

Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Reply Submission

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

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GROUP

4 YEARLY REVIEW OF MODERN AWARDS

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

	Chapter	Page
1	Introduction	3
2	The Statutory Framework	4
3	The Commission's General Approach to the Review	14
4	The Unions' Claims	19
5	The National Disability Insurance Scheme	39
6	Overtime, Weekend and Public Holiday Rates for Casual Employees	70
7	Excursions	83
8	First Aid Allowance	92
9	Community Language Skills Allowance	104
10	Public Holidays	126

1. INTRODUCTION

1. This submission is filed by the Australian Industry Group (**Ai Group**) in relation to the Fair Work Commission's (**Commission**) 4 yearly review of the *Social, Community, Home Care and Disability Services Industry Award 2010* (**Award**). It responds to the submissions and evidence filed by the Health Services Union (**HSU**), United Voice and the Australian Services Union (**ASU**) (collectively, **Unions**) in support of various substantive changes they seek to the Award.
2. In particular, the submissions respond to the following substantive claims advanced by the Unions:
 - (a) HSU and United Voice claims to require the payment of the casual loading during overtime, public holidays and for ordinary hours performed on a weekend;
 - (b) A United Voice claim to require that time off in lieu of overtime accrues at overtime rates where an employee undertakes work on an excursion;
 - (c) A HSU claim to introduce entitlements in relation to refresher first aid training undertaken by an employee;
 - (d) An ASU claim to introduce a new allowance payable to employees who use a "community language skill"; and
 - (e) A United Voice claim relating to rostering on a public holiday.
3. In addition, this submission deals in detail with the operation of the National Disability Insurance Scheme (**NDIS**); a matter that is of relevance to the aforementioned claims as well as the remaining Union claims that we understand will be dealt with at a later stage of the proceedings.
4. Each of the aforementioned claims are opposed by Ai Group. In our submission, they should each be dismissed.

2. THE STATUTORY FRAMEWORK

5. The Unions claims are being pursued in the context of the 4 yearly review (**Review**), which is conducted by the Commission pursuant to s.156 of the *Fair Work Act 2009* (**FW Act** or **Act**).
6. In determining whether to exercise its power to vary a modern award, the Commission must be satisfied that the relevant award includes terms only to the extent necessary to achieve the modern awards objective (s.138).
7. The critical principle to flow from the operation of s.138 is that a modern award can only include such terms as are *necessary* to achieve the modern awards objective. The requirement imposed by s.138 is an ongoing one. That is, at any time, an award must only include terms that are necessary in the relevant sense.
8. The modern awards objective is set out at s.134(1) of the FW Act. It requires the Commission to ensure that modern awards, together with the National Employment Standards (**NES**), provide a fair and relevant minimum safety net of terms and conditions. In doing so, the Commission is to take into account a range of factors, listed at s.134(1)(a) – (h). This necessarily requires a consideration of the Award, taken as a whole, including the various terms and conditions it provides.
9. In its decision concerning claims to reduce penalty rates in a number of awards (**Penalty Rates Decision**), the Commission made the following observations about various factors listed at s.134(1)(a) – (h), which we respectfully adopt for the purposes of our submission:

[165] Section 134(1)(a) requires that we take into account ‘relative living standards and the needs of the low paid’. This consideration incorporates two related, but different, concepts. As explained in the *2012–13 Annual Wage Review* decision:

‘The former, relative living standards, requires a comparison of the living standards of award-reliant workers with those of other groups that are deemed to be relevant. The latter, the needs of the low paid, requires an examination of the extent to which low-paid workers are able to purchase the essentials for a “decent standard of living” and to engage in community life. The assessment

of what constitutes a decent standard of living is in turn influenced by contemporary norms.'

[166] In successive Annual Wage Reviews the Expert Panel has concluded that a threshold of two-thirds of median full-time wages provides 'a suitable and operational benchmark for identifying who is low paid', within the meaning of s.134(1)(a). There is, however, no single accepted measure of two-thirds of median (adult) ordinary time earnings. The surveys that provide the information about the distribution of earnings from which a median is derived vary in their sources, coverage and definitions in ways that affect the absolute values of average and median wages (and, accordingly, what constitutes two-thirds of those values). The two main Australian Bureau of Statistics (ABS) surveys of the distribution of earnings are the *Employee Earnings, Benefits and Trade Unions Membership* (the 'EEBTUM') and the survey of *Employee Earnings and Hours* (the 'EEH'). We note that the EEBTUM is no longer published and the relevant data is now produced as part of the *Characteristics of Employment Survey* (the 'CoE'). Some data is also available from the HILDA survey.

[167] In the *2015–16 Annual Wage Review* decision the Expert Panel noted that the submissions provided different estimates of the 'two-thirds of median (adult) ordinary time earnings' threshold. The relevant extract from that decision, and the Expert Panel's conclusion, are set out below:

'In its submission, the Australian Government provided two estimates to identify low-paid workers:

- \$18.67 per hour (or about \$710.00 per week over a 38-hour week), using the May 2014 EEH data; and
- \$18.42 per hour (or about \$700.00 per week over a 38-hour week) using the 2014 HILDA survey data.

The Australian Government contended that there were about 1.3 million low-paid employees in 2014 (or 13.3 per cent of all employees), with around one-third of award-reliant workers being low paid in the EEH data. Their analysis took explicit account of the number and the level of pay of junior workers.

The ACTU used unpublished ABS EEH data on the distribution of award only workers by hourly earnings to estimate the number of employees at each award classification level. On the basis of the May 2014 data, the ACTU estimated that 43 per cent of award only employees had hourly earnings at or below the C10 rate of pay in May 2014 (\$724.50).

Research Report 6/2013 found that around 75 per cent of adult award-reliant employees in the non-public sector were earning below the C10 rate of \$18.60 per hour.

Whilst no specific conclusion is available, the information as a whole suggests that a sizeable proportion—probably a majority—of employees who are award reliant are also low paid by reference to the two-thirds of median weekly earnings benchmark.' (footnotes omitted)

[168] The most recent data for the 'low paid' threshold is set out below:

<i>Two-thirds of median full-time earnings</i>	<i>\$/week</i>
Characteristics of Employment survey (Aug. 2015)	818.67
Employee Earnings and Hours survey (May 2016)	917.33

[169] The assessment of relative living standards focuses on the comparison between award-reliant workers and other employed workers, especially non-managerial workers. 78 As noted in the 2015–16 Annual Wage Review decision:

'There is no doubt that the low paid and award reliant have fallen behind wage earners and employee households generally over the past two decades, whether on the basis of wage income or household income.'

[170] Award reliance is a measure of the proportion of employees whose pay rate is set according to the relevant award rate specified for the classification of the employee and not above that rate. Table 4.8 from the 2015–16 Annual Wage Review decision sets out the extent of award reliance by industry. Relevantly for present purposes, the most recent data identify the Accommodation and food services and Retail trade industries as among the most award reliant in that they are the industries in which the highest proportion of employees are award reliant (42.7 per cent and 34.5 per cent, respectively).

[171] The relative living standard of employees is affected by the level of wages they earn, the hours they work, tax-transfer payments and the circumstances of the households in which they live. As a general proposition, around two-thirds of low-paid employees are found in low income households (i.e. in the bottom half of the distribution of employee households) and have lower living standards than other employees. Many low-paid employees live in households with low or very low disposable incomes.

[172] In taking into account 'relative living standards' in the context of Annual Wage Reviews, the Expert Panel has paid particular attention to changes in the earnings of all award-reliant employees compared to changes in measures of average and median earnings more generally.

[173] In the 2015–16 Annual Wage Review decision the Expert Panel also observed that increases in modern award minimum wages have a *positive* impact on the relative living standards of the low paid and on their capacity to meet their needs. It seems to us that the converse also applies, that is, the variation of a modern award which has the effect of reducing the earnings of low-paid employees will have a *negative* impact on their relative living standards and on their capacity to meet their needs.

...

[179] Section 134(1)(c) requires that we take into account 'the need to promote social inclusion through increased workforce participation'. The use of the conjunctive 'through' makes it clear that in the context of s.134(1)(c), social inclusion is a concept to be promoted exclusively '*through* increased workforce participation', that is obtaining employment is the focus of s.134(1)(c).

...

[184] Section 134(1)(da) requires that we take into account the 'need to provide additional remuneration' for:

- '(i) employees working overtime; or
- (ii) employees working unsocial, irregular or unpredictable hours; or
- (iii) employees working on weekends or public holidays; or
- (iv) employees working shifts.'

[185] Section 134(1)(da) was inserted by the *Fair Work Amendment Act 2013* (Cth), with effect from 1 January 2014. The Explanatory Memorandum to the Fair Work Amendment Bill 2013 made the following observation about the addition of s.134(1)(da):

'Under the FW Act, the FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant safety net of terms and conditions. In making or varying modern awards, the FWC must take into account the modern awards objective (see subsection 134(1) of the FW Act).

Item 1 of Schedule 2 to the Bill amends the modern awards objective to include a new requirement for the FWC to consider, in addition to the existing factors set out in subsection 134(1) of the FW Act, the need to provide additional remuneration for:

- employees working overtime;
- employees working unsocial, irregular or unpredictable hours;
- employees working on weekends or public holidays; or
- employees working shifts.

This amendment promotes the right to fair wages and in particular recognises the need to fairly compensate employees who work long, irregular, unsocial hours, or hours that could reasonably be expected to impact their work/life balance and enjoyment of life outside of work.'

[186] In the second reading speech to the Fair Work Amendment Bill 2013 the then Minister for Employment and Workplace Relations said:

'... as part of this Bill, the Government is seeking to ensure that work at hours which are not family friendly is fairly remunerated. This will be done by amending the modern awards objective to ensure that the Fair Work Commission, in carrying out its role, must take into account the need to provide additional remuneration for employees working outside normal hours, such as employees working overtime or on weekends...'

[187] Section 134(1)(da) is a relatively new provision and one which did not exist at the time the modern awards under review were made. These provisions have not yet been the subject of substantive arbitral or judicial comment.

[188] Five observations may be made about s.134(1)(da).

[189] First, s.134(1)(da) speaks of the 'need to provide additional remuneration' for employees performing work in the circumstances mentioned in s.134(1)(da)(i), (ii), (iii) and (iv).

[190] An assessment of 'the need to provide additional remuneration' to employees working in the circumstances identified in paragraphs 134(1)(da)(i) to (iv) requires a consideration of a range of matters, including:

(i) the impact of working at such times or on such days on the employees concerned (i.e. the extent of the disutility);

(ii) the terms of the relevant modern award, in particular whether it already compensates employees for working at such times or on such days (e.g. through 'loaded' minimum rates or the payment of an industry allowance which is intended to compensate employees for the requirement to work at such times or on such days); and

(iii) the extent to which working at such times or on such days is a feature of the industry regulated by the particular modern award.

[191] Assessing the extent of the disutility of working at such times or on such days (issue (i) above) includes an assessment of the impact of such work on employee health and work-life balance, taking into account the preferences of the employees for working at those times.

[192] The expression 'additional remuneration' in the context of s.134(1)(da) means remuneration in addition to what employees would receive for working what are normally characterised as 'ordinary hours', that is reasonably predictable hours worked Monday to Friday within the 'spread of hours' prescribed in the relevant modern award. Such 'additional remuneration' could be provided by means of a penalty rate or loading paid in respect of, for example, work performed on weekends or public holidays. Alternatively, additional remuneration could be provided by other means such as a 'loaded hourly rate'.

