor between the sectors and most other industries is the recognised reliance upon governments funding arrangements by employers covered by the Award; and more specifically in the current context, the pressures that have flowed from the major reforms constituted by the NDIS. The simplistic comparison urged by the ASU seeks to simply overlook these patent differences.

58. The comparison to the business equipment industry is unhelpful to the Commission and on one view actually serves to demonstrate why it is not always appropriate to pay employees by reference to time that they spend performing an activity such as travel. That is a sector which, within the award context, has evolved an atypical approach to the regulation of remuneration and employment conditions in order to suit the particular context of the work and the industry. For example, in various streams of the *Business Equipment Industry Award 2010*

[28] Transcript of proceedings on 18 October 2019 at PN3211 – PN3212.

[29] ASU submission dated 18 November 2019 at paragraph 87.

employers are relieved of the application of aspects of the award if employees are in receipt of a salary above a certain level.[30]

Response to the HSU Submissions

59. Before addressing the substance of the submissions and findings advanced by the HSU, it is salient to note that they are pursuing a different claim in respect of travel and travel time through their most recent submissions than that which was previously being sought.

60. The HSU's previous claims were directed at:

    (a) Requiring payment in relation to time spent (or notionally spent) travelling between clients during a broken shift; and

    (b) Obtaining an amendment to the clause dealing with reimbursement of employee costs through the payment of an allowance on a per kilometre basis so as to broaden the circumstances when the allowance is payable.

61. Concerningly, the HSU now appear to be seeking to broaden their claim through their submissions of 18 November 2019 to include payment for the time spent travelling to or from their first client as though it is work. They relevantly submit (emphasis added):

> The HSU contends that as a matter of principle the time spent travelling to, from and between clients, whether or not carried out during a break in a shift is work, just as much as contact time with clients. It is carried out at the behest of the employer in order to perform the work of an employer, as the employer has arranged it. It should therefore be paid for as work time, and the cost of undertaking all such travel should attract an allowance at the appropriate rate per kilometre. The award should be varied to make those entitlements clear, having regard to the evidence before the Commission.

62. They now appear to not merely be seeking reimbursement of costs for commuting to and from the first or last client but payment for such travel time. As the union has not set out a specific draft variation to the award dealing with this issue, it is unclear how such time would be calculated.

[30] See clause 21 of the *Business Equipment Industry Award 2010*.

63. For convenience we shall refer to this as the “New HSU Travel Time Claim” and address it before dealing with the remainder of the HSU’s submissions.

64. Our primary position is that the Commission should not now consider this new claim in these proceedings. It is fundamentally different in nature to the previous claims advanced by the HSU and the other unions in these proceedings, except for the superficial fact that it relates to travel.

65. Ai Group accepts that the Commission is not bound to grant a variation in the terms sought[31], however the variation that is now being pursued is so far beyond the scope of that which was previously advanced by the union, that it is unfair for the employer parties to now be expected to deal with it at this late stage of the proceedings. Indeed, entertaining such a course of action would, in our respectful submission, mean the Commission is failing to exercise its functions in a manner required by s.577(a) of the Act.

66. This is not a prejudice that is cured by the employer parties having been afforded a window to provide a response to the submissions, having regard to the volume of material and claims to be dealt with. Ai Group would require much more time than has been afforded to consider the claim and engage with industry in order to be able to properly respond.

67. Moreover, parties such as ourselves have directed our limited resources to responding to the claims advanced prior to the evidentiary hearing. From a procedural perspective, it is unfair to expect parties to be put to the task of responding to an ever-evolving suite of claims. This is particularly so given the Commission has already permitted various parties multiple opportunities to change their claims earlier in the proceedings.

68. Perhaps more importantly, the evidentiary case advanced has been dealt with in the context of proceedings directed to particular claims. Decisions about which evidence should be tested through cross examination or the subject of objections have been made in this light and it would be unfair and unsafe to accede to union

[31] *4 yearly review of modern awards - Penalty Rates* [2017] FWCFB 1001 at [110].

calls to rely on such evidence in consideration of any substantively different claim to that previously advanced.

69. In advancing these submissions we do not overlook the overarching obligation on the Commission to ensure that modern awards are meeting the modern awards objective and we acknowledge that it must of course be guided by the substantive merits of an issue properly put before it. However, the capacity for employer parties to assist the Commission by acting as effective contradictors in arbitral proceedings is undermined if proponents of an award variation are afforded unreasonable opportunities to alter their claims. This in turn undermines the Commission's ability to properly asses the force of such claims. In our respectful submission this would occur if the Full Bench were to consider the HSU's new claim in these proceedings.

70. We turn now to the substance of the HSU's submissions.

71. Notwithstanding our primary position, we raise the following arguments in opposition the HSU New Travel Time Claim and their November submissions relating to the issue of payment for travel.

72. Firstly, a central proposition underlying the union's case appears to be that, as a matter of principle, time travelling to and from an employee's first or last client is work and should therefore be payable as work time (We understand their submission to be a statement of their understanding of the legal position).[32] For reasons we have already articulated, this interpretation should be rejected. The union's associated contention that such travel is "…carried out at the behest of an employer" cannot be accepted.[33] The travel is in part a product of where the employee elects to live or where they are immediately preceding their shift or the location they wish to attend after their shift. It cannot be accurately characterised as being undertaken at the behest of the employer.

[32] HSU submission dated 18 November 2019 at paragraph 103.

[33] HSU submission dated 18 November 2019 at paragraph 103.

73. Where an employee is engaged on the basis that they commence the work of their employment at a client's location, any travel that they undertake is not undertaken in the course of their employment. The same can be said of travel undertaken after concluding work. The evidence does not suggest that employers direct employees to travel from their home to the starting location for the day. Instead, what is required is that the employee be at the starting point and finish at the location of the final client at the end of the day.

74. We do not deny that the requirement for an employee to start at different locations or to conclude at different locations during the course of their employment necessitates, at a practical level, some requirement for the employee to undertake travel. However, the amount of such travel is in part a product of decisions made by an employee that are entirely outside of the employer's control. Indeed, there is no reason to assume that an employer will even know where an employee travels from or to either before or after work. A proposition that an employer should have to pay for such travel is accordingly unfair and unworkable.

75. Of course, if an employee is engaged on the basis of that they commence work at a client's premises, an employer is not a liberty to issue any direction to the employee as to how they undertake their commute; the consequence being that they cannot direct the method, route or mode of travel. Moreover, an employer cannot direct that an employee not perform other activities in connection with such travel, such as deviating from the most direct path between the employee's home and their destination. Nor can they direct an employee to undertake activities such as contemporaneously recording the time they spend undertaking such travel. These factors also render it unfair to expect an employer to pay for an employee's commute to work.

76. In considering the HSU's New Travel Time Claim the Full Bench should also be mindful that it is not permitted pursuant to s.139 to include a term in an award about *where* work should start. Nor are awards capable of regulating what activities would constitute work. These are matters that fall to an employee and employer to determine through the contract of employment. As such, it could not

be possible to vary the Award to make it clear that travel before or after a client visit or during a break is "work" – if that is what the HSU is seeking through their new claim.

77. At paragraph 101 of its submissions, the HSU asserts that there is little justification for the approach of not providing a payment to employees for travel to or from their first and last client as the evidence before the Commission showed that under the NDIS, providers can now claim for up to 30 minutes in travel time city in metropolitan areas and up to 60 minutes in travel time in regional areas. They cite paragraph 10(d) of the Farthing Supplementary Statement in support of the claim.[34] The evidence cited does not substantiate the assertion.

78. The price guide that operated from February 2019 expressly prohibited providers from charging for travel to the first client for the day or travel following the last client for the day.[35] The cited evidence of Mr Farthing deals with changes that were made through the introduction of the 2019 – 2020 Price Guide, which does not state that providers are able to claim travel time to or from the first or last client for a day. It simply refers to increases in the length of time for which clients can be charged. On our reading of the 2019 – 2020 Price Guide, it does not appear that all NDIS participants are afforded an unfettered right to charge for time an employee spends travelling to or from a client and their home as asserted by the union.[36]

79. Even if there has been a relaxation of the previous prohibition on such charges, we assume that it is not contested that a participant would need to agree to such charges. The evidence before the Commission does not establish that this is typically occurring. We also note that the HSU accepts that "the common approach of employers in the industry appears to be that travel by a worker to the first appointment of the day is not regarded as work related travel, and is not

[34] Page 2982.

