BACKGROUND PAPER 2

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

4 yearly review of modern awards—Award stage—Group 4—*Social, Community, Home Care and Disability Services Industry Award 2010*—substantive claims – Tranche 2

(AM2018/26) MELBOURNE, 4 MARCH 2020

This is a background document only and does not purport to be a comprehensive discussion of the issues involved. It does not represent the view of the Commission on any issue.

Introduction

[1] Background Paper 1, published on 6 January 2020, posed a series of questions to parties with an interest in these proceedings. The answers to those questions were to be filed with the submissions due on 7 February 2020. In addition to answering the questions posed the parties were invited to identify any errors or omissions in the Background Paper.

[2] The following submissions were received:

- ASU – community language skills allowance submission – 7 February 2020
- NDS – Submission 7 February 2020 and Reply Submission 27 February 2020
- Ai Group – Submission 10 February 2020 and Reply Submission 27 February 2020
- ABI & NSWBC – Submission 10 February 2020 and Reply Submission 27 February 2020
- ASU, HSU and UWU (Joint Union Submission) – Submission 10 February 2020 and Reply Submission 27 February 2020
- AFEI – Submission 11 February 2020 and Reply Submission 27 February 2020

[3] This Background Paper sets out the answers provided to the questions posed in Background Paper 1.

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

Responses to the Questions

BP1 Q1. Question for all parties: Is the list set out above an accurate list of the Tranche 2 claims that are being pressed?

[4] The parties generally accepted that the list of claims presented at [9] of Background Paper 1 is accurate. The only error identified is that ABI is also pressing the variation to clause 25.5(d)(ii) relating to roster changes, as set out in its Amended Draft Determination filed on 15 October 2019.

[5] ABI noted the submissions of Ai Group dated 26 September 2019, which identifies an unintended consequence of ABI's proposed draft.[1] ABI accepts and agrees with the submissions of Ai Group and submits that the phrase "personal/carer's leave" in its Amended Draft Determination should be replaced with the phrase "illness". The proposed variation to clause 25.5(d)(ii) is set out below:

> By deleting clause 25.5(d)(ii) and inserting in lieu thereof:
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> (ii) However, a roster may be altered at any time:
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> A. by agreement between the employer and relevant employee, provided the agreement is recorded in writing;
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> B. to enable the service of the organisation to be carried out where another employee is absent from work on account of ~~personal/carer's leave,~~ illness, compassionate leave, community service leave, ceremonial leave, leave to deal with family and domestic violence, or in an emergency; or
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> C. where the change involves the mutually agreed addition of hours for a part-time employee to be worked in such a way that the part-time employee still has four rostered days off in that fortnight or eight rostered days off in a 28 day roster cycle.

BP1 Q2. Question for all parties: Is Attachment A an accurate list of all exhibits tendered in the Tranche 2 proceedings

[6] The only error identified in the list of exhibits is in the Joint Union Submission which pointed out that Deon Fleming, the maker of the statements which are exhibits UV4 and UV5, is referred to as Deon Flemming.

BP1 Q3. Question for all parties: Is Attachment B 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?

[7] The only omissions identified in Attachment B are:

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[1] Court Book at p.949-953

- the joint submission filed by the UWU and HSU dated 13 November 2019 in relation to the 24 hour clause;
- AFEI's submission dated 8 April 2019 in relation to the 24 hour clause; and
- the joint submission of AFEI, ASU and NDS concerning the ERO, at pp 4374 – 4389 of the Court Book.

BP1 Q4. Question for all parties: Are any of the findings made in the Tranche 1 September 2019 Decision challenged (and if so, which findings are challenged and why)?

[8] NDS and the joint Unions do not challenge any of the findings made in the Tranche 1 September 2019 Decision.

> We note that the Full Bench found at [75] that: "No employer participant in the NDIS gave evidence in the proceedings regarding the financial impact of the claims before us".
> Whilst that is correct, our clients note that there was evidence adduced during the Tranche 2 hearing from a number of employer witnesses regarding the financial impacts of the proposed claims.

[9] Ai Group makes the following submission:

1. The findings made at paragraph [75] of the September 2019 Decision were based on the state of play in 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. Accordingly, paragraph [75] of the September 2019 Decision should not be relied upon in the context of the second tranche of claims.

Supplementary Question 1: Ai Group is asked to identify the evidence concerning the 'Reasonable Cost Model' upon which it relies.

2. As to the Full Benches conclusion at paragraph [142] of the September 2019 Decision: Ai Group does not dispute that, 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; but submits that, 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)). The 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.

Ai Group submits (at [108] – [109]):

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

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

[10] As to the finding in the September 2019 decision at [75] that: "No employer participant in the NDIS gave evidence in the proceedings regarding the financial impact of the claims before us", ABI notes that whilst at that time, that is correct, there was evidence adduced during the Tranche 2 hearing from a number of employer witnesses regarding the financial impacts of the proposed claims.

[11] AFEI challenges the UWU contention that the 'relevant findings' in the September 2019 Decision include the proposition that 'A significant number of employers covered by the award are low paid: AFEI submits that no such finding was made in the September 2019 Decision.

Supplementary Question 2 (for the UWU): The UWU is invited to identify the paragraph of the September 2019 Decision in which the asserted finding is made.

[12] AFEI also submits that any proposition that 'a significant number of employees covered by the Award are 'low paid' should be rejected for these four reasons:

1. there is no single accepted measure of two-thirds of median ordinary time earnings.

2. The Commission's comments at [47] were in reference to base rates payable in accordance with the Award and the ERO.[2] In these proceedings it has become evident that only a portion of employees covered by the Award are Award-reliant.[3]

3. The Commission identified that two-thirds of median ordinary time earnings using CoE survey data was $886.67, and using EEH survey data was $973. Whereas the base rate payable under the ERO for a Level 2.1 SACS employee was $987.20 per week.[4] This rate would be higher in States where the pre-modern award was higher than the Award as at 1 January 2010, such as in NSW.[5]

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

Supplementary Question 3: The joint Unions are invited to respond to AFEI's submissions.

[13] AFEI also notes that the UWU relies on the Commission's observation at [26] of the September 2019 Decision as a finding that 'there is a high proportion of part-time employment in the sectors covered by the Award.'[6] Similarly the ASU claim that the Census data at [25]

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[2] September 2019 Decision at [46]

[3] 6 out of 14 employee witness statements filed by the ASU and HSU were covered by enterprise agreements

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

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

[6] Background Paper at [21]

shows 'SCHADS industry workers are more likely to be part-time employees than the all industry average (50.3 percent compared to 34.2 percent).' AFEI submits that these are however not findings of the Commission on the September 2019 Decision. Nor are these findings which are available on the Census data included in the Decision:

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

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

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

3. At paragraph [26] of the Decision, the Commission describes the profile as having around half (50.3 per cent) of employees employed on a part-time or casual basis (i.e. less than 35 hours per week). The Commission does not make any finding about the fraction of those employees which are employed on a part-time basis. Conclusions/findings about the fraction of part-time employment in the industry (that is, part-time employment as defined in the Award) is not available on the Census data extracted in the September 2019 Decision.

Supplementary Question 4: (All parties) Do the parties challenge the proposition that a significant proportion of employers covered by the SCHADS Award are part time employers?

[14] AFEI also challenges the observation at [142] of the September 2019 Decision and submits that it is 'not consistent with the requirements of the Act', because

1. As the Full Bench in the 2011 Equal Remuneration Decision found:

   > '…because of the pervasive influence of funding models any significant increase in remuneration which is not met by increased funding would cause serious difficulties for employers, with potential negative effects of employment and service provision.'[7]

2. Reliance on government funding remains a key feature of the industry, with 87.2% of respondents to the 2019 Survey of SCHADS Employers identifying that they

[7] [2011] FWAFB 2700 at [272]

received a significant proportion of income from Commonwealth, State or Local Government.[8]

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

BP1 Q5. Question for all other parties: Are the findings proposed by ABI challenged (and if so, which findings are challenged and why)?

[15] NDS and Ai Group do not challenge any of the findings proposed by ABI.

[16] The Joint Union's challenge the findings proposed by ABI, are set out as follows. References to paragraph numbers in square brackets are to the paragraph numbers of the ABI findings (between [1] and [22]) which are set out at paragraph [24] of the Background Paper.

ABI Proposed Finding [4] - these reforms have fundamentally changed the operating environment…

[17] The Joint Unions submit that, ABI's proposed finding overstates the reality for

1. The Commission would distinguish between changes to the funding arrangements applicable within the sector, and changes to the nature and conditions of the work required to be performed within the sector. As to the latter, the evidence does not support a conclusion of fundamental change. Workers within the sector continue to provide the same or similar services, albeit the extent and scope of their work have expanded as a consequence of the increased funding within the sector.

Supplementary Question 5: The Joint Union's contend that the nature of the work required to be performed by employers in the sector has not undergone fundamental change and that those employers provide the same or similar services as is the point (ie pre NDIS), albeit that the extent and scope of their work has expanded. Do the other parties challenge this contention? If so, on what basis.

2. So far as ABI's proposed finding concerns funding arrangements, it requires 'tempering'. The Commission would not think "block funding" arrangements were without their own vicissitudes and risks; changes in government policy and the need to seek, justify and account for continued funding being just two of those potential risks.

3. The significant injection of funds into the sector consequential on the NDIS and Home Care reforms has created considerable opportunity for participants in the sector, notwithstanding the risk and variability associated with increased consumer choice. There was no evidence of operators falling by the wayside as a consequence of the changes; there was, however, evidence of some operators doing very well, having capitalised on the opportunities presented by the increased available funding.

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

ABI Proposed Finding [4(a)] - service providers now have less certainty in relation to revenue

[18] The Joint Unions note that ABI does not urge any finding that employers have suffered any loss or reduction in revenue.

ABI Proposed Finding [4(b)] - consumers have a greater ability to terminate their service arrangements

[19] The Joint Unions note that the only footnote reference for this proposed finding was to a part in Scott Harvey's statement[9] referring to his organisation's pro forma service agreement which allows participants to cancel with 4 weeks' written notice. Whilst the changes in funding arrangements are designed to facilitate choice by clients, the extent to which that ability may be exercised will be contingent on a variety of factors. ABI called no evidence of the extent to which that capacity has manifested in any real adverse (and undeserved) impact upon employers.

ABI Proposed Finding [4(e)] - service providers have reduced levels of control in relation to the delivery of services, as individual consumers have more control over the manner in which services are provided to them

[20] The Joint Unions submit that ABI's proposed finding overstates the evidence and that the first part of the proposed finding should be rejected:

> 'Nothing in the changes in disability and home care services has resulted in any service provider being compelled to provide services to any particular client, or to provide services at a time or in a manner dictated by the client. Service providers retain the ability to offer services to clients of their choice, and to determine the extent and timing of the services they offer. In that sense, service providers in fact have more control over their service than under block funding arrangements as they have the capacity to choose not to take on particular clients.'

ABI Proposed Finding [4(f)] - the employer is now less able to organise the work in a manner that is most efficient to it

In support of this proposed finding, ABI references Mr Harvey's statement at [28[10]], where he states:

"The model of Rostering for customers has generally not changed but with the introduction of the NDIS it offered opportunities for customers to select supports outside of business hours and on weekends/public holidays. The scope of rostering increased significantly due to this. Currently ConnectAbility is investigating the continued viability of providing weekend/public holiday supports under the current pricing framework. There is potential that the weekend/public holiday model of service delivery will be withdrawn if new pricing framework to be delivered by the NDIA does not sustainably match the actual costs for services provided."

[21] The Joint Unions submit that the Commission should disregard the proposed finding as the evidence falls well short of supporting the proposition for which it is cited. The evidence concerns only one employer, did not demonstrate any actual (as opposed to potential) impact

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[9] AB17

[10] Ibid

on the manner of organisation, or cost of performing, the work. The evidence did not identify the efficient modes of work organisation that are not open to employers by reason of the changed funding arrangements. Rather, the evidence cited shows that the NDIS created an opportunity to work outside existing patterns, and that the ongoing viability of that new arrangement was being monitored. The latter circumstance is hardly surprising.

ABI Proposed Finding [4(g)] greater choice and control for consumers has led to greater rostering challenges by reason of:

(i) an increase in cancellations by clients;
(ii) an increase in requests for changes to services by consumers; and
(iii) an increase in requests for services to be delivered by particular support workers

[22] The Joint Unions contend that the finding urged by ABI overstates the evidence, and it is not logical.

[23] The Unions contest the ABI's use of the word "control" in characterising the nature of the influence in the hands of clients in their position as consumers of service providers.

[24] So far as ABI contends there has been an increase in cancellations by clients, it relies only on the statement of Ms Ryan. The Unions submit that Ms Ryan's evidence provides scant, if any, support for a finding about the incidence of cancellations across the entire sector. To the extent there was any clear data before the Commission about the rate or incidence of cancellation, that was found in the Same Day Cancellation Log that Ms Ryan had prepared.[11] Further, Ms Ryan accepted that the vast bulk of the cancellations for the period during which her organisation had retained a record were chargeable [12]. The Unions submit that given the capacity in many cases to charge for cancellations, it could hardly be safely inferred that rates of cancellations had increased as a consequence of the changes to funding arrangements. Indeed, it might be thought that cancellation charges might operative as a disincentive to cancellation for a client with a finite amount of dedicated funding.

[25] The Unions submit that it is not clear how cancellations might be productive of rostering difficulties, that is, difficulties in drawing up, or having workers fill a roster. As a matter of logic it is apparent that there may be either loss of income or a waste of working time where cancellations occur; nor is it clear how requests for changes to services, or requests for particular workers might cause problems at the point at which work patterns and allocations for the coming roster period are set down. Requests for a specific worker, or variations to timing of services are just two examples of the many variables (much like qualifications, availability, leave arrangements etc) of which account must be taken in drawing up a roster.

[26] The Joint Unions submit that ABI has not demonstrated how the factors it points to make the tasks of setting rosters and managing the workforce that much more difficult than previously.

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[11] HSU-15

[12] Ryan XXN, 18-10-19, PN3020 - 3032

[27] The Unions accept that the factors identified in the proposed finding are challenges but submit that, the extent to which they adversely impact employers, and particularly in relation to the task of rostering, has not been established.

ABI Proposed Finding [5] – It is also widely accepted that clients benefit from having continuity of care in the sense that care is provided by the same employee or group of employees.

[28] The Joint Unions submit that the proposed finding is vague, and should be treated with some caution.

[29] The Unions accept that many clients and their families desire services to be provided by the same employee or group of employees, and that the familiarity that engenders may make the performance of the work more efficient and possibly more pleasant for clients and their service providers; however, there were limits to the evidence on this issue. There was no expert evidence of any demonstrable clinical benefit from having the same person providing the care and/or support work each time. As a matter of logic it must be the case that whether there are benefits in any case is likely to depend on a number of factors. Dr Stanford gives evidence that broken shifts exacerbate the personal and economic stress of disability work, contributing to the high rate of turnover in the industry.[13]

[30] Further, ABI's cross-examination of the Unions' witnesses about "continuity of care", was predominantly concerned with the provision of care over extended periods of time, and not directed to multiple attendances within a day.[14]

[31] The Unions urge some caution in respect of the contended finding as it appears designed to lay the foundation for a contention, in support of the ABI's position in respect of broken shifts, that clients require (as a matter of clinical imperative or priority and not just client preference) care by the same carer multiple times in a day, and that such requirement justifies the maintenance of broken shifts with no minimum engagement. The evidence before the Commission provides limited, if any, support for such a conclusion.

ABI Proposed Finding [14] – The price regulation controls applied by the NDIA do not enable employers to recover the full employment costs incurred for the services provided to participants under the NDIS

[32] The Unions reject this proposed finding. The proposition is based on the fact that certain contingent costs (i.e. costs that an employer would not necessarily incur) were not factored into the Efficient Cost Model. The Unions submit that it does not follow from that fact that the full employment costs are not able to be recovered through the NDIS, particularly in circumstances where the hourly rate allowed under that model allowed overheads of 10.5% of direct costs.[15]

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[13] Stanford, CB 1449[11] – 1450 [13], CB 1456 [27] – 1456 [30], CB 1471 [70] – 1472 [71]

[14] See, for example, cross-examination of Deon Fleming, PN518 - 524 Ms Flemming, are you often rostered to work with the same clients over an extended period?---Yes. Do the clients derive any benefit from working with you, the same support worker, over an extended period?---Could you explain that again, please? Do the clients get any benefit from consistently working with you rather than a series of people?---Yes, they do. What would those benefits be?---They just get to know you over time. Build rapport with you?---Yes, you do, yes. Does working with the same client over a period of time help you to develop an understanding of their needs?---It does, yes. Then you'd agree that that helps you perform your role more efficiently?---Yes, it does

[15] 7 Farthing XXN, 15.10.19, PN 877

In order to make its assertion good, the ABI would require evidence as to actual employment costs and actual NDIS monies recovered, so that any gap between those amounts was able to be discerned.

ABI Proposed Finding [18] – Providers in the home care sector are under financial strain following the rollout of CDC

[33] The Joint Unions submit that this proposition is not supported by the evidence. Paragraph [61] in Mr Mathewson's Statement is footnoted in support of the proposed finding. Mr Mathewson's statement annexes (at "B") the Seventh Report on the Funding and Financing of the Aged Care Industry 2019. That report contains some discussion of both Home Care and Home Support and detail of financial performance across both areas for the 2017-2018 financial year [16]. What that report shows are considerable increases for that period in Commonwealth funding for the Commonwealth Home Support Program[17] and for the Home Care Packages Program, with 70% of home care package providers achieving a net profit in that year. The financial results were complicated: increased funding, decreases in EBITDA per client, but also a substantial increase in unspent funds. Unions submit that he analysis in that report falls well short of supporting the proposed finding about financial strain, or of substantiating any connection, if one is suggested, between any such strain and the introduction of CDC.

ABI Proposed Finding [21] – Accordingly, many service providers in the SCHCDS industry are not primarily motivated by profitability and other commercial considerations

[34] The Unions accept that many service providers in the SCHCDS industry are motivated by factors other than profit or commercial considerations, and many of them may be primarily motivated by those other factors. However, the Unions submit that the evidence before the Commission falls short of establishing those motivations as facts.

ABI Proposed Finding [22] - Equally, many employees working in the SCHCDS industry are motivated by factors other than purely economic benefit

[35] The Joint Unions submit, as a matter of common sense, that employees in any industry to have a range of motivations, including a range of motivations affecting the work that they perform: their innate interests and skills, their physical and mental capacities, the work that is available to them, the level of remuneration available etc. The Unions submit that it should also be accepted as a 'fundamental proposition' that almost all workers engage in employment for the purpose of making a living. The Unions doubt the capacity of the Commission to test or weigh in any evidentiary sense, the motivations of employees in the sector and do not agree that such motivations are relevant in valuing and determining the terms and conditions that should apply to the performance of work.

BP1 Q6. Question for ABI: How do these proposed general findings relate to the specific claims before the Full Bench?

[36] ABI submits that the discretion in s.156(2)(b)(i) to make determinations varying modern awards in this Review is expressed in general terms, but, in discharging its functions, s.134(1)

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[16] At page 55ff of that report

[17] P.55

requires the Commission to ensure that the Award, together with the NES, provides 'a fair and relevant minimum safety net of terms and conditions' taking into account prescribed factors.

[37] The general findings advanced by ABI are said to be relevant to a number of the s.134(1) considerations, including:

> (a) the need to encourage collective bargaining;
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> (b) the need to promote flexible modern work practices and the efficient and productive performance of work;
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> (c) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden;
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> (d) the need to ensure a simple, easy to understand, stable and sustainable modern award system; and
>
> (e) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

[38] Turning to specific claims before the Full Bench, ABI submits that its proposed general findings around the fragmentation of work, volatility in demand, reduced levels of control, rostering challenges and continuity of care are relevant to the claims about:

> (a) minimum engagements;
>
> (b) broken shifts;
>
> (c) client cancellations; and
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> (d) travel time.[18]

[39] Other proposed general findings around the inadequacy of funding and the financial challenges of employers in the industry are said to be relevant to all claims which result in an increase in employment costs for employers. Whilst it is important that appropriate weight be placed on these issues, ABI submits that funding arrangements should be given determinative weight.