[193] As mentioned, s.134(1)(da) speaks of the 'need' to provide additional remuneration. We note that the minority in *Re Restaurant and Catering Association of Victoria* (the *Restaurants 2014 Penalty Rates decision*) made the following observation about s.134(1)(da):

'This factor must be considered against the profile of the restaurant industry workforce and the other circumstances of the industry. It is relevant to note that the peak trading time for the restaurant industry is weekends and that employees in the industry frequently work in this industry because they have other educational or family commitments. These circumstances distinguish industries and employees who expect to operate and work principally on a 9am-5pm Monday to Friday basis. Nevertheless the objective requires additional remuneration for working on weekends. As the current provisions do so, they meet this element of the objective.' (emphasis added)

[194] To the extent that the above passage suggests that s.134(1)(da) 'requires additional remuneration for working on weekends', we respectfully disagree. We acknowledge that the provision speaks of 'the *need* for additional remuneration' and that such language suggests that additional remuneration is required for employees working in the circumstances identified in paragraphs 134(1)(da)(i) to (iv). But the expression 'the need for additional remuneration' must be construed in context, and the context tells against the proposition that s.134(1)(da) *requires* additional remuneration be provided for working in the identified circumstances.

[195] Section s.134(1)(da) is a relevant consideration, it is *not* a statutory directive that additional remuneration must be paid to employees working in the circumstances mentioned in paragraphs 134(1)(da)(i), (ii), (iii) or (iv). Section 134(1)(da) is a consideration which we are required to take into account. To take a matter into account means that the matter is a 'relevant consideration' in the *Peko-Wallsend* sense of matters which the decision maker is bound to take into account. As Wilcox J said in *Nestle Australia Ltd v Federal Commissioner of Taxation*:

'To take a matter into account means to evaluate it and give it due weight, having regard to all other relevant factors. A matter is not taken into account by being noticed and erroneously disregarded as irrelevant'.

[196] Importantly, the requirement to take a matter into account does not mean that the matter is necessarily a determinative consideration. This is particularly so in the context of s.134 because s.134(1)(da) is one of a number of considerations which we are required to take into account. No particular primacy is attached to any of the s.134 considerations. The Commission's task is to take into account the various considerations and ensure that the modern award provides a 'fair and relevant minimum safety net'.

[197] A further contextual consideration is that 'overtime rates' and 'penalty rates' (including penalty rates for employees working on weekends or public holidays) are terms that *may* be included in a modern award (s.139(1)(d) and (e)); they are not terms that *must* be included in a modern award. As the Full Bench observed in the *4 yearly review of modern awards – Common issue – Award Flexibility* decision:

'... s.134(1)(da) does not amount to a statutory directive that modern awards must provide additional remuneration for employees working overtime and may be distinguished from the terms in Subdivision C of Division 3 of Part 2-3 which *must* be included in modern awards...'

[198] Further, if s.134(1)(da) was construed such as to *require* additional remuneration for employees working, for example, on weekends, it would have significant consequences for the modern award system, given that about half of all modern awards currently make no provision for weekend penalty rates. If the legislative intention had been to mandate weekend penalty rates in all modern awards then one would have expected that some reference to the consequences of such a provision would have been made in the extrinsic materials.

[199] Third, s.134(da) does not prescribe or mandate a fixed relationship between the remuneration of those employees who, for example, work on weekends or public holidays, and those who do not. The additional remuneration paid to the employees whose working arrangements fall within the scope of the descriptors in

s.134(1)(da)(i)–(v) will depend on, among other things, the circumstances and context pertaining to work under the particular modern award.

[200] Fourth, s.134(1)(da)(ii) is not to be read as a composite expression, rather the use of the disjunctive ‘or’ makes it clear that the provision is dealing with separate circumstances: ‘unsocial, irregular or unpredictable hours’ (emphasis added).

[201] Section 134(1)(da)(ii) requires that we take into account the need to provide additional remuneration for employees working in each of these circumstances. The expression ‘unsocial ... hours’ would include working late at night and or early in the morning, given the extent of employee disutility associated with working at these times. ‘Irregular or unpredictable hours’ is apt to describe casual employment.

[202] Fifth, s.134(1)(da) identifies a number of circumstances in which we are required to take into account the need to provide additional remuneration (i.e. those in paragraphs 134(1)(da)(i) to (iv)). Working ‘unsocial ... hours’ is one such circumstance (s.134(1)(da)(i)) and working ‘on weekends or public holidays’ (s.134(1)(da)(iii)) is another. The inclusion of these two, separate, circumstances leads us to conclude that it is not necessary to establish that the hours worked on weekends or public holidays are ‘unsocial ... hours’. Rather, we are required to take into account the need to provide additional remuneration for working on weekends or public holidays, irrespective of whether working at such times can be characterised as working ‘unsocial ... hours’. Ultimately, however, the issue is whether an award which prescribes a particular penalty rate provides ‘a fair and relevant minimum safety net.’ A central consideration in this regard is whether a particular penalty rate provides employees with ‘fair and relevant’ compensation for the disutility associated with working at the particular time(s) to which the penalty attaches.

...

[204] Section 134(1)(e) requires that we take into account ‘the principle of equal remuneration for work of equal or comparable value’.

[205] The ‘Dictionary’ in s.12 of the FW Act states, relevantly:

‘In this Act:

equal remuneration for work of equal or comparable value: see subsection 302(2).’

[206] The expression ‘equal remuneration for work of equal or comparable value’ is defined in s.302(2) to mean ‘equal remuneration for men and women workers for work of equal or comparable value’.

[207] The appropriate approach to the construction of s.134(1)(e) is to read the words of the definition into the substantive provision such that in giving effect to the modern awards objective the Commission must take into account the principle of ‘equal remuneration for men and women workers for work of equal or comparable value’.

...

[217] Section 134(1)(f) requires that we take into account ‘the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden’.

[218] We note at the outset that s.134(1)(f) is expressed in very broad terms. We are required to take into account the likely impact of any exercise of modern award powers ‘on business, including’ (but not confined to) the specific matters mentioned, that is, ‘productivity, employment costs and the regulatory burden’.

...

[221] ‘Productivity’ is not defined in the FW Act but given the context in which the word appears it is clear that it is used to signify an economic concept.

[222] The Productivity Commission defines productivity as:

‘... a measure of the rate at which outputs of goods and services are produced per unit of input (labour, capital, raw materials, etc). It is calculated as the ratio of the quantity of outputs produced to some measure of the quantity of inputs used’.

[223] Similarly, the Commonwealth Treasury also defines productivity by reference to volumes of inputs and output:

‘Productivity is a measure of the rate at which inputs, such as labour, capital and raw materials, are transformed into outputs. The level of productivity can be measured for firms, industries and economies. Productivity growth implies fewer inputs are used to produce a given output or, for a given set of inputs, more output is produced.’

[224] The conventional economic meaning of productivity is the number of units of output per unit of input. It is a measure of the volumes or quantities of inputs and outputs, not the cost of purchasing those inputs or the value of the outputs generated. As the Full Bench observed in the *Schweppes Australia Pty Ltd v United Voice – Victoria Branch*:

‘... we find that ‘productivity’ as used in s.275 of the Act, and more generally within the Act, is directed at the conventional economic concept of the quantity of output relative to the quantity of inputs. Considerations of the price of inputs, including the cost of labour, raise separate considerations which relate to business competitiveness and employment costs.

Financial gains achieved by having the same labour input – the number of hours worked – produce the same output at less cost because of a reduced wage per hour is not productivity in this conventional sense.’

[225] While the above observation is directed at the use of the word ‘productivity’ in s.275, it is apposite to our consideration of this issue in the context of s.134(1)(f).

...

[228] Section 134(1)(h) requires that we take into account ‘the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy’.

[229] We note that the requirement to take into account the likely impact of any exercise of modern award powers on ‘the sustainability, performance and competitiveness of *the national economy*’ (emphasis added) focuses on the aggregate (as opposed to sectorial) impact of an exercise of modern award powers.
...¹

10. Further, the employer parties in these proceedings do not bear any onus to demonstrate that the Unions’ claims will result in increased employment costs, reduced productivity or undermine flexible work practices as contemplated by s.134(1) of the Act. No adverse inference can or should be drawn from the absence of evidence called by employer parties or from the absence of evidence that establishes that the claim will affect all or most employers in an industry.
11. The conduct of the Review differs from an inter-party dispute. Those responding to a claim do not bear an onus. Rather, it is for the proponents of a claim to establish that the variation proposed is necessary in order to ensure that an award is achieving the modern awards objective of providing a fair and relevant minimum safety net of terms and conditions. In determining whether a proponent has in fact established as much, the Commission will have regard to material before it that addresses the various elements of the modern awards objective, including those that go to employment costs, flexible work practices and productivity. These considerations are both microeconomic and macroeconomic; they require evaluation with respect to the practices of different types of businesses as well as industry at large.
12. As the Full Bench stated in the Preliminary Jurisdictional Issues Decision:
(emphasis added)

The proponent of a variation to a modern award must demonstrate that if the modern award is varied in the manner proposed then it would only include terms to the extent necessary to achieve the modern awards objective (see s.138). What is ‘necessary’ in a particular case is a value judgment based on an assessment of the

¹ 4 yearly review of modern awards – Penalty Rates [2017] FWCFB 1001 at [165] – [229].

considerations in s.134(1)(a) to (h), having regard to the submissions and evidence directed to those considerations.²

13. It is therefore for the proponents to overcome the legislative threshold established by ss.138 and 134(1), which includes a consideration of the impact upon different types of businesses and industry at large.
14. We later address each element of the modern awards objective with reference to the Unions claims for the purposes of establishing that, having regard to s.138 of the FW Act, the claims should not be granted.

² 4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues [2014] FWCFB 1788 at [60].

3. THE COMMISSION'S GENERAL APPROACH TO THE REVIEW

3.1 The Preliminary Jurisdictional Issues Decision

15. At the commencement of the Review, a Full Bench dealt with various preliminary issues. The Commission's Preliminary Jurisdictional Issues Decision³ provides the framework within which the Review is to proceed.

16. The Full Bench emphasised the need for a party to mount a merit based case in support of its claim, accompanied by probative evidence (emphasis added):

[23] The Commission is obliged to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net taking into account, among other things, the need to ensure a 'stable' modern award system (s.134(1)(g)). The need for a 'stable' modern award system suggests that a party seeking to vary a modern award in the context of the Review must advance a merit argument in support of the proposed variation. The extent of such an argument will depend on the circumstances. We agree with ABI's submission that some proposed changes may be self evident and can be determined with little formality. However, where a significant change is proposed it must be supported by a submission which addresses the relevant legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation.⁴

17. The Commission indicated that the Review will proceed on the basis that the relevant modern award achieved the modern awards objective at the time that it was made (emphasis added):

[24] In conducting the Review the Commission will also have regard to the historical context applicable to each modern award. Awards made as a result of the award modernisation process conducted by the former Australian Industrial Relations Commission (the AIRC) under Part 10A of the Workplace Relations Act 1996 (Cth) were deemed to be modern awards for the purposes of the FW Act (see Item 4 of Schedule 5 of the Transitional Act). Implicit in this is a legislative acceptance that at the time they were made the modern awards now being reviewed were consistent with the modern awards objective. The considerations specified in the legislative test applied by the AIRC in the Part 10A process is, in a number of important respects, identical or similar to the modern awards objective in s.134 of the FW Act. In the Review the Commission will proceed on the basis that prima facie the modern award being reviewed achieved the modern awards objective at the time that it was made.⁵

³ 4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues [2014] FWCFCB 1788.

⁴ 4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues [2014] FWCFCB 1788 at [23].

⁵ 4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues [2014] FWCFCB 1788 at [24].

18. The decision confirms that the Commission should generally follow previous Full Bench decisions that are relevant to a contested issue unless there are cogent reasons for not doing so: (emphasis added)

[25] Although the Commission is not bound by principles of stare decisis it has generally followed previous Full Bench decisions. In another context three members of the High Court observed in *Nguyen v Nguyen*:

“When a court of appeal holds itself free to depart from an earlier decision it should do so cautiously and only when compelled to the conclusion that the earlier decision is wrong. The occasion upon which the departure from previous authority is warranted are infrequent and exceptional and pose no real threat to the doctrine of precedent and the predictability of the law: see *Queensland v The Commonwealth* (1977) 139 CLR 585 per Aickin J at 620 et seq.”