[35] NDIS, *NDIS Price Guide, New South Wales, Queensland, Victoria, Tasmania* (valid from 1 February 2019) at page 16.

[36] Page 833.

paid as time worked nor compensated by payment of a kilometre allowance."[37] Accordingly, it cannot be seriously disputed that the imposition of a new obligation to provide payments to an employee for such activities would have an adverse cost impact upon employers. A matter which must weigh heavily against the claim.

80. At paragraph 100 of its submissions, the union seeks to identify factors which differentiate the circumstances of employees covered by the Award from that of other employees so as to justify adopting the unusual approach of requiring that employees be paid for their commute to and from work. It has not however led evidence about the relevant experiences of other workers so as to substantiate the assertions.

81. A clear example of the deficiency identified above arises from paragraph 100(c), in which the union claims that in many cases, workers covered by the Award are required to travel distances that exceed those ordinarily travelled by workers to and from work. They have not however cited any evidence in support of the proposition. Further, while there is evidence about distance travelled by a comparatively small number of individual employees covered by the Award, there is no evidence of ordinary travel distances or times of employees more generally. As such, no finding regarding the relative commute to or from work undertaken by employees covered by the Award and other employees can be made.

82. All of the abovementioned considerations weigh against a claim to require payment for travel before commencing or after concluding work on a given day.

83. The Commission should find that a case for requiring payment for travel to and from the first or last client, in either the form of an expense related allowance or a new obligation to pay for such travel time, has not been made out. When regard is had to the final paragraph of the HSU's submissions pertaining to its travel claim, it seems that there is implicit recognition by the union that this aspect of their claim would be an overreach as they there appear to retreat to an appeal

[37] HSU submission of 18 November 2019 at paragraph 100

for “at the least” a payment for travel between clients. We have dealt with this alternate aspect of the HSU’s claim in previous submissions.

3. RESPONSE TO HSU SUBMISSIONS – MINIMUM ENGAGEMENTS AND BROKEN SHIFTS

84. We here respond to the following aspects of the HSU's submission of 18 November 2019 regarding minimum engagements and broken shifts:

    (a) Employers "are at liberty" to schedule work in a way that "eliminate[s] from what is regarded as work time, the time spent travelling to, from, and between clients, writing up notes on clients, or waiting on the next client".

    (b) "It is difficult to imagine new workers entering the industry … being in a position to resist a requirement to perform such short shifts".

    (c) "Given the evidence as to the distances regularly required to be travelled by disability support workers in order to perform any shift of work", it is appropriate to set the minimum engagement period at three hours, and for that minimum to apply to any engagement, including each portion of a broken shift.

85. *First*, we do not accept that employers are "at liberty" to schedule work in the manner described. Work is scheduled in a way that responds to client demands; in respect of which employers, in the provision of disability services, have very little if any control. Absolute limitations as to the prices that may be charged by such employers to their clients prevent them from recovering any additional costs associated with additional employment costs from their clients. In the context of travel, the NDIS also imposes a limitation on the period of time for which funding may be claimed. Importantly, an employer's ability to claim such funding is contingent upon receiving the client's consent. Short of an employer advising a client that they will withhold their services if the client does not consent to the claim, there is no other incentive for a client to consent.

86. As a result of the aforementioned circumstances in which employers in the disability sector operate, they are not “at liberty” to schedule work in the manner described. Work is scheduled according to specific client demands and in the face of stringent funding limitations.

87. *Second*, the HSU’s assertion that “it is difficult to imagine new workers entering the industry … being in a position to resist a requirement to perform such short shifts” is self-evidently speculative. The evidence does not establish that new recruits to the industry are unable to “resist a requirement to perform such short shifts”.

88. *Third*, without demurring from our position that minimum engagement periods should not be increased or introduced as proposed by the unions, we also note that no basis has been made out, in particular, for a minimum engagement period of *three hours*. The HSU’s submission in this regard is vague and unhelpful. It does not articulate how the evidence justifies a three hour minimum engagement. No proper basis for a three hour minimum engagement has been made out.

89. Ai Group continues to rely on the submissions it has previously made in opposition to the unions’ minimum engagement and broken shift claims.

4. RESPONSE TO HSU SUBMISSIONS – OVERTIME FOR CASUAL AND PART-TIME EMPLOYEES

90. We make the following submissions in response to the HSU's submissions of 18 November 2019 regarding their claims to enhance overtime entitlements for casual and part-time employees. In addition, we continue to rely on our previous submissions in opposition to these claims. To a large degree, those submissions address the matters raised in the HSU's submission of November 2019.

91. The HSU's submissions appear to assert that the utilisation of broken shifts enables employers to "minimise paid hours of work" and that as a result, there is no warrant for a different approach to the payment of overtime to part-time workers. They submit that due to the implementation of broken shifts, it is unlikely that part-time employees would work 10 ordinary hours in a day.

92. We make two submissions in reply.

93. *First*, not all part-time employees are engaged to perform broken shifts. The impact of the claim will not be moderated in respect of such employees.

94. *Second*, where a part-time employee works broken shifts, their ordinary hours may nonetheless exceed eight hours. Where their ordinary hours exceed 8 but are less than ten, the claim will impose additional employment costs on employers.

95. *Third*, at its highest, it is the HSU's submission that it is *unlikely* that part-time employees would work more than 10 ordinary hours in a day. However, no evidence in support of this proposition has identified. The Commission is, respectfully, unable to assess the likelihood of employees working more than 10 ordinary hours in a day in the context of the material advanced.

ATTACHMENT A: RESPONSE TO QUESTIONS POSED BY THE BACKGROUND PAPER

96. Our responses to the questions posed by the Commission in the Background Paper are set out in this attachment. They are arranged in the order in which they appear in the Background Paper, under the following headings:

    A. Background;

    B. General findings on the evidence;

    C. The Remote Response / Recall to Work Claims;

    D. The Broken Shift Claims;

    E. The Clothing and Equipment Claims;

    F. The Client Cancellation Claims;

    G. The Mobile Phone Claims;

    H. The Sleepover Claim; and

    I. The Variation to Rosters Claim.

97. We note that there appears to be an error in respect of paragraph [313] of the Background Paper. The proposed findings cited do not relate to the HSU's sleepover claim.

A. Background

Question 1: Is the list set out at paragraph [9] of the Background Paper an accurate list of the Tranche 2 claims that are being pressed?

98. It is unclear whether ABI is pursuing additional variations to the Award, which it had previously foreshadowed. We refer to footnote 4 at paragraph [9] of the Background Paper in this regard.

99. Subject to the above, Ai Group has not identified any inaccuracies in the list of Tranche 2 claims at paragraph [9] of the Background Paper.

Question 2: Is Attachment A to the Background Paper an accurate list of all exhibits tendered in the Tranche 2 proceedings?

100. We have not identified any inaccuracies in respect of the exhibit tendered by Ai Group, as listed at Attachment A to the Background Paper.

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

101. We have not identified any inaccuracies in respect of the submissions (including submissions in reply) relied upon by Ai Group, as listed at Attachment B to the Background Paper.

B. General findings on the evidence

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

102. Ai Group responds as follows to Question 4.

103. *First*, the findings made at paragraph [75] of the September 2019 Decision were based on the state of play before the Full Bench in the context of the first tranche of the proceedings. Since then, evidence has been adduced in the context of the second tranche of the proceedings concerning the 'Reasonable Cost Model' underpinning the funding arrangements and employer operations under the NDIS.

104. Accordingly, paragraph [75] of the September 2019 Decision should not be relied upon in the context of the second tranche of claims.

105. *Second*, the Full Bench reached the following conclusion at paragraph [142] of the September 2019 Decision:

> **[142]** 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. …

106. We do not dispute that a sector, employers engaged in a sector or employees of those employers should not be treated differently solely on the basis that the sector receives government funding. However, the fact that a sector receives government funding is an important contextual consideration that is directly connected to the matters that the Commission must take into account (i.e. the likely impact on business, including employment costs (s.134(1)(f)).

107. As stated in the aforementioned paragraph, particular circumstances that pertain to particular awards may warrant different outcomes. One such circumstance, in the context of the sectors covered by the Award, is government funding.

108. 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.

109. 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.

Question 5: Are the findings proposed by ABI (set out at paragraph [24] of the Background Paper) challenged (and if so, which findings are challenged and why)?