[40] ABI also accepts that such matters can be ameliorated to some extent by appropriate transitional arrangements

BP1 Q7. Question for all parties: Are the findings proposed by the NDS challenged (and if so, which findings are challenged and why)?

[41] ABI and Ai Group do not challenge the findings proposed by NDS.

[42] The Unions challenge the following finding proposed by NDS:

NDS Proposed Finding 11 - Most of the employer and union claims in tranche 2 of these proceedings, such as client cancellation, broken shift and minimum engagements, travel time,

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[18] See Background Paper at [24], finding number 4

and phone allowances, deal with issues arising from the implementation of NDIS in disability services, and consumer directed care in home care

[43] The Unions' claims for minimum engagements, improved broken shift provisions, travel time and other claims are said to arise because of regulatory gaps in the Award that allow for underpayment or non-payment of workers for time that should properly be treated as time worked. The Unions submit that those regulatory gaps have become apparent since the Award modernisation process. Whilst the introduction of the NDIS and CDC models incentivises employers to exploit those gaps, those developments are not the cause of the deficiencies in the award.

BP1 Q8. Question for NDS: How do these proposed general findings relate to the specific claims before the Full Bench?

[44] The NDS submits that the proposed general findings provide a context for the claims made in tranche 2 and are relevant to taking into account the operational requirements of employers in this industry. In particular:

(a) The proposed findings (4) and (11) (regarding the fragmentation of work, and the link between tranche 2 claims and changes in the organisation of work), are relevant to considerations of how and whether the award ought to be varied in order to meet the modern award objectives set out in s 134 (1) (d) and (f).

(b) Findings (3) and (5) relate to the enhanced market power of participants in the NDIS which arises from widely supported policy decisions to give disabled people a greater say in how they can live and order their lives. Providers need to be able to accommodate the new reality that services cannot be delivered on a timetable that suits the convenience of the employer.

(c) These findings are directly relevant to Tranche 2 claims relating to broken shift and minimum engagements, travel time and client cancellation which are all claims that arise in response to these changes in the organisation of work.

(d) In the case of client cancellation, the findings support employer claims that the current modern award does not now adequately deal with the growth in client cancellation and needs to be varied in order to do so.

(e) In the case of broken shift and minimum engagements, the findings need to be taken into account in striking an appropriate balance between the needs of employees to have protection from unduly fragmented working arrangements; and the needs of employers to be able to organise the work without, for example, undue limitation on the number of breaks that might occur.

(f) The travel time claims are inextricably linked with the broken shift and minimum engagements claims and so those findings are also relevant.

(g) The findings relating pricing and financial sustainability (7-9) are relevant to consideration of the modern award objective in s134 (f). NDS accepts the observations made at [137]-[143] in the September decision. It is true that the adequacy of funding for social services is a matter for government. However, at the very least, these findings are relevant to considerations about priorities for any changes to the award, as well as for any transitional arrangements in the event that the award is varied in ways that will increase employment costs.

BP1 Q9. Question for all parties: Are these aspects of AFEI's submission challenged (and if so, which findings are challenged and why)?
[45] The NDS, ABI and Ai Group do not seek to challenge the AFEI's submissions referenced at paragraph [26] of the Background Paper.

[46] The Unions challenge the following of AFEI's proposed findings at paragraphs 12-32 of their 23 July 2019 submission.

AFEI Proposed Finding [12] – The Community Services sector is predominantly operated by not-for-profit organisations, many being charitable organisations, and most charitable organisations being small (revenue less than $250,000) to medium (revenue less than $1m) in size

[47] The Unions submit that the footnote reference cited does not support the proposition advanced. The footnote refers to the Australian Charities and Not-for-profits website and the definition of 'charity size'. It does not establish that most charities are "small" (as defined), or that most charitable operators within the industry are small.

AFEI Proposed Finding [20] – More recently, while private investment in welfare operations has increased, industry operators have been forced to increasingly rely on charitable donations by private citizens and companies

[48] The Unions submit that the link provided in support of this proposition is unavailable and that the proposition is not substantiated by reference to any evidence, and no attempt is made to quantify the extent of any alleged increase in reliance on charitable donations. The Unions do not dispute that some operators in the industry receive charitable donations, but it is not clear that the rate of reliance on such donations is increasing. If so submitted that given the increase in funding available as a consequence of NDIS funding, there appears some basis to query the support for that proposition.

AFEI Proposed Finding [21] - The NDIS is the first sector of the industry to provide clients the power to exercise choice and control by being able to purchase their supports directly from providers.

[49] The Unions challenge the accuracy and relevance of this proposed finding, on the following basis:

1. The consumer directed care model was first piloted in aged care in home care from 2010 (as the Full Bench discussed in the Tranche 1 decision [2019] FWCFB 6067 at [53]ff).

2. The language of choice and control is not entirely apposite to a model where the funds expended on the provision of services are not available to the client as cash, may not be expended on other items at the client's discretion, and may only be expended on accredited providers for specific services. The "market" in which service providers and clients operate is a very particular one.

3. The evidence adduced by the employers did not examine the relationship between clients and providers prior to changes to the funding models or establish any change in patterns of behaviour by customers as a consequence of those changes to funding models. AFEI Proposed Finding [27] - Cost savings measures to account for increases

in staff wage costs which are not fully funded may occur by reducing non-support worker staff, and limiting investment in staff development and training; or alternatively, reducing the amount of supply or service hours if the cost increases are related to the weekend, overtime or other higher staff cost activities. The evidence before the Commission about employer practice did not demonstrate that such steps were being taken, or their prevalence.

[50] AFEI Proposed Finding [32] - In the current state of the industry, unfunded increases in wage costs are likely to have negative effects on employment and services

[51] The Unions submit that this claim is speculative, imprecise and generalised. No evidential basis for it is disclosed.

BP1 Q10. Question for all other parties: Are the findings proposed by Ai Group challenged (and if so, which findings are challenged and why)?

[52] NDS does not challenge the findings proposed by Ai Group.

[53] ABI agrees with the findings proposed by Ai Group save that:

1. ABI disagrees with the proposition that enterprise bargaining between employers and employees covered by the Award is not common. This has been a proposition that has been advanced by various parties throughout the course of these proceedings, and whilst it may be true in a general sense compared to other industries, we do not necessarily agree that it is. The experience of ABI's clients' is that while enterprise bargaining across the SCHCDS industry is certainly not widespread, it is not rare. The evidence discloses that a number of employers have enterprise agreements and have therefore engaged in enterprise bargaining.[19]

2. ABI does not necessarily agree that where an enterprise agreement applies, the terms and conditions are not "significantly more beneficial" to employees than those provided by the Award. ABI makes this comment particularly by reference to the home care sector rather than in the disability services sector. For example, a number of enterprise agreements in the home care sector provide for paid travel time and other allowances.[20]

3. While ABI agrees that the NDIS cost model provides for a profit margin of 2%, we note for completeness that it is referred to in the guidance material as a "margin as a share of other costs".[21]

[54] The Unions challenge the following findings proposed by AI Group.

Proposed Finding [1] - Employees providing disability services in clients' homes perform a range of duties...

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[19] ABI1, HSU18 and PN3644 JOYCE WANG

[20] See for example Exhibit ABI1, HSU18

[21] Court Book p.499

[55] The Unions submit that the duties set out therein are an inclusive, but not exhaustive list.

Proposed Finding [6] - Such an arrangement benefits the employee…

[56] The Unions acknowledge that the practice of an employee working routinely with a particular client may provide benefits for the employer and the client. The Unions do not embrace the characterisation of the practice as constituting a "benefit" of employment for an employee.

Proposed Finding [8] - Some employees find personal satisfaction in undertaking work in the sectors covered by the Award

[57] The Unions accept this to be the case, however, also note the extensive evidence, in particular, that of Dr Stanford, as to the deleterious effects of the precarity of work in the sector on employee well-being and retention in the industry.

Proposed Finding [9] - The hours of work of an employee engaged in the provision of disability services in a person's home are dictated by their employer's clients' needs and demands

[58] The Unions disagree with this proposed finding and contend that the hours of work of an employee are determined by the employer. Client needs shape the overall demand for the employer's services, which in turn influences the hours that may be required of the workforce overall, and of particular employees. The finding as advanced ignores the intermediate factors and steps that affect the hours of work of any particular employee.

Proposed Finding [10] – Demand for specific services from an employer fluctuates constantly due to changes to the number of their clients, their budgets, their choices of services, seasonal factors, holidays and medical or clinical factors

[59] The Unions accept that the factors enumerated in this proposed finding can and do cause fluctuations in demand for specific services; but submit that, the evidence fell short of establishing that these factors cause constant fluctuation in demand in the case of every employer, or the degree of fluctuation in demand experienced by employers.

Proposed Finding [12] – Absence of cost provision in NDIS Pricing Arrangements

[60] The Unions submit that whilst specific provision may not be made for the enumerated matters, the efficient cost model also factors within it a number of elements of cost which are contingent:

- it assumes all personal leave will be taken;
- it assumes employees will be entitled to be paid for an entire day on all public holidays[22].

Proposed Finding [13] - The component of the NDIS cost model attributed to 'overhead costs' is intended to cover labour costs associated with employees who are not delivering disability

[22] CB 489ff

services (such as a CEO, managers, payroll staff and HR personnel); as well as capital expenditure

[61] This finding is said to be supported by reference to the evidence given by Mr Farthing in cross-examination at PN 891 on 15 October 2019. The Unions submit that the purported finding misstates the evidence of Mr Farthing, who said, of the overheads component of the cost model:

> Whether it's the labour costs of direct support staff is another matter, but as I said the NDIA has never been prescriptive about what a provider can and cannot use their overhead component of the unit price for.

Proposed Finding [14] - The cost model does not expressly factor the Unaccounted Labour Costs into the setting of the component of the cost model attributed to overhead costs.

[62] This finding is said to be supported by reference to the evidence given by Mr Farthing in cross-examination at PN 888 on 15 October 2019. The Unions submit that the purported finding misstates the evidence of Mr Farthing, who said, at that paragraph:

> the NDIA has never been that prescriptive to providers about what the overhead can and cannot be used for.

BP1 Q11. Question for Ai Group: How do these proposed findings relate to the specific claims before the Full Bench?

[63] Ai Group submits that its proposed findings, 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.

BP1 Q12. Question for Ai Group: The interviewees were disability support workers, why wouldn't they be covered by the award?

[64] Ai Group submits that 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. 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*[23], which covers various categories of employees on an occupational basis who may be engaged in the disability sector (for example, a social worker[24]). Further, it is Ai Group's 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.[25]

BP1 Q13. Question for Ai Group: Was Dr Stanford cross examined in respect of this aspect of his evidence?

[65] Ai Group replies that Dr Stanford was cross-examined regarding the constraints imposed by the NDIS on an employer's discretion as to how work is organised:

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[23] Clause 4.2(d) of the Award

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

[25] Section 768AS of the Act

'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.'[26]

BP1 Q14. Question for all other parties: What do the other parties say in response to Ai Group's general observations regarding the evidence?

[66] NDS does not disagree with Ai Group's general observations regarding the evidence and ABI agrees with the general observations advanced by Ai Group.[27] ABI also refers to its submissions in paragraphs 23-32 in relation to the evidence of Dr Stanford and the Muurlink Report.

[67] AFEI concur with the general observations of AI Group in relation to weight that should be attributed to the union evidence.

[68] The Unions' submit that Ai Group's second observation that "(v)ast portions of the union' evidence should, in our submission be given little weight…" is without merit. The

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

[27] See Ai Group submission of 18 November 2019 at [48]-[60]

Commission heard from a number of home care and disability support workers, employed across several states in both urban and regional area, with a range of employers in the industry, including some of the major employers.

[69] So far as Ai Group's general observations include an observation that Dr Stanford's opinion should not be afforded any weight, the Unions note this question is raised specifically in Question 15 and the Unions respond to that question below.

BP1 Q15. Question for all other parties: What do the other parties say about Ai Group's submission that Dr Stanford's opinion should not be afforded any weight?

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

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

(b) NDS agrees with Ai Group's criticism at (10) and (11) of Dr Stanford's conclusions that employers have "free reign" or that employers ignore efficiency in organising work as that part of his evidence overstates the situation and is in conflict with employer witness evidence in these proceedings[28].

[71] ABI agrees with the Ai Group's submissions regarding the evidence of Dr Stanford and refers to paragraphs 24-29 of its submission.

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

[73] The Unions submit that Ai Group's submission concerning the evidence of Dr Stanford should be rejected. Dr Stanford's report provides a cogent analysis of the state of the disability sector workforce and he is eminently qualified by reason of his specialised study and qualifications to comment on labour market issues within the disability sector. The Unions submit that no real attempt was made by Ai Group to challenge Dr Stanford's qualification as

[28] For example Shanahan Statement at [36]; Wright Statement at [41]; Mason Statement at [71]; Harvey Statement at [57][58]; Ryan Statement at [65]

an expert in the area. There is no reason the Commission would not give Dr Stanford's evidence significant weight.

[74] To the extent Ai Group criticises Dr Stanford's evidence because it relies on qualitative research projects conducted by Dr Stanford and his colleagues, that criticism should be rejected. Qualitative research is an accepted and common method of social research. Ai Group did not cross-examine Dr Stanford regarding his research methods, neither in respect of the 19 respondent research project, nor in respect of the academic papers that were annexed to his report, which are the subject of Ai Group's criticism at [56] of its submissions. Dr Stanford's opinion was not based solely on that research project; he also drew upon another research project into the skills and training requirements of the disability services workforce, his exploration of the published literature in the field, statistical data and government policy documents. All of that enquiry was underlined by his extensive history of study, research and publication in the field of labour economics.

[75] As to Ai Group's assertion that "Dr Stanford's apparent refusal to accept under cross-examination that there are other pre-existing incentives for an employer to arrange work efficiently…" the Unions submit that this misstates the evidence. Dr Stanford accepted the existence of such an incentive, but, characterised such incentive as an indirect one in circumstances where the employer was not bearing additional cost due to travel time and downtime.[29] Ai Group's submission proceeds on the basis that its assertion that there is such an incentive is self-evident, when in fact the existence of such incentive was put to Dr Stanford by the Ai Group as the product of an employer not having enough disability support workers.[30] No other basis for the existence of such an incentive was identified in the cross-examination of Dr Stanford. The Unions submit that the nub of the exchange appeared at PN 2278-2279, as follows:

> Yes. There's also an incentive for them to be able to structure the work in a way that lets the employee visit as many fee paying clients as possible in a day, isn't there? If they've got a shortage of workers? -Well, the shortage of workers per se is difficult to measure and interpret relative to how workers are utilised, so employers do face a challenge in recruiting new individuals to come and work for them, yet despite that we also see employers having a pattern of under-utilising the workers that they have in terms of the fragmentation of work, the very low average hours of work and the unreliability of the hours of work.
>
> That might be because they don't have any other option but to roster it that way in some circumstances. I'm sure you accept that? -But if they already experience an incentive to try to utilise the individuals as fully as possible, despite the absence of cost penalty to employers of fragmented work, then you would think they would be doing a better job of utilising those workers, and clearly they're not. The hours of work are very low in the sector. Many workers indicate that they would like to work more and the work has been very fragmented in the sector.

[76] Ai Group asserts it did not have an opportunity to test the veracity or relevance of the information provided during the course of the interviews undertaken by Dr Stanford. The

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[29] Stanford XXN, PN 2269ff

[30] Stanford XXN, PN 22873

Unions submit that, in fact, no attempt, was made to do so. Ai Group did not make any call for the production of Dr Stanford's working papers.

[77] The Unions also note that elsewhere in its submissions, Ai Group relies on Dr Stanford's observations about the industry in support of the findings it urges on the Commission. It is submitted that Ai Group cannot have it both ways on Dr Stanford.

[78] Ai Group was asked (at Q13) if Dr Stanford was cross-examined in respect of their submission that Dr Stanford's opinion that the Award gives 'free reign' for employers to organise work is unreasonable at paragraphs 56 of his report. The Unions submit that he was not cross-examined on his evidence in this regard, and Ai Group's submission is unsustainable.

[79] The Unions submit that at paragraphs 56 and 57 of his report, Dr Stanford is clearly referring to the industrial regulation of working hours in the SCHADS Award. His evidence was that the SCHADS Award does little to regulate how employers organise worker in the disability sector (whether by direct regulation or the imposition of additional costs). He does not, as Ai Group suggest, ignore the fact non-Award factors may influence or constrain an employer's decision-making. Dr Stanford's point is that the Award does not provide an incentive for employers to organise work efficiently or fairly of sufficient strength to override the other influences on their behaviour. The Unions rely on Dr Stanford's evidence in this regard to support our submission that the Award does not provide a fair and relevant safety net of terms and conditions in regards to the organisation of work.

[80] The Unions acknowledge Dr Stanford was cross-examined by Ai Group about the influence of award regulation on employer decision-making (Transcript PN2244 to PN2280). It is submitted that this largely consisted of Ai Group of asking Dr Stanford to agree with general propositions about the behaviour of hypothetical employers in unspecified circumstances.[31] Contrary to Ai Group's submission that Dr Stanford irrationally refused to accept that there are other pre-existing incentives for an employer to arrange work efficiently, the Unions submit that Dr Stanford's evidence was there were multiple factors that influenced how employers organise work, leading to more or less optimal uses of labour depending on the circumstances.[32] In the case of the disability sector, the incentives asserted by Ai Group were weak. Dr Stanford noted that the incentive to allocate work in an efficient way that minimises unproductive time (travel and waiting) was an indirect incentive because the employee bears the cost of travel time.[33]

[81] Dr Stanford also noted that even labour-shortages in the industry were sufficient to improve the organisation of work.[34] During re-examination, he went on to say that employee satisfaction was;

> Something a smart employer would take into account, but that I don't believe that the impact of that incentive is as direct or as powerful as a more tangible financial or economic incentive which they would face, and in my experience in labour economics simply showing employers that they do get some benefits from a more satisfied

[31] Transcript, PN2247, PN2248, PN2251, PN2253, PN2259, PN2262, PN2266, PN2271

[32] Transcript, PN2260, PN2265-PN2266, PN2271

[33] Transcript, PN2274

[34] Transcript, PN2278

> workforce that feels it's been treated fairly, a workforce that's able to combine its work life with its family life is not always enough to elicit respect or do attention to those goals unless there's also some more tangible profit and loss related considerations that come into play. That's why we have labour regulations and benchmarks and norms because leaving it up to the voluntary wisdom and willingness of employers to do the right thing has not been reliable. (Transcript PN2284)

[82] The Unions note that Ai Group appears to accept Dr Stanford's evidence that work is generally not organised in an optimal manner in the disability sector. Ai Group's submission is said to rely on a naïve assumption that employers always know what is good for them and will always make the most optimal decision that they can in the circumstances. The Unions submit that Ai Group have led no evidence about economic decision-making to support this assertion. However, as Dr Stanford told the Commission during cross-examination, 'in my experience as a labour economist I've met lots of employers who haven't figured out yet that they're actually better off when their workers are better treated.'[35]

BP1 Q16. Question for other parties: Are the findings proposed by the ASU challenged (and if so, which findings are challenged and why)?

[83] NDS does not challenge the general terms of the findings proposed by the ASU, but does challenge the following specific points:

(a) The proposed findings about the effect of fragmentation and precarious employment arrangements on overall staff turnover at (15) – (17) go too far in describing conditions as "intolerable". NDS accepts that the attractiveness of the work is undermined by fragmented and precarious working arrangements, and that this is contributing to a serious workforce problem with recruitment and retention. Nevertheless large numbers of workers continue to provide support to people with disability and derive great satisfaction from the work.

(b) NDS challenges the emphasis given in the proposed findings at (23) and (24) regarding employer reluctance to "do the right thing" without an economic incentive. This proposed finding goes too far and ignores other evidence[36] in these proceedings, such as the efforts made by employers to accommodate employee preferences when rostering.

(c) The proposed findings at (23) and (24) also oversimplify the role of profit and loss considerations. The evidence regarding the economic factors of concern to employers makes it clear that the issue is financial survival and ongoing capacity to deliver their mission that is of concern to employers[37]. This concern is a consequence of government policy and pricing constraints.