[26] While the Commission is not a court, the public interest considerations underlying these observations have been applied with similar, if not equal, force to appeal proceedings in the Commission. As a Full Bench of the Australian Industrial Relations Commission observed in *Cetin v Ripon Pty Ltd (T/as Parkview Hotel) (Cetin)*:

“Although the Commission is not, as a non-judicial body, bound by principles of stare decisis, as a matter of policy and sound administration it has generally followed previous Full Bench decisions relating to the issue to be determined, in the absence of cogent reasons for not doing so.”

[27] These policy considerations tell strongly against the proposition that the Review should proceed in isolation unencumbered by previous Commission decisions. In conducting the Review it is appropriate that the Commission take into account previous decisions relevant to any contested issue. The particular context in which those decisions were made will also need to be considered. Previous Full Bench decisions should generally be followed, in the absence of cogent reasons for not doing so.⁶

19. In addressing the modern awards objective, the Commission recognised that each of the matters identified at s.134(1)(a) – (h) are to be treated “as a matter of significance”⁷ and that “no particular primacy is attached to any of the s.134 considerations”⁸. The Commission identified its task as needing to “balance

⁶ 4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues [2014] FWCFB 1788 at [24] – [27].

⁷ 4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues [2014] FWCFB 1788 at [31].

⁸ 4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues [2014] FWCFB 1788 at [32].

the various s.134(1) considerations and ensure that modern awards provide a fair and relevant minimum safety net”⁹: (emphasis added)

[36] ... Relevantly, s.138 provides that such terms only be included in a modern award ‘to the extent necessary to achieve the modern awards objective’. To comply with s.138 the formulation of terms which must be included in modern award or terms which are permitted to be included in modern awards must be in terms ‘necessary to achieve the modern awards objective’. What is ‘necessary’ in a particular case is a value judgment based on an assessment of the considerations in s.134(1)(a) to (h), having regard to the submissions and evidence directed to those considerations. In the Review the proponent of a variation to a modern award must demonstrate that if the modern award is varied in the manner proposed then it would only include terms to the extent necessary to achieve the modern awards objective.¹⁰

20. The frequently cited passage from Justice Tracey’s decision in *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* was adopted by the Full Bench. It was thus accepted that:

... a distinction must be drawn between that which is necessary and that which is desirable. That which is necessary must be done. That which is desirable does not carry the same imperative for action.¹¹

21. Accordingly, the Preliminary Jurisdictional Issues Decision establishes the following key threshold principles:

- A proposal to significantly vary a modern award must be accompanied by submissions addressing the relevant statutory requirements and probative evidence demonstrating any factual propositions advanced in support of the claim;
- The Commission will proceed on the basis that a modern award achieved the modern awards objective at the time that it was made;
- An award must only include terms to the extent necessary to achieve the modern awards objective. A variation sought must not be one that is merely desirable; and

⁹ 4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues [2014] FWCFB 1788 at [33].

¹⁰ 4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues [2014] FWCFB 1788 at [36].

¹¹ *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* (2012) 205 FCR 227 at [46].

- Each of the matters identified under s.134(1) are to be treated as a matter of significance and no particular primacy is attached to any of the considerations arising from it.

22. In a subsequent decision considering multiple claims made to vary the *Security Services Industry Award 2010*, the Commission made the following comments, which we respectfully commend to the Full Bench (emphasis added):

[8] While this may be the first opportunity to seek significant changes to the terms of modern awards, a substantive case for change is nevertheless required. The more significant the change, in terms of impact or a lengthy history of particular award provisions, the more detailed the case must be. Variations to awards have rarely been made merely on the basis of bare requests or strongly contested submissions. In order to found a case for an award variation it is usually necessary to advance detailed evidence of the operation of the award, the impact of the current provisions on employers and employees covered by it and the likely impact of the proposed changes. Such evidence should be combined with sound and balanced reasoning supporting a change. Ultimately the Commission must assess the evidence and submissions against the statutory tests set out above, principally whether the award provides a fair and relevant minimum safety net of terms and conditions and whether the proposed variations are necessary to achieve the modern awards objective. These tests encompass many traditional merit considerations regarding proposed award variations.¹²

23. The Unions claims conflict with the principles in the Preliminary Jurisdictional Issues Decision. Further, the Unions have not discharged the evidentiary burden described in the above decision. Accordingly, the claims should be rejected.

3.2 Considerations Associated with Procedural Fairness

24. We are of course mindful of the nature of the Review and the Commission's repeated observation that it is not bound by the terms of a proponent's claim. Nevertheless, a respondent party at this stage of the proceedings can deal only with that which has been put before us. That is, these submissions only relate to the variations sought and the material filed by the Unions in support of them. It is not incumbent upon us to provide a response (or a hypothetical

¹² *Re Security Services Industry Award 2010* [2015] FWCFB 620 at [8].

response) to potential derivatives of the variations sought. Such an approach would render the task here before us virtually impossible to undertake, particularly within the timeframes imposed upon us by the Commission and the resource constraints we face in the context of the Review generally.

25. Should the Unions or the Commission, during these proceedings, propose that the Award be varied in terms that differ to those which have been proposed as at the time of drafting these submissions, notions of fairness dictate that respondent parties such as Ai Group be afforded an opportunity to address the Full Bench in relation to whether such a course of action should be permitted or taken in the context of these proceedings. If such a course is to be adopted, there should also be a further opportunity to make submissions and/or call evidence in response to any such new proposal. Absent such a process, it may be argued that procedural fairness has not been afforded to those who oppose the claim because, for instance, such parties have not been granted a chance to be properly heard in relation to the variations ultimately sought to be made, which may well have implications that have not otherwise been put before the Full Bench.

4. THE UNION'S CLAIMS

26. In this section we summarise the various claims of the Unions.
27. It is our understanding that the claims identified at sections 4.1 – 4.5 are to be dealt with in the first phase of the proceedings in relation to this matter. These submissions address each of those claims.
28. Ai Group intends to seek an opportunity to respond to the remaining claims in due course.

4.1 Overtime, Weekend and Public Holiday Rates for Casual Employees

The HSU Claims

29. Clause 26 of the Award is in the following terms: (our emphasis)

26. Saturday and Sunday work

Employees whose ordinary working hours include work on a Saturday and/or Sunday will be paid for ordinary hours worked between midnight on Friday and midnight on Saturday at the rate of time and a half, and for ordinary hours worked between midnight on Saturday and midnight on Sunday at the rate of double time. These extra rates will be in substitution for and not cumulative upon the shift premiums prescribed in clause 29—Shiftwork and the casual loading prescribed in clause 10.4(b), and are not applicable to overtime hours worked on a Saturday or a Sunday.

30. The HSU is seeking the insertion of a new clause 26.1 in the following terms as well as the deletion of the words underlined above:
- (a) Casual employees will receive their casual loading in addition to the Saturday and Sunday rates at clause 26.
- (b) The rates are:
- (i) in substitution for and not cumulative upon the shift premiums prescribed in clause 29 – Shiftwork; and
- (ii) not applicable to overtime worked on a Saturday or Sunday.

31. The HSU is also seeking the insertion of a new clause 34.2(c) as follows:

34.2 Payment for working on a public holiday

- (a) An employee required to work on a public holiday will be paid double time and a half of their ordinary rate of pay for all time worked.
- (b) Payments under this clause are instead of any additional rate for shift or weekend work which would otherwise be payable had the shift not been a public holiday.
- (c) A casual employee will be paid the casual loading under clause 1.4(b) in addition to the public holiday penalty at clause 34.2(a).

32. The effect of the proposed variation would be to require the payment of the 25% casual loading prescribed by clause 10.4(b) during the performance of ordinary hours of work on a weekend or a public holiday.

The United Voice Claim

33. United Voice seeks the following variation to clause 28.1(b)(iv) of the Award:

28.1 Overtime rates

...

(b) Part-time employees and casual employees

- (i) All time worked by part-time or casual employees in excess of 38 hours per week or 76 hours per fortnight will be paid for at the rate of time and a half for the first two hours and double time thereafter, except that on Sundays such overtime will be paid for at the rate of double time and on public holidays at the rate of double time and a half.
- (ii) All time worked by part-time or casual employees which exceeds 10 hours per day, will be paid at the rate of time and a half for the first two hours and double time thereafter, except on Sundays when overtime will be paid for at the rate of double time, and on public holidays at the rate of double time and a half.
- (iii) Time worked up to the hours prescribed in clause 28.1(b)(ii) will, subject to clause 28.1(b)(i), not be regarded as overtime and will be paid for at the ordinary rate of pay (including the casual loading in the case of casual employees).
- (iv) Overtime rates payable under this clause will be in substitution for and not cumulative upon the shift premiums prescribed in clause 29—Shiftwork and are not applicable to ordinary hours worked on a Saturday or a Sunday.:-

~~(A) the shift premiums prescribed in clause 29 Shiftwork; and~~

~~(B) the casual loading prescribed in clause 10.4(b),~~

~~and are not applicable to ordinary hours worked on a Saturday or a Sunday.~~

34. The effect of the variation is to require the payment of the 25% casual loading prescribed by clause 10.4(b) during the performance of overtime in circumstances where currently, the casual loading is not payable for the performance such work.

4.2 Excursions

35. United Voice seeks the following amendment to clause 25.9(a)(ii) of the Award:

25.9 Excursions

Where an employee agrees to supervise clients in excursion activities involving overnight stays from home, the following provisions will apply:

(a) Monday to Friday excursions

- (i) Payment at the ordinary rate of pay for time worked between the hours of 8.00 am to 6.00 pm Monday to Friday up to a maximum of 10 hours per day.
- (ii) The employer and employee may agree to accrual of time instead of overtime payment for all other hours. Time accrued will be calculated at the overtime rate.
- (iii) Payment of sleepover allowance in accordance with the provision of clause 25.7.

(b) Weekend excursions

Where an employee involved in overnight excursion activities is required to work on a Saturday and/or Sunday, the days worked in the two week cycle, including that weekend, will not exceed 10 days.

36. The variation would have the effect of expressly requiring that where the employer and employee agree that the employee will accrue time off in lieu of payment for overtime, the time will be accrued at the relevant overtime rate.

4.3 First Aid Allowance

37. The HSU is seeking the insertion of a new clause 20.4(c) in the following terms:

20.4 First aid allowance

(a) First aid allowance—full-time employees

A weekly first aid allowance of 1.67% of the standard rate per week will be paid to a full-time employee where:

- (i) an employee is required by the employer to hold a current first aid certificate; and
- (ii) an employee, other than a home care employee, is required by their employer to perform first aid at their workplace; or
- (iii) a home care employee is required by the employer to be, in a given week, responsible for the provision of first aid to employees employed by the employer.

(b) First aid allowance—casual and part-time employees

The first aid allowance in 20.4(a) will apply to eligible part time and casual employees on a pro rata basis on the basis that the ordinary weekly hours of work for full-time employees are 38.

(c) First aid refresher

(i) Where an employee is required to maintain first aid certification, the employer will pay the full cost of the employee updating their first aid certification by:

a. reimbursing the employee's registration and attendance expenses; or

b. paying the registration and attendance costs.

(ii) Attendance at first aid refresher courses will be work time and paid as such.

38. The proposed clause would create various new entitlements where an employee is required to maintain their first aid certification. Specifically, the employer would be required to:

- (a) Reimburse the employee's registration and attendance expenses or pay the registration and attendance costs; and

- (b) Pay the employee for time spent attending the relevant first aid refresher courses and treat such time as time worked.