110. Ai Group does not seek to challenge the findings proposed by ABI, as set out at paragraph [24] of the Background Paper.

Question 7: Are the findings proposed by NDS (set out at paragraph [25] of the Background Paper) challenged (and if so, which findings are challenged and why?)

111. Ai Group does not seek to challenge the findings proposed by the NDS, as set out at paragraph [25] of the Background Paper.

Question 9: Are the aspects of the AFEI's submission that are referenced at paragraph [26] of the Background Paper challenged (and if so, which findings are challenged and why)?

112. Ai Group does not seek to challenge the AFEI's submissions referenced at paragraph [26] of the Background Paper.

Question 11: How do the findings proposed by Ai Group (set out at paragraph [27] of the Background Paper) relate to the specific claims before the Full Bench?

113. The findings proposed by Ai Group, as set out at paragraph [27] of the Background Paper, relate to the specific claims before the Full Bench as follows:

	Relevance to specific claims
1	• **Union minimum engagement claims**: the duties performed by employees providing disability services often require only short periods of time that fall well short of the increased minimum engagement periods sought by the unions. • **Union broken shift claims**: the duties performed by employees providing disability services often require only short, separate, discreet periods of time. This is relevant to the claims advanced by the unions to limit the performance of broken shifts to where an employee agrees, limit the performance of broken shifts to part-time and casual employees, limit the number of times a shift can be broken, requiring the application of the minimum engagement periods (including the increased minimum engagement periods proposed by the union) to each portion of a broken shift and the cost impost of requiring the payment of an additional loading. • **Union travel time and vehicle allowance claims**: the nature of the duties (i.e. that they are performed in persons homes) results in travel undertaken by employees to and from those persons home. Such travel would in various circumstances attract a requirement to make a payment under the union travel time claims. In each case, the proposed changes are clearly at odds with ss.134(1)(d) and 134(1)(f).
2	• **Union minimum engagement claims**: the simultaneous demands from clients at particular times of the day limit an employer's ability to schedule client visits consecutively in a way that enables each employee to be productively utilised over the course of the minimum engagement periods proposed by the unions. • **Union broken shift claims**: o The simultaneous demands from clients at particular times of the day limit an employer's ability to schedule client visits consecutively in a way that enables each employee to be productively utilised over the course of the minimum engagement periods proposed by the unions, which would apply to each portion of a broken shift. o The simultaneous demands also highlight the need for the flexibility offered by broken shifts (i.e. the ability to require the same employee to work on multiple separate instances through the course of the day). This is relevant to the claims advanced by the unions to limit the performance of broken shifts where an employee agrees, limit the performance of

	broken shifts to part-time and casual employees, limit the number of times a shift can be broken and the cost impost of requiring the payment of an additional loading. • **Union travel time and vehicle allowance claims**: the nature of the duties (i.e. that they are performed in persons homes) results in travel undertaken by employees to and from those persons home, often multiple times in a day. Such travel would in various circumstances attract a requirement to make a payment under the union travel time claims. In each case, the proposed changes are clearly at odds with ss.134(1)(d) and 134(1)(f).
3	The proposed finding is relevant to all of the claims advanced by the unions because it supports the proposition that employers covered by the Award are generally not insulated from the direct consequences that would result from changes made to the Award.
4	The proposed finding is relevant to all of the claims advanced by the unions because it supports the proposition that employers covered by an enterprise agreement are generally not insulated from the consequences that would result from changes made to the Award, through the application of the 'better off overall' test.
5 - 6	The proposed findings are relevant to the following claims as they highlight the need to ensure that employers have access to sufficient flexibility as to the rostering of employees. In particular, an employer's ability to substitute labour in the context of a particular client or rearrange work in a way that subverts the impacts of the unions claims may be significantly limited as a result. • ABI's claim to enable roster changes by agreement with the employee (if pressed). • ABI's client cancellation claim to the extent that it extends the application of the clause to disability services. • Union minimum engagement claims. • Union broken shift claims that seek to: o Limit the performance of broken shift claims to casual employees and part-time employees who agree to work broken shifts; o Limit the number of times a shift can be broken; and o Require the application of the minimum engagement periods proposed to each segment of a broken shift. • The HSU's claim to require the payment of overtime rates for hours worked by a part-time employee in excess of their agreed hours. • Union travel time and vehicle allowance claims.

	The proposed finding supports the contention that the aforementioned claims are inconsistent with ss.134(1)(d) and 134(1)(f).
7	The proposed finding is relevant to the union mobile phone claims, as it highlights the extent to which employees may benefit from a 'windfall gain' where the same award entitlement arises in respect of each employer, the unfairness of this and/or the complexities of administering the entitlements in such circumstances. The proposed finding is also relevant to the extent that the unions argue that a proportion of employees covered by the Award are underemployed and/or that they are unable to accept secondary employment due to their working hours or arrangements.
8	The proposed finding is relevant to rebutting the following contentions advanced by the unions: • Attracting and retaining employees to the sector is a major challenge and that this is a justification for improving terms and conditions under the Award. This contention appears to have been advanced in support of the unions' claims generally. • The unions' remote response claims: employees may be motivated to undertake additional, unauthorised work, albeit with commendable intentions, which has the effect of increasing employment costs.
9 - 10	The proposed findings are relevant to the following claims as they highlight the limited discretion that employers have regarding the scheduling of disability services work and the need to ensure that employers have access to sufficient flexibility as to the rostering of employees: • ABI's claim to enable roster changes by agreement with the employee (if pressed). • ABI's client cancellation claim to the extent that it extends the application of the clause to disability services. • Union minimum engagement claims. • Union broken shift claims that seek to: o Limit the performance of broken shift claims to casual employees and part-time employees who agree to work broken shifts; o Limit the number of times a shift can be broken; and o Require the application of the minimum engagement periods proposed to each segment of a broken shift. • Union claims to require the payment of overtime rates for hours worked by a part-time employee in excess of their agreed hours. • Union travel time and vehicle allowance claims.

	The proposed finding supports the contention that the aforementioned claims are inconsistent with ss.134(1)(d) and 134(1)(f).
11 - 16	The proposed findings are relevant to all of the claims advanced by the unions, with the exception of the secondary HSU client cancellation claim, because they would each reduce flexibility and / or increase employment costs, which are not funded by the NDIS.

Question 12: The interviewees (mentioned at [28](4) of the Background Paper) were disability support workers, why wouldn't they be covered by the Award?

114. Dr Stanford's report does not explain precisely the type of work undertaken by 'disability support workers' or their employer's activities. The award coverage of the employees therefore cannot be assessed.

115. For instance, if Dr Stanford has referred to any employee who performs disability support work as a 'disability support worker', that employee could be covered by another modern award, such as the *Health Professionals and Support Services Award 2010*[38], which covers various categories of employees on an occupational basis who may be engaged in the disability sector (for example, a social worker[39]). Further, it is our understanding that certain employees engaged in the disability sector may also be covered by copied state awards, as a result of which they are not covered by a modern award.[40]

[38] Clause 4.2(d) of the Award.

[39] Schedule C of the *Health Professionals and Support Services Award 2010*.

[40] Section 768AS of the Act.

Question 13: Was Dr Stanford cross examined in respect of the evidence described at paragraph [28](9) – (10) of the Background Paper?

116. Dr Stanford was cross-examined by Ai Group as follows regarding the constraints imposed by the NDIS on an employer's discretion as to how work is organised:

> Do you accept that they're structuring the way they roster work partly in order to align their staffing levels with the preferences of when clients want to be serviced?---It is certainly true that agencies and providers in this industry face a number of pressures and constraints in structuring their work and the rostering. One of those is the desire and preferences of the individual clients, but there are other factors which influence their decisions in this regard including minimising their own costs and making it convenient for management to perform their management function, reducing financial or operational risks to the agencies, so I would not accept that this whole pattern of work that we've portrayed in our research is the result of organising work solely to meet the preferences and choices of NDIS participants.
>
> But you'd accept, wouldn't you, that agencies either do not have, or at least have a much reduced capacity, in times gone by to dictate when a client will be serviced?---It is certainly the case that agencies and employers in this sector have to address and respond to the hard to predict needs and preferences of their client base.
>
> And they can't simply tell a client when the service will be offered and expect the client will accept that, can they?---In my knowledge, based on the interviews, there's some capacity for agencies and organisations to influence and schedule and arrange when clients are served. Similar, I suspect, to how a doctor's office or a dentist's office works. They can't tell their patients when to show up for treatment, but they certainly have some capacity to organise their scheduling of treatment - - -
>
> But they might - - -?--- - - -in a way that makes it feasible for this organisation to function.
>
> But if they don't service the client at the time they want they run the risk of the client electing to go to another provider, don't they?---To some extent that is true of any market-based delivery system. In an industry where you service individual clients you have some ability to try and manage and smooth demand and feed it into an efficient delivery structure, and if the client or customer or patient has other options, then clearly one constraint on management's leeway is the concern that the customers will go somewhere else.[41]

[41] Transcript of proceedings on 17 October 2019 at PN2276 – PN2279.