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[35] PN2274

[36] Ibid

[37] NDS (2018) State of the Disability Sector Report 2018 – in particular sections reproduced in the Court Book at pages 3397-3398; 3404-3406

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

1. 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.[38]

[85] Further, 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.

[86] Ai Group asserts 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.[39] 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 – Ai Group submits this should not be permitted.

[87] Ai Group also continues to rely on the submissions made on 18 November 2019 regarding specific elements of Dr Stanford's report which would, it submits on a strict application of the rules of evidence, be rendered inadmissible,[40] as well as its submissions set out at paragraphs [28](9) – (12) of the Background Paper.

2. 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. 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.[41]

    (b) His report does not include a consideration of the industrial context in which the claims there being considered were advanced, including the Award.[42]

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

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

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

[41] Transcript of proceedings on 15 July 2016 at PN6363

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

(c) A number of the studies relied upon relate to other industries.[43]

(d) Some of the studies relied upon concerned specific circumstances such as work performed on weekends[44], fathers working in excess of 40 hours a week[45] and shiftwork[46].

(e) The vast majority of the studies relied upon are international studies; particularly concerning Scandinavia.[47]

(f) The industrial conditions prevailing in those countries are "potentially" and relevantly different.[48]

(g) The unemployment rate in those countries may affect an employee's sense or perception of their control in a workplace.[49]

	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.

[43] Transcript of proceedings on 15 July 2016 at PN6370

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

[45] Transcript of proceedings on 15 July 2016 at PN6420

[46] Transcript of proceedings on 15 July 2016 at PN6428

[47] Transcript of proceedings on 15 July 2016 at PN6374

[48] Transcript of proceedings on 15 July 2016 at PN6379

[49] Transcript of proceedings on 15 July 2016 at PN6386

21	Paragraph [29](21) does not constitute a finding. The ASU has only repeated the evidence of Dr Stanford.
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.

[88] The Ai Group proffers that 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. 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.

[89] The proposed findings derived by the Commission that are challenged by Ai Group are set out in the table below.

	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[50] 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.

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

	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.[51]
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.

[90] ABI challenges or makes comment on the findings 173, 175, 176, 177, 178, 179, 180, 181, 182, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196 for the reasons set out at paragraphs 140-159 of Part B of this submission.

Proposed findings advanced by ASU

Finding [173]: ABI disagrees on the basis that it is unclear what is meant by "precarious" and there is no evidence to suggest that there are "significant" adverse effects nor that the turnover can be characterised as "extreme". To the extent that the ASU rely on the evidence of Dr Stanford, ABI refers to paragraphs 24 – 29 of its submission dated 10 February 2020.

Finding [175]: ABI contests this proposed finding. For the reasons set out in paragraphs 24 – 29 of ABI's submission dated 10 February 2020, the Stanford Report cannot be relied upon to make such a finding.

Finding [176]: ABI disagrees on the basis that this is a vague proposition that is unsupported by evidence. The assertion that the industry is increasingly unpredictable sits in contrast to other assertions made by the unions that the work is planned and predictable.[52]

Finding [177]: ABI contests this proposed finding. For the reasons set out in paragraphs 24 – 29 of ABI's submission dated 10 February 2020, the Stanford Report cannot be relied upon to make such a finding. The hearsay evidence cannot be used to prove the truthfulness of the representations made by the unidentified interviewees.

Finding [178]: ABI contests this finding. For the reasons set out in paragraphs 24 – 32 of ABI's submission dated 10 February 2020, neither the Stanford Report nor the Muurlink Report can be relied upon to make such findings. Certainly, a proper analysis of the literature reviewed by Dr Muurlink does not disclose a "scientific consensus".

Finding [179]: ABI contests this finding. For the reasons set out in paragraphs 30 – 32 of ABI's submission dated 10 February 2020, the Muurlink Report should not be relied upon to make such findings.

Finding [180]: For the reasons set out in paragraphs 30 – 32 of ABI's submission dated 10 February 2020, the Muurlink Report should not be relied upon to make such findings.

[51] Transport of proceedings on 15 October 2019 at PN917

[52] For example, finding 147 sought by the UWU

Finding [181]: ABI generally agrees that disability support work is skilled work and that the industry may be struggling to attract sufficient new staff. However, it submits there is insufficient probative evidence to make such a finding.

Finding [182]: ABI contests this finding. No such finding can be made from the Stanford Report for the reasons set out in paragraphs 24 – 29 of ABI's submission dated 10 February 2020. The Stanford Report cannot be used to prove the truthfulness of what the 19 respondents stated.

Finding [186]: ABI cavils with the use of the phrase "unusually" high.

Finding [187]: ABI do not agree with the proposition that any staffing shortage in the industry is caused by low conditions of employment or intolerable working conditions. This is not supported by the evidence. For the reasons set out in paragraphs 24 – 29 of ABI's submission dated 10 February 2020, the Stanford Report cannot be relied upon to make such a finding.

Finding [188]: ABI contests this finding. No such finding can be made from the Stanford Report for the reasons set out in paragraphs 24 – 29 of ABI's submission dated 10 February 2020. The Stanford Report cannot be used to prove the truthfulness of what the 19 respondents stated.

Finding [189]: ABI contests this finding. No such finding can be made from the Stanford Report for the reasons set out in paragraphs 24 – 29 of ABI's submission dated 10 February 2020. The Stanford Report cannot be used to prove the truthfulness of what the 19 respondents stated.

Finding [190]: ABI disagree that this finding can be made. At a hypothetical level, any shortage of skilled staff *may* of course impact the quality of case, but there is insufficient evidence to find that it *will*.

Finding [191]: See above.

Finding [192]: There is insufficient evidence to make this finding. It is incredibly speculative and general.

Finding [193]: ABI contests this finding. No such finding can be made from the Stanford Report for the reasons set out in paragraphs 24 – 29 of ABI's submission dated 10 February 2020. The Stanford Report cannot be used to prove the truthfulness of what the 19 respondents stated.

Finding [194]: ABI disagrees with the colourful and generalised assertion that there is a "weakness" of the Award and that the alleged weakness is contributing to any fragmentation and destabilisation of work in the sector. This is in the nature of a submission rather than a proposed finding.

Finding [195]: ABI contests this finding. No such finding can be made from the Stanford Report for the reasons set out in paragraphs 24 – 29 of ABI's submission dated 10 February 2020. Additionally, no weight should be placed on Dr Stanford's philosophical views about the wisdom and willingness of employers to "do the right thing".

Finding [196]: See above.

[91] The other unions support the general findings contended for by the ASU. The conclusions of Dr Stanford and Dr Muurlink are said to be supported by the evidence of Dr MacDonald, and also that of the employee witnesses.

[92] AFEI submits that many of the findings sought by the ASU rely on (and repeat) the report by Dr Stanford. AFEI concurs with the Ai Group that little weight should be attributed to the evidence of Dr Stanford, including due to Dr Stanford's predominant reliance on interviews with a limited number of disability support workers in a single region of NSW only[53], and where the reports of those support workers could not be verified or tested in cross-examination.

[93] As to the ASU findings that the 'rate of casual employment in disability services is increasing,' and as a result 'work in the disability services is becoming increasingly precarious'.[54] AFEI notes that this submission appears to rely solely on the part of Dr Stanford's report where he expresses 'key conclusions derived from the NDS data' from the 2018 NDS Workforce Report. It says the same 2018 NDS Workforce Report relied on by Dr Stanford however clarifies that the rate of growth in casual employment is not universal in the sector, and that the trend towards casualisation is absent in large organisations.[55] This was also referred to in the September 2019 Decision.[56]

[94] The ASU also seek a finding that 'average hours of work are low and highly variable, that some workers work very short hours and many workers experience regular fluctuations in their hours of work and as a result '*precarious work practices are becoming <u>increasingly</u> common for <u>all</u> disability support workers*[57]' on the basis of Dr Stanford's report at pages 11 and 6. AFEI submits that this finding is also not available on the evidence and submit the following:

1. Page 6 of Dr Stanford's report does not cite particular sources for the opinions included in it. In cross examination Dr Stanford confirmed 'we've relied a lot on the NDS Workforce Wizard database.'[58] Dr Stanford's report at page 11 includes his 'key conclusions derived from the NDS data' from the 2018 NDS Workforce Report. Dr Stanford does not however present/cite any evidence in relation to the rate of growth/decline for all Disability Support Workers in low average hours, or variability in hours.

2. Further, '*the average hours worked by a disability support worker increased for the March 2018 quarter to 22 hours/week. This compares to 21 hours/week in the preceding two quarters*.[59]'

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[53] See p4 of Dr Stanford's Report – CourtBook 1448 – For Dr Stanford's reliance on interviews with 19 Disability Support Workers in the Hunger region of NSW

[54] [29] Background Paper, pt1-2

[55] [1828 – 1883] CB

[56] [67] September 2019 Decision

[57] [29] Background Paper, pt3

[58] PN2258

[59] p10 of the 2018 NDS Workforce Report

[95] Noting the findings sought by the ASU about '*elevated levels of mental and physical stress being* suffered *by workers'*[60] rely on Dr Stanford's report on interviews with disability support workers in the Newcastle, NSW Region. AFEI submits that, such evidence should not be attributed any weight by the Commission and that there is thus no proper basis for these findings sought

BP1 Q17. Question for the ASU: How do these proposed findings relate to the specific claims before the Full Bench?

[96] The ASU submits that its general findings relate directly to each claim made by the ASU in the Tranche 2 proceedings and support its submissions made in support of its claims and in opposition to the employer claims,:

1. That work in the disability sector is increasingly 'precarious' (Paragraphs [9]-[16] of the ASU's November Submission). That is work is characterised by casual work, high variability of hours of work, shorter hours of work, discontinuous hours of work, and unpredictable hours of work. Work with these characteristics is called 'precarious' because that is the social, psychological and physical state of those who work it. Simply, the SCHADS Award is not acting as a fair and relevant safety net of minimum terms and conditions for disability services workers. The ASU sets out the findings about work in the disability sector that is applicable to all its claims in the general findings, and deals with the evidence specific to individual claims later in the document. The ASU's claims are directed to the most egregious failings of the SCHADS Award, discontinuous work and unpaid working time. The ASU opposes the employer claims because they would remove the limited protections afforded to employees covered by the SCHADS Award.

2. That the low quality of work of in disability services means that employers are not able to retain skilled staff or attracted sufficient numbers of new staff (with the requisite skills) to meet demand (Paragraphs [17]-[25]). Again, the precarious nature of work in disability services means that new recruits are not being trained to the standard of the experienced workers they are replacing. This has a significant impact on the quality of care afforded to people with a disability. The ASU's claims are directed towards fixing the recruitment and retention problems that beset the industry at a time of significant growth.

BP1 Q18. Question for all other parties: Are the findings proposed by ABI challenged (and if so, which findings are challenged and why)?

[97] NDS does not challenge the findings proposed by ABI.

[98] Ai Group challenges the first proposed finding set out at paragraph [48] of the Background Paper.

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[60] [29] Background Paper, pt5

[99] The Unions challenge the proposed findings [1], [5] and [6] of ABI, which are set out within [48] of the Background Paper.

Proposed Finding [1]- There is broad support from both employer and union parties for the introduction of a term in the Award dealing with 'remote response' work, or work performed by employees outside of their normal working hours and away from their working location.

[100] The Unions support a clause clarifying the arrangements where an employee is recalled to work overtime. This includes where an employee is recalled to a workplace other than their employer's premises (i.e. a client's home) or where they are required to work overtime from their home. This can be distinguished from ABI's claim which would remunerate people for working outside of their ordinary hours of work at ordinary rates of pay.

Proposed Finding [5] – Many inquiries that are fielded by employees when on-call or otherwise when not performing work do not require more than a few minutes of time.

[101] The Unions reject this finding. This finding is said to be supported by the Witness Statement of Ms Anderson[61] and the Unions submit that the proposed finding misrepresents Ms Anderson's evidence. ABI has cherrypicked the single innocuous reference in a series of paragraphs detailing the significant demands on her outside of her rostered hours. Ms Anderson's evidence dealt with the requirements when she is on call at [17] – [22],[62] including:

- Responding to emergencies;
- Providing advice to staff about their issues, including advising regarding medication
- Rostering;
- Having to make up to a dozen calls to find replacement staff in the event of illness;
- Covering the duties of absent workers herself;
- Ensuring incident reports and made and logging occurrences herself.

[102] The Unions submit Ms Anderson averred to the limitation on her activities as a consequence of the requirement of availability when on-call, the prospect that she will be called in to deal with difficult incident requiring extended hours of her attendance, and the anxiety she suffers as a consequence [63]. Ms Anderson's evidence, they say, is complemented by that of Ms Emily Flett, who also reports sufficient work during on call shifts to feel exhaustion and significant stress.[64] Further, the evidence of the Ms Anderson and Ms Flett is that they are paid an above-award 2 hour minimum engagement each time they perform out of hours work.[65] Ms Anderson was not cross examined about the duration of inquiries, or any other work, performed while on call. Ms Flett was not cross-examined at all.

Proposed Finding [6] - It is difficult for employers to monitor the time that employees spend performing remote response work.

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[61] Anderson: CB 1394

[62] CB 1396

[63] Anderson, CB 1396 [24]

[64] Flett CB 1428 [11]-[13], CB 1429-30 [21]-[25]

[65] Anderson CB 1396 [22]; Flett CB 1428, [16]

[103] The Unions do not accept that monitoring the time spent by employees performing remote work would be any more onerous than monitoring other work performed away from the client's premises (such as disability work performed in the community or a client's premises).

[104] AFEI submits that in relation to the ABI proposed variation, it is accurately summarised at [51] of the Background Paper.

BP1 Q19. Question for ABI: What does ABI say in relation to the amendments sought by AFEI?

[105] ABI acknowledges the concern expressed by AFEI in relation to the wording proposed by its clients for triggering the operation of the clause (that is, where an employee is "requested or required to perform work by the employer via telephone or other electronic communication away from the workplace"). AFEI submit that such a formulation is capable of capturing circumstances where the employee is performing work that is not in the nature of "response" duties. AFEI draw a distinction between "response" duties (i.e. an employee responding to a specific request) and employees working under a "general instruction/requirement to undertake work from home" or performing "routine overtime work".

[106] While ABI accepts that concern, but does not consider that the specific variation proposed by AFEI is sufficiently clear so as to alleviate this concern. If the Commission is minded to introduce more precision as to the notion of "remote response work, ABI considers that the better approach to achieving this objective would be to include a definition of "remote response work" or "remote response duties".

BP1 Q20. Questions for ABI: Does ABI agree with Ai Grouproup's characterisation of the intention of its proposal? ABI is invited to provide a definition of 'remote response duties'.

1. ABI agrees with Ai Group's characterisation of the intention of its proposal and proposes that if the Commission is minded to introduce more precision as to the notion of "remote response work" or "remote response duties", there be the insertion of a definition in the following terms:

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

   (a) Responding to phone calls, messages or emails;
   (b) Providing advice ("phone fixes");
   (c) Arranging call out/rosters of other employees; and
   (d) Remotely monitoring and/or addressing issues by remote telephone and/or computer access.

BP1 Q21. Question for Ai Group: What reliance is placed on the Government funding?

[107] Ai Group replies that 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.

[108] Accordingly, Ai Group submits that 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.

BP1 Q22. Question for all other parties: Are the findings proposed by the Ai Group challenged (and if so, which findings are challenged and why)?

[109] NDS, ABI and AFEI do not challenge the findings proposed by Ai Group.

[110] The Unions challenged the Ai Group findings

Proposed Finding [1] - Some employees undertake work-related activities while they are not at the workplace in circumstances where they are not required by their employer to perform such work.

[111] The Unions note that the ASU's draft determination would not cover this type of activity.

Proposed Finding [2] - Some work-related activities are undertaken by employees while they are not at the workplace in as little as a 'few minutes'.

[112] The Unions reject this finding: 'It is imprecise, generalised and not supported by evidence.' Ai Group cites Ms Anderson's answers during cross-examination (At PN1002 of Transcript) as the basis for this finding. The Unions submit that this misrepresents Ms Anderson's evidence. Ms Anderson was asked under cross-examination if she checks her emails in her personal time, and Ms Anderson answered that she does so occasionally, but is not required to answer her phone or check her emails when she is not at work or on call.[66] Ms Anderson's evidence does not support any conclusion that demands on employees out of hours are insignificant.

BP1 Q23. Question for the HSU: How does the proposed clause operate in the event that an employee responds to, say, three phone calls within the same one hour period?

[113] The HSU does not press for the adoption of its draft clause. The HSU supports the ASU draft determination.

BP1 Q24. Question for all other parties: Are the findings proposed by the ASU challenged (and if so, which findings are challenged and why)?

[114] NDS challenges the following findings proposed by the ASU:

> (a) At [68] the ASU proposed findings at (4), (6) and (8) overstate the likelihood of negative impacts on health and well-being. It is based on research that reviews the literature across a range of industries, and a range of working arrangements. To the extent that the research deals with the health and care sector it is at a very broad level that does not distinguish, for example, between being on call for rostering tasks at a regular time of day, versus crisis management in a rare emergency.
>
> (b) The proposed finding (13) asserts the main reason employees agree to work on call is to maximise income, however there is no evidence to support that proposition. Income

[66] Transcript, PN1000-PN1013

seems likely to be a factor, but for example so too will be the professional commitment of employees working in a human centred industry.

[115] Ai Group opposes the following ASU findings:

	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".

[116] ABI challenges or make comment on the findings 197, 198, 200, 201, 202, 203, 204, 205, 206, 207, 208, and 209 for the reasons set out at paragraphs 160-172 of Part B of its submission dated 10 February 2020.

Finding [197]: ABI agrees generally that employees are requested to perform remote response duties from time to time. It's clients also agree that remote response duties are typically carried out by use of electronic means of communication. However, the precise numbers of employees and the incidence of such practices will vary from workplace to workplace and the specific sector.

Finding [198]: ABI disagree that a finding can be made that these employees tend to be employed in higher classifications. With respect to the two witnesses called by the ASU to give evidence in relation to remote response, it says Ms Flett is employed as a Level 6 but it is not clear what classification Ms Anderson is engaged as under the Award. There is also insufficient evidence before the Commission to make any finding about classification levels generally. ABI also disagree that "many" of these employees work part-time hours. Of the relevant witnesses, one was a full-time employee and the other a part-time employee.[67] ABI submits this does not support the assertion that "many" employees undertaking remote response duties work part-time hours.

Finding [200]: For the reasons set out in paragraphs 30 – 32 of its submissions dated 10 February 2020, ABI submits, the Muurlink Report should not be relied upon to make such a finding. The other employee evidence on point is also insufficient to support this finding.

Finding [201]: For the reasons set out in paragraphs 30 – 32 of its submissions dated 10 February 2020, the Muurlink Report should not be relied upon to make such a finding. The other employee evidence on point is also insufficient to support this finding.

Finding [202]: For the reasons set out in paragraphs 30 – 32 of its submissions dated 10 February 2020, the Muurlink Report should not be relied upon to make such a finding. The other employee evidence on point is also insufficient to support this finding.

Finding [203]: This is not a proposed finding. It is opinion evidence from one employee.

Finding [204]: For the reasons set out in paragraphs 30 – 32 of its submissions dated 10 February 2020 the Muurlink Report should not be relied upon to make such a finding.

Finding [205]: See preceding paragraph.

Finding [206]: This is not a proposed finding. It is opinion evidence from one employee.

Finding [207]: For the reasons set out in paragraphs 30 – 32 of its submissions dated 10 February 2020, the Muurlink Report should not be relied upon to make such a finding.

Finding [208]: This is not a proposed finding. It is opinion evidence from one employee in some cases about her perceptions.

Finding [209]: ABI does not consider that there is sufficient evidence to make a finding as to the reasons of employees generally for working on-call. The evidence was limited to a very small number of employees. Further, the fact that two employees gave evidence that they "may" choose not to do something under a particular scenario is hardly compelling.

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[67] Statement of Deborah Lee Anderson at[9] and Statement of Emily Flett at [7]

[117] AFEI's responses to the findings proposed by the ASU as listed at [68] of the Background Paper.

[118] The HSU and UWU support the findings contended for by the ASU.