4.4 Community Language Skills Allowance

39. The ASU is seeking the insertion of a new clause in the terms set out below. It would afford employees with an entitlement to an additional allowance where they use “a community language skill as an adjunct to their normal duties”:

20.10 Community Language and Signing Work

- 20.10.1** Employees using a community language skill as an adjunct to their normal duties to provide services to speakers of a language other than English, or to provide signing services to those with hearing difficulties, shall be paid an allowance in addition to their weekly rate of pay.
- 20.10.2** A base level allowance shall be paid to staff members who language skills are required to meet occasional demands for one-to-one language assistance. Occasional demand means that there is no regular pattern of demand that necessitates the use of the staff members language skills. The base level rate shall be paid as a weekly all purposes allowance of \$45.00.
- 20.10.3** The higher level allowance is paid to staff members who use their language skills for one-to-one language assistance on a regular basis according to when the skills are used. The higher level rate shall be paid as a weekly all purposes allowance of \$68.00.
- 20.10.4** Such work involves an employee acting as a first point of contact for non-English speaking service users or service users with hearing difficulty. The employee identifies the resident's area of inquiry and provides basic assistance, which may include face-to-face discussion and/or telephone inquiry.
- 20.10.5** Such employees convey straightforward information relating to services provided by the employer, to the best of their ability. They do not replace or substitute for the role of a professional interpreter or translator.
- 20.10.6** Such employees shall record their use of community language skills.
- 20.10.7** Where an employee is required by the employer to use community language skills in the performance of their duties a) the employer shall provide the employee with accreditation from a language/signing aide agency b) The employee shall be prepared to be identified as possessing the additional skill(s) c)

The employee shall be available to use the additional skill(s) as required by the employer.

- 2.10.8** The amounts at 2.10.2 and 2.10.3 will be adjusted in accordance with increases in expense related allowances as determined by the Fair Work Commission.

4.5 Public Holidays

40. United Voice seeks the insertion of a new clause 34.2(c) as follows:

34.2 Payment for working on a public holiday

- (a) An employee required to work on a public holiday will be paid double time and a half of their ordinary rate of pay for all time worked.
- (b) Payments under this clause are instead of any additional rate for shift or weekend work which would otherwise be payable had the shift not been a public holiday.
- (c) Rosters must not be altered for the purpose of avoiding public holiday entitlements under the Award and the NES.

41. The proposed clause would prohibit roster changes for the purposes of avoiding public holiday entitlements under the Award and the NES.

4.6 Minimum Engagement Periods

42. The HSU is seeking the deletion of clause 10.4(c), which is in the following terms:

- (c) Casual employees will be paid the following minimum number of hours, at the appropriate rate, for each engagement:
 - (i) social and community services employees except when undertaking disability services work—3 hours;
 - (ii) home care employees—1 hour; or
 - (iii) all other employees—2 hours.

43. The HSU also seeks the insertion of a new clause 10.6:

10.6 The minimum engagement for employees under this award will be 3 hours.

44. The variations would have the effect of:

(a) Increasing the minimum engagement period for casual employees performing home care, disability services work, crisis accommodation work and family day care employees to three hours.

(b) Introducing a minimum engagement period for full-time and part-time employees of 3 hours.

4.7 Broken Shifts

The HSU Claims

45. The HSU is seeking the following changes to clause 25.6 of the Award:

25.6 Broken shifts

(a) This clause only applies to:

(i) social and community services employees when undertaking disability services work; and

(ii) home care employees.

(ab) For the purposes of this clause, a **broken shift** means a shift worked by an a casual or part-time employee that includes no more than one or more breaks (other than a meal break) and where the span of hours is not more than 12 hours.

(c) A broken shift may only be worked where there is mutual agreement between the employer and employee.

(d) Where an employee works a broken shift, they shall be paid at the appropriate rate for the reasonable time of travel from the location of their last client before the break to their first client after the break, and such time shall be treated as time worked. The travel allowance in clause 20.5 also applies.

(e) The minimum period of engagement specified in clause 10.6 shall apply to each period of work in a broken shift.

(bf) In addition to the rates at 14.4(d) Payment for a broken shift will be at ordinary pay with penalty rates and shift allowances in accordance with clause ~~29~~20.2

~~Shiftwork and clause 19—Overtime apply, with shift allowances being determined by the finishing time of the broken shift.~~

(g) Shift allowances will be determined by the starting or finishing time of the broken shift, whichever allowance is higher. The allowance will apply across both parts of the shift.

(eh) All work performed beyond the maximum span of 12 hours for a broken shift will be paid at ~~double-time~~ 200% of the minimum hourly rate.

(di) An employee must receive a minimum break of 10 hours between broken shifts rostered on successive days.

46. The variations proposed seek to significantly alter the current broken shift provisions. Specifically, they would have the following consequences:

(a) Limit the application of the clause to part-time and casual employees. The clause would no longer apply to full-time employees.

(b) Redefine a 'broken shift' such that a shift could only be 'broken' into two parts on a given day.

(c) Require that the employer and employee must *agree* that the employee will work broken shift in order for a broken shift to be worked.

(d) Introduce an express obligation to pay an employee for time spent travelling during the break in the shift and to treat such time as time worked.

(e) Require that each portion of the broken shift must be at least three hours in length.

(f) In some circumstances, increase an employee's entitlement to the relevant shift allowances during the performance of a broken shift.

The United Voice Claims

47. United Voice is seeking the following changes to clause 25.6 of the Award:

25.6 Broken shifts

This clause only applies to social and community services employees when undertaking disability services work and home care employees.

- (a) A ~~broken shift~~ means a shift worked by an employee that includes one or more breaks (other than a meal break) and where the span of hours is not more than 12 hours. For the purposes of this award a broken shift is a shift where an employee works in two separate periods of duty on any day within a maximum spread of twelve (12) hours and where the break between periods exceeds one hour.
- (b) Payment for a broken shift will be at ordinary pay with penalty rates and shift allowances in accordance with clause 29—Shiftwork, with shift allowances being determined by the starting or finishing time of the broken shift, whichever is greater.
- (c) All work performed beyond the maximum span of 12 hours for a broken shift will be paid at double time.
- (d) An employee must receive a minimum break of 10 hours between broken shifts rostered on successive days.

48. The variations proposed seek to:

- (g) Redefine a broken shift such that:
 - i) A shift could only be 'broken' into two parts on a given day;
 - ii) The break during the shift exceeds one hour.
- (h) In some circumstances, increase an employee's entitlement to the relevant shift allowances during the performance of a broken shift.

The ASU Claim

49. The ASU is seeking the insertion of a new clause 25.6(b)(i), in the terms set out below:

25.6 Broken shifts

This clause only applies to social and community services employees when undertaking disability services work and home care employees.

- (a) A **broken shift** means a shift worked by an employee that includes one or more breaks (other than a meal break) and where the span of hours is not more than 12 hours.
 - (b) An employee who works a broken shift will receive:
 - (i) Payment for a broken shift will be at ordinary pay plus a loading of 15% of their ordinary rate of pay for each hour from the commencement of the shift to the conclusion of the shift inclusive of all breaks; and
 - (ii) with penalty rates and shift allowances in accordance with clause 29—Shiftwork, with shift allowances being determined by the finishing time of the broken shift.
 - (c) All work performed beyond the maximum span of 12 hours for a broken shift will be paid at double time.
 - (d) An employee must receive a minimum break of 10 hours between broken shifts rostered on successive days.
50. The variation sought would see employees working a broken shift to an additional 15% loading for the duration of the entire shift and any intervening breaks.

4.8 Travelling, Transport and Fares

The United Voice Claim

51. United Voice is seeking the insertion of a new clause 25.7, as follows:

25.7 Travel Time

- (a) Where an employee is required to work at different locations they shall be paid at the appropriate rate for reasonable time of travel from the location of the preceding client to the location of the next client, and such

time shall be treated as time worked. The travel allowance in clause 20.5 also applies.

- (b) The clause does not apply to travel from the employee's home to the location of the first client nor does it apply to travel from the location of the last client to the employee's home.

52. The proposed clause would expressly require employers to pay an employee at the appropriate rate for time spent travelling between clients. The clause would also require that such time be treated as time worked.

The HSU Claims

53. The HSU is seeking the following amendment to clause 20.5(a):

20.5 Travelling, transport and fares

- (a) Where an employee is required and authorised by their employer to use their motor vehicle in the course of their duties, the employee is entitled to be reimbursed at the rate of \$0.78 per kilometre. Disability support workers and home care workers shall be entitled to be so reimbursed in respect of all travel:

- (a) from their place of residence to the location of any client appointment;

- (b) to their place of residence from the location of any client appointment;

- (c) between the locations of any client appointments on the basis of the most direct available route.

- (b) When an employee is involved in travelling on duty, if the employer cannot provide the appropriate transport, all reasonably incurred expenses in respect to fares, meals and accommodation will be met by the employer on production of receipted account(s) or other evidence acceptable to the employer.

- (c) Provided that the employee will not be entitled to reimbursement for expenses referred to in clause 20.5(b) which exceed the mode of transport, meals or the standard of accommodation agreed with the employer for these purposes.

- (d) An employee required to stay away from home overnight will be reimbursed the cost of reasonable accommodation and meals. Reasonable proof of costs so incurred is to be provided to the employer by the employee.

54. The proposed changes would create an express entitlement to reimbursement at a per kilometre rate where an employee is required and authorised to use their motor vehicle in the course of their duties where they travel as contemplated by the proposed clauses (a) – (c).

4.9 Overtime After 8 Hours of Work

55. The HSU is seeking the following amendment to clause 28.1(b)(ii):

28.1 Overtime rates

...

(b) Part-time employees and casual employees

...

- (ii) All time worked by part-time or casual employees which exceeds ~~40~~ 8 hours per day, will be paid at the rate of time and a half for the first two hours and double time thereafter, except on Sundays when overtime will be paid for at the rate of double time, and on public holidays at the rate of double time and a half.
- (iii) Time worked up to the hours prescribed in clause 28.1(b)(ii) will, subject to clause 28.1(b)(i), not be regarded as overtime and will be paid for at the ordinary rate of pay (including the casual loading in the case of casual employees).

...

56. The proposed variation would create an entitlement to overtime rates for part-time and casual employees for work performed in excess of 8 hours per day. Currently overtime rates are payable for work performed in excess of 10 hours per day.

4.10 Overtime for Part-Time Employees

57. The HSU is seeking the following amendment to clause 28.1(b)(iii):

28.1 Overtime rates

...

(b) Part-time employees and casual employees

- (i) All time worked by part-time or casual employees in excess of 38 hours per week or 76 hours per fortnight will be paid for at the rate of time and a half for the first two hours and double time thereafter, except that on Sundays such overtime will be paid for at the rate of double time and on public holidays at the rate of double time and a half.

- (ii) All time worked by part-time or casual employees which exceeds 10 hours per day, will be paid at the rate of time and a half for the first two hours and double time thereafter, except on Sundays when overtime will be paid for at the rate of double time, and on public holidays at the rate of double time and a half.
- (iii) All time worked by part-time employees which exceeds the hours agreed in clause 10.3(c) will be treated as overtime and paid at the rate of time and a half for the first two hours and double time thereafter, except on Sundays when overtime will be paid at the rate of double time and public holidays at the rate of double time and a half. Time worked up to the hours prescribed in clause 28.1(b)(ii) will, subject to clause 28.1(b)(i), not be regarded as overtime and will be paid for at the ordinary rate of pay (including the casual loading in the case of casual employees).

58. Clause 10.3(c) of the Award requires that an employer and part-time employee reach agreement before the employee commences employment about a regular pattern of work including the number of hours to be worked each week, and the days of the week the employee will work and the starting and finishing times each day.
59. The Award does not presently require payment at overtime rates to part-time employees where the employee works hours in addition to the hours they have agreed to work pursuant to clause 10.3(c) of the Award, unless the employee works more than 10 hours in a day or 38 hours in a week / 76 hours in a fortnight.
60. The HSU's claim would alter this position by requiring the payment of overtime rates to part-time employees wherever they work hours in addition to their 'agreed' hours.