Question 16: Are the findings proposed by the ASU (set out at paragraph [29] of the Background Paper) challenged (and if so, which findings are challenged and why)?

117. Ai Group's submissions in opposition findings proposed by the ASU (as set out at paragraph [29] of the Background Paper) are set out in the table below. We also note the following.

118. *First*, a number of the findings proposed by the ASU relate directly to that part of the evidence of Dr Stanford that was drawn from his interviews with 19 employees. This includes opinions expressed by Dr Stanford that were based primarily on those interviews.[42]

119. For the reasons set out at paragraph [28](4) – (7) of the Background Paper, that evidence should be afforded little if any weight. Accordingly, where the ASU relies wholly on the evidence of Dr Stanford in support of a proposed finding, the Commission should not make that finding.

120. Further, the ASU conceded during the proceedings before the Commission that it does not rely on the hearsay evidence given by Dr Stanford to assert the truthfulness of that which was said to him (and / or his colleagues) by the interviewees.[43] To the extent that the ASU now seeks to rely on the evidence to establish the truthfulness of those statements – as appears to be the case in respect of various findings advanced by the ASU – this should not be permitted.

121. Ai Group also continues to rely on the submissions made on 18 November 2019 regarding specific elements of Dr Stanford's report which would, in our submission, on a strict application of the rules of evidence, be rendered inadmissible,[44] as well as our submissions set out at paragraphs [28](9) – (12) of the Background Paper.

[42] Noting that Dr Stanford testified that his "expert opinion [was] based primarily on" this research – see page 1445.

[43] Transcript of proceedings on 17 October 2019 at PN2176 – 2188.

[44] Ai Group submission dated 18 November 2019 at paragraph 50.

122. *Secondly*, a number of the findings proposed by the ASU relate to Dr Muurlink's report ('*Predictability and control in working schedules'*). Ai Group submits that this report can be afforded little weight.

123. The report constitutes a "review of scholarly work" concerning workforces in a range of nations employed under various regulatory schemes and in numerous industries. As was conceded by Dr Muurlink when he was cross examined about this evidence in the context of the Casual and Part-time Common Issues Proceedings:

    (a) His 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.[45]

    (b) His report does not include a consideration of the industrial context in which the claims there being considered were advanced, including the Award.[46]

    (c) A number of the studies relied upon relate to other industries.[47]

    (d) Some of the studies relied upon concerned specific circumstances such as work performed on weekends[48], fathers working in excess of 40 hours a week[49] and shiftwork[50].

    (e) The vast majority of the studies relied upon are international studies; particularly concerning Scandinavia.[51]

[45] Transcript of proceedings on 15 July 2016 at PN6363.

[46] Transcript of proceedings on 15 July 2016 at PN648 – PN6452.

[47] Transcript of proceedings on 15 July 2016 at PN6370.

[48] Transcript of proceedings on 15 July 2016 at PN6391 and PN6400.

[49] Transcript of proceedings on 15 July 2016 at PN6420.

[50] Transcript of proceedings on 15 July 2016 at PN6428,

[51] Transcript of proceedings on 15 July 2016 at PN6374.

(f) The industrial conditions prevailing in those countries are "potentially" and relevantly different.[52]

(g) The unemployment rate in those countries may affect an employee's sense or perception of their control in a workplace.[53]

124. In our submission, these factors clearly undermine the relevance of Dr Muurlink's report in these proceedings. It is not clear that the report has any material connection with work undertaken by employees under the Award or the broader regulatory scheme within which it operates.

125. It again necessarily follows that where the ASU relies wholly on Dr Muurlink's report in support of a proposed finding, the Commission cannot properly make that finding.

	Ai Group Position
4	The ASU has not identified any evidence in support of this proposition, subject to that which is set out at paragraphs [29](5) – (8), which we deal with those below. There is no basis for making the finding proposed at paragraph [29](4).
5	Paragraph [29](5) does not constitute a finding. The ASU has only repeated the evidence of Dr Stanford. We refer also our earlier submissions regarding the weight that should be attributed to this evidence.
6	The ASU has not explained what the "general scientific consensus" is. To the extent that it relies on Dr Muurlink's report, we refer to our submissions above regarding the weight that should be attributed to that report.
7 - 8	We refer to our earlier submissions regarding the weight that should be attributed to Dr Muurlink's report. Ai Group challenges the proposed finding on this basis.
10	Paragraph [29](10) does not constitute a finding. The ASU has only repeated the evidence of Dr Stanford.
15	We refer to the submissions made above regarding the evidence of Dr Stanford. The proposed finding is challenged on that basis.
16	We refer to the submissions made above regarding the evidence of Dr Stanford. The proposed finding is challenged on that basis.
17	We refer to the submissions made above regarding the evidence of Dr Stanford. The proposed findings are challenged on that basis.
18	We refer to the submissions made above regarding the evidence of Dr Stanford. The proposed finding is challenged on that basis.
19	We refer to the submissions made above regarding the evidence of Dr Stanford. The proposed findings are challenged on that basis.
20	We refer to the submissions made above regarding the evidence of Dr Stanford. The proposed findings are challenged on that basis.
21	Paragraph [29](21) does not constitute a finding. The ASU has only repeated the evidence of Dr Stanford.

[52] Transcript of proceedings on 15 July 2016 at PN6379.

[53] Transcript of proceedings on 15 July 2016 at PN6386.

22	We refer to the submissions made above regarding the evidence of Dr Stanford. The proposed finding is challenged on that basis.
23	We refer to the submissions made above regarding the evidence of Dr Stanford. The proposed findings are challenged on that basis.
24	Paragraph [29](24) does not constitute a finding. The ASU has only repeated the evidence of Dr Stanford.

Response to potential HSU findings at paragraph [30] of the Background Paper

126. At paragraph [30] of the Background Paper, the Commission notes that the HSU's submission "does not clearly set out the general findings sought" and that the Commission has derived "proposed findings" from the union's submissions, as set out at the following 17 paragraphs.

127. The Commission's Statement, at paragraph [2], invites interested parties to identify any errors or omissions in the Background Paper. In the event that the HSU considers that the proposed findings derived by the Commission do not accurately reflect its position, it thereby has an opportunity to identify as much in its written submissions.

128. We beefily note the proposed findings derived by the Commission that are challenged by Ai Group below. We may seek to respond to these more comprehensively in our reply submissions, if the HSU clarifies its position in respect of those findings in the interim.

	Ai Group Position
6	We refer to the submissions made above regarding Dr Stanford's evidence. For the reasons there stated, the evidence of Dr Stanford cited in the final sentence should not be relied upon.
7 – 8	We refer to the submissions made above regarding Dr Muurlink's report. For the reasons there stated, the report should not be relied upon and the findings proposed should not be made.
9	The HSU has not cited any evidence in support of the proposition advanced. To the extent that they rely on Dr Stanford's opinions based primarily on the interviews conducted with 'disability support workers', we refer to the earlier submissions about Dr Stanford's evidence and submit that the proposed finding should not be made.
12	We do not agree with the HSU's characterisation of the increases made to the NDIS funding from 1 July. The union describes them as being "significant above inflation increases". Absent the TPP (see our submissions that follow), the price cap for attendant care support provided during the daytime increased by less than 10%. This is clearly not a "significant" funding increase, particularly when considered in the context of the very significant implications that the funding limitations have had for employers in

	the industry (as documented primarily in the 'UNSW Report') and the serious insufficiencies of that funding to cover labour costs associated with providing the relevant services. It remains the case that numerous components of such labour costs remain unfunded[54] and there is no evidence of any plan or intention to increase the funding to cover those labour costs or any additional labour costs that might flow from these proceedings or that will flow from the Tranche 1 proceedings. Further, the HSU's submission fails to mention the oral evidence given by Mr Farthing regarding the application of the TTP in respect of plans made from 1 July 2019; that is, that an employer would require their client's consent to claim the TTP.[55]
13	For the reasons described above, we do not agree that the findings of the 'UNSW Report' are no longer apposite. Whilst certain elements of the funding have changed substantively since that report was published (e.g. increases to the maximum period of travel time that can be claimed and changes to the client cancellation scheme), the increases to the price caps for various types of services are marginal and do not in our view address the many shortcomings of the funding identified in that report.