The Broken shift claims

General observations

*BP1 Q25. Question for all parties: Is **Attachment D** an accurate summary of the modern award provisions that allow employers to engage employees on 'broken' or 'split' shifts (and if not accurate, which findings are challenged and why)?*

[119] NDS accepts that Attachment D is an accurate summary.

[120] Ai Group submits that 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, Ai Group notes 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.[68]

(b) *Educational Services (Schools) General Staff Award 2010:* whilst a shift "can only be broken in two", this is in addition to any meal breaks.[69]

(c) *Cleaning Services Award 2010*: The "paid morning and afternoon tea breaks" referenced by the union apply only to "non-shift workers".[70]

(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:* Other than the requirement to pay overtime rates in certain circumstances, the award does not otherwise regulate broken shifts.

[68] Clause 21.7

[69] Clause 25.3(a)

[70] 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. 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 of 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:* Other than the requirement to pay an allowance, the award does not otherwise regulate broken shifts.

(h) *Mining Industry Award 2010*: 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.

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

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

[121] Ai Group submits that the analysis at Attachment D to the Background Paper demonstrates that the treatment of broken shifts varies significantly in different awards which is reflective of the different operational realities in those industries.

[122] ABI submits that Attachment D is an accurate summary of the modern award provisions that allow employers to engage employees on broken or split shifts, save for the following minor points:

(a) Clause 22.8 of the Aged Care Award now includes a subsection (f) which provides that each portion of the shift must meet the minimum engagement requirements.

(b) Children's Services Award – reference to ordinary hours clause should read 21.2.

(c) Mining Industry Award – Clause 14.3(c)(ii) for allowance.

(d) Animal Care and Veterinary Services Award 2010 – broken shift allowance is clause 16.2(b).

[123] The Union submits that Attachment D is an accurate summary of the provisions that refer to or regulate (including to prohibit, expressly or impliedly) employers engaging

employees on broken shifts. It is important to observe that not all of those Awards permit the working of broken shifts.

[124] The Unions do not accept as a matter of proper construction of Awards, that where broken shifts are expressly prohibited for a particular class of worker, they are necessarily permitted for another class of worker (for example, see the *Sugar Industry Award 2010)*. Whether or not an award permits the working of broken or split shifts will depend upon the overall construction and history of the award.

[125] Further, although the *Building and Construction General On-site Award 2010* refers (at clause 34.1(d) to "broken shifts", it is not clear this refers to "broken shifts" as understood in the present matter, as the total hours of work in a day not being worked continuously, but broken by more than meal or rest breaks. In context, that phrase in the *Building and Construction General On-site Award* appears to refer to shifts of less than 7.6 hours in length over the course of a week.

[126] AFEI agree that the list of 18 awards include provisions for broken or split shift.

BP1 Q26. Question for ABI: Given the view taken by the Full Bench in the Tranche 1 decision, does ABI press its contention that the unions are simply seeking to relitigate a matter which had previously been advanced and rejected?

[127] ABI accepts that the unions are free to reagitate a previously agitated matter that was considered during the transitional review process. ABI also accept that decisions made during the transitional review do not prevent the Commission from reconsidering the matter in these proceedings and reaching a different conclusion based on the evidence and submissions before it. The question, according to ABI, is whether the Commission should place weight on the transitional decision and, if so, how much weight should be given to it.

[128] ABI accepts that it is open to the Commission to place limited weight on the transitional review decision.

BP1 Q27. Question for other parties: Are the findings proposed by ABI challenged (and if so, which findings are challenged and why)?

[129] NDS does not challenge the findings proposed by ABI.

[130] Ai Group oppose 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.[71]

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

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.

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

1. AFEI does not agree that the SCHADS Award requires amendment[72] nor that the unions have substantiated a case for 'rectification'.[73] AFEI relies on its submissions of 23 July 2019 and 19 November in relation to the union evidence.

2. In response to the ABI submission that its clients do not oppose 'introduction of a requirement that broken shifts only be worked where there is mutual agreement between the employer and individual employee,'[74] AFEI oppose any such variation. Findings sought by employers and unions include that broken shifts are common/routine/regular/of very high incidence in home care and disability services.[75] A provision in the Award requiring mutual agreement with an individual in order for that person to work a standard arrangement in the industry is inappropriate.

3. In response to the ABI submission that its clients do not oppose varying the payment under Clause 25.6(b) to refer to the starting time or finishing time, whichever is greater[76], AFEI has opposed such a variation, and relies on its submissions of 23 July 2019.[77]

4. AFEI challenge the proposed finding that most broken shifts involve two portions of work and one break, or that it is only on occasion that it is necessary for broken shifts to involve more than one break.78 The balance of evidence does not support this finding, rather that the number of breaks in a broken shift vary.[79]

[132] In respect to the findings proposed by the ABI, the Joint Unions submit that it is important to observe that broken shifts, as conceived of in the context of other industries, such as in restaurants, hospitality and aged care, ordinarily involve only a single break of a defined minimum period. Such breaks ordinarily represent a genuine hiatus in the overall pattern of the work to be performed, for example, between meal service periods, and not simply the gaps between particular tasks which form a part of the work.

[133] The Unions submit the evidence in the present matter shows that for home care and disability support workers, shifts are "broken" between client engagements, and may be broken

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[72] [81] Background Paper

[73] [82] Background Paper

[74] [83] Background Paper

[75] See for example ABI at [85 - 2] of the Background Paper, AI Group at [86- 1] of the Background Paper, ASU at [106-1] of the Background Paper, UWU at [118-1] of the Background Paper

[76] [83] Background Paper

[77] At [116] – [120]

[78] [85 – 5] Background Paper

[79] In this respect, AFEI agree with the finding sought by the AI Group as extracted at [86 – 5] of the Background Paper

more than once during the course of the day. Accordingly, where "broken shifts" are discussed and debated, it is essential to understand what particular arrangements are envisaged.

[134] The Unions challenge the following ABI findings:

Proposed Finding [1] - Broken shifts are an essential feature of the home care and disability services sectors.

[135] While broken shifts are a common feature of the home care and disability services industry, the Unions dispute they are an *essential* method of organising work in the industry.

Proposed Finding [4] - It is very common for consumers in the home care and disability services sectors to request services of a short duration.

[136] The Unions urge caution regarding this finding and note that a service is not necessarily identical with an employee's shift.

Proposed Finding [5] - Most broken shifts involve two portions of work and one break. However, occasionally it is necessary for broken shifts to involve more than one break.

[137] The Unions dispute that the evidence shows that most broken shifts involve two portions of work and one break. Several employer witnesses accepted that it is desirable to organise work in that way, and gave evidence that they endeavoured to do so. However, the Award enables multiple breaks and the circumstances of the industry incentivise that practice, and the evidence shows numerous incidences of employers using multiple breaks. The Unions do not accept multiple breaks during the course of the day are either necessary or desirable. One striking feature of the evidence in the matter is the absence of detailed and reliable employer data showing the patterns of work of employees. Given that the breaking of shifts was a fundamental part of the union claims, in the absence of such evidence, the Commission could not be satisfied that current employer practice is consistent across the board with a fair minimum standard. The Unions rely on the Expert Report of Dr Stanford and his oral evidence at PN2260 to PN2278 regarding the organisation of work in the disability sector. The Unions also rely on Dr MacDonald: CB2916.5, 2916.9 – 2917.3; Thames: CB 2963 [13]; Quinn: CB 2990 [27] – [29], 2995ff; Quinn Supplementary: CB 3052, esp [10(e)&(f)] 3053[14] – 3055[29], 3057ff as to the practice.

Proposed Finding [6] - Consumers in rural and remote areas require services more than once per day for short periods of time.

[138] The Unions agree that some consumers in rural and remote areas may be provided with services more than once per day for short periods, however, the employers failed to adduce clear data as to the incidence and length of such attendances, the numbers of clients with such needs, nor the patterns of work employed as a consequence of this alleged trend.

Proposed Finding [8(a)] – Some employers provide a broken shift allowance.

[139] The Unions contend that where such allowance is paid, this is ordinarily limited to where the "break" is more than one hour. However, for other employees, "gaps" of a shorter period are not compensated.

[140] ABI references the witness statement of Hammond Care CEO Jeffrey Wright as support for this proposed finding. Hammond Care provide a broken shift allowance for breaks in a shift, but only where breaks are 'in excess of 60 minutes'.[80] The Unions say that the evidence of Mr Quinn was that he is only paid a split shift allowance where the break is longer than one hour, not including travel time. Otherwise, breaks in shifts are not paid. Mr Quinn refers to this time as 'dead time'.[81] Mr Quinn's evidence was that:

If the break is one hour, but including travel time, then the split shift allowance is not paid. For example, my roster on 12 July 2019 has a one hour break between my first and second clients. I would be paid the time it takes to travel between these clients, according to Google Maps, and the kilometre allowance, but no split shift allowance for that day.[82]

[141] Similarly, the Unions say evidence of Ms Thames was that:

Generally, breaks between clients longer than 10 minutes are called 'gaps' and are unpaid. Breaks an hour or longer are called broken shifts. We get an allowance of $10.74 for each broken shift.[83]

Proposed Finding [9] - The introduction of a 15% 'broken shift loading' will impose an additional cost on businesses. Such an allowance is not accounted for in the existing funding arrangements, including under the NDIS.

[142] The Unions note that any new conditions are not accounted for in current funding arrangements.

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

1. AFEI does not agree that the SCHADS Award requires amendment84 nor that the unions have substantiated a case for 'rectification'.85 AFEI relies on its submissions of 23 July 2019 and 19 November 2019 in relation to the union evidence.
2. In response to the ABI submission that its clients do not oppose 'introduction of a requirement that broken shifts only be worked where there is mutual agreement between the employer and individual employee,'86 AFEI oppose any such variation. Findings sought by employers and unions include that broken shifts are common/routine/regular/of very high incidence in home care and disability services.87 A provision in the Award requiring mutual agreement with an individual in order for that person to work a standard arrangement in the industry is inappropriate.

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[80] *HammondCare Residential Care and HammondCare At Home Enterprise Agreement* 2018, clause 13.4.1, 19, Ex. ABI1

[81] Quinn CB 3053 [15]

[82] Quinn CB 3053 [20]

[83] Thames CB 2963 [13]

[84] [81] Background Paper

[85] [82] Background Paper

[86] [83] Background Paper

[87] See for example ABI at [85 - 2] of the Background Paper, AI Group at [86- 1] of the Background Paper, ASU at [106-1] of the Background Paper, UWU at [118-1] of the Background Paper

3. In response to the ABI submission that its clients do not oppose varying the payment under Clause 25.6(b) to refer to the starting time or finishing time, whichever is greater[88], AFEI has opposed such a variation, and relies on its submissions of 23 July 2019.[89]
4. AFEI challenge the proposed finding that most broken shifts involve two portions of work and one break, or that it is only on occasion that it is necessary for broken shifts to involve more than one break.[90] The balance of evidence does not support this finding, rather that the number of breaks in a broken shift vary.[91]

BP1 Q28. Question for other parties: Are the findings proposed by Ai Group challenged (and if so, which findings are challenged and why)?

[144] NDS and ABI do not challenge the findings proposed by Ai Group.

[145] AFEI does not challenge the findings proposed by Ai Group as outlined at [86] of the Background Paper, with one exception. The AI Group seek a finding that broken shifts are commonly utilised by employers covered by the Award, however broken shifts may only be a feature of work for social and community employees when undertaking disability services work and home care employees. There are however the family day care scheme sector, and many other social and community services/sectors covered by the Award, which are not privy to the broken shifts provisions at all. This is evident by the definition of the Social and Community Services Sector in the Award.[92]

[146] The Unions challenge the following AIG findings:

Proposed Finding [6] - Client cancellations sometimes result in a broken shift where the employer is unable to provide the employee with other work during the cancelled shift.

[147] The Unions contend that the client cancellations do not apply to disability services. Consequently, a cancellation cannot cause a broken shift in the context of broken shifts.

Proposed Finding [10] - The period of time taken to travel to a client's place of residence can vary from one occasion to the next and be difficult to predict for reasons including traffic.

[148] The Unions dispute that the travelling time between clients' residences is difficult to predict. Employers are able to schedule and allocate workers to perform appointments across different locations, which task must necessarily involve some assessment of the travel time required between the locations. Where travel to and between particular locations is carried out regularly, the Commission would think employers would have a very good idea of those travel times.

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[88] [83] Background Paper

[89] At [116] – [120]

[90] [85 – 5] Background Paper

[91] In this respect, AFEI agree with the finding sought by the AI Group as extracted at [86 – 5] of the Background Paper

[92] Clause 3 of the Award

Proposed Finding [13] - During a break in a broken shift, employees often undertake non-work-related activities, including spending time at home.

[149] The Unions submit that employees sometimes undertake non-work-related activities, and may sometimes spend time at home. Although employees may make some use of the broken time between engagements for their own purposes, a significant proportion of the down time is either lost to the employee (by reason of having to undertake unpaid travel during that time, or being insufficient to engage in other meaningful activity), or of much less utility and value to the employee than time where the employee is not required to attend a further part of the shift later in the day.

Proposed Finding [14] - Some employers endeavour to prepare rosters in a way that maximises their employees' working time and / or minimises the time their employees spend travelling to and from their clients.

[150] The Unions note Dr Stanford's evidence that the incentive to allocate work in an efficient way that minimises unproductive time (travel and waiting) was an indirect incentive because the employee bears the cost of travel time and lost-time[93], and the evidence referred to above as to the working of broken shifts. While some employers may endeavour to prepare rosters in the manner described by Ai Group, (and the Unions note in this respect the Ai Group did not call a single witness to substantiate this proposition), it is evident that across the industry, there are a significant number of employees that are working, or have worked, patterns that do not minimise their unproductive time.[94]

BP1 Q29. Question for all other parties: Is NDS's characterisation of the evidence challenged (and if so, which apsects are challenged and why)?

[151] Ai Group, ABI and AFEI do not seek to challenge the NDS's characterisation of the evidence, as set out at paragraphs [88] – [92] of the Background Paper.

[152] The Unions note the concession by the NDS (at [87] of the Background Paper) of the legitimacy of the concern of employees for stability in their employment.

[153] The Unions challenge NDS's contention (at [92] of the Background Paper) that the use of broken shifts is driven by the needs of clients. The use of broken shifts reflects decisions by employers about how work is arranged, and as discussed at length by both Dr Stanford and Dr MacDonald, the Award may provide an ineffective barrier to employers shifting the cost of dead-time and travel onto employees. At the very least, many employers do not appear to regard the Award as preventing such practice.

[154] NDS submits that its position is driven by its support of the right of people with a disability to have choice and control over how their lives are lived and how supports are provided. The Unions submit that the Commission should be hesitant in treating NDS as being the voice of people with disability because it is an organisation which represents employers in the industry and the only organisation that represents people with a disability, People with A

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[93] Stanford XXN, PN2274

[94] Stanford CB 1453ff, pp 21-25

Disability Australia, has made a submission supporting the Union's claims and opposing the claims of employers.[95]

BP1 Q30. Question for other parties: Are the findings proposed by AFEI challenged (and if so, which findings are challenged and why)?

[155] ABI challenge finding 67 for the reasons set out at paragraph 19 of Part B of ABI's submission dated 10 February 2020.

Finding [67]: ABI accepts at a general level that "Existing arrangements for broken shifts in the Award are appropriate to the industry" it's clients consider that the existing arrangements could benefit from variation to make them *more* appropriate. In this context, it refers to the position outlined by its clients in its submission dated 12 July 2019.[96]

[156] NDS relies on its earlier submission[97] that there is a case for consideration of a variation of the broken shift provisions of this award in relation to the application of shift penalties and so does not fully agree with finding (4) as proposed by AFEI.

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

[158] The Unions challenge the following AFEI findings

> **Proposed Finding [1] - Employees covered by the Award provide services which are unique to this sector; services are dictated by client needs.**

[159] The Unions disagree with this proposed finding and contend that the hours of work of an employee are determined by the employer. Client needs shape the overall demand for the employer's services, which in turn influences the hours that may be required of the workforce overall, and of particular employees. The finding as advanced ignores the intermediate factors and steps that affect the hours of work of any particular employee. Additionally, the work performed by employers covered by the SCHADS Award is also performed by employees of local, state and federal governments who are covered by other industrial instruments and work under other arrangements.

> **Proposed Finding [2] - Employees in this sector typically work with the same clients on an ongoing basis.**

[160] The Unions accept that some employees covered by the SCHADS Award work with the same clients on an ongoing basis, however, the evidence does not go so far as to demonstrate that this is the invariable practice, or that in those cases the same worker provides all services to the one client.

> **Proposed Finding [3] – Each portion of work in a broken shift is typically less than three hours of length**

[161] The Unions submit that this proposed finding should be treated with caution. In many cases the portions of work in a broken shift are much less than three hours.

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[95] Submission of People with a Disability Australia, 11 September 2019

[96] See [5.11]

[97] NDS submission in reply of 16 July 2019 at [28-49]

Proposed Finding [4] - Existing arrangements for broken shifts in the Award are appropriate to the industry.

[162] The Unions submit that this finding is generalised, imprecise and without a disclosed evidentiary basis.

Proposed Finding [5] - The variation sought by the HSU would detrimentally impact on the provision of services in this sector, ultimately service users and could result in an employee being liable to pay an employee for hours during which no productive work is being performed.

[163] The Unions submit that this finding is generalised, imprecise, without a disclosed evidentiary basis. It is contrary to the expert evidence before the Commission which shows the opposite trend; that is, employees not being remunerated for periods during which they are travelling or in a state of readiness to perform work for their employer.

The HSU Broken shift claim

BP1 Q31. Question for the HSU: The HSU is asked to clearly set out the findings it seeks in respect of broken shifts and the evidence in support of those findings.

[164] The HSU contends that the Commission should make the following findings in respect of the working of broken shifts:

1. The individualisation and marketisation of social care in the United Kingdom resulted in the adoption of arrangements where workers are paid only for contact time and not for travel time, and short periods of paid time are interspersed with fragmented, variable and unpredictable periods of non-work time. As a consequence social care workers there at greater risk than other workers of not receiving the National Minimum Wage[98];

2. Both the NDIS and the consumer directed care model in in aged care in the home involve the same individualisation and marketisation of those services, meaning that there are similar incentives to adopt like arrangements;

3. The evidence shows the agencies providing disability services in Australia attempt to shift the uncertainty and risk associated with fluctuations in demand and revenue, associated with the changes to funding arrangements, onto their employees, through the imposition of increasingly insecure and unstable employment relationships, rostering practices, and compensation. A clear consequence of this structural shift in the nature of work in the sector has been a marked increase in precarious work practices in various forms, including: casualisation, increased part-time employment, irregular and discontinuous shift assignments, requirements that disability workers work in multiple locations (often in the course of a single day, and often working inside clients' private residences), and the expectation that disability workers provide private or informal transportation services in the course of their work (including transporting clients, in some cases without compensation)[99].

[98] MacDonald CB2911-2912

[99] Stanford CB1447 [8]

4. The scheduling of discontinuous or split shifts is an increasingly common practice in the disability sector. That practice undermines the quality and sustainability of work in the sector as workers are expected to divide their working days between multiple even-shorter shifts. This has the result of reducing their effective hourly wage over the course of the working day[100], with workers accruing paid time significantly less than the overall hours devoted to the performance the work, travelling to and from clients, waiting between client appointments and being in a state of readiness to perform the work[101].

5. Disability support workers may work between one and 5 separate "shifts" in the course of any day with "shifts" as short as 30 minutes long[102], or even as brief as 15 minutes in some cases[103].

6. Employers in home care have the same capacity and incentive to arrange work in that manner as employers in disability services.

7. The SCHCDS Award facilitates and incentivises the breaking of the shifts of social and community services employees because it:

   (i.) expressly contemplates, and thereby, permits disability services workers and home care workers to be required to work broken shifts[104];

   (ii.) expressly contemplates and thereby permits that the shifts of such workers may be broken more than once and imposes no limit on the number of such breaks during the course of any shift[105];

   (iii.) prescribes no minimum period of total hours of work for a shift to be broken, or any minimum period of work before a shift may be broken, or broken again[106];

   (iv.) contains no minimum engagement for any shift worked by a part-time employee, or casual disability services worker[107];

   (v.) contains no penalty, loading or allowance associated with the break of any shift.