4.11 Roster Changes

61. United Voice has proposed amendments to clause 25.5(d)(i) of the Award as follows:

25.5 Rosters

- (a) The ordinary hours of work for each employee will be displayed on a fortnightly roster in a place conveniently accessible to employees. The roster will be posted at least two weeks before the commencement of the roster period.
- (b) Rostering arrangements and changes to rosters may be communicated by telephone, direct contact, mail, email, facsimile or any electronic means of communication.
- (c) It is not obligatory for the employer to display any roster of the ordinary hours of work of casual or relieving staff.
- (d) **Change in roster**
 - (i) Seven days' notice will be given of a change in a roster. Full time and part time employees will be entitled to the payment of overtime for roster changes where seven days' notice is not provided.
 - (ii) However, a roster may be altered at any time to enable the service of the organisation to be carried on where another employee is absent from duty on account of illness, or in an emergency.
 - (iii) This clause will not apply where the only change to the roster of a part-time employee is the mutually agreed addition of extra hours to be worked such that the part-time employee still has four rostered days off in that fortnight or eight rostered days off in a 28 day roster cycle, as the case may be.
- (e) Where practicable, accrued days off (ADOs) will be displayed on the roster.

62. The proposed variation seeks to introduce a new substantive entitlement to overtime rates where a full-time or part-time employee is afforded less than 7 days' notice of a change to the roster.

4.12 Client Cancellations

63. The HSU has proposed the following variations to clause 25.5(f)(i):

(f) Client cancellation

- (i) Where a client cancels or changes the rostered home care service, an employee will be provided with notice of a change in roster at least 48 hours in advance ~~by 5.00 pm the day prior~~ and in such circumstances no payment will be made to the employee. If a full-time or part-time employee does not receive such notice, the employee will be entitled to receive payment for their ~~minimum specified hours~~ rostered hours for that visit on that day.
- (ii) The employer may direct the employee to make-up time equivalent to the cancelled time, in that or the subsequent fortnightly period. This time may be made up working with other clients or in other areas of the employer's business providing the employee has the skill and competence to perform the work.

64. The HSU's proposals would have the following consequences:

- (a) At least 48 hours' notice would need to be given to an employee of a change to their roster due to a client cancellation for the employer to be released of their obligation to pay any amount to the employee for the work they would otherwise have performed. Currently, the employer is released of their obligation so long as the employee is advised by 5:00pm the previous day.
- (b) If the requisite period of notice is not provided to an employee, they would be entitled to payment for their "rostered hours for that visit".

4.13 Recall to Work Overtime

65. The HSU is seeking the insertion of a new clause 28.4(b), as set out below:

28.4 Recall to work overtime

- (a)** An employee recalled to work overtime after leaving the employer's or client's premises will be paid for a minimum of two hours' work at the appropriate rate for each time so recalled. If the work required is completed in less than two hours the employee will be released from duty.
- (b)** Where an employee is required to perform work from home after leaving the employer's or client's premises, including:
- (i)** Responding to phone calls, message or emails;
 - (ii)** Providing advice ("phone fixes")
 - (iii)** Arranging call out/rosters of other employees; and
 - (iv)** Remotely monitoring and/or addressing issues by remote telephone and/or computer access;
- the employee will be paid for a minimum of one hours' work at the overtime rate for each time recalled.

66. The proposed new clause would require payment at overtime rates for at least one hour each time an employee is required to performing any work after leaving the employer or client's premises.

4.14 Sleepovers

67. The HSU is proposing the following amendments to clause 25.7(c) of the Award:

25.7 Sleepovers

- (a)** A sleepover means when an employer requires an employee to sleep overnight at premises where the client for whom the employee is responsible is located (including respite care) and is not a 24 hour care shift pursuant to clause 25.8 or an excursion pursuant to clause 25.9.
- (b)** The provisions of 25.5 apply for a sleepover. An employee may refuse a sleepover in the circumstances contemplated in 25.5(d)(i) but only with reasonable cause.

- (c) The span for a sleepover will be a continuous period of eight hours. Employees will be provided with:
- (i) a separate and securely lockable room with a peephole or similar in the door, with a bed and a telephone connection in the room; and,
 - (ii) suitable sleeping requirements such as a lamp and clean linen; and
 - (iii) use of appropriate facilities (including staff facilities where these exist); and
 - (iv) free board and lodging for each night when the employee sleeps over.
- (d) The employee will be entitled to a sleepover allowance of 4.9% of the standard rate for each night on which they sleep over.
- (e) In the event of the employee on sleepover being required to perform work during the sleepover period, the employee will be paid for the time worked at the prescribed overtime rate with a minimum payment as for one hour worked. Where such work exceeds one hour, payment will be made at the prescribed overtime rate for the duration of the work.
- (f) An employer may roster an employee to perform work immediately before and/or immediately after the sleepover period, but must roster the employee or pay the employee for at least four hours' work for at least one of these periods of work. The payment prescribed by 25.7(d) will be in addition to the minimum payment prescribed by this subclause.
- (g) The dispute resolution procedure in clause 9 of this Award applies to the sleepover provisions.

68. The variations proposed require the provision of various additional amenities to an employee during any sleepover.

4.15 Uniforms

69. United Voice is seeking the insertion of a new clause 20.2(b), as set out below:

20.2 Clothing and equipment

- (a) Employees required by the employer to wear uniforms will be supplied with an adequate number of uniforms appropriate to the occupation free of cost to employees. Such items are to remain the property of the employer and be laundered and maintained by the employer free of cost to the employee.
- (b) An adequate number of uniforms should allow an employee to work their agreed hours of work in a clean uniform without having to launder work uniforms more than once a week.
- ~~(bc)~~ Instead of the provision of such uniforms, the employer may, by agreement with the employee, pay such employee a uniform allowance at the rate of \$1.23 per shift or part thereof on duty or \$6.24 per week, whichever is the lesser amount. Where such employee's uniforms are not laundered by or at the expense of the employer, the employee will be paid a laundry allowance of \$0.32 per shift or part thereof on duty or \$1.49 per week, whichever is the lesser amount.
- ~~(ed)~~ The uniform allowance, but not the laundry allowance, will be paid during all absences on paid leave, except absences on long service leave and absence on personal/carer's leave beyond 21 days. Where, prior to the taking of leave, an employee was paid a uniform allowance other than at the weekly rate, the rate to be paid during absence on leave will be the average of the allowance paid during the four weeks immediately preceding the taking of leave.
- ~~(de)~~ Where an employer requires an employee to wear rubber gloves, special clothing or where safety equipment is required for the work performed by an employee, the employer must reimburse the employee for the cost of purchasing such special clothing or safety equipment, except where such clothing or equipment is provided by the employer.

70. Currently, the Award requires that an employer must provide "an adequate number of uniforms appropriate to the occupation" of the employee where the employer requires the employee to wear a uniform. The Award does not purport to prescribe what the "adequate number of uniforms" will be. Rather, this is a matter to be determined by the employer, having regard to the employee's occupation and other relevant circumstances.

71. United Voice seeks the insertion of a new clause that describes or defines what constitutes "an adequate number of uniforms".

4.16 Damaged Clothing

72. The HSU is seeking the insertion of a new clause 20.3, which is in the following terms:

20.3 Damaged clothing allowance

- (i) Where an employee, in the course of their employment suffers any damage to or soiling of clothing or other personal effects (excluding hosiery), upon provision of proof of the damage, employees shall be compensated at the reasonable replacement value of the damaged or soiled item of clothing.
- (ii) This clause will not apply where the damage or soiling is caused by the negligence of the employee.

73. The proposed clause would entitle an employee to compensation “at the reasonable replacement value” of any damaged or soiled clothing or personal effects if they are so damaged or soiled during the course of their employment by virtue of any cause other than the negligence of the employee.

4.17 Telephone Allowance

The HSU Claim

74. Clause 20.6 of the Award provides as follows:

20.6 Telephone allowance

Where the employer requires an employee to install and/or maintain a telephone for the purpose of being on call, the employer will refund the installation costs and the subsequent rental charges on production of receipted accounts.

75. The HSU has proposed that the above clause be replaced with the following:

20.6 Telephone allowance

Where an employer requires an employee to use a mobile phone for any work related purpose, the employer will either:

- (a) provide a mobile phone fit for purpose and cover the cost of any subsequent charges; or
- (b) refund the cost of purchase and usage charges on production of receipts.

76. The proposed clause would apply wherever an employer requires an employee to use a mobile phone for any work related purpose. It would require the employer to provide the employee with a mobile phone and cover the cost of any usage charges (whether incurred for work purposes or otherwise) or reimburse the employee for the same.

The United Voice Claim

77. United Voice has proposed the following amendments to clause 20.6 of the Award:

20.6 Telephone allowance

Where the employer requires an employee to install and/or maintain a telephone or mobile phone for the purpose of being on call, for the performance of work duties or to access work related information, the employer will refund the installation costs and the subsequent rental charges on production of receipted accounts.

78. The variations proposed seek to extend the application of clause 20.6 to circumstances in which:
- (a) An employer requires an employee to “install and/or maintain ... a mobile phone”.
 - (b) An employer requires an employee to install and/or maintain a telephone for the performance of work duties or access work related information.
 - (c) An employer requires an employee to install and/or maintain a mobile phone for the performance of work duties or access work related information.

5. THE NATIONAL DISABILITY INSURANCE SCHEME

79. The NDIS was established in 2013, by the *National Disability Insurance Scheme Act 2013* (Cth) (**NDIS Act**). The NDIS is managed by the National Disability Insurance Agency (**NDIA**), which is a statutory agency.
80. In addition to the NDIS Act, a number of rules¹³ (**NDIS Rules**) have been made by the relevant Federal minister. The NDIS Rules deal with a range of matters. In some cases, the rules apply only in certain states / territories, whilst in other instances, they have nationwide application.
81. The implementation of the NDIS brought with it significant changes to the way in which support and care for people with permanent and significant disability is provided and funded. Rather than the previous model of providing “block funding” to providers, the NDIS operates through individualised support packages for each participant in the scheme. At its core, the NDIS is directed towards enabling persons with a disability to exercise choice and control over the support and care that they receive. The model espoused by the NDIS is, in essence, a consumer-driven one. This has had and continues to have various implications for providers in the industry, which we later come to.

¹³ For example, the *National Disability Insurance Scheme (Becoming a Participant) Rules 2016*; *National Disability Insurance Scheme (Children) Rules 2013*; *National Disability Insurance Scheme (Code of Conduct) Rules 2018*; *National Disability Insurance Scheme (Complaints Management and Resolution) Rules 2018*; *National Disability Insurance Scheme (Facilitating the Preparation of Participants' Plans—Australian Capital Territory) Rules 2014*; *National Disability Insurance Scheme (Facilitating the Preparation of Participants' Plans—New South Wales) Rules 2016*; *National Disability Insurance Scheme (Facilitating the Participation of Participants' Plans – Queensland) Rules 2016*; *National Disability Insurance Scheme (Facilitating the Preparation of Participants' Plans—South Australia) Rules 2013*; *National Disability Insurance Scheme (Facilitating the Preparation of Participants' Plans – South Australia) Rules 2014*; *National Disability Insurance Scheme (Facilitating the Preparation of Participants' Plans – Tasmania) Rules 2016*; *National Disability Insurance Scheme (Facilitating the Preparation of Participants' Plans—Victoria) Rules 2016*; *National Disability Insurance Scheme (Facilitating the Preparation of Participants' Plans—Western Australia) Rules 2014*; *National Disability Insurance Scheme (Facilitating the Preparation of Participants' Plans—Northern Territory) Rules 2016*.