[54] Ai Group submission dated 19 November 2019 at paragraphs 17 – 20.

[55] Transport of proceedings on 15 October 2019 at PN917.

C. The Remote Response / Recall to Work Claims

Question 18: Are the findings proposed by ABI (set out at paragraph [48] of the Background Paper) challenged (and if so, which findings are challenged and why)?

129. Ai Group challenges the first proposed finding set out at paragraph [48] of the Background Paper. We refer to paragraph [55] of the Background Paper in this regard.

Question 21: What reliance is placed by Ai Group on Government funding?

130. The NDIS funding arrangements do not afford funding for the nature of work contemplated by any of the remote response / recall to work proposals. The grant of any of the claims will therefore impose an unfunded employment cost on employers.

131. Accordingly, if the Commission is minded to make any variation to the Award in this regard, it should grant only a modest change and ABI's proposal ought to be preferred over that advanced by the unions.

Question 24: Are the findings proposed by the ASU (set out at paragraph [68] of the Background Paper) challenged (and if so, which findings are challenged and why)?

132. Ai Group advances a submission in opposition to the following ASU findings set out at paragraph [68] of the Background Paper:

	Ai Group Position
1	Whilst we do not disagree that employees in the social and community sector may be recalled to work overtime without returning to a workplace; we do not consider that the evidence establishes the proposition that employees generally (i.e. all employees, irrespective of their employer, classification level or type of employment) are *regularly* recalled to work overtime as described. We note however that when read with the second proposed finding, our concern is potentially somewhat tempered.

2	Ai Group challenges the finding proposed in the second sentence. The evidence does not establish that *many* employees employed in higher classifications that are rostered on call to provide managerial duties or specialist experience out of hours work part-time hours.
4	We refer to our earlier submissions regarding the weight that should be attributed to Dr Muurlink's report. Ai Group challenges the proposed finding on this basis.
5	There is no basis for the assertion that employees need to remain alert whilst on call.
6	We refer to our earlier submissions regarding the weight that should be attributed to Dr Muurlink's report. Ai Group challenges the proposed finding on this basis.
7	Paragraph [68](7) does not constitute a finding. The ASU has only repeated the evidence of Ms Anderson.
8	We refer to our earlier submissions regarding the weight that should be attributed to Dr Muurlink's report. Ai Group challenges the proposed finding on this basis.
9	We refer to our earlier submissions regarding the weight that should be attributed to Dr Muurlink's report. Ai Group challenges the proposed finding on this basis.
10	Paragraph [68](10) does not constitute a finding. The ASU has only repeated the evidence of Ms Flett.
11	We refer to our earlier submissions regarding the weight that should be attributed to Dr Muurlink's report. Ai Group challenges the proposed finding on this basis.
12	Paragraph [68](12) does not constitute a finding. The ASU has only repeated the evidence of Ms Flett.
13	The ASU has not identified any evidence in support of the proposition that "the main reason why employees agree to work on call is to maximise their income". The evidence of Ms Anderson and Ms Flett cited by the union does not establish the aforementioned finding. At its highest, it establishes only that those two employees may not wish to not be on call in the circumstances described. It does *not* go to their motivation, or the motivation of employees more generally, for working on call. There is also no evidence identified in support of the proposition that the aforementioned views of those employees or employees more generally are "a significant concern for the disability services sector".

D. The Broken Shift Claims

Question 25: Is Attachment D to the Background Paper 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 [sic] are challenged and why)?

133. The "notes" prepared by the ASU do not necessarily comprehensively describe or explain the manner in which the relevant broken shift provisions operate. In addition, we note the following:

(a) *Security Services Industry Award 2010*: the award does not require that there must be at least three *working hours* on each side of the break. The award instead requires a *minimum payment* of three hours in respect of each portion of a broken shift.[56]

(b) *Educational Services (Schools) General Staff Award 2010:* whilst we agree that a shift "can only be broken in two", this is in addition to any meal breaks.[57]

(c) *Cleaning Services Award 2010*: The "paid morning and afternoon tea breaks" referenced by the union apply only to "non-shift workers".[58]

(d) *Children's Services Award 2010:* The allowance payable in respect of broken shifts is $16.47 for each day that a broken shift is worked. The union also refers to "clause 53.1", however the award does not contain a clause 53.1.

(e) *Aboriginal Community Controlled Health Services Award 2010:* We note that other than the requirement to pay overtime rates in certain circumstances, the award does not otherwise regulate broken shifts.

[56] Clause 21.7.

[57] Clause 25.3(a).

[58] Clause 26.2.

(f) *Passenger Vehicle Transportation Award 2010*: the final point made by the ASU appears to misunderstand clause 10.5(e) of the award. As we understand it, that clause enables employers to arrange the work of employees described by that clause in a specific way (i.e. by engaging employees to work two separate engagements on a day), without enlivening the application broken shift provisions. In such circumstances, an employee is entitled to at least two hours' pay for each engagement.

(g) *Registered and Licensed Clubs Award 2010:* We note that other than the requirement to pay an allowance, the award does not otherwise regulate broken shifts.

(h) *Mining Industry Award 2010*: We note that other than the requirement to pay an allowance, the award does not regulate broken shifts.

(i) *Animal Care and Veterinary Services Award 2010*: the allowance is payable only once per 24 hour period. The first point made by the ASU is inaccurate to that extent.

(j) *Higher Education Industry – General Staff – Award 2010*: The first point made by the union is unclear.

(k) *Medical Practitioners Award 2010*: We note that other than the prohibition in respect of doctors in training, the award does not regulate broken shifts.

134. The analysis at Attachment D to the Background Paper demonstrates that the treatment of broken shifts varies significantly in different awards which, in our submission, is reflective of the different operational realities in those industries.

Question 27: Are the findings proposed by ABI (set out at paragraph [85] of the Background Paper) challenged (and if so, which findings are challenged and why)?

135. Ai Group advances the following submissions in opposition to certain findings proposed by ABI, as set out at paragraph [85] of the Background Paper:

	Ai Group Position
5	Ai Group does not consider that the evidence cited, or the evidence more generally, establishes that *most* broken shifts in the *disability sector* involve two portions of work and one break, or that it is only *occasionally* necessary for a broken shift to include more than one break. The evidence establishes that there are a range of arrangements in operation in the disability sector, which can result in up to 5 breaks.[59]
8	Ai Group does not consider that the evidence cited, or the evidence more generally, establishes that there is a range of means of remuneration in relation to the performance of a broken shift in the disability services sector. This is unsurprising given the absence of any NDIS funding for such payments.

Question 29: Is NDS's characterisation of the evidence (set out at paragraphs [88] – [92] of the Background Paper) challenged (and if so, which aspects are challenged and why)?

136. Ai Group does not seek to challenge the NDS's characterisation of the evidence, as set out at paragraphs [88] – [92] of the Background Paper.

Question 30: Are the findings proposed by AFEI (set out at paragraph [93] of the Background Paper) challenged (and if so, which findings are challenged and why?)

137. Ai Group does not seek to challenge the findings proposed by AFEI, as set out at paragraph [93] of the Background Paper.

[59] Ai Group submission dated 18 November 2019 at paragraph 26.

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

138. NDS has made the following submission regarding part-time minimum engagement periods:

> 25. NDS is not opposed to consideration of a minimum engagement for part-time disability services employees limited to work performed for the purposes of delivering client services, provided such a minimum reflects the 2 hours that currently applies with regard to casual employees. This is part of the balance that we submit needs to be struck in reviewing this award. However 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.[60]

139. It is important to note that the NDS has expressed various caveats on its position:

(a) Its position relates only to *disability services* employees – not *all* part-time employees covered by the Award.

(b) Its position relates only to "work performed for the purposes of delivering client services". We take this to mean that it does not consider that a two hour minimum engagement period should apply to other work undertaken by disability services employees such as, for example, undertaking training or attending internal meetings.