8. The capacity of employers to require employees to work broken shifts facilitates the fragmentation and disruption of normal work schedules and complicates the challenges facing disability workers in maintaining healthy work-life balance[108];

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[100] Stanford, CB1449 [11], 1456[29]

[101] Quinn CB2991 [43]; Fleming CB 4482 [23]; Sinclair CB 4603 [13] – [16]

[102] MacDonald CB 2916; see also Quinn CB 3054

[103] Fleming CB 4482 [21]

[104] Clause 25.6

[105] Clause 25.6(a)

[106] Clause 25.6

[107] The minima appear at clause 10.4(c)

[108] Stanford CB 1465 [54(c)]

9. Time between portions of broken shifts typically occurs at sub-optimal locations and times of the day, preventing workers from experiencing full "value" for their leisure time[109]. For some workers, breaks between shifts are spent waiting in their cars for the next appointment[110], or driving home only to have to turn around and drive back out to a later appointment[111]. Although employees may make some use of the break between engagements for their own purposes, a significant proportion of the down time is either lost to the employee due to the need to travel, or of less utility and value to the employee than time.

BP1 Q32. Question for the HSU: In accordance with its supplementary reply submissions of 3 October 2019 should the words be deleted from its draft variation determination? As to the HSU's submission at [41] of its supplementary reply submission of 3 October 2019, does that mean that full time and casual employees are to be treated differently to part time employees?

[165] The HSU submits it is not clear which words are the subject of the first sentence of this question. Assuming they are the words "a casual or part-time employee" in clause 25.6(b) of the HSU's Draft Determination at CB 2836 [3], the answer is "Yes". If that assumption is incorrect, the HSU would wish to address this issue in oral submissions.

BP1 Q33. Question for other parties: What is said in response to the NDS proposition that consideration be given to a minimum engagement of 2 hours for part time employees?

[166] In accordance with its submissions of 12 July 2019, ABI is not opposed to the introduction of minimum engagements for part-time employees, provided that:

a. They are consistent with the existing minimum engagement periods for casual employees; and

b. Attendances for the purpose of staff meetings and training/professional development are subject to a minimum engagement of one hour.[112]

[167] Given that casual employees undertaking disability services work currently have a minimum engagement period of two hours, ABI does not oppose the NDS proposition that consideration be given to a minimum engagement of two hours for part-time disability services employees.

[168] 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

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[109] Stanford CB 1466 [54(c)]; Thames CB 2963 [15]

[110] Waddell CB 2957 [11] – [12]; Thames CB 2963 [15]

[111] Waddell CB 2957 [11] – [12]; Quinn CB 3053ff [20] – [29]

[112] See Court Book at p.91

> 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.[113]

[169] AI Group notes 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) The NDS position relates only to "work performed for the purposes of delivering client services" it takes this to mean that NDS 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;[114] that is, the two hour minimum engagement could be 'broken' in accordance with the broken shift provisions.

[170] Ai Group submits that, 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.[115]

[171] It says it is also relevant that shift durations are dictated by client needs and employers do not have any capacity under the NDIS to recover additional funding in respect of time that is not spent providing a service to a client (subject to specific provisions concerning travel between clients). Ai Group says it would be unfair to visit the resulting serious cost implications on employers.

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[113] Page 4390

[114] Page 4392 at paragraphs 43 – 44

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

[172] 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 it has previously outlined in opposition to the union's claim.[116] This is particularly so if the two hour minimum engagement period applies to each portion of a broken shift.

[173] Nonetheless, Ai Group submits 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.

[174] AFEI oppose the NDS proposition that consideration be given to a minimum engagement of 2 hours for part time employees,:

1. The evidence does not support a work-based/industry need for minimum engagement period of 2 hours for part time employees. Rather, employees' evidence is that a scheduled service (i.e. time taken at a client's residence) takes less than 2 hours in length. For example, Ms Sinclair stated that she would be at a client's residence for one hour and this involved showering a client.[117] Ms Waddell states that "a lot of the shifts we get are just half an hour".[118]

2. There is therefore the prospect of the minimum engagement period requiring payment to employees of an hourly rate of pay where no active care services are being provided to clients.

3. Payment for hours not worked is not efficient or productive. AFEI relies on its submissions of 23 July 2019 in response to union claims for a minimum engagement period for part-time employees.[119]

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

[175] The HSU contends that a 3 hour minimum engagement represents a fair and relevant minimum standard for workers under the award. Given the current standard of a minimum 3 hour engagement that applies to casual SACS workers (other than disability services employees), by virtue of clause 10.4(c)(i), the Unions see little basis for a provision any less than that standard for part-time workers.

[176] If an unlimited capacity to work broken shifts remains in the Award (with a concomitant approach of treating travel to and from each part of the engagement as travel to be undertaken

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[116] Page 707 – 724

[117] PN739

[118] Statement of Waddell at [22]

[119] Including at [70]-[78]

in the employee's own time) then a 2 hour minimum engagement is unlikely to prevent the risk foreshadowed in the *Part-time and Casuals Case*, that work arrangements will be exploitative, being realised. The Commission should only contemplate a 2 hour minimum engagement in the event that minimum applies to any period of engagement within a broken shift

BP1 Q34. Question for Business SA: What is the evidentiary basis for the submission set out above?

[177] No submissions were filed by Business SA in response to this question.

The ASU Broken shift claim

BP1 Q35. Question for all other parties: Are there findings proposed by the ASU challenged (and if so, why)?

[178] ABI challenge or make comment on the findings [211] and [212] on the bases set out at paragraphs 173 – 174 at Part B of its submission dated 10 February 2020.

[179] *Finding [211]:* ABI disagrees with the very generic submission that the Award in its current form does not promote the efficient and productive performance of work.

[180] *Finding [212]:* ABI's clients do not accept that working broken shifts involves working "long" or "irregular" hours, although it is possible that it may. It's clients do not know and cannot agree or disagree as to the asserted impact on employees, save for noting that some of the employee witnesses expressed opinion evidence in relation to their experiences. ABI does not consider that there is sufficient evidence to make this finding.

[181] NDS challenges the proposed finding (2) that, in relation to the broken shift provision, the award does not promote efficient and productive performance of work ignores the evidence in these proceedings about why broken shift is used. In particular, the evidence shows that broken shift is used precisely because it is an arrangement that helps to meet the needs of clients in an efficient and productive manner[120]. The absence of a broken shift provisions would adversely affect efficiency and productivity.

[182] Ai Group opposes 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

[120] NDS Submission 19 November 2019 at [33]-[37]

	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.

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

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

Disability sector employers routinely break the shifts of disability services employees

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

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

This finding is challenged. Evidence demonstrates that, on the contrary, employees tend to work with the same clients and as such, there are benefits to those clients that flow from consistent client care (such as the ability to build a rapport with the clients) that allow employees to work more effectively and efficiently in their role.[121] Further, the ASU appear to rely on in support of this finding that 'continuous patterns of work are consistent with the efficient and productive performance of work' – however such a concept is irrelevant for an industry where the evidence has shown that for employers to provide effective service to meet individualised client requirements, efficient and productive work arrangements involve utilisation of broken shifts.[122]

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

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

- undertake activities not related to work[123]
- go home[124]
- go to the shops[125]

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

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[121] PN469-PN473; PN518-PN524

[122] AFEI submissions 19 November 2019

[123] PN461; PN525

[124] PN464; PN527

[125] PN529

Additionally, in some instances, employee availability and personal circumstances could be taken into account when broken shifts are rostered.[126]

[185] The other Unions do not challenge the findings proposed by the ASU.

BP1 Q36. Question for the ASU: Does the ASU agree with ABI's characterisation of its claim? (and if it disagrees, why)?

[186] The ASU disagrees with ABI's characterisation of the claim. Contrary to the ABI submission, the loading is paid on hours worked during a broken shift.

BP1 Q37. Question for the ASU: Does the ASU accept that the casual loading compensates casual employees for working irregular hours? If so, why should casual employees receive the proposed 15% loading?

[187] The ASU submits that the 125 percent casual loading does not include a component for irregular hours of work. Clause 10.4(e) of the Award provides that the casual loading is paid instead of the '*leave entitlements accrued by the full-time employees*'. It does not include any component in lieu of overtime, penalty rates, award payments or other matters. The ASU says its position is consistent with the reasoning of the Full Bench in the *September Decision*.[127]

[188] Moreover, it says the case history of the 125 per cent casual loading suggests that the current loading does not include compensation for irregular hours of work. The 125 percent loading was set across all modern awards (barring the business equipment award) by the AIRC during the award modernisation process. Like many of the decisions made during that time, the AIRC did not disclose its reasoning. When the issue of the loading was pressed by employer parties, the AIRC simply stated, '*we consider that the reasoning in that case Re Metals, Engineering and Associated Industries Award, 1998 – Part 1* [('Metals Casual Decision')] *is generally sound and that the 125 per cent loading is sufficiently common to qualify as a minimum standard*'.[128]

[189] In the *Metals Casual Decision*, the Commission set the 125 percent casual loading. The Commission compared the entitlements of permanent full-time employee. The loading for paid annual leave, leave loading, sick leave, long service leave, and termination benefits amount to a loading of roughly 120 percent. The Commission also found that there should be a component of the loading to compensate for '*itinerancy and lost time*'. They calculated the difference between the average hours of a full-time employee (38 hours) with those of a casual employee (36.1). This resulted in a component of 5 percent to compensate for.[129] However, the ASU submits this component only compensated for the shorter working hours of casual employees in the metals industry. It did not compensate for the disutility associated with working irregular hours, such as shift penalties, weekend rates, public holiday rates or overtime. In any case, the ASU position is that the casual loading in the SCHADS Award only compensates of leave entitlements, it does not compensate for itinerancy or lost time.

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[126] PN2623

[127] [2019] FWCFB 6067, [152]-[158]

[128] *Award Modernisation Decision* [2008] AIRCFB 1000 at [47]-[49]

[129] Print T4991, [184]-[192]

The UWU Broken shift claim

BP1 Q38. Question for other parties: Are the findings proposed by the UWU challenged (and if so, which findings are challenged and why)?

[190] ABI challenge or make comment on the findings 139, 140, 141, 142, 143, 144, 145 and 148 for the reasons set out at paragraphs 98 – 114 of Part B of its submission dated 10 February 2020 as follows:

Finding [139]: We disagree that "Broken shifts are used as a device by some employers to avoid the payment of travel time". This proposed finding requires knowledge of the intention of employers or evidence of their *purpose* for using broken shifts (e.g. they use broken shifts in order to avoid paying travel time). There is no such evidence before the Commission to support such a finding.

The evidence relied upon by the UWU to support this finding[130] does not support any such finding. Rather, that evidence simply evidences occasions where employers have lawfully utilised broken shifts in accordance with the terms of the Award.

Finding [140]: It is not clear what is meant by "multiple broken shifts". For present purposes, however, we have assumed that this is a reference to "a broken shift with multiple breaks". Our clients agree in a hypothetical sense that broken shifts with multiple breaks "reduce the earning capacity" of employees, in the sense that the allocation of work may involve periods of non-work time for which, in certain circumstances, the employee is not realistically capable of converting into income-earning time (for example, through a second job). However, there will be other occasions where an employee is able to, and does, undertake other paid work during the non-work time portion of a broken shift.

Lastly, it is unclear upon what basis the UWU assert that the worker "has to be available for lengthy periods of time".

Finding [141]: Our clients do not know and cannot agree or disagree with the generalised proposition that "The loss of potential earnings contributes to financial distress". We note that the evidence relied upon to support this proposition consists of evidence from one employee witness. That generalised evidence does not provide a sufficient basis to make this finding.

Finding [142]: Our clients disagree with the generic characterisation of all non-work time between portions of work in a broken shift as time where "the worker is engaged in the work of the employer". We also disagree with the characterisation of all such time as "not 'free time'".

That said, our clients accept that there may be a disutility associated with working broken shifts for some employees due to the way in which the work might be structured. Equally, in some cases the structuring of broken shifts may be convenient for certain employees.

[130] See [33] of the UWU submission of 18 November 2019 and the footnote therein

The disutility associated with broken shifts is addressed by the Award providing penalty rates and shift allowances in accordance with clause 29 of the Award.[131]

Finding [143]: We agree generally with the description of how the Award terms currently operate, save that the characterisation of the time variously as "dead time" or "idle time" is colourful and in many cases not an accurate description of the time. It is also not clear what is meant by employees bearing the "cost of the "idle time". We therefore disagree with the proposed factual finding.

Finding [144]: Our clients do not consider that there is sufficient probative evidence to make a finding that "Multiple broken shifts are a disincentive for employees to stay in the sector",:

1. Firstly, it is unclear what is meant by "multiple broken shifts".[132]
2. While we accept the broad hypothetical proposition that broken shifts *may* disincentivise certain employees from staying in the sector, we anticipate that individual employees will be incentivised and disincentivised in a variety of ways, depending on their particular circumstances. There was evidence from one employee to the effect that one of the reasons for her leaving her employment with LiveBetter was broken shifts.[133] However, evidence from one employee does not provide a sufficient basis to make any generalised or widespread finding about features of the industry generally.
3. ABI notes that the UWU have relied on a report from Dr Fiona MacDonald in support of this proposed finding.[134] However, we cannot identify any specific passage from that report that supports the contention that "multiple broken shifts are a disincentive for employees to stay in the sector". Further, to the extent that such an assertion is made by Dr MacDonald, we note the following deficiencies with the qualitative data:

    a) the sample size is confined to 10 employees;

    b) the 10 employees were all employed in the disability services sector;

    c) the qualitative research is from 2016 and is limited to one geographical area;

    d) any such conclusion was based on analysis of working diaries of only 30 days (3 diarised days for each of the 10 employees);

[131] See clause 25.6(b) of the Award

[132] See our comment at 0

[133] See Further Statement of Trish Stewart at [5]

[134] The UWU cite page 87 of the Report appearing at annexure FM-2 to the MacDonald statement, appearing at Court Book p.2916

e) Dr MacDonald acknowledges that "The 10 DSWs cannot be seen as representative of all DSWs working under the NDIS";[135] and

f) Dr MacDonald acknowledges that the data "is indicative only and our findings warrant further investigation through a larger study".[136]

Finding [145]: This is in the nature of a submission and is not a factual finding. That said, we agree that the evidence of some employers was that they attempt, wherever practicable, to bundle a series of discrete client engagements together in order to build a shift of continuous work for employees. We further accept that such practices promote the efficient and productive performance of work. However, we do not agree that "continuous patterns of work" will in all cases be consistent with "the efficient and productive performance of work". Nor do our clients accept that continuous patterns of work are an "appropriate" alternative to broken shifts. The reality is that employers:

a) do not have full control over when and where client services take place; and

b) do not always have sufficient volume of work to build a continuous pattern of work.

In certain cases, the use of broken shifts promotes the efficient and productive performance of work.

Finding [148]: We accept that service providers have the ability to set out what services they will provide, including the times at which they will provide services, and the length of such services. However, the reality is that many service providers are not-for-profit, mission-driven organisations that are committed to delivering services that meet the needs of vulnerable members of the community. We also disagree with the suggestion that the reality of client demands and the associated challenges to the planning of consistent service delivery is exaggerated. At best, the evidence of employers was clarified in cross-examination that they were referring to their organisational beliefs around their moral obligations rather than any legal obligation to meet the demands of customers.

[191] NDS challenges the following findings proposed by the UWU.

a) The proposed findings at (8) and (9) regarding employer preferences for continuous shifts mis-characterises the evidence. The employer evidence is actually about trying to strike an optimal balance around a number of factors including efficient use of time, employee preferences and client preferences. In some circumstances a continuous shift will be preferable, but where there are peaks and troughs in client demand a broken shift may be more efficient, subject to balancing operational requirements and employee needs.

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[135] Court Book p. 2914

[136] Court Book p. 2915

b) The proposed findings at (11) and (12) understate the shift in bargaining power towards clients in the NDIS system. It is true that providers have a capacity to negotiate agreed arrangements, but the overriding public policy purpose of the NDIS is to place client choice and control at the centre of decision making. The capacity of providers to dictate to clients is very much weakened, for deliberate public policy reasons.

[192] Ai Group opposes the 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.[137]
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.[138]
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.
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

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

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

	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[139], 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[140], as a result of which it does not rely on the provision of disability services funded by the NDIS for its sustainability. *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".

[193] AFEI's responses to the findings proposed by the UWU are set out below:

[139] Mr Scott Harvey

[140] Page 163 at paragraph [13]

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

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

Broken shifts are used as a device by some employers to avoid the payment of travel time, as such employers claim that time spent travelling by the employee in between broken shifts is travel undertaken after a 'break' and unpaid

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

Ms Mason states[141]:

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

Multiple broken shifts reduce the earning capacity of low paid workers, as the worker has to be available for lengthy periods of time to receive a few hours of paid work. This is time in which the employees could undertake other paid work.

This finding is challenged:

1. Firstly, where possible, endeavours are made by employers to roster employees on longer shifts (or "runs").[142] Mr Harvey states "this…creates a 6-8 hour working day for support workers making it an attractive engagement for staff".[143]
2. Ms Sinclair is a part-time home care worker. She sometimes undertakes broken shifts.[144] Ms Sinclair gave evidence that she holds a second job working for a chemist casually 'some afternoons a week'[145], hours total around '10 to 11 hours a week'.[146] Given that Ms Sinclair works for her employer, Wesley Mission, Mondays thorough to Fridays, Ms Sinclair's evidence demonstrates that working broken shifts does not

[141] Statement of Mason at [71]

[142] PN2070; Statement of Harvey at [57-58]; Statement of Mason at [60-61]; Statement of Ryan at [65]

[143] Statement of Harvey at [57]

[144] Statement of Sinclair at [12]

[145] PN711

[146] PN713

prevent employees undertaking other paid work. Ms Stewart confirmed that she also obtained a second job with Edmen Group as a disability support worker whilst working for Live Better.[147]

The loss of potential earnings contributes to financial distress,

The UWU rely on the statement of Trish Stewart in support of this finding sought. Ms Stewart was employed by Excel Care in April 2014. Excel Care was subsequently taken over by Live Better in August 2018.[148] In this statement, Ms Stewart states that she is employed as a permanent part-time support worker at level 2 of the Award.[149] Ms Stewart confirms that her contract guarantees a minimum of 10 hours per week and attaches, at annexure A, a copy of her terms and conditions of employment. Pursuant to clause 10.3(c) of the award, the employee's hours of work had been agreed. This agreement is reflected in the employee's signed contract with Live Better. Notwithstanding, Ms Stewart confirms that some weeks Live Better would roster her on for 30 hours per week.[150] AFEI submits that there is insufficient evidence to support the substantive variation to clause 25.6 of the award based on one witness evidence alone.

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

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

- undertake activities not related to work[151]
- go home[152]
- go to the shops[153]

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

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

Employees covered by the award provide services which are unique to this sector; services are dictated by client needs and AFEI refer to paragraph B-2 of its submissions

[147] Further Statement of Ms Stewart at [7]

[148] Statement of Stewart at [6]

[149] Statement of Stewart at [7]

[150] Statement of Stewart at [9]

[151] PN461; PN525

[152] PN464; PN527

[153] PN529

dated 19 November 2019. As such, broken shifts in the Award are appropriate to the industry and AFEI refer to paragraph B-5 of its submissions dated 19 November 2019.

Evidence also demonstrate that, on the contrary, employees tend to work with the same clients and as such, there are benefits to the client that flow from consistent client care (such as the ability to build a rapport with the clients) that allow employees to work more effectively and efficiently in their role.[154] To this end, AFEI refer to paragraph B-3 of its submissions dated 19 November 2019. The evidence relied on by UWU to support its proposed finding instead demonstrates that employers will attempt to maximise work time for its employees where this is able to correspond with daily client requirements.[155]

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

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

The propositions that work in this sector can be organised to fit a pattern of continuous work, or if not, into a pattern of a broken shift with only one break; and that service providers have the ability to set out what services they will provide, including the times at which they will provide services, and the length of such services.