82. The scope of the NDIS can be characterised by reference to the following defining features, noting that this is not an exhaustive list of the various eligibility criteria stipulated by the NDIS Act¹⁴ and NDIS Rules:

(a) The NDIS relates to the provision of care to persons with “permanent and significant disability”. The NDIS Act prescribes “disability requirements” that must be satisfied in order for a person to be eligible for funding under the NDIS. Those requirements are summarised at rule 5.1 of the *National Disability Insurance Scheme (Becoming a Participant) Rules 2016* in the following terms:

- The person has a disability that is attributable to one or more intellectual, cognitive, neurological, sensory or physical impairments, or to one or more impairments attributable to a psychiatric condition; and
- The person’s impairment or impairments are, or are likely to be, permanent; and
- The impairment or impairments result in substantially reduced functional capacity to undertake, or psychosocial functioning in undertaking, one or more of the following activities: communication, social interaction, learning, mobility, self-care, self-management; and
- The impairment(s) affect the person’s capacity for social and economic participation; and
- The person is likely to require support under the NDIS for the person’s lifetime.

¹⁴ See for example age and residence requirements at sections 22 and 23 of the NDIS Act.

The rules go on to prescribe further requirements in relation to certain aspects of the above overarching requirements.¹⁵

- (b) The NDIS funds “reasonable and necessary supports”, having regard to s.34 of the NDIS Act, which describes the type of supports that will or will not be provided.¹⁶

83. The rollout of the NDIS commenced on a ‘transitional’ basis in various states and territories. The chart¹⁷ below identifies the timeframes for the rollouts as agreed between the Commonwealth and State and Territory Governments in 2013:

Table 1 NDIS transition arrangements by jurisdiction

	Trial period			Transition to full scheme			Full scheme
	2013 14	2014 15	2015 16	2016 17	2017 18	2018 19	2019 20
NSW	Hunter area trial			Transition to full scheme (by region)		Full scheme	
		Early Transition in Nepean Blue Mountains area (children aged 0–17 years)					
Vic	Barwon area trial			Transition to full scheme (by region)			Full scheme
Qld				Transition to full scheme from July 2016 (by region). Early Transition from January 2016 in Townsville, Charters Towers and Palm Island			Full scheme
SA	Statewide trial (children aged 0–14 years)			Transition to full scheme (by age and region)		Full scheme	
Tas	Statewide trial (people aged 15–24 years)			Transition to full scheme (by age)			Full scheme
NT		Barkly region trial		Transition to full scheme (by region)			Full scheme
ACT ^a		Territorywide trial		Full scheme			
WA ^b	Perth Hills area trial			Transition to locally administered NDIS			
	MyWay trial						

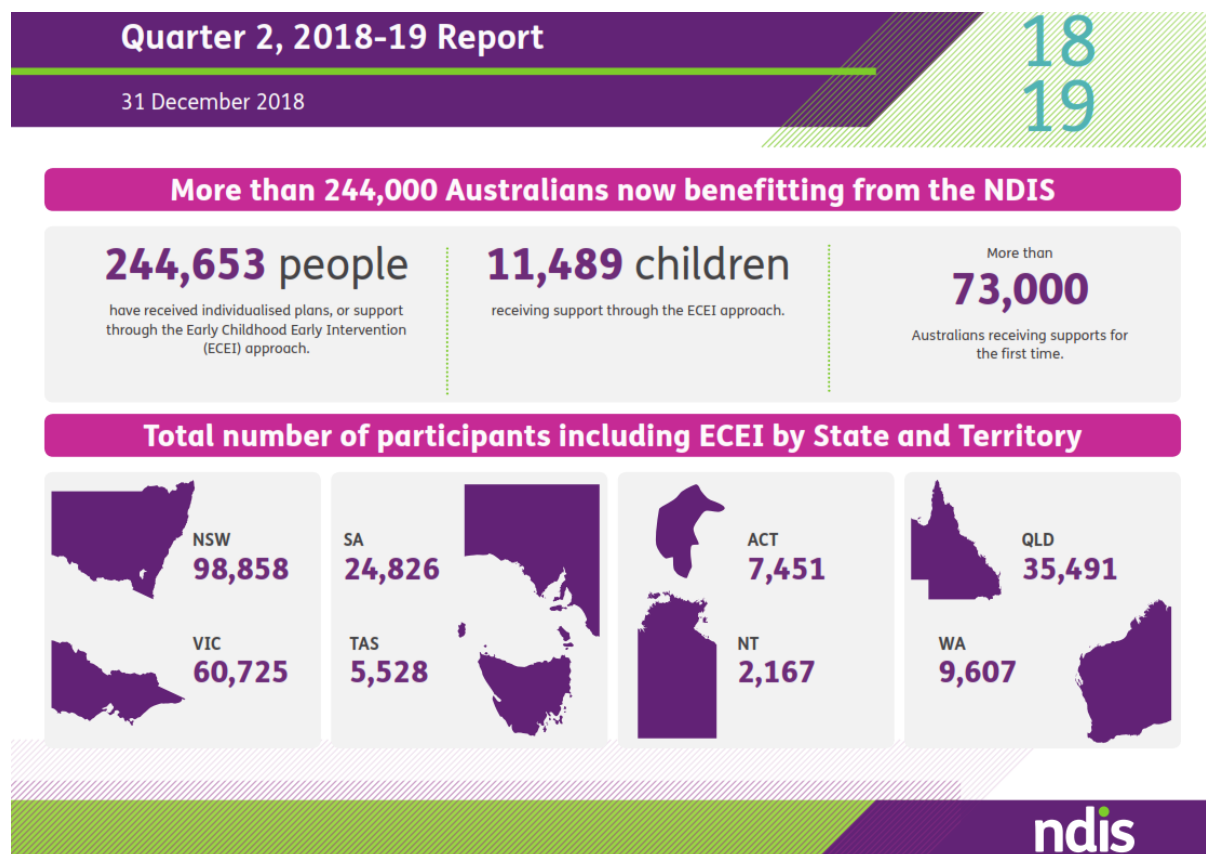
^a The Bilateral Agreement for the NDIS launch between the Australian Government and the ACT Government notes that from 2016-17 the ACT will be in ‘transition to full scheme’. This transition has been categorised as ‘full scheme’ because all residents who meet the eligibility criteria will have access to the scheme. ^b In February 2017, the Australian Government and Western Australian Government signed a Bilateral Agreement for a nationally consistent, but locally administered, NDIS.

¹⁵ *National Disability Insurance Scheme (Becoming a Participant) Rules 2016* at rules 5.4 – 5.8.

¹⁶ See also the *National Disability Insurance Scheme (Supports for Participants) Rules 2013*.

¹⁷ Productivity Commission, *National Disability Insurance Scheme (NDIS) Costs; Productivity Commission Study Report* (October 2017) at Table 1.

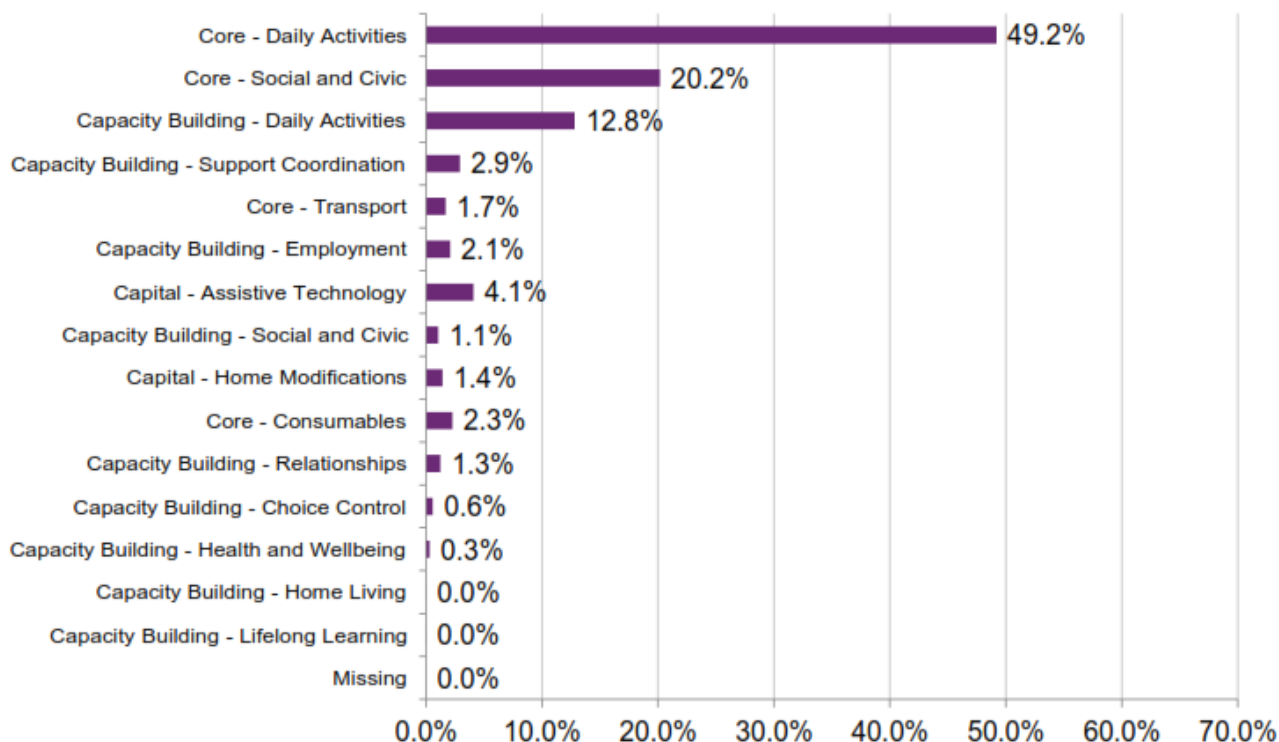
84. The rollout of the NDIS is continuing. In October 2017, the Productivity Commission (PC) observed that “the intake of participants with approved plans [had] already [fallen] behind the expected pace” and that if that trend continued, it would take “an additional year before all eligible participants are in the scheme”¹⁸.
85. Information published by the NDIA indicates that as at 31 December 2018, 244,653 persons were accessing the NDIS, as follows:



¹⁸ Productivity Commission, *National Disability Insurance Scheme (NDIS) Costs; Productivity Commission Study Report* (October 2017) at page 11.

86. As the chart below demonstrates¹⁹, as at 31 December 2018, close to 50% of the funding included in active plans related to core daily activities²⁰:

3.1 Total annualised committed support for active participants with an approved plan by support category (%)



87. It is anticipated that when the rollout is complete (previously scheduled for 2019 – 2020), some 475,000 participants would have access to the scheme.²¹

¹⁹ NDIA, *National Dashboard as at 31 December 2018*.

²⁰ For example, assistance with self-care activities during the day or evening.

²¹ Productivity Commission, *National Disability Insurance Scheme (NDIS) Costs; Productivity Commission Study Report* (October 2017) at page 3.

5.1 Participant Plans

88. As previously mentioned, participants under the NDIS have individualised support packages and plans. In broad terms, the process for developing and implementing a plan is as follows:

- (a) A person is required to provide various information about themselves and their disability to the NDIA. This is referred to as an 'access request'.²²
- (b) The relevant information is relied upon by the NDIA to assess whether the person is eligible for support under the NDIS. The NDIA's 'assess decision' is communicated to the person in writing, once determined.²³
- (c) The participant will then attend a 'planning meeting', to discuss the participant's current supports and goals for the purposes of developing a plan for the participant, including the specific types of support that the participant requires.
- (d) All plans must be submitted to the NDIA for approval.
- (e) Once approved, a participant's plan will indicate the funding that has been allocated to each support category. The NDIS' publications for participants in the scheme indicate that there are varying degrees of flexibility contemplated under participants' plans. For example:

²² Section 18 of the NDIS Act.

²³ Section 28 of the NDIS Act.

- i) A participant's "**Core Supports budget**" is "the most flexible, and in most cases, [the participant] can use [their] funding across any of the following four support categories:
- Assistance with daily life;
 - Consumables;
 - Assistance with social and community participation; and
 - Transport.²⁴

However, there are instances where [the participant does] not have flexibility in [their] funding, particularly transport funding".