(c) That any consideration given to a two hour minimum engagement period must be in the context of also considering how clause 10.3 (applying to part-time employees generally) and clause 25.5 (concerning rostering requirements) operate, "to enable some reasonable degree of flexibility in the rostering of part-time employees".

(d) Whilst not abundantly clear, it appears that the NDS considers that the two hour minimum engagement would not apply to each portion of a broken shift;[61] that is, the two hour minimum engagement could be 'broken' in accordance with the broken shift provisions.

[60] Page 4390.

[61] Page 4392 at paragraphs 43 – 44.

140. In our submission, the evidence in these proceedings does not establish that a two hour minimum engagement for part-time employees is 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.[62]

141. It is also relevant that shift durations are dictated by client needs. Further, it is our understanding that 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). It would be unfair to visit the resulting serious cost implications on employers.

142. Although a two hour minimum engagement would result in lesser adverse consequences for an employer than a three 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.[63] This is particularly so if the two hour minimum engagement period applies to each portion of a broken shift.

143. Nonetheless, 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.

[62] Ai Group submission dated 19 November 2019 at paragraph 25.

[63] Page 707 – 724.

Question 35: Are the findings proposed by the ASU (set out at paragraph [106] of the Background Paper) challenged (and if so, why)?

144. Ai Group advances the following submissions in opposition to certain findings proposed by ASU, as set out at paragraph [106] of the Background Paper:

	Ai Group Position
2	The ASU appears to misunderstand s.134(1)(d) of the Act. Section 134(1)(d) is directed towards the need to promote efficient and productive performance *of work*. It requires an assessment of the manner in which work is performed; not whether an individual employee's time is used effectively or efficiently from the employee's perspective. There is no evidence that the extant broken shift provisions "promote inefficient and unproductive work practices", as alleged by the ASU. The broken shift provisions enable the practice of breaking shifts in the industry in order to meet client demands and need to arrange work in a manner that corresponds with such demand. The ASU submits that "continuous patterns of work are consistent with" s.134(1)(d). Considered in the abstract, it might be accepted that a continuous pattern of work is the most efficient way in which work can be arranged. It is self-evident, however, that the nature of the work performed in this industry is such that it does not enable work to be arranged in this way. It is also clear that the imposition of greater restrictions on the performance of broken shifts will not necessarily result in work being arranged in the manner described by the ASU. Any such assertion entirely disregards the realities of operating in the disability services sector. Employers do not have capacity to materially alter the way in which work is arranged in the context of consumer-directed care. Nor can it be assumed (noting the absence of any evidence to this effect) that employers will maintain their current employment arrangements such that employees who are currently required to work a certain pattern of broken shifts will continue to work the same or a similar pattern of work with the added benefit of additional remuneration. Fundamental changes to the minimum safety net regarding the manner in which broken shifts may be implemented and / or the costs associated with implementing such arrangements may simply result in employers rostering employees differently by giving individual employees less work or by refusing to service certain clients (thereby reducing the opportunity to perform the relevant hours of work). The evidence of employers that they endeavour to provide continuous work is, inappropriately, described by the union as a "concession". The evidence serves only to highlight that the Commission should not find that employers roster work in a way that does not seek to minimise "dead time", as it is termed by the ASU. The corollary may also be put – the evidence establishes that employers *are* incentivised to arrange work in a way that minimises "dead time". The ASU relies on portions of Dr Stanford's report in support of its submissions that we dealt with at paragraphs 57 – 60 of our 19 November 2019 submission. We continue to rely on those submissions.

	The ASU's submissions also refer to the "extremely wide" geographic areas over which an employee may be required to work. It asserts that employers are "permitted" to do so by virtue of the extant broken shift provisions and the absence of an express obligation to pay for time spent travelling. There is no evidence that employers are deliberately requiring employees to travel long distances absent a legitimate operational justification. Such distances are generally travelled in order to support a client living in regional or rural areas.
3	The ASU's submissions in support of the proposed finding rely primarily on the evidence of Dr Stanford and Dr Muurlink. For the reasons earlier set out, neither source of evidence provides a sound basis upon which the finding can be made. The evidence of the four employees cited by the ASU establishes only that *some* employees experience interference with work / life balance. The extent to which this occurs amongst employees engaged in the industry more generally is unable to be measured on the evidence before the Commission.

Question 38: Are the findings proposed by the UWU (set out at paragraph [118] of the Background Paper) challenged (and if so, which findings are challenged and why)?

145. Ai Group advances the following submissions in opposition to findings proposed by UWU, as set out at paragraph [118] of the Background Paper:

	Ai Group Position
3	The UWU submits that broken shifts *reduce* the earning capacity of employees. We assume that the union seeks to compare the earning capacity of a hypothetical employees who work continuously over the same span of hours as an employee who works a broken shift. Such a comparison assumes that if the second employee was not working a broken shift, they would be afforded continuous work throughout that span of hours. There is no basis for such an assumption. As we have previously submitted, the client-driven nature of the sector determines the manner in which work is arranged. Continuous working arrangements cannot simply substitute this. We also note that the evidence establishes that the performance of broken shifts affords some employees with the flexibility that they desire.[64]
5	The proposed finding disregards the evidence that some employees *do* often undertake non-work-related activities, including spending time at home, during a break in a broken shift.[65]
7	The evidence cited does not establish that, as a general proposition, employees are disincentivised from staying in the sector due to broken shifts. The UWU has identified evidence from only one employee to that effect. For the reasons earlier set out, the evidence of Dr McDonald should not be relied upon in support of the proposed finding.
8	We refer to and rely upon submissions earlier made in response the finding advanced by the ASU, as summarised at paragraph [106](2) of the Background Paper.

[64] Ai Group submission dated 19 November 2019 at paragraph 28.

[65] Ai Group submission dated 19 November 2019 at paragraph 34.

9	Whilst we do not, as such, oppose the finding proposed; the context in which the evidence cited was given must be properly understood. *First*, as previously submitted, the evidence serves to highlight that the Commission should not find that employers roster work in a way that does not seek to minimise "dead time", as it is termed by the ASU. The corollary may also be put – the evidence establishes that employers *are* incentivised to arrange work in a way that minimises "dead time". *Second*, neither the evidence cited nor the finding proposed should be relied upon to establish that such employer preferences render the current flexibility to break a shift more than once unnecessary or that such an arrangement will always be operationally feasible. The mix of clients being serviced by an employer, their specific needs and preferences, the location at which they require the employer's services, their respective locations relative to one another and their willingness to agree to alternate service delivery times if requested by the employer will all contribute to an employer's capacity to arrange work in a way that minimises the number of breaks in a broken shift.
10	The thrust of the proposed findings is that the provision of services to clients, including the timing of those services, can be determined in advance and must be the result of a negotiated outcome with the client. The proposed finding is plainly incorrect in the context of disability services funded by the NDIS. It is not supported by the material before the Commission in this regard. We also note that none of the evidence cited by the UWU in support of the proposed findings relates to services provided under the NDIS. As for the final sentence of paragraph [118](10), we refer to the second proposition advanced above in relation to the finding proposed at paragraph [118](9).
11	The proposed finding in the first sentence is plainly incorrect in the context of disability services funded by the NDIS. It is not supported by the material before the Commission in this regard. The evidence plainly demonstrates that client demands create a great deal of uncertainty as to if, where and when services are to be provided. Employers require a flexible operational environment in order to provide them with sufficient agility to respond to such changes. The UWU refers to one witness[66], called by ABI, who gave evidence of refusing to provide services funded by the NDIS unless clients agree to a minimum duration of service delivery on a daily and weekly basis. We make two observations about this evidence. *First*, the weight of evidence and other material concerning NDIS-funded services in these proceedings does not establish that employers generally can and / or do take the approach adopted by ConnectAbility; that being to impose a minima of the number of hours of service required by the employee. There may be specific circumstances that enable it to take such an approach, such as a diverse service offering[67], as a result of which it does not rely on the provision of disability services funded by the NDIS for its sustainability.

[66] Mr Scott Harvey.

[67] Page 163 at paragraph [13].

	Second, the evidence demonstrates that Award terms that impose inflexibilities and cost imposts can result in an employer determining that it will not provide services to those in need.
12	The proposed finding should not be made in relation to the provision of disability services. The evidence cited does not concern services funded by the NDIS. Further, the evidence more generally does not establish that, in the context of such services, clients are "capable of making choices within service constraints, and understanding of those constraints".