In relation to this proposition, the UWU appear to seek findings that 'care services such as cleaning, medication checks and personal care can be provided in a planned manner.' UWU relies on one witness statement evidence of Ms Coad dated 16 September 2019. This finding is disputed. There is significant evidence from employers in this industry to demonstrate that work in this sector is based on client demands and that rostering takes place around preferred times of clients,[156] which would make 'planned services' unworkable. For example, Mr Wright states "as clients have choice and control over their visit times, visits typically follow peak patterns. 55 per cent of visits take place between 7:00am and 12:00pm and the other 45 per cent span a nine hour period to 9:00pm."[157] Ms Wang states "Under NDIS, one of the elements regarding a provider's code of conduct when delivering services to client states "To support people with disability to make decisions", which means people with a disability have the right to make choices and should always be assumed to have the capacity to make these choices, as this is central to their individual rights to freedom of expression and self-determination. Depending on the service nature, the Company will need to make arrangements as per the client's request."[158]

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[154] PN469-PN473; PN518-PN524

[155] For example, see Statement of Mason at [71]

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

[157] Statement of Wright at [18]

[158] Statement of Wang at [53]

The evidence also show that the consequence of not being able to provide services in the requested time period could be detrimental to organisations including loss of business.[159] Given the focus on client flexibility and client choice, services provided in a "planned manner" would be inconsistent with the nature of services provided in this industry.

Further, evidence demonstrate that a continuous pattern of work in this sector would not be sustainable on the basis that the nature of this industry, based on complex client based changes, means that employee rosters are susceptible to change[160] and thus does not support UWU's finding that "work in this sector can be organised to fit a pattern of continuous work" or "a pattern of a broken shift with only one break".

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

This proposition appears to infer that clients should be prepared to limit the services they receive, and/or how and when they receive the services. This proposition reflects an outdated approach to client care, being inconsistent with the National Disability and Insurance Scheme Act 2013,[161] and the principle of consumer-directed care.[162] AFEI also refers to its submissions dated 19 November 2019 at paragraph D.

[194] The Unions do not challenge the findings proposed by the UWU, and support the UWU's contentions.

The Clothing and Equipment claims

BP1 Q39. Question for all other parties: Do you challenge the findings sought by the HSU (and if so, which findings are challenged and why)?

[195] ABI challenge the finding [116] disagrees that care work performed by employees in the industry is "likely to cause damage to their clothing" and says the limited evidence in the proceedings suggested that employers provide protective clothing and other products for use when engaging in work that may expose them to a risk of having their clothes damaged.

[196] NDS accepts the finding proposed by the HSU to the extent there is likely to be some truth to the proposition that care work could cause damage to clothing, but challenges the significance of the proposed finding in the context of the existing award provisions relating to uniforms and laundry. It says the evidence is limited to a small number of witnesses whose evidence is actually mixed. The witness evidence is said to be well summarised by ABI and set out at [142] and [143] of the background paper, and NDS submits it is not sufficient to support a need to vary the award.

[197] 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 opposes one element of

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

[160] Statement of Ryan at [62]

[161] s3(1)(e)

[162] Statement of Matthewson at [48], and Statement of Coad [16]

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*[163] (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[164] 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.

[198] AFEI's response to the 'grounds advanced by the HSU in support of its claims' as outlined at [134] of the Background Paper is set out below.

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

> The evidence adduced during the proceedings does not support such a finding. For example, Mr Elrick, although not a support worker himself, observes that uniforms are common in the home care sector[165], Ms Sinclair, a home care worker, is provided with shirts to wear by her employer[166] and also paid a uniform allowance, [167] and Mr Sheehy, who is not a support worker, concedes that some employers in the home care sector provide uniforms whilst others do not.[168]

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

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

[164] Page 2943 at paragraphs [15] – [16]

[165] Statement of Elrick at [39]

[166] Statement of Sinclair at [18]

[167] PN628

[168] Statement of Sheehy at [14]

> AFEI observe that the available witness evidence from employees actually working in this sector is the evidence of Ms Waddell and Ms Wilcock, who both work for the same employer. This evidence does not support the variation proposed by the HSU, as both Ms Waddell and Ms Wilcock confirm that they are provided with protective clothing by their employer.[169]

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

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

[199] The ASU and UWU support the HSU findings. The Unions submit that whilst many employees are required to wear their own clothes to work, and in disability services there is a trend to require employees to wear casual clothes, there remains a proportion of employees, particularly in home care, required to wear uniforms to work. The terms of the Award should provide appropriately for each circumstance.

BP1 Q40. Question for all other parties: Is ABI's characterisation of the evidence in respect of [the HSU's] claim, and the findings sought by ABI in respect of that evidence, challenged by any other party (and if so, which characterisation of the evidence or findings are challenged and why)?

[200] NDS and AI Group do not challenge ABI's characterisation of the evidence or the findings sought by ABI in respect of the evidence.

[201] The Unions do not agree with ABI's submission in paragraph [139] that under the current SCHCDS Award provisions, an employee is entitled to receive a uniform allowance even if they are not required to wear a uniform to work, and that '[t]his uniform allowance can be used to purchase clothes to wear to work, and, if those clothes become damaged in the course of their employment, to replace them'. The Unions assert it is seemingly clear from clause 20.2(b) of the Award that the uniform allowance is only applicable to employees who are required to wear uniforms.

[202] The Unions do not agree with ABI's characterisation of the William Elrick's evidence in paragraph [143] (a) and (b). Mr Elrick's evidence was not 'hypothetical' but based on his seven years' experience in disability support and social and community services roles set out in his witness statement, as well as his experience as a union organiser in the SACS sector. [170]

[203] The Unions do not agree with ABI's characterisation of the evidence of Ms Wilcock and Ms Waddell in paragraph [143] - [146].

[204] In paragraph [145] ABI points to the fact that some protective clothing is available to employees at Hammond Care. However at paragraph [34] of her statement, Ms Waddell's states:

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[169] Statement of Wilcock at [90]; Statement of Waddell at [34]

[170] Statement of William Elrick, [1]-[9], CB2933 - 2944

Hammond Care does provide single use aprons and goggles that we can use, for example when dealing with bodily fluids. These are kept at head office and we'd need to drive to head office before our shift to pick them up if we are rostered to them. I don't do this because the head office is usually in the opposite direction of my clients, and it doesn't work out economically to make that trip.[171]

[205] Additionally, in cross-examination, Jeffrey Wright, the CEO of Hammond Care, confirmed that Hammond Care home care employees were required to travel from home directly to their first client, and not to report into the Hammond Care's premises first.

And just in terms of the mechanics of doing the job, is it the case that home care workers are required to report in to HammondCare's premises every day, and then they move out to do their jobs from there?---No. That wouldn't be practical.

They are required to go directly to the client's home?---First client. [172]

[206] The Union submits that ABI's characterisation of the evidence is, therefore, is inaccurate. In the case of Hammond Care employees, such personal protective equipment is not practically available to employees, as employees have to pick these up in their own time, and cover the costs of travel themselves, if they wish to use such equipment.

BP1 Q41. Questions for all other parties: Is the finding proposed by Ai Group challenged (and if so, which evidence or findings are challenged and why)?

[207] NDS and ABI do not challenge the finding proposed by Ai Group.

[208] The Unions refer to the response to Q40 and reiterate that such protective clothing is not practically available to employees at Hammond Care, as they are required to travel directly to their first client, and not to the office where such equipment is kept.

BP1 Q42. Question for all other parties: Is there merit in inserting a clause in similar terms to the Manufacturing Award (with appropriate amendment, e.g. to remove the reference to 'molten metal') into the SCHADS Award and if so, why?

[209] ABI does not consider that a sufficient evidentiary case has been advanced that would justify the insertion of a clause of this type. The Manufacturing Award regulates very different industries and occupations to the SCHCDS Award, and so in that sense it is not an appropriate 'benchmark' in relation to an issue such as damage to clothing, etc.

[210] Further, ABI submits the clause in the Manufacturing Award also has quite a confined operation, in that it only applies where prescribed items are "damaged or destroyed by fire or molten metal or through the use of corrosive substances". This means that, by way of example, an employer would not be liable to compensate an employee for damaged spectacles where they drop them on a concrete floor. However, if the clause is migrated to the SCHCDS Award, it is not clear what industry-specific limitation would be adopted. For that reason, the clients of ABI are concerned that the adoption of this clause may drastically broaden the operation of the clause compared to how it currently operates under the Manufacturing Award.

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[171] Statement of Heather Waddell, [34], CB 2960

[172] Transcript 17 October 2019, PN2580-PN2581

[211] ABI submits there are also particular peculiarities to the clause in question. For example, it is unclear how subclauses (i) and (ii) interrelate and operate, given that sub-clause (i) appears to be quite broad and so would capture most circumstances that might arise under sub-clause (ii).

[212] As a general proposition, ABI does not consider that the Manufacturing Award clause is an appropriate clause to borrow from.

[213] NDS submits that the existing award provision regarding uniforms and laundry is sufficient. If a uniform is provided the employer is already required to replace damaged clothing. If the employee is required to provide a uniform, an allowance is paid to compensate for the cost and for laundry if needed. However, if the award were to be varied to address the HSU claim in relation to clothing other than uniforms, the proposed clause could be a reasonable starting point for drafting, subject to addressing concerns such as those raised by Ai Group[173] and AFEI[174]. Those concerns relate to identifying what the value of the clothing is, what extent of damage is necessary to require replacement, and confirming that the damage is work related.

[214] 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.

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

[216] The Unions would not oppose a clause similar to that in the Manufacturing Award being inserted into the SCHCDS Award, subject to this qualification: the clause establishes liability in (d)(ii) where the damage is suffered as a consequence of *negligence* of the employer. In the Unions' submission, negligence should not be the touchstone for reimbursement for damaged clothing or equipment. The fact that such loss is suffered in the course of the employment should be sufficient to ground an entitlement to reimbursement.

BP1 Q43. Question for all other parties: Are the findings proposed by the UWU challenged (and if so, which findings are challenged and why)?

[217] ABI challenge in part findings [161] and [162] for the following reasons:

> *Finding [161]:* Our clients agree that it is hypothetically possible that "Employees may not be provided with an adequate number of uniform items". However, such conduct would amount to a breach of the existing Award. There is also insufficient evidence to make good the proposition that employees are regularly not provided with an adequate number of uniforms. By way of example, the evidence suggested that employees would typically ask for additional uniforms and that employers agree to such requests.[175]

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[173] Ai Group Submission 13 July 2019 at [527] and summarised in the Background Paper at [148]

[174] AFEI Submission at [149]-[152] and summarised in the Background Paper at [156]

[175] Statement of Belinda Sinclair at [19]-[20]

Finding [162]: It is hypothetically accepted that where an employee is not provided with an adequate number of uniforms, the employee *may* have to wash their uniforms multiple times per week. However, again, the evidence suggested that employees would typically ask for additional uniforms and that employers agree to such requests.[176]

[218] NDS challenges the proposed finding that employees may not be provided with an adequate number of uniforms because the evidence is limited to two witnesses and one of those witnesses acknowledged that she had five shirts provided to cover a 5 day working week[177].

[219] Ai Group opposes 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".

[220] AFEI submits that the union's proposed findings appear to rely on the sole statement of Ms Sinclair as evidence for their findings. The evidence of a single individual, is not a sufficient basis upon which the Full Bench should be satisfied that a change of the Award is necessary. Ms Sinclair's evidence, moreover, appears to state that her employer provides her with what she considers an "adequate number of uniforms". Ms Sinclair is also paid a uniform and laundry allowance.[178]

[221] The Unions do not challenge the findings proposed by the UWU.

BP1 Q44. Question for all other parties: Is ABI's characterisation of the evidence in respect of this claim, and the findings sought by ABI in respect of that evidence, challenged by any other party party (and if so, which characterisation of the evidence or findings is challenged and why)?

[222] NDS and AI Group do not challenge ABI's characterisation of the evidence in respect of this claim, and the findings sought by ABI in respect of that evidence.

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

[224] The Unions' response to ABI's characterisation of the evidence is as follows:

Finding (paragraph reference)	Response	Comment

[176] Ibid

[177] Transcript 15 October 2019 PN 639 [Sinclair]

[178] Statement of Sinclair – Annexure B

[165]	Disagree	The unions contend that a sufficient case has been made for the claim. We refer to paragraphs [58] to [61] of the UWU submission on factual findings dated 18 November 2019.
[166]	Disagree, in part	We do not see ABI's statement that the Award requires an '*objective assessment*' as inconsistent with UWU's submission that the decision as to what constitutes an '*adequate*' amount of uniforms is often made solely by the employer. That disputes regarding the clause could be dealt with via the dispute resolution procedure in the Award does not negate the need for a definition of the term '*adequate*' within the clause.
[167]	Disagree	The unions contend that there is sufficient evidence before the Commission is sufficient to justify the variation to the Award.

BP1 Q45. Question for the UWU: Is the union aware of any instance where the adequacy of the number of uniforms provided to an employee has been the subject of a dispute under the dispute mechanism in the award?

[225] The UWU is not aware of any such instances.

BP1 Q46. Question for all other parties: Is the finding proposed by Ai Group challenged by any other party (and if so, why)?

[226] NDS and ABI do not challenge the finding proposed by Ai Group.

[227] The Unions do not challenge the finding that employee concerns about inadequate uniforms are on occasion dealt with and resolved at the enterprise level. However, the Unions contend that defining the term 'adequate' in the manner proposed by the UWU would ensure that employees were provided an adequate number of uniforms from the commencement of employment.

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

BP1 Q47. Question for other parties: Does any party take issue with Ai Group's contention as to how clause 25.2(f) operates (and if so, why)?

[229] NDS, ABI and AFEI do not take issue with Ai Group's contention as to how clause 25.2(f) operates.

[230] As to [180(iv)], the Unions submit that there is evidence before the Commission that some employers take the approach that they are required to make a payment of one hour, and not the employee's minimum specified hours. The Unions contend such approach is contrary to the clause. This approach is said to be reflected in the evidence of Mr Shanahan who stated

> *When a client cancels a scheduled service, the Company tries to place the employee who was supposed to work that shift, with another client. For example, if another employee is sick, the employee who has had their client cancel would be moved to cover the sick employee's shift. If the Company cannot find alternative work, the Company sends the employee home and pays them for one hour.*[179]

[231] It was also said to be reflected in the evidence of Ms Ryan, who stated

> *For example if the client had a three hour service scheduled, but cancelled the night before, we would charge the client for one hour and pay the employee for one hour's work.*[180]

[232] Ms Wang gave evidence that

> *If the client's cancellation is after 5.00pm, a late cancellation fee of one hour will be charged to the client, and the rostered support worker will receive a one hour shift payment regardless the original length of the shift.*[181]

BP1 Q48. Question for all other parties: Are the findings proposed by ABI challenged (and if so which findings are challenged and why)?

[233] NDS, AI Group and AFEI do not challenge the findings proposed by ABI.

[234] The Unions challenge the following proposed ABI findings:

> **Finding [2] - Client cancellation events occur frequently in both the disability and home care sectors**
>
> The Unions submit client cancellations occur in both disability and home care sectors. However, their incidence depends on the business practices of the home care and disability provider. The employers referred to in this finding were not able to quantify the incidence of client cancellations or explain the financial impact of client cancellations with any precision.

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[179] Statement of Graham Shanahan, [23], CB 158

[180] Statement of Deborah Ryan, [49], CB 196

[181] Statement of Joyce Wang, [38], CB 206

Finding [6] - Funding schemes have different terms in respect of cancellations. Employers are in some cases prohibited from charging cancellation fees. For example, where disability services are provided under the NDIS, service providers must comply with the cancellation rules in the NDIS Price Guide 2019-20. Some service providers have adopted cancellation policies and practices whereby they do not always charge cancellation fees (or charge lower cancellation fees than permitted to) even though they are permitted to under the applicable regulatory system. For example, Shanahan gave evidence that Coffs Coast Health & Community Care Pty Ltd has a policy whereby they only charge clients for one hour of a cancelled service regardless of the scheduled duration of the service.

The Unions urge caution with respect to this finding. Both in home care and in disability services employers have significant capacity to charge where scheduled services are cancelled. The latest NDIS rules give employers considerable latitude to charge. There was no evidence before the Commission that employers in the disability sector have adopted cancellations policies that do not reflect NDIA funding arrangements.

BP1 Q49. Question for other parties: Do you agree with the above statement (and, if not, why not)?

[235] ABI does not agree with the statement and submits that it is not correct that the NDIS Price Guide 2019-20 allows employers to claim "an unlimited amount of client cancellations", for three reasons.

1. Under the current NDIS Price Guide 2019-20 valid from 1 December 2019,[182] employers are only able to claim for cancellations where they are "short notice cancellations". Employers cannot charge for cancellations that do not meet that definition.

   The Price Guide defines a "short notice cancellation" as being where the participant:

   a) does not show up for a scheduled support within a reasonable time, or is not present at the agreed place and within a reasonable time when the provider is travelling to deliver the support (i.e. a "no show"); or

   b) for supports that are less than 8 hours continuous duration and the agreed total price for the support is less than $1000, has given less than two (2) clear business days' notice; or

   c) has given less than five (5) clear business days' notice for any other support.[183]

[182] Version 2.0 – Publication Date: 1/12/2019

[183] Ibid, page 18

2. Secondly, providers are only permitted to claim 90% of the fee associated with the activity for short notice cancellations.[184]

3. Thirdly, providers are only permitted to charge for a short notice cancellation (or no show) if they have "not found alternative billable work for the relevant worker and are required to pay the worker for the time that would have been spent providing the support".[185]

[236] NDS does not agree with the statement of UWU to the effect that an unlimited number of client cancellations are now claimable in disability services under the NDIS.

a) The NDIS Price Guide for 2019-2020 clearly states that cancellations are only claimable for short notice cancellations and the relevant extract is reproduced at [207] of the Background Paper.
b) The consequence is that cancellations that do not meet the definition of a short notice cancellation are not claimable.
c) The UWU statement is therefore incorrect.

[237] Ai Group submits that 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 Ai Group acknowledges that there is no longer a specific maximum number of client cancellations that can be claimed by an employer.

[238] Ai Group extract 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

[184] Ibid.

[185] Ibid

- 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.[186]

[239] AFEI submits that the 'statement' referred to is a submission of the UWU that 'in disability services, due to changes made in July 2019 in the NDIS Price Guide 2019 – 20, an unlimited amount of client cancellations are now claimable.' The UWU cites CourtBook reference 2796, pg12-13. AFEI submit that the statement is not accurate. The NDIS price guide provides that fees associated with short notice cancellations[187] may be recoverable subject to the terms of the service agreement between the provider and participant. As identified by ABI, some service providers have adopted cancellation policies and practices whereby they do not always charge cancellation fees even though they are permitted to under the applicable regulatory system.[188]

[240] The other Unions agree with the UWU's statement, understanding that it is subject to the claim for cancellation being one made in accordance with the guidelines (that is, that the cancellation has been made inside the timeframes there specified.

BP1 Q50. Question for UWU: Were the relevant employer witnesses cross-examined in respect of this aspect of their evidence?

[241] The UWU responds that the relevant witness was Mr Shanahan and he was not directly cross-examined on this question, because the opinion he expressed in this regard was speculative, and that was already apparent from the manner in which he expressed himself.

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

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

[188] Background Paper at page 74

BP1 Q51. Question for other parties: Are the findings proposed by the UWU challenged (and if so, which findings are challenged why)?

[242] ABI challenge or partly challenge the findings 165, 168, 170, 171 and 172 for the following reasons:

Finding [165]: We disagree with this finding. Where an employee has a rostered shift cancelled without payment by their employer, the employee will in many cases not "lose out" on income that the employee expected for the week, as the employer will provide make up time in accordance with clause 25.5(f)(ii).

Finding [168]: While we agree that "Home care providers can charge a client for a cancelled service provided this is in accordance with the service agreement in place between the provider and the client", the evidence was that employers do not always enforce this contractual right for a range of reasons.[189]

Finding [170]: We disagree. This is in the nature of a submission rather than a proposed finding.

Finding [171]: We agree hypothetically that in very limited circumstances where a client cancels scheduled service, a service provider may be able to both recover money from the client and cancel the shift of the employee without payment of wages. However, the overwhelming evidence supports a finding that employers do not engage in such practices.[190]

Finding [172]: This is in the nature of a submission and is not a proposed finding.