- ii) A participant's "**Capacity Building Supports budget** ... cannot be moved from one support category to another. Funding can be used to purchase approved individual supports that fall within that Capacity Building category". The categories relevantly include:
- Increased social and community participation;
 - Improved relationships;
 - Improved health and wellbeing; and
 - Improved daily living.²⁵
- iii) A participant's plan may also include "**stated supports**". Such supports are not flexible. Funding is allocated for specific stated supports or services and that funding cannot be directed towards an alternate support or service.²⁶

²⁴ NDIS, *Using your NDIS plan* at page 6.

²⁵ NDIS, *Using your NDIS plan* at page 7.

²⁶ NDIS, *Using your NDIS plan* at page 8.

- (f) The participant can choose which provider provides the various supports for which funding has been approved by the NDIA. A participant's funding will be managed in one of three ways:
- i) Self-management (the NDIA provides the funding to the participant and the participant then pays the providers directly).
 - ii) Plan-management (a Plan Manager will pay providers on behalf of the participant).
 - iii) NDIA-Managed (The NDIA pays providers directly, on behalf of the participant).
- (g) Once a participant selects their providers, a service agreement must be entered into between the participant and the provider. The service agreement will identify, amongst other matters, the services to be provided and their respective prices.

89. The function served by participant plans and the strictures contained therein regarding the manner in which participants may use their funding are important features of the scheme for the purposes of these proceedings. We explain the reasons for this below.

5.2 The NDIS Pricing Guides

90. It is expected that, ultimately, supports funded by the NDIS will be provided to participants at prices set by the market, absent regulation by the NDIA. Currently, however, the NDIA has imposed price caps on a range of supports. This market intervention is intended to strike a balance between ensuring that participants are able to access the relevant supports at affordable prices whilst also incentivising providers to in fact offer the relevant services.²⁷

²⁷ Productivity Commission, *National Disability Insurance Scheme (NDIS) Costs; Productivity Commission Study Report* (October 2017) at page 33.

91. In practice, the pricing caps also limit a provider's ability to recover additional, unfunded costs or to increase the margin between the costs incurred in providing the relevant supports and the price charged to participants in the scheme for those same supports.
92. A participant's plan will identify the support category(ies) for which they are entitled to funding. The NDIS recognises numerous specific supports and services, which are referred to as "line items". Providers claim payments by reference to those "line items".²⁸
93. As at the time of drafting this submission, the most recent price guides published by the NDIS apply to services provided on or after 1 February 2019 (**Price Guides**). The Price Guides vary in their application. For example, one price guide applies to New South Wales (**NSW**), Queensland, Victoria and Tasmania, whilst a separate price guide applies to the remaining states and territories. Those Price Guides operate subject to other Price Guides applying to "remote" and "very remote" areas within the various states and territories.
94. In addition to identifying the price caps for various line items, the Price Guides also deal specifically with certain issues that are of direct relevance to the Unions' claims, such as cancellations by participants and travel by employees of providers between participants. Given that those matters are to be dealt with at a subsequent stage of these proceedings, we do not here detail the NDIS funding arrangements in relation to those matters, but we intend to seek an opportunity to do so in due course.
95. It is also relevant that on 30 March 2019, the Federal Government announced increases to price limits for therapy, attendant care and community participation, which are expected to take effect from 1 July 2019.²⁹ It appears that a detailed price guide identifying the specific changes to the

²⁸ NDIA, *Price Guide; New South Wales, Queensland, Victoria, Tasmania* (1 February 2019) at page 10.

²⁹ Media release by Minister Fletcher and Minister Henderson, *NDIS price increases for a sustainable and vibrant disability services market* (30 March 2019).

price limits will not be released until June 2019, after the Commission makes its decision regarding the Annual Wage Review (AWR).³⁰

96. In the interim, the NDIA has published revised indicative price guides that are subject to indexation to take into account wage inflation (i.e. the Commission’s AWR). For example, it has released the following “*Indicative change to East Price Guide*”:

Indicative change to East Price Guide
(does not yet include indexation for wage inflation)

Shift	Level of care	2019–20 base price	2018–19 base price	Increase in base price
Weekday	Level 1	\$50.57	\$47.02	7.6%
Saturday	Level 1	\$69.56	\$65.22	6.7%
Sunday	Level 1	\$90.45	\$83.47	8.4%
Public Holiday	Level 1	\$113.24	\$101.66	11.4%
Afternoon Shift	Level 1	\$55.80	\$51.56	8.2%
Night Shift	Level 1	\$56.84	\$52.46	8.4%
Weekday	Level 2	\$54.69	\$49.61	10.2%
Saturday	Level 2	\$75.24	\$68.92	9.2%
Sunday	Level 2	\$97.83	\$88.27	10.8%
Public Holiday	Level 2	\$122.46	\$107.55	13.9%
Afternoon Shift	Level 2	\$60.34	\$54.43	10.9%
Night Shift	Level 2	\$61.47	\$55.38	11.0%
Weekday	Level 3	\$57.45	\$51.86	10.8%
Saturday	Level 3	\$79.02	\$72.11	9.6%
Sunday	Level 3	\$102.75	\$92.42	11.2%
Public Holiday	Level 3	\$128.63	\$112.67	14.2%
Afternoon Shift	Level 3	\$63.38	\$56.91	11.4%
Night Shift	Level 3	\$64.56	\$57.91	11.5%

97. As can be seen, the price increases range from 6.7% - 14.2%. Importantly, however, by way of example, the hourly rate for the most basic level of attendant care during a weekday has increased by only \$3.55 per hour. In real

³⁰ NDIA, *Annual Price Review* (accessed 4 April 2019).

terms, this represents only a marginal increase which will not, in our submission, absolve the concerns raised with us by industry regarding their ability to meet the additional employment costs that would flow from the Unions' claims if granted.

5.3 The Assumptions Underpinning the NDIS Pricing Arrangements

98. The NDIS' pricing arrangements are based on a 'Reasonable Cost Model' (RCM). That model is underpinned by various assumptions.
99. The HSU seeks to rely on a report published by the University of NSW³¹ in June 2017 titled '*Reasonable, necessary and valued: Pricing disability services for quality support and decent jobs*' (UNSW Report). The report considers the assumptions underpinning the RCM for disability support work.
100. We here summarise the key assumptions considered in the UNSW Report and the difficulties arising from them. For the reasons subsequently explained, in our submission the pricing arrangements are based on problematic assumptions and as a result, absent significant further adjustments to the NDIS, employers will be unable to recover any additional employment costs associated with enhancements to employee entitlements through these proceedings. The material before the Commission rather demonstrates that the grant of the Unions' claims would serve only to compound the significant existing difficulties experienced by employers under the NDIS.
101. *First*, The RCM assumes that disability support workers are employed at level 2.3 under the 'Social and Community Services' stream of the Award. The NDIA has described this as the "average" level at which such employees are

³¹ University of NSW; Cortis, N, Macdonald F, Davidson B and Bentham E, *Reasonable, necessary and valued: Pricing disability services for quality support and decent jobs* (June 2017).

engaged under the Award.³² This of itself assumes that employees may be classified at a higher level under the Award.

102. The UNSW Report identifies the following problems with the first assumption:

- (a) The assumed classification level does not reflect the applicable classification level under the Award when regard is had to the type of work performed by disability support workers.³³ Employers have described Level 2, pay point 3 as the “entry level” classification.³⁴
- (b) There is no allowance made for above award wages; for example, those provided under an enterprise agreement.³⁵
- (c) It is resulting in an over-reliance on inexperienced members of staff, which undermines the quality of the service delivered to participants in the scheme.³⁶

103. The authors conclude:

Based on a comparison with definitions in the [Award], and on employer and disability worker accounts, Level 2.3 is considered entry level, and under-classifies disability support workers. This component of the price is misaligned to the actual profile of the workforce, creating incentives to hire less qualified, competent and permanent staff. As expectations of the disability support workforce grow, and new skills demands arise from individualisation and quality and safeguarding measures (DSS, 2016), the assumption that workers will, on average, be employed at Level 2.3 provides a disincentive to support upskilling and career progression.³⁷

104. In addition, we note the following further concerns.

³² UNSW Report at page 22.

³³ UNSW Report at page 29.

³⁴ UNSW Report at page 30.

³⁵ UNSW Report at page 29.

³⁶ UNSW Report at page 29.

³⁷ UNSW Report at pages 30 – 31.

105. Clause 13.3(a) of the Award deals with progression through pay points under the Award:

13.3 Progression

- (a)** At the end of each 12 months' continuous employment, an employee will be eligible for progression from one pay point to the next within a level if the employee has demonstrated competency and satisfactory performance over a minimum period of 12 months at each level within the level and:
 - (i)** the employee has acquired and satisfactorily used new or enhanced skills within the ambit of the classification, if required by the employer; or
 - (ii)** where an employer has adopted a staff development and performance appraisal scheme and has determined that the employee has demonstrated satisfactory performance for the prior 12 months' employment.

106. In addition to the general application of the classification structure of the Award, clause 13.3(a) contemplates that an employee will progress through the pay scales set by the Award if the prescribed criteria are satisfied. On its face, it is apparent that the assumption made for the purposes of the RCM may not hold in the circumstances of a particular employee just 12 months after they are classified at Level 2, pay point 3.

107. Further, clause 30 of the Award ('Higher duties') requires payment at a higher rate than the rate applying to the classification in which the employee is ordinarily engaged in the prescribed circumstances. Its application again distorts the assumption made in the RCM.

108. In any event, the hourly rate for an employee classified as Level 2, pay point 3 under the Award is currently \$23.42. That represents almost 50% of the price limit of \$48.14 for assistance with self-care activities on a weekday in the Eastern states (as of 1 February 2019)³⁸. This does not include additional amounts payable pursuant to the Equal Remuneration Order³⁹ (**ERO**), the

³⁸ NDIS Price Guide, *New South Wales, Queensland, Victoria, Tasmania* (valid from 1 February 2019).

³⁹ PR525485.

inclusion of which would necessarily subsume a greater proportion of the NDIA price cap.

109. *Second*, the RCM assumes that only 10% of a disability support worker's paid time will be spent on leave and that of their remaining 'on duty' time, only 5% will constitute time that is spent on duty but not with a participant or travelling between participants. This comes to just 3 minutes per hour.⁴⁰

110. The authors of the report make the following important observation regarding the assumptions underpinning the RCM in relation to employee utilisation: (our emphasis)

... There does not appear to be any publicly available data or detailed analysis about the extent to which these assumptions reflect the time demands on disability support workers arising from the range of essential tasks required of workers when they are not with participants, and whether administration, handover and communication between disability support workers, supervision, training, team meetings, breaks and other requirements are accounted for.⁴¹

111. They then go on to say as follows: (our emphasis)

Evidence from disability workers and employers shows NDIS prices for disability support do not allow adequate time for quality support. For example, there is too little allowance made for legal requirements such as breaks for workers, and for essential tasks such as administration and coordination, or for the development of workers through training and time for supervision and peer support.

...

Analysis of the pricing model in the context of the [Award] shows prices do not adequately account for non-client facing time, including breaks. The pricing model assumes that just 3 minutes per hour of workers' time is not spent either with participants or travelling between them (Section 4.2). This allows for little more than the 10 minute paid tea break required every four hours under the [Award], leaving minimal time for other non-client facing activities.⁴²

⁴⁰ UNSW report at page 22.

⁴¹ UNSW report at pages 22 – 23.

⁴² UNSW Report at page 31.

112. The report criticises the NDIS pricing arrangements for not including, or adequately including, a consideration of other duties or activities undertaken by employees in the course of their employment, including:
- (a) Communication between employees for the purposes of handovers;⁴³
 - (b) Attendance at staff / team meetings;⁴⁴
 - (c) Completion of paperwork and other administrative duties, which have reportedly increased under the NDIS;⁴⁵
 - (d) Training for new and existing employees;⁴⁶
 - (e) Leave, noting that:
 - (i) The assumptions inadequately reflect annual leave entitlements to the extent that they do not taking into account the entitlement to an additional week of leave where an employee meets the definition of ‘shiftworker’ at clause 31.2 of the Award.⁴⁷
 - (ii) The assumptions inadequately reflect long service leave entitlements in certain states and territories, including portable long service leave schemes.⁴⁸
 - (f) Travelling between clients, which the report describes as a “vexed” issue.⁴⁹ We intend to return to the consideration given in the UNSW Report to the issue of travelling time in subsequent proceedings regarding the unions’ travelling time claims.