E. The Clothing and Equipment Claims

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

146. At paragraph [134] of the Background Paper, the Commission identifies the grounds that the HSU "appears" to advance in support of its claim. Ai Group advances a submission in opposition to the one element of those grounds, and the proposition summarised at the final sentence in paragraph [135] of the Background Paper:

	Ai Group Position
[134], third bullet point	The evidence does not, in our submission, establish that employees' clothes will *frequently* become damaged, soiled or worn. We also note that the HSU has not identified any evidence in support of this assertion.
[135], final sentence	Ai Group challenges the proposition advanced. The evidence cited does not, in our submission, establish the *likelihood* of care work causing damage to employees' clothing. The evidence of Ms Wilcock establishes only that certain duties that she performs for Hammond Care *can*[68] (or *may*) cause damage to her clothing. Their evidence does not so much as establish that her work *does* or *has* caused damaged to her clothing. The evidence of Mr Sheehy[69] constitutes opinion evidence for which a proper basis has not been established and / or hearsay evidence in circumstances where the source has not been identified. In either case, the evidence can be given little weight. The evidence of Ms Waddell, that clothes "get damaged and worn out very quickly with the kind of work we do" is not of itself sufficient to establish the proposition advanced by the UWU, which is cast to relate to employees in the industry at large.

[68] Page 2953 at paragraph [13] and page

[69] Page 2943 at paragraphs [15] – [16].

Question 40: Is ABI's characterisation of the evidence in respect of the HSU's 'damaged clothing allowance' claim and the findings sought by ABI in respect of that evidence (set out paragraphs [141] – [145] of the Background Paper) challenged by any other party (and if so, which characterisation of the evidence or findings are challenged and why)?

147. Ai Group does not seek to challenge ABI's characterisation of the evidence or the findings sought by ABI in respect of that evidence.

Question 42: Is there merit in inserting a clause in similar terms to the clause set out at paragraph [154] of the Background Paper (with appropriate amendment, e.g. to remove the reference to 'molten metal') into the SCHCDS Award and if so, why?

148. Ai Group submits that there is no warrant for submitting a term that is similar to the clause set out at paragraph [154] of the Background Paper.

Question 43: Are the findings proposed by the UWU (set out at paragraph [164] of the Background Paper) challenged (and if so, which findings are challenged and why)?

149. Ai Group advances the following submissions in opposition to certain findings proposed by the UWU, as set out at paragraph [164] of the Background Paper:

	Ai Group Position
2	The finding sought suffers from the very same deficiency as the proposed clause. It is unclear what the UWU means by "adequate".
3	The finding sought suffers from the very same deficiency as the proposed clause. It is unclear what the UWU means by "adequate".

Question 44: Is ABI's characterisation of the evidence in respect of the UWU's uniform claim, and the findings sought by ABI in respect of that evidence (set out at paragraphs [167] – [168]), challenged by any party (and if so, which characterisation of the evidence or findings is challenged and why)?

150. Ai Group does not seek to challenge ABI's characterisation of the evidence or the findings sought by ABI in respect of that evidence.

F. The Client Cancellation Claims

Question 48: Are the findings proposed by ABI (set out at paragraph [193] of the Background Paper) challenged (and if so, which findings are challenged and why)?

151. Ai Group does not challenge the findings proposed by ABI, as set out at paragraph [193] of the Background Paper.

Question 49: Do you agree with the UWU's statement set out at paragraph [197] of the Background Paper (and, if not, why not)?

152. The UWU's submission potentially overstates the changes made to the NDIS funding arrangements in respect of client cancellations. There remain certain limitations on the extent to which an employer can recover fees for a cancellation; however we acknowledge that there is no longer a specific maximum number of client cancellations that can be claimed by an employer.

153. We have extracted the relevant part of the 2019 – 2020 Price Guide below. The various limitations are underlined.

> 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. 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.
>
> A cancellation is a short notice cancellation if the participant:
>
> - 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
> - 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
>   - the agreed total price for the support is less than $1000; or
> - has given less than five (5) clear business days' notice for any other support.

> Claims for a short notice cancellation should made using the same support item as would have been used if the support had been delivered, using the "Cancellation" option in the Myplace portal. When making a claim for a cancelled support the provider should claim for the full agreed price of the support and indicate in the payment system that the claim is for a cancellation. The payment system will reduce the claim to 90% of the full-agreed price.
>
> ['Cancellation Example 1' not extracted]
>
> 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.[70]

Question 51: Are the findings proposed by the UWU (set out at paragraph [199] of the Background Paper) challenged (and if so, which findings are challenged and why)?

154. Ai Group advances the following submissions in opposition to certain findings proposed by the UWU, as set out at paragraph [199] of the Background Paper:

	Ai Group Position
1	The UWU seeks to rely on the evidence of just two witnesses, both of whom are employed by the same employer. The evidence does not substantiate the proposition that it is common for employers generally to cancel rostered shifts of part-time employees, without payment, under clause 25.5(f) of the Award. We also note that although the UWU relies on paragraph [10] of the witness statement of Belinda Stewart (Exhibit UV1), her evidence in fact states that at least once per week her roster is changed, however this is due to the absence of another employee due to illness *or* a client cancellation. Her statement goes on to explain the circumstances in which she is and is not paid where a client cancels; but does not give evidence of the frequency with which she is in fact not paid due to a client cancellation. The evidence cited does not even establish that it is common for *Ms Stewart's employer* to cancel her rostered shifts without payment under clause 25.5(f) of the Award.

[70] NDIS, *NDIS Price Guide 2019 – 2020* (version 2.0) at page 18.

2	It does not follow that wherever an employee's rostered shift is cancelled without payment, the employee will "lose out on income that the employee expected for the week". Clause 25.5(f)(ii) gives an employer the right to direct an "employee to work make-up time equivalent to the cancelled time, in that or the subsequent fortnightly period". Where this occurs, an employee may not lose out on income (or *all* of the income) that the employee expected for the week. The evidence of the two employees (employed by the same employer) cited by UWU does not establish that employees will, as a general proposition, "lose out on income that the employee expected for the week".
8	The proposed finding has been cast to apply to all sectors covered by the award. To the extent that it relates to the disability sector, we refer to the following extract from the NDIS Price Guide: *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.* Accordingly, it is our understanding that an employer will be unable to cancel a shift due to a client cancellation and claim NDIS funding where the employer is not required to pay the employee.

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

155. Ai Group does not agree with the ASU's submission as to the effect of the NDIS client cancellation arrangements.

156. Employers cannot charge 90% of the cost of the service in all cases where five clear business' days of notice is not given. As set out above in answer to question 49, 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
- 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. [71]

157. The ASU's submission that "providers may claim an unlimited number of cancellations" potentially overstates the changes made to the NDIS funding arrangements in respect of client cancellations. There remain certain limitations on the extent to which an employer can recover fees for a cancellation; however, we acknowledge that there is no longer a specific maximum number of client cancellations can that can be claimed by an employer. We refer to and rely on our response to question 49 in this regard.

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

158. NDS' characterisation of the modified funding arrangements is broadly accurate; however, to the extent that it asserts that funding can be claimed in the event of all cancellations made with less than 2 business days' notice, this is not correct.

159. As set out above in answer to question 49, 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
- the agreed total price for the support is less than $1000; or

[71] NDIS, *NDIS Price Guide 2019 – 2020* (version 2.0) at page 18.

(c) has given less than five (5) clear business days' notice for any other support. [72]

Question 60: Are the findings proposed by AFEI (as set out at paragraph [216] of the Background Paper) challenged (and if so, which findings are challenged and why)?

160. Ai Group does not challenge the findings proposed by AFEI (as set out at paragraph [216] of the Background Paper).

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

HSU's Primary Position – Delete clause 25.5(f)

161. Ai Group opposes the deletion of clause 25.5(f). If the provision were removed from the award, an employer would effectively be prohibited from making any variation to an employee's roster unless seven days' notice is provided.[73]

162. As is apparent from the evidence led in the proceedings[74], a significant proportion of cancellations are made by clients with less than one week's notice. The removal of the current flexibility would have obvious and significant implications for employers; including employment costs in circumstances where the employee cannot be productively engaged during the time that the employee would otherwise have worked. In our submission, such implications are unfair on employers; a matter that is relevant to the Commission's consideration of the matters contemplated by s.134(1) of the Act.