[243] NDS challenges the following finding proposed by UWU:

a) Finding (7) regarding employer evidence about loss of clients is not speculative as claimed by UWU. It arises out of direct experience of organisations in dealing with clients.

[244] Ai Group opposes 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

[189] Statement of Graham Shanahan at [27]; PN2651 JEFFREY SIDNEY WRIGHT; PN3321 WENDY MASON

[190] Ibid

	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.
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.

[245] The AFEI position is outlined below:

> *It is common for employers to cancel rostered shifts of part time employees (without payment) under the provisions of the current clause 25.5(f):*
>
> In relation to the incidence of shift cancellation for part-time employees, the findings proposed by ABI at [193] of the Background Paper are more precise.
>
> *Where an employee has a rostered shift cancelled without payment by their employer, the employee will lose out on income that the employee expected for the week, and this can result in financial uncertainty and detriment:*
>
> AFEI refer to the finding sought by ABI at [193] of the Background Paper. In particular, while employers endeavour to redeploy employees to other productive work where cancellation events occur, it is not always possible to do so for a range of reasons.[191] AFEI also refer to the finding sought in its submissions dated 19 November 2019 that employers do not benefit financially from a cancelled service, supported by the evidence of Ms Wang who states "when the client cancels a service, we don't have an income".

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

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

There is no evidence to support a finding that providers are able to claim back a greater "amount" with respect to client cancellations. Mr Farthing states that "In 2015-16, 2016-17, 2017-18 Price Guides, the NDIA allowed providers to charge a participant the full amount of a scheduled personal care or community support…when there was a short-notice cancellation or a "no show" by a participant".[192] Mr Farthing also states "in the 2018-2019 Price Guide, the NDIA revised its cancellation rules…it reduced the amount that a provider could charge from 100%...to 90%".[193] AFEI note that the recovery of 90% is consistent with the amount that could be charged from a provider to a participant in the 2019/20 Price Guide. Mr Fathing's evidence does not support the UWU's finding that providers are able to claim back a 'greater amount' with respect to client cancellations. Mr Harvey confirms that, in the light of the changes to NDIS, there is a greater "scope" (not greater amount) to claim moneys through the NDIS in respect of cancellations.[194]

Home care providers are able to set out the terms and conditions upon which they will provide services to a client, including terms about cancellation of service:

AFEI challenges this finding. Evidence provided by Mr Wright clarifies that in packages such as the Commonwealth Home Support Program, there is no cancellation provision in those package funds due to block funding.[195]

Home care providers may choose not to charge a client for a cancellation for reasons that may include demonstrating sensitivity to the client and retaining/gaining client business:

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

Depending on the timing of a cancelled service, a service provider may be able to both recover money from the client, and cancel the shift of the employee without payment of wages:

This finding is inconsistent with witness evidence of Ms Wang who confirmed that "if a client cancelled the service we don't have the income".[196]
The evidence shows that providers in home care may choose not to charge a client for a cancellation for business reasons. The UWU submits that the provider's decision in this respect should not result in an employee losing out on payment for a rostered shift:

This is a *submission* rather than a proposed finding supported by evidence.

[246] The other Unions do not challenge the UWU's proposed findings.

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

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

[194] PN3127

[195] PN2646-PN2651

[196] PN3612

BP1 Q52. Question for the ASU: Were the relevant employer witnesses cross-examined in respect of this aspect of their evidence?

[247] The response of the ASU is, yes and that the relevant transcript is found here:

Employer Witness	Transcript Reference
Scott Harvey	PN3134-PN3140
Deb Ryan	PN3014-PN3032, including Exhibit #HSU15
Wendy Mason	PN3281-3289
Joyce Wang	PN 3463-3479
Steven Milller	PN2028-PN2032

BP1 Q53. Question for all other parties: Do you agree with the ASU's submission as to the effect of the NDIS client cancellation arrangements (and, if not, why not)?

[248] In response ABI says yes and refers to its response to Question 49.

[249] NDS does not agree with the ASU's submission as to the effect of the NDIS client cancellation arrangements. The submission downplays the evidence that, while most cancellations meet the definition of a short notice cancelation, there remain cancellations that do not meet that definition and that are therefore unfunded.

[250] Ai Group does not agree with the ASU's submission as to the effect of the NDIS client cancellation arrangements. 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. [197]

[251] 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, AFEI acknowledges that there is no longer a specific maximum number of client cancellations can that can be claimed by an employer and refers to and relies on its response to question 49 in this regard.

[252] AFEI submits that the NDIS price guide provide that fees associated with short notice cancellations[198] may be recoverable subject to the terms of the service agreement between the provider and participant. As identified by ABI, some service providers have adopted cancellation policies and practices whereby they do not always charge cancellation fees even though they are permitted to under the applicable regulatory system.[199]

[253] The Unions agree with ASU's submission.

BP1 Q54. Question for NDS: NDS is asked to clarify the submission that the current provision 'would appear onerous'; onerous for whom and why?

[254] NDS submits that the current provision allows for a permanent employee to not be paid in certain circumstances where there is a cancellation. It submits that this is onerous on the employee, and that the ABI proposal remedies that aspect of the current award provision.

BP1 Q55. Question for ABI: Does ABI agree with NDS' characterisation of its proposal?

BP1 Q56. Question for all other parties: Is the NDS' characterisation of the modified funding arrangements in the event of client cancellation accurate (and if not, why not)?

[255] ABI response: Yes, subject to its comments in response to Question 49 above.

[256] Ai Group submits that 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. 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

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

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

[199] Background Paper at page 74

(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. [200]

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

[258] The Joint Unions accept that the statement is accurate. However, the Unions doubt the submission that that financial impact of client cancellations is '*slightly reduced*'. The modified funding arrangements have changed the definition of 'short-notice cancellation' from a cancellation after 3 pm the day before the scheduled service to two clear business days before the scheduled service. Cancellation rules have also changed in favour of service providers, increasing the number of times a provider could recover funding in respect of a short-notice cancellation from a cap of 8-12 times per year, to now be uncapped. Although the rate at which funds may be recovered are 90% of the charge, given the two changes above, the Commission should find that the rules regarding cancellations have been modified *significantly in favour of service providers*.

[259] NDS has not led any evidence of the overall financial impact of client cancellations on employers. The findings sought by other employers suggest that the majority of the cancellations occur in the 24 hours prior to service (see ABI Finding 4, AFEI Finding 1); in other words in the majority of cases, 90% of the funds will be recoverable.

BP1 Q57. Question for ABI: Does ABI agree with Ai Group's submission as to how ABI's proposed clause would operate (and if not, why not)?

[260] ABI's response: Yes.

BP1 Q58. Question for ABI: ABI is asked to respond to the above example and to Ai Group's submission that ABI's proposal will 'exacerbate or further any existing disconnect between the two in same respects'.

[261] In response, ABI agrees that the example is accurate as to the operation of its clients' proposed clause and refers to paragraphs [2.28]-[2.32] of its reply submissions dated 12 October 2019 in which it addresses the concerns of Ai Group.

[262] ABI respectfully disagrees with the proposition that the proposal will "exacerbate or further any existing disconnect between the two in some respects". ABI accepts that its proposed clause does not operate in perfect harmony with the NDIS funding arrangements. ABI

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

also accepts that it operates detrimentally to employers in certain circumstances. However, ABI submits that the proposed variation strikes the right balance for employers and employees

BP1 Q59 Question for AFEI: In its submission of 3 July 2019 AFEI states (at [12]) that it 'reserves its position in respect to the proposed introduction of clauses 25.5(f)(iii)-(vi) in the ABI draft determination'. AFEI is asked to expand on this submission in light of ABI's amended draft determination filed on 15 October 2019.

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

BP1 Q60. Question for all other parties: Are the findings proposed by AFEI challenged (and if so, which findings are challenged and why)?

[264] NDS, ABI and Ai Group do not challenge the findings proposed by AFEI.

[265] The Unions challenge the following AFEI findings:

Proposed Finding [1] - Client cancellations are usually on late notice.

Most cancellations occur in the 24 hours immediately prior to service.

Proposed Finding [2] – Cancellation fees are not always charged to the client

AFEI has led no evidence of the incidence of such practices in the Home Care Sector. There is no evidence before the Commission that disability services do not charge for cancellations.

Proposed Finding [3] - Employers do not benefit from a cancelled service.

Currently, there are situations where employers may receive funding from a cancellation but have no obligation to pay an employee for the cancelled shift, such as if the employee scheduled to perform the shift is casual. If an employer receives funding for a cancelled shift and does not need to pay the employee the portion of that funding that goes to wage costs, it benefits from a cancellation. The evidence did not reveal the extent to which employers exercised their right to charge for cancelled services in those circumstances.

BP1 Q61. Question for ABI: ABI is asked to file an amended draft variation determination addressing the drafting issues raised in its reply submission.

[266] ABI filed a further amended draft determination, which was attached to their submission of 10 February 2020.

BP1 Q62. Question for Ai Group: What is Ai Group's response to the HSU's claim?

[267] Ai Group opposes the deletion of clause 25.5(f) on the basis that if the provision were removed from the award, an employer would effectively be prohibited from making any variation to an employee's roster unless seven days' notice is provided.[201]

[268] As is apparent from the evidence led in the proceedings,[202] 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. Ai Group submits 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.

[269] Noting the HSU has relied in its submissions on the evidence of home care sector providers, Ai Group submits 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

[270] Ai Group suggests that 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. It asserts that the HSU's submissions at paragraph [138] are not relevant in that context. Rather, it says that 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)

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.

Ai Group submits the prevailing funding arrangements are of clear significance to the determination of the safety net created by the Award. In this instance, the proposed variation would align with the NDIS funding arrangements and accordingly, Ai Group does not seek to oppose the proposal.

The Mobile telephone allowance claims

BP1 Q63. Question for other parties: Are the findings proposed by the UWU challenged (and if so, which findings are challenged and why)?

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[201] See clause 25.5(d) of the Award

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

[271] ABI challenges or comments on findings [155], [156]. [158] and [159] for the reasons set out below:

Finding [155]: It is not clear what is meant by "required" in the context of the proposed finding that "Employees in home care and disability services are required to have access to, and to utilise, a mobile phone in the course of their duties". For example, is it suggested that access to a phone is a practical requirement? Or is it suggested that the employer imposes a contractual requirement?

While some employers might specifically require as a condition of employment that employees have a mobile phone, ABI does not agree that all employers impose such a requirement.

ABI also disagrees that all employees require a mobile phone as a practical matter. In some cases, it will not be necessary for an employee to have a mobile phone in order to perform their duties.

Finding [156]: ABI disagrees with this proposed finding. While many employers have an expectation that employees have a mobile phone for various purposes, it does not agree that <u>all</u> employers have such an expectation and the evidence does not support a finding that every employee in the industry is expected to possess and utilise a mobile phone.

Finding [158]: ABI disagrees with this proposed finding for the following reasons:

a. In relation to (a), while that may be correct that not all employees in the industry have a smartphone or a phone with the capabilities to access the relevant apps as required by their employer, the evidence overwhelmingly suggested that the vast majority of employees have a smartphone with the appropriate capabilities;

b. In relation to (b), we disagree as an industry-wide proposition that employees are in effect directed by their employer to upgrade to a smartphone, or upgrade their smartphone, in order to be able to access apps required by the employer

c. In relation to (c), while it may be hypothetically correct that some employees may have to pay for a higher level plan than they otherwise would, the evidence does not support this finding; and

d. In relation to (d), we disagree that the evidence supports a finding that the work-related cost of an appropriate mobile phone can be a significant portion of the overall cost. To the contrary, the evidence suggested otherwise.[203]

Finding [159]: While it may be correct that no employer evidence suggested that a mobile phone allowance would be costly or prohibitive, it is self-evident that the imposition of such a requirement would be "costly". Any Award-mandated monetary allowance will impose a cost

[203] PN440-PN452 TRISH STEWART

on employers. ABI says that it has already made submissions about the difficulties associated with modelling the cost impact on employers given the challenges with calculating or apportioning the costs in circumstances where an employee is on a 'plan'.[204]

[272] NDS submits that the findings proposed by UWU overstate their significance. The witness evidence was mixed with regard to the extent to which employees do not possess smart phones and the cost impact of any requirement to use a smart phone. No evidence was provided to contradict the submission of ABI regarding evidence of the rate of mobile and smart phone ownership in Australia,[205] or the submission of Ai Group regarding similar evidence.[206]

[273] Ai Group opposes 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[207] 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

[204] [2019] FWCFB 5078 at 65; Submission dated 20 March 2019 at paras [3.14] – [3.21]

[205] ABI Reply Submission 12 July 2019 as summarised in the Background Paper at [273]

[206] Ai Group Reply Submission 13 July at [548] and summarised in the Background Paper at [279]

[207] Transcript of proceedings on 15 October 2019 at PN455

	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 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.[208]

[274] AFEI's response to the proposed findings is set out below:

Employees in home care and disability services are required to have access to, and to utilise, a mobile phone in the course of their duties:

AFEI refer to and support the finding sought by the ABI. The evidence adduced during the proceedings does not support such a broad finding. Mr Elrick, for example, stated "generally speaking, most workers will only use their personal phone for the purposes of being contacted for shifts, and not during work."[209]

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

AFEI refer to the response above.

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

The witness evidence relied upon by the UWU (Ms Fleming, Ms Sinclair and Ms Stewart, the totality of the employee witness evidence of the UWU) was that each employee owned a mobile phone, [210] Ms Fleming a smart phone with access to apps but unclear whether Ms Sinclair's and Ms Stewart's were smartphones.

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

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

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

[209] Statement of Elrick at [30]

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

Employees may have to pay for a higher-level plan than they otherwise would and *the work-related cost of an appropriate mobile phone can be a significant portion of the overall cost, and in some cases, equally as significant as the costs of personal use.*

The proposed findings are not supported by the evidence.

[275] The HSU and ASU support the findings proposed by the UWU.

The HSU mobile phone allowance claim

BP1 Q64. Question for all other parties: Do you challenge the findings sought by the HSU (and if so, which findings are challenged and why)?

[276] ABI challenge or make comment on the findings sought by the HSU for the reasons set out below:

Finding [119]: We disagree that a smart phone is an essential "tool of the trade". It is unclear what is meant by "tool of the trade", and it is not clear whether that term has any particular legal, industrial or other specialised meaning.

Finding [120]: There is no evidence to support this finding. It is nothing more than a speculative assertion.

[277] Ai Group opposes 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.

[278] AFEI's response to the proposed findings is set out below

A smart phone is an essential 'tool of trade'. Employees require a telephone in order to contact and be contactable by their employer and in order to contact and to be contactable by clients. Employees also need to access email, perform internet searches or use their employer's telephone applications for the purpose of record keeping etc.

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

The likelihood of employers communicating with employees via internet-based application or requiring them to use such applications in the course of their work is only likely to increase in the coming years.

AFEI submits this is not a finding based on evidence but simply an observation/opinion.

[279] The ASU and UWU support the findings proposed by the HSU.

BP1 Q65. Question for UWU and HSU: Do you take issue with the above submission (and if so, point to the relevant evidence)?

[280] ABI submitted that the Unions have failed to adduce relevant evidence in support of the claims. The Unions submit that ABI's submissions should not be accepted and that itt would not be feasible for Unions to ascertain 'the proportion of employees in the industry who are required to use mobile phones in the course of their employment'. That level of specificity poses too high an evidentiary bar for any party to meet, particularly in an industry where, as Dr Stanford observed, the precise numbers of workers are not known. The Unions contend ABI's submission flies in the face of the reality of the ubiquitous use of mobile telephones and smart phones in the Australian community, and as a method of communication between employers and employees.

[281] The Unions complain that ABI's submission that they have had not adduced evidence of 'the proportion of work related mobile phone usage versus non-work related use by employees' again poses an unrealistic evidentiary bar.

[282] They say both the HSU and UWU have adduced ample evidence from rank and file workers and union organisers and industrial officers that home care workers and disability support workers in particular are required to use smart phones in the course of their employment, as their roles are not based in the employer's offices but in private homes. In many cases employees only contact with their employer is via their telephone.

The Unions contend this evidence was corroborated by ABI's own witnesses, such as Mr Shanahan's evidence in cross-examination, which confirmed that home care workers are required to electronically report in to the premises every day, and need to be contactable via their mobile phones.[211] Mr Shanahan's evidence was that employees of his company, Coffs Coast Health & Community Care Pty Ltd, are covered by the SCHCDS Award. ABI therefore has adduced its own evidence of 'any award covered employer requiring prospective employees, as a condition of employment, to own a mobile phone'.

The Unions submit ABI is also incorrect to state that they have not provided evidence of an 'award covered employer directing or otherwise requiring existing employees to purchase a mobile phone'. Paragraph [32] of the witness statement of William Elrick sets out evidence of

[211] Transcript 18 October 2019, PN2865 – PN2872

a disability support provider, PALS requiring employees to upgrade their phones to smart phones.[212] PALS is an award covered employer. Ms Fleming, an award covered employee, gave evidence that she was previously provided with a work tablet, but when this was taken off the home care workers, she had to upgrade from a flip style phone to a smart phone, otherwise she would not have been able to access her work roster or emails.[213]

Further, the Unions say that in addition to disability support workers based in private homes, Mr Elrick's evidence was that disability support workers in group homes may also be required to use their personal mobile phones to carry out research and communications.[214]

BP1 Q66. Questions for all parties: The evidence led by the unions in support of these claims is confined to particular categories of employees. If the Commission was minded to vary the SCHADS Award to provide a mobile phone allowance then should the application of that allowance be restricted to the class of employees which have been the subject of evidence in the proceeding? How should that class be defined?

[283] ABI submits that if the Commission is minded to vary the Award to provide a mobile phone allowance, there is merit in confining the application of any such allowance to employees who work as direct support workers providing care services in the community. By this, it means employees performing:

a. home care work in circumstances where the client's home is not based in a residential aged care facility; and

b. disability services work in the community (i.e. not in a group home or other residential or fixed place).

[284] If the award were to be varied in this respect, NDS would support the variation being limited to the class of employees who have been the subject of evidence in these proceedings. It says these employees are characterised as working remotely from traditional workplaces and are usually working on their own in private settings with clients. The relevant class of employees can be defined as "*Home Care or Disability Support workers engaged in the delivery of direct client services in a community and/or private residence setting, excluding respite centre and day services*". This definition identifies the class of employees for which evidence has been provided, and draws on the definition of disability work at Clause 3 of the award, while excluding work carried out in traditional institutional workplaces.

[285] In respect of those classes of employees in relation to whom the unions have not led any evidence, Ai Group submits there is clearly no basis for the grant of the claim.

[286] 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.

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[212] Statement of William Elrick [32], CB 2938

[213] Fleming CB 4483 [25]-[28]

[214] HSU Submissions, 18 November 2019, [118]; Witness Statement of William Elrick, [30]-[33] (CB 2937)

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

[288] The Unions submit that the mobile phone allowance should apply to any employees covered by the Award who are required to use a mobile phone for the performance of work duties. This would include (but not be limited to) home care and disability support workers, and employees who perform on call duties.

BP1 Q67. Question for HSU: What does the HSU say in response to the issues raised by ABI?

[289] The HSU withdraws the mobile phone claim in the draft determination replicated at paragraph [260] and adopts the UWU claim as set out in paragraph [252].

BP1 Q68. Question for the UWU and HSU: If a smart phone is to be characterised as a 'tool of trade' are the costs associated with work-related use tax deductible?

The Joint Unions response is as follows:

'The Australian Tax Office (ATO) permits employees who use their own phones for work to claim a certain amount as a tax deduction.[215] That some phone related costs can be claimed as a tax deduction does not negate the need for a mobile phone allowance in the Award. A tax deduction for a low paid worker will be in the lower tax brackets, meaning that a small portion only of the work related expense will ultimately be recouped. Even to the extent the cost can be recouped through a tax deduction, the employee will remain out of pocket for the expense for 12 months or more until they submit their tax return. It is not apparent to the Unions why employees and taxpayers should subsidise employers expenses in this manner. The Union's proposed claim would result in the employee being paid a mobile phone allowance on a weekly or fortnightly basis, in line with their wages.[216]

Of course, not all employees covered by the Award will be eligible for tax deductions. The tax free threshold is currently $18,200.[217] Given the low wages and the high incidence of part time work in this sector, it is likely that there are a proportion of employees who do not earn more than the tax free threshold and therefore, do not pay income tax. For example, a home care employee at level 2 (hourly rate $22.24) working 10 hours per week will earn less than $18,200 per year.[218] Tax deductions do not assist with the issue of work-related mobile costs for these employees.