⁴³ UNSW Report at page 34.

⁴⁴ UNSW Report at page 34.

⁴⁵ UNSW Report at page 35.

⁴⁶ UNSW Report at pages 40 – 43.

⁴⁷ UNSW Report at page 43.

⁴⁸ UNSW Report at pages 43 – 44.

⁴⁹ UNSW Report at 37.

113. In light of the above observations, the assumption made is clearly problematic and without proper foundation. To that end, the funding arrangements inadequately account for time necessarily spent by employees taking breaks required by the Award and undertaking duties other than attending to clients.
114. *Third*, the RCM assumes that supervisors are employed at level 3.2 under the Award. The NDIA has described this as the “average” level at which employees who undertake program management and administration are engaged under the Award. It also assumes a ratio of one supervisor to 15 members of staff.⁵⁰
115. The authors of the UNSW Report have identified that the ratio “[does] not appear to be based on existing practice or any model of good practice, and [does] not recognise how disability support work is organised”⁵¹.
116. An important link is also draw between this assumption and the first assumption articulated above: (our emphasis)

... If all workers were employed at SACS Level 2, as per the pricing level, the span would need to be much less than 1:15. However, as Level 2.3 is assumed to be the average for support workers (with some employed at higher levels and some lower), in order to make 1:15 acceptable, supervisors would need to be employed at SACS Level 4 or higher, rather than at Level 3.2 as assumed in the RCM. The [Award] stipulates that Level 3.2 staff ‘supervise a limited number of lower classified employees’. The assumed level of supervisors, at Level 3.2, is below the commencement level of a graduate with a three-year degree (Level 3.3). Under the [Award] a characteristic of Level 4, is that positions may involve a ‘substantial component of supervision’. This would more plausibly reflect supervision spans of 1:15, than the ‘limited number’ stipulated at Level 3. Further, larger supervisory spans (such as the 1:18 envisaged in future) require higher levels of responsibility and employment of supervisors at higher levels, and are poorly aligned with the description of responsibilities at Level 3.2.

Empirical data shows supervisory spans of 1:15 and 1:18 are much higher than is common practice. Data from the survey of disability workers shows that among disability workers with supervisory responsibilities, 2 in 3 were supervising 8 or fewer staff (66% of supervisors). Only 16.4% of supervisors reported supervising over 14

⁵⁰ UNSW Report at page 23.

⁵¹ UNSW Report at page 44.

staff, although the figure was higher for those working under NDIS (20%) compared with those who were not (12%). ...⁵²

117. The authors go on to observe as follows: (our emphasis)

These data underline how the pricing model has assumed a larger supervision span than accords with the [Award] classifications or than is common practice. Supervision of 15 staff as per the pricing model would entail significant (and unrealistic) change to the design of supervisory roles, and would intensify supervisory workloads for around 83% of supervisors in the survey.⁵³

118. Clearly, the supervisory ratios and classification levels upon which the pricing assumptions are made are unrealistic and do not reflect common practice. To the extent that employers cannot operate in accordance with those assumptions, the resulting additional employment costs are not provided for in the funding and accordingly, must be absorbed by employers.

119. *Fourth*, the authors state that it is “common practice” to include a loading of 25 – 30% for staff on-costs. They observe however that “it is not clear from public documents precisely how this element of the RCM was calculated and which other costs, if any, were included, making it difficult to assess its adequacy”⁵⁴. They go on to observe that in any event, “the actual amounts in the RCM ... are inevitably much less than what is necessary, because on-costs are a percentage mark-up on direct wage costs, which, as shown above, are significantly under-stated, based on the under-classification of workers and supervisors, and under-estimates of the time required to provide disability support ...”⁵⁵.

120. We again express doubt as to the reliability of this assumption.

121. *Fifth*, the UNSW Report also documents concerns about the allowance made in the pricing arrangements for corporate overheads and return on capital.⁵⁶

⁵² UNSW Report at page 44.

⁵³ UNSW Report at page 45.

⁵⁴ UNSW Report at page 23.

⁵⁵ UNSW Report at page 47.

⁵⁶ UNSW Report at pages 23 – 24 and 47 – 51.

122. The price cap for relevant services may be increased by virtue of the following factors:

- (a) The geographical location of the service (higher price caps apply in regional parts of Australia);
- (b) The intensity or complexity of the participant's needs;
- (c) The time when the support is provided; and
- (d) The number of participants being supported.

123. In relation to the intensity or complexity of the participant's needs (paragraph (b) above), the UNSW Report states: (our emphasis)

... the evidence ... [shows] the loading for intensity is far too limited, as it fails to take account of the range and cost of strategies that are essential to assist participants with complex support needs, in particular the need for more senior workers and the frequent need for more than worker to work with participants. The loading only takes (inadequate) account of additional non-client time required of workers, with a 5% reduction allowed from the proportion assumed in the base hourly rate. Under current arrangements, the higher rate of supports can be considered where assistance to manage challenging behaviour is required at least once per shift or where continual active support is required, but it is the case that some participants have more intermittent complex support needs. ...⁵⁷

124. In relation to the time at which a support is provided (paragraph (c) above), the UNSW Report states:

NDIS prices for a number of service types requiring disability support workers vary by the time of day and/or the day when the service is provided. Depending on the particular service type, there are up to six periods for which prices may be set, namely (i) daytime (6am – 8pm) (ii) weekday evening (8pm – 12am) (iii) Saturday (iv) Sunday (v) public holiday (not used for group programs), and (vi) overnight. The reasons for differences in process between these periods are not completely apparent but they appear to reflect the shift loadings and penalty rates in the [Award] at the time the RCM was developed.⁵⁸

125. It appears that the assumptions have some regard to additional amounts payable under the Award for work performed on weekends and public holidays, however it is unclear whether the pricing arrangements account for

⁵⁷ UNSW Report at page 51.

⁵⁸ UNSW Report at page 26.

the penalty rates payable under the Award in full. For example, it is not apparent whether the labour component of the hourly rate is doubled for the purposes of the prices applying to Sundays or whether providers are required to partially absorb the additional labour costs incurred on those days.

126. Importantly, we have not been able to identify any information that suggests that the following employee entitlements under the Award are accounted for or form part of the NDIA's calculations when setting the price caps for the relevant range of services:

- (a) Overtime rates, including where they are payable:
 - (i) For work performed outside an employee's ordinary hours in accordance with clause 28.1 of the Award;
 - (ii) For work performed outside the hours stipulated by clause 25.9(a)(i) of the Award on Monday – Friday excursions;⁵⁹ and
 - (iii) For a minimum of two hours because an employee has been recalled to work overtime after leaving an employer's or client's premises.
- (b) Payment at double time for work performed outside the maximum 12 hour span of a broken shift.⁶⁰
- (c) Payment at double time where an employee is instructed to resume or continue work without having had 10 consecutive hours off duty as required by clause 28.3(a).⁶¹
- (d) Shift allowances payable except between 8pm and midnight.⁶²

⁵⁹ Clause 25.9(a) of the Award.

⁶⁰ Clause 25.6(c) of the Award.

⁶¹ Clause 28.3(b) of the Award.

⁶² Clause 29 of the Award.

- (e) Any monetary allowances⁶³ including the:
 - (i) Clothing and equipment allowance;
 - (ii) Meal allowance;
 - (iii) First aid allowance;
 - (iv) Travelling, transport and fares allowance;
 - (v) Telephone allowance;
 - (vi) Heat allowance;
 - (vii) Boarding and lodging allowance; or
 - (viii) On call allowance.
- (f) Penalty rates payable where an employee is required to work during a meal break.⁶⁴

127. The pricing arrangements do not enable employers to recover the full employment costs incurred for the services provided to participants in the NDIS.

128. The UNSW Report reveals that there are major problems with the RCM and as a result, the pricing arrangements of the NDIS. The evidence cited in the report demonstrates that “[o]verwhelmingly, ... NDIS prices are not covering the full costs of disability service provision or supporting quality services”.

129. Importantly for the purposes of these proceedings:

Overall, the data shows how provider organisations are finding it difficult to be ‘good employers’ and to meet their industrial obligations and cover required pay rates and conditions. Many are reconsidering whether they are likely to be able to provide services in viable ways in the future. ...⁶⁵

⁶³ Clause 20 of the Award.

⁶⁴ Clause 27.1(b) of the Award.

⁶⁵ UNSW Report at page 54.

130. We shortly return to the relevance of the fundamental issues posed by the pricing model to the proceedings here before the Commission.

5.4 Critique of the NDIS

131. The NDIS has been the subject of various reviews and reports since its implementation, including:

- (a) The UNSW Report (published in June 2017).
- (b) The PC's report titled '*National Disability Insurance Scheme (NDIS) Costs; Productivity Commission Study Report*' (published in October 2017) (**PC Report**).
- (c) McKinsey and Company published a report⁶⁶ (**McKinsey Report**) following an Independent Pricing Review (**IPR**) of the NDIS in February 2018.

132. The aforementioned publications highlight the various complexities, difficulties and deficiencies that have emerged since the operation of the NDIS. We here summarise the salient points made in those reports that support the case advanced by Ai Group in opposition to the Unions' claims.

The UNSW Report

133. We have earlier summarised the UNSW Report's treatment of the problematic assumptions underpinning the NDIS pricing arrangements in relation to disability support work.

134. The UNSW Report draws, in part, on a survey on CEOs from 398 not-for-profit community service providers in NSW, conducted in February 2017.⁶⁷

⁶⁶ McKinsey & Company, *Independent Pricing Review, National Disability Insurance Agency, Final Report* (February 2018).

⁶⁷ UNSW Report at page 9.

135. The survey results are set out at section 2.2 of the UNSW Report. They reveal that:
- (a) Two-thirds of CEO's disagreed with the proposition that "NDIS prices enable us to meet our industrial obligations". Only 14% agreed. The rest were neutral or unsure.⁶⁸
 - (b) Two-thirds of CEO's disagreed with the proposition that "NDIS prices allow us to pay rates necessary to attract and retain quality support workers". Only 10.9% agreed. The rest were neutral or unsure.⁶⁹
136. The UNSW Report identifies that it has been argued on behalf of employers in the disability services sector that the prices set by the NDIA "are too low to cover providers' overheads and the margin necessary to cover future costs, and, as such, the pricing mechanism precludes existing service providers from developing the additional service capacity required to meet demand".⁷⁰
137. The following responses received to the open-ended part of the survey are also telling:
- (a) "Covering travel cost is a major concern as most of the clients we support live in rural remote areas. Without adequate funding to cover travel, our service may not be able to continue to provide support to clients in these areas. There are no other services in some of the areas we provide support in." (CEO of medium sized non-metropolitan organisation)⁷¹
 - (b) "The hourly rate is unsustainable and does not allow funds for training or CPD or staff meetings and supervision. This all is covered by the org as a commitment to maintaining quality. Hours cannot be

⁶⁸ UNSW Report at page 15.

⁶⁹ UNSW Report at page 15.

⁷⁰ UNSW Report at page 14.

⁷¹ UNSW Report at page 16.

guaranteed so we look to a casual workforce in regional areas, we cannot meet demand with staffing and are constantly short staffed. Travel is a nightmare in regional areas with agencies needing to pay mileage as well as travel time.” (CEO of medium sized non-metropolitan based)⁷²

(c) “The lack of alignment between how NDIS is funded and employers obligations under the Modern award (particularly in NSW with higher rates under transitional arrangements