[72] NDIS, *NDIS Price Guide 2019 – 2020* (version 2.0) at page 18.

[73] See clause 25.5(d) of the Award.

[74] See paragraph [193] of the Background Paper at subparagraph (4).

163. The HSU has relied in its submissions on the evidence of home care sector providers. In our view, it is not clear that all employers engaged in the home care sector operate outside the scope of the NDIS and its funding constraints. The 'home care sector' is defined by the Award as follows:

> **home care sector** means the provision of personal care, domestic assistance or home maintenance to an aged person or a person with a disability in a private residence

164. It would appear that work performed in the home care sector may include work performed under the NDIS and that therefore, the current client cancellation clause applies in such instances. The HSU's submissions at paragraph [138] are not relevant in that context. Rather, in such circumstances, employers would again be saddled with additional, unfunded, employment costs where the NDIS funding arrangements do not permit an employer to claim the relevant fees.

HSU's Secondary Position – Amend clause 25.5(f)

165. Ai Group has not sought to oppose the HSU's claim 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.

166. As has consistently been our position in the context of these proceedings; 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.

G. The Mobile Phone Allowance Claims

Question 63: Are the findings proposed by the UWU (set out at paragraph [258] of the Background Paper) challenged (and if so, which findings are challenged and why)?

167. Ai Group advances the following submissions in opposition to certain findings proposed by the UWU, as set out at paragraph [258] of the Background Paper:

	Ai Group Position
1	Ai Group challenges the finding proposed to the extent that it purports to relate to *all* employees in the home care and disability services sectors. Ai Group does not, however, dispute that the proposed finding is true of *some* such employees. The proportion of such employees cannot be assessed based on the evidence.
2	Ai Group challenges the finding proposed to the extent that it purports to relate to *all* employees covered by the Award. Ai Group does not, however, dispute that the proposed finding is true of *some* such employees. The proportion of such employees is not made out by the evidence.
4(b)	The UWU appears to cite only the evidence of Ms Fleming in support of their contention. This self-evidently does not make out the proposition that employees generally are being directed by their employers to upgrade their phones. Moreover, Ms Fleming's statement says that she was "forced" to upgrade to a flip phone; however, this is evidence only of her perception. It is *not* her evidence that she was required, directed or "forced" *by her employer* to purchase a smart phone or that she attempted to ascertain from her employer whether, absent a smart phone, she could nonetheless access her rosters.
4(c)	The UWU appears to cite only the evidence of Ms Stewart in support of their contention. This self-evidently does not make out the proposition that employees generally may have to pay for a higher level plan than they otherwise would. Moreover, the evidence cited does not establish that employees may have to pay for a higher level plan for the purposes of their work than they otherwise would. Ms Stewart's evidence[75] reveals that her plan included "paying off" a mobile phone. It is not clear that a cheaper plan would not have been available if, for instance, she had selected a more modest phone, including a different type of smart phone.
4(d)	The evidence of Ms Stewart cited by the UWU does not establish either proposition advanced by the union at paragraph (d). Ms Stewart's evidence only establishes that she uses her phone for both personal and work purposes. The evidence does not establish that the work-related costs of an appropriate mobile phone can be a *significant portion* of the total costs or *equally as significant* as the costs of personal use. The evidence of Ms Fleming cited by the UWU does not establish either proposition advanced by the UWU either. Her evidence establishes only that she uses her phone for work and personal purposes and that the "good majority" of that usage is for work. This does not establish that a significant portion of the costs incurred, or an equal

[75] Transcript of proceedings on 15 October 2019 at PN455.

	proportion of the costs incurred relate to work. Indeed, it was Ms Fleming's evidence that her mobile phone plan entitles her to an unlimited number of text messages, phone calls and 20 gigabytes of data, as a result of which she did not incur any additional costs when checking her rosters.[76]

Question 64: Do you challenge the findings (set out at paragraph [265] of the Background Paper) sought by the HSU (and if so, which findings are challenged and why)?

168. Ai Group advances the following submissions in opposition to the findings proposed by the HSU, as set out at paragraph [265] of the Background Paper:

	Ai Group Position
1	The proposed finding is cast in general terms, purporting to apply to all employees engaged in all sectors covered by the Award. Read in this context, the proposed finding does not bear scrutiny. For example, there is no evidence that employees engaged in certain sectors covered by the Award are required to use a mobile device for work purposes.
2	The HSU has not cited any evidence to support the proposed finding, which is inherently speculative in nature. Further, there was no evidence in the proceedings from, for example, employers in the industry indicating that they intended to implement internet based applications. We also note that the Commission is required by the Act to ensure that the Award provides a *relevant* safety net; that is, a safety net that is suited to contemporary circumstances – not a safety net that is suited to potential circumstances that may arise in the future.

[76] Transcript of proceedings on 15 October 2019 at PN547 – PN549.

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

169. In respect of those classes of employees in relation to whom the unions have not led any evidence, there is in our submission clearly no basis for the grant of the claim.

170. However, Ai Group maintains its primary position that for all the reasons previously submitted, and given the paucity of probative evidence advanced by the unions in respect of any category of employees covered by the Award, the claim should simply be dismissed.

Question 69: Are the findings proposed by ABI (set out at paragraph [273] of the Background Paper) challenged (and if so, which findings are challenged and why)?

171. Ai Group does not seek to challenge the findings proposed by ABI, as set out at paragraph [273] of the Background Paper.

Question 72: Are the findings proposed by the NDS (set out at paragraph [289] of the Background Paper) challenged (and if so, which findings are challenged and why)?

172. Ai Group does not seek to challenge the findings proposed by NDS, as set out at paragraph [289] of the Background Paper.

Question 73: Are the findings proposed by AFEI (set out at paragraph [294] of the Background Paper) challenged (and if so, which findings are challenged and why)?

173. Ai Group does not seek to challenge the findings proposed by AFEI, as set out at paragraph [294] of the Background Paper.

H. The Sleepover Claim

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

174. We apprehend that question 75 is directed at a perceived inconsistency between our submission summarised at paragraph [312](iv) of the Background Paper and the extant provisions, which state that employees will be provided with "appropriate facilities".

175. We recognise that the term "appropriate facilities" also does not exhaustively describe what might be said to constitute appropriate facilities or provide an express indication as to the basis on which the requirements might be regarded as "appropriate". It may be that this provision, too, suffers from some of the deficiencies to which we have pointed in relation to the union's claim. The mere existence of such a provision in the Award does not render it appropriate to insert another provision that is inappropriate for the various reasons set out in our submissions and as summarised at paragraph [312] of the Background Paper.

I. The Variation to the Rosters Claim

Question 80: Are any of the findings proposed by the UWU (set out at paragraph [321] of the Background paper) challenged (and if so, which findings are challenged and why)?

176. Ai Group advances the following submissions in opposition to certain findings proposed by the UWU, as set out at paragraph [321] of the Background Paper:

	Ai Group Position
2	Ai Group does not as such challenge the findings sought but notes that the possible disruption caused is but one of many factors that must be considered and balanced against competing considerations by the Commission when determining the appropriate Award terms in this regard.
3	The evidence does not support the proposition put by the UWU; which is cast in general terms. The UWU seeks a finding relating to employees covered by the Award at large in circumstances where, at its highest, only three witness' evidence is cited in support of the proposition. The evidence says nothing of the frequency with which employees at large who are covered by the Award agree to roster changes *because of* underemployment.
4	The evidence does not support the proposition put by the UWU; which is cast in general terms. The UWU seeks a finding relating to employees covered by the Award at large in circumstances where, at its highest, only three witness' evidence is cited in support of the proposition. Further, the concept of a 'good' reason is subjective. The meaning of the finding sought by the UWU is, to that extent, unclear.
5	Ai Group does not challenge the proposition that no evidence was presented by employer witnesses that suggested that employees were regularly disagreeing or refusing roster changes without "good" reasons. We note again, however, that the concept of a 'good' reason is subjective and unclear. The further finding sought (that there was no evidence that "employers had issues with excessive overtime") is vague and unclear. The Commission should not make such a finding.

Question 81: Are the findings proposed by ABI (set out at paragraph [328] of the Background Paper) challenged (and if so, which findings are challenged and why)?

177. In respect of the proposed finding sought by ABI at paragraph (c), Ai Group does not consider that the evidence establishes that a departure from clause 10.3(c) it is the *most* common item sought by employers through enterprise bargaining.