It is common for Awards to provide reimbursement or an allowance for work-related expenses that could also be claimed as a tax deduction. Many awards contain allowances or

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[215] https://www.ato.gov.au/Individuals/Income-and-deductions/Deductions-you-can-claim/Other-work-related-deductions/Claiming-mobile-phone,-internet-and-home-phone-expenses/

[216] Clause 24, payment of wages.

[217] https://www.ato.gov.au/individuals/working/working-as-an-employee/claiming-the-tax-free-threshold/

[218] Assuming the employee's hours of work does not attract penalty rates. This calculation does not take into account penalty rates or overtime

reimbursements for vehicle expenses and clothing, laundry and dry-cleaning expenses. These items are also tax-deductible (when not reimbursed or paid for by the employer).'[219]

BP1 Q69. Question for all other parties: Are the findings proposed by ABI challenged (and if so, which findings are challenged and why)?

[290] NDS, Ai Group and AFEI do not challenge the findings proposed by ABI.

[291] The Joint Unions response is set out below:

Findings in [273]	Response	Comment
1	Agree	
2	Agree, in part	We agree most but not all employees in the SCHADS sector would own a mobile phone.[220] Some employees may own a mobile phone, but it may not be of the model or type that can access the employer's required apps.[221]
3	Agree, in part	To the extent to which 'mixed' is intended to refer to some employers requiring employees to use their own phones, and others providing phones, we do not oppose this statement. But if 'mixed' is intended to infer that the evidence was ambiguous or uncertain, we disagree.
4	Agree, in part	As above.
5	Agree, in part	We agree that employees use their personal mobile phones for both personal and work related purposes. The proportion used for personal purposes and work purposes will vary depending on the specific nature of the employee's role, the employer's expectations

[219] https://www.ato.gov.au/Individuals/Income-and-deductions/Deductions-you-can-claim/

[220] Statement of William Gordon Elrick (EX. HSU3), at [31]; Transcript (15/10/19), PN1075-1080 [WILLIAM GORDON ELRICK]

[221] Statement of Deon Fleming (EX. UV4), at [27]

		about usage (some employers may expect employees to 'log in' at each client location and input detailed client care records, others may use a different system) and the extent to which a particular employee uses their own phone for personal needs. Ms Stewart and Ms Fleming, for example, both indicated in cross examination that work related usage of their phones was significant.[222] The UWU and HSU mobile phone allowance provides that an employer and an employee will agree to a reasonable reimbursement amount, taking into account the circumstances (see subclause (c) of the draft determination).
6	Disagree	ABI have failed to take into account that numerous employer witnesses also acknowledged the need for employees to have mobile phones for work purposes, for example: Jeffrey Wright, PN2584-2587 Graham Shanahan, PN2865-2872 Joyce Wang, PN3554-3563 We disagree the evidence was limited. The UWU submission on findings dated 18 November at paragraphs [52] to [57] and the HSU submission on findings dated 18 November at paragraphs [114] to [126] covers the evidence comprehensively.
7	Disagree	We refer again to the UWU and HSU submissions on findings. For home care and disability services employees, having access to, and being available by mobile, is critical.

[222] PN442-443, PN538-539

8	Disagree	As noted above, Ms Stewart and Ms Fleming, both indicated in cross examination that work related usage of their phones was significant.[223] Even for employees who only have a modest work-related phone costs, employers should not be permitted by the Award to require employees to pay for work-related costs without reimbursement.
9	Agree	We agree that mobile phone costs may vary between employees.

BP1 Q70. Question for the unions: What do you say in response to the above submission?

[292] The Joint Unions response is set out below:

Paragraph reference	Response	Comment
[274]	Disagree	The proposed clause provides the employer with the option to provide a mobile phone or, where the employer expects an employee to use their own phone in the course of employment, to reimburse a reasonable amount.
[275]	Disagree	The variation is necessary to ensure mobile phone costs are not shifted onto employees. We refer to the UWU submission on findings dated 18 November 2019 at paragraphs [52] to [57] and the HSU submission on findings dated 18 November at paragraphs [114] to [126].
[276]	N/A	No longer relevant.

[223] PN442-443, PN538-539

[277]	Disagree	We refer to our response to question 65.
[278]	Agree	We agree with this statement. However, we disagree with the inference that there is no need for a mobile phone allowance because most employees own mobile phones. We refer to the UWU submission in reply, which is quoted in paragraph [300] of the Background paper.

BP1 Q71. Question for other parties and HSU: Are the findings proposed by Ai Group challenged (and if so, which findings are challenged and why)?

[293] ABI and AFEI do not challenge the findings proposed by Ai Group and findings (1) and (2) in paragraph [288] are not challenged by the Joint Unions.

BP1 Q72. Question for other parties: Are the findings proposed by NDS challenged (and if so, which findings are challenged and why)?

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

[295] AFEI's response is set out below:

> *Disability support workers who are required to work in client homes and in the community are commonly required to own a mobile phone:*
>
> AFEI refer to and support the finding proposed by the ABI, and note also the evidence of Mr Elrick that "generally speaking, most workers will only use their personal phone for the purposes of being contacted for shifts, and not during work."[224] To the extent that an employee may be required to have a mobile phone in order that the employee can be contacted concerning their shifts is not an unreasonable condition of employment, or one that justifies award related compensation.
>
> *Disability support workers use their mobile phones for a combination of work and personal purposes, and may be on plans with unlimited data:*
>
> AFEI refers to paragraph F-2 of its submissions dated 19 November 2019 where it also seeks the finding that "employees in this sector already own a mobile phone and already use them for work purposes at no additional cost to the employee". This finding is supported by witness evidence of Ms Stewart and Ms Fleming. Ms Stewart has, as part

[224] Statement of Elrick at [30]

of her phone plan, unlimited standard calls and SMS messages and up to 10 gigabytes usage without additional charges.[225] Ms Fleming has, as part of her phone plan, unlimited standard national calls and texts with 20 gigabytes of data and she doesn't get separately charged for any data used for accessing her roster.[226]

Joint Union Submission

Findings (1) and (2) in paragraph [289] are not challenged.

BP1 Q73. Questions for other parties: Are the findings proposed by AFEI challenged (and if so, which findings are challenged and why)?

[296] ABI makes the following comments:

Finding [173]: While we agree generally with the proposition that "Employees in this sector already own a mobile phone", the more accurate finding would be that that "the vast majority of employees in this sector already own a mobile phone".

We also agree that many employees "already use" their mobile phones for work purposes, although it is most likely the case that not all employees use their personal phones for work purposes.

Where employees use their personal mobile phones for work purposes, in many cases this will be done "at no additional cost to the employee" given that many employees will have 'bundled' phone plans.

[297] NDS and Ai Group do not challenge the findings proposed by AFEI.

The Joint Unions response is set out below

Findings in paragraph [294]	Response	Comment
1	Disagree	Both Ms Stewart and Ms Fleming gave evidence that they have incurred additional costs as a result of having to use their phones for work. Ms Stewart gave evidence that: "my phone bill costs approximately $170 per month. If I was not required to make as many work calls, I could consider dropping to a cheaper mobile phone plan."[227]

[225] PN448; PN452

[226] PN547-PN549

[227] Stewart CB4605 [21]

		Ms Fleming gave evidence that she had to upgrade from a flip phone to a smart phone at a cost of $65 per month to ensure she could "access the internet to check my roster and my work emails…. If I did not buy a smart phone, then I would not have been able to access my work roster or work emails."[228]
2	Disagree	AFEI's contention is not supported by the evidence of Ms Anderson or Ms Stewart that AFEI refers to. At PN1005, Ms Anderson responds to a question regarding checking emails in her personal time, and whether her employer has 'any way to monitor how long you spend monitoring your emails on your phone, does it?' Ms Anderson indicates that in response that: 'Not that I'm aware of. I don't know. I wouldn't be able to clarify that.' This exchange is not relevant to the mobile phone allowance claim. Ms Anderson is provided with a mobile phone for work purposes (see PN992). At PN1011-1013, Ms Anderson is questioned about responding to emails during personal time, and whether she is allowed to not check her emails, or switch off her phone, during times at which she is not rostered to work. Again, this exchange is not relevant to the mobile phone allowance claim. Ms Anderson's employer already provides her with a company mobile phone for work purposes and she would receive no further entitlement for mobile phone costs under the UWU and HSU's mobile phone allowance claim, as her costs are already covered.

[228] Fleming CB 4483 [27]

		At PN441, Ms Stewart is asked if she also uses her personal phone for personal purposes unconnected to her work. She responds: 'Yes, I do. I've always said I use the personal phone. But we didn't only ring clients, but we used to have to ring the office as well.' The Unions understanding is that it is not in dispute that employees who are required to use their personal phone for work also use their personal phone for non-work purposes. PN441 does not assist AFEI in establishing anything further than that.

The Sleepover claim – HSU

BP1 Q74. Question for the HSU: what does the HSU say in response to the findings sought by ABI?

[298] The Joint Unions response is set out below:

Proposed Finding [1] - There is insufficient evidence to conclude that the current clause 25.7(c) is not operating satisfactorily.

The Unions disagree. It is clear on the face of the clause that there are not sufficient protections to ensure employees have access to the basic requirements for a night's sleep during a sleepover shift. The HSU provided evidence that supports our claim.

Proposed Finding [2] Further, when one considers the specific items that the HSU seek to have expressly included in clause 25.7(c)…there is no evidence….

There are no requirements in the clause for an employer to provide a separate room or any other of these facilities in the clause. The question for the Commission is not whether there is evidence of widespread failure to afford those items, it is whether a term making such provision establishes an appropriate fair minimum standard for the performance of the work.

The HSU adduced evidence in the witness statement of William Elrick about the deficiencies in sleepover provisions for disability support workers. In reference to ABI's submission summarised at [309] in the Background Paper regarding the evidence of Mr Elrick, the Unions note that Mr Elrick attended the Commission for cross-examination, but ABI chose not to crossexamine Elrick on his evidence.

BP1 Q75. Question for Ai Group: What does Ai Group say about the current provisions, which speaks of 'appropriate facilities'?

[299] Ai Group's response is set out below:

'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".

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.'

BP1 Q76. Question for the HSU: What is the source of the power to vary the award in the manner sought?

[300] HSU submits that the source of power for the HSU's proposed changes is s 139(1)(c) which provides, relevantly:

> (1) A modern award may include terms about any of the following matters:
>
> > (c) arrangements for when work is performed, including hours of work, rostering, notice periods, rest breaks and variations to working hours;

[301] The HSU says the sleepover clause in the current award sits at sub-clause 25.7 and is under the heading of clause 25 – Ordinary hours of work and rostering. Further, it submits section 139(1)(c) does not provide an exhaustive list of what is included under 'arrangements for when work is performed'.

BP1 Q77. Question for all other parties: Are the findings proposed by Ai Group challenged (and if so, which findings are challenged and why)?

[302] ABI submit they do not.

[303] NDS, ABI and AFEI note that this question appears to relate to the Mobile phone claim, and do not challenge the proposed findings.

[304] The Joint Unions challenge the findings and note that Q.77 is a repeat of Q.71 and refer to their response to Q.71.

BP1 Q78. Question for AFEI: What was the basis stated by the AIRC for the removal of the provision referred to by the AFEI?

[305] AFEI's response is set out below:

> 'The provision was removed by the AIRC on the basis that it was not an allowable matter pursuant to s89A(2) of the Workplace Relations Act 1996 (Cth).
>
> The Fair Work Act 2009 (Cth) ('The FW Act') also limits terms which can be included in Modern Awards at s136, such that Modern Awards must only include terms permitted or required by Subdivision B or C of the FW Act. The FW Act imposes the further

limitation that 'allowable' or 'permissible' terms may only be included in Modern Awards 'to the extent necessary to achieve the modern awards objective and (to the extent applicable) the minimum wages objective.

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

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

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

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

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

AFEI further relies on its submissions of 23 July 2019.'

The Variation to the Rosters clause claim – UWU

BP1 Q79. Question for the UWU: As to the consequence for an employer who does not provide the requisite 7 days notice, is it not simply a breach of the award and amenable to an order for contravention of a civil remedy provision (see ss 45 and 539)? What is the argument in support of what is said to be the 'logical interpretation' that overtime is payable in such circumstances?

[306] The UWU withdraws its statement that overtime is payable in such circumstances and agrees that the consequence of such conduct would be a breach of the award.

BP1 Q80 Question for all other parties: Are any of the findings proposed by the UWU challenged (and if so, which findings are challenged and why)?

[307] ABI challenges or make comment on findings [151], [152], [153] and [154] for the reasons below:

Finding [151]: We agree in the hypothetical sense that roster changes can be disruptive and create difficulties for employees:

a. in planning budgets; and

b. undertaking outside of work activities.

However, the degree of disruption will differ from employee to employee and from circumstance to circumstance. In some cases, there will be little or no disruption while in others the change may actually be beneficial to the employee.

Finding [152]: We agree that employees often agree to changes to their rosters. However, we do not consider that any generalised finding can be made as to why employees may agree to roster changes. We anticipate that there are a range of reasons for employees to agree to roster changes. We accept, however, that one reason would be that employees are seeking additional hours and additional income.

Finding [153]: We do not agree that a finding can be made to the effect that "It is uncommon for employees to disagree to roster changes, and where such disagreement occurs, it is for a good reason".

An employee's propensity to agree to roster changes will vary from employee to employee and across different workplaces. Equally, reasons for disagreeing with proposed roster changes will differ from employee to employee.

Further, the evidence relied upon by the UWU simply does not support such a finding being made. The UWU rely on the evidence of three witnesses; however, for at least two of those witnesses, the parts of their statements relied upon by the UWU do not relate to roster changes at all. For example:

a. the statement of Ms Stewart refers to accepting offers of <u>additional shifts</u> due to a desire or need to maximise her income;[229] and

b. the statement of Mr Fleming refers to taking on extra shifts.[230]

An employer offering additional shifts to employees and employees accepting those shifts is not the same as an employer changing an employee's roster. The notion of changing an employee's roster connotes a circumstance where an employee is rostered to work a particular shift which is then changed.

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[229] Statement of Trish Stewart at [11]

[230] Statement of Deon Fleming at [17]

Finding [154]: Our clients agree that there was no employer evidence suggesting that employees regularly refuse roster changes without good reason.

However, we do not understand what is meant by the purported lack of evidence of employers having "issues with excessive overtime payments".

[308] NDS does not challenge the findings proposed by UWU.

[309] Ai Group opposes 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.

[310] AFEI submits:

> 'There is insufficient evidence to support the finding that *employees may have their rosters changed regularly, sometimes with little or no notice*. For example, the evidence of Ms Stewart and Ms Fleming contains no information about how much notice they are given of any change. AFEI observe from the evidence that the main reason for changes to roster include employee sickness/client cancellation.[231] The

[231] Statement of Trish Stewart at [10]; Statement of Deon Fleming at [15]; Statement of Belinda Sinclair at [22]

Award already contain provisions addressing these scenarios at clause 25.5(d)(ii) (employee absent from duty on account of illness) and clause 25.5(f) (client cancellation). To this end, AFEI refer to paragraphs 96 to 104 of its submissions dated 23 July 2019.

There is insufficient evidence to support the finding that *roster changes can be disruptive, and create difficulties for employees a) in planning budgets and b) undertaking outside work activities'.* The income for full time and part time employees is effectively regulated by the Award (either 38 ordinary hours per week, or a regular pattern of hours for the week). Moreover, the evidence of Ms Sinclair was that she exercised a degree of control over her availability for work, including Tuesday afternoon off, and attending a second job on Monday, Wednesday and Fridays.[232]

There is insufficient evidence to support the findings that *employees regularly agree to roster changes because there is under-employment in the sector and they require additional income*) and that *it is uncommon for employees to disagree to roster changes, and where such disagreement occurs, it is for a good reason.* The evidence of Ms Stewart and Ms Fleming provide no reasons as to why they could not or would not accept additional shifts, and the evidence of Ms Sinclair was that she would not accept a shift if it was outside of her 'availability',[233] including that she does not wish to work on Tuesday afternoons.[234]

In relation to the finding that *'no evidence was presented by the employer witnesses that suggested that employees were regularly disagreeing or refusing roster changes without good reason. There was no evidence that employers has issues with excessive overtime payment',* AFEI questions the relevance of this proposed finding. Any evidence in relation to how employees may currently respond to requests for roster variations would only be relevant within the context of the current Award provisions. They would not support any findings about how roster variations would be responded to by employees if the Award were varied as sought by the union.

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

[311] The Unions support the findings urged by the UWU.

BP1 Q81. Question to all other parties: Are the findings proposed by ABI challenged (and if so, which findings are challenged and why)?

[312] NDS does not challenge the findings proposed by ABI.

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[232] PN717-PN725

[233] PN606

[234] PN725

[313] 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) is the *most* common item sought by employers through enterprise bargaining.

[314] The Joint Unions submissions is set out below:

Findings in [328]	Response	Comment
(a)	Disagree, in part	While the Unions acknowledge that consumer-directed care has created change within the sector, the Unions contend that ABI has: over-emphasised the rostering challenges faced by service providers and; downplayed the control that service providers have in deciding which services to provide, and the terms and conditions on which those services will be provided to clients.[235]
(b)	Agree, in part	The Unions agree that there has been an increase in working hours variability since the introduction of consumer-directed care, but do not agree that this is a natural or inevitable consequence of the introduction of consumer directed care. The increase in working hours variability is a result of how employers in the industry have chosen to organise their workforce, and of the high level of flexibility available for employers under the current Award (for example, with respect to broken shifts and client cancellation). Employers operating under the NDIS and the home care sector continue to have control over when work is required to be performed.[236]
(c)	Agree, in part	The Unions agree that it is not uncommon for employers seek to depart from the requirements of clause 10.3(c) in enterprise bargaining (though we do not agree it is necessarily the most common bargaining request).
(d)	Agree	
(e)	Agree, in part	The Unions agree that changes are generally made for operational reasons. However, whilst some of these operational changes will result from genuinely unexpected

[235] See paragraphs [41] to [43] of the UWU Submission on factual findings dated 18 November 2019

[236] See paragraphs [11] to [20] of the UWU Submission on the NDIS dated 17 May 2019 (CB 4460)

		circumstances, operational reasons for changes can also be the result of poor roster planning by the service provider and the service provider offering clients an unsustainable degree of flexibility that relies upon late changes to staff rosters. Ensuring that overtime is paid for late roster changes will act as a financial incentive for employers to roster effectively.
(f)	Disagree, in part	The Unions agree that rostering in the sector requires consideration of a number of factors, as does rostering in many sectors, but do not consider this justifies frequent and late changes to employee rosters.

BP1 Q82. Question for the UWU: What does the UWU say in response to the above submission?

[315] The UWU says that the submission in paragraph [330] is inaccurate. Overtime payments would not apply in scenario (i) and (ii) as the employees have agreed with the changes. Further, as the UWU is not seeking to vary clause 25.5(d)(ii), the proposed variation would not apply in the listed circumstances where the reason for the roster alteration was to enable the service of the organisation to carry on where another employee was absent from duty on account of illness, or in an emergency.

BP1 Q83. Question for other parties: Are the findings proposed by Ai Group challenged (and if so, which findings are challenged and why)?

[316] NDS and ABI do not challenge the findings proposed by Ai Group.

[317] Findings (1) and (2) in paragraph [343] are not challenged by the Joint Unions.

> 'The relatively common occurrence of these matters indicate that these are matters that should be taken into account by a service provider in planning rosters and in setting out policies on service provision. Ensuring that overtime is paid for late roster changes will act as a financial incentive for employers to roster effectively, and to adopt a model of service provision that does not rely on regular late changes to employee rosters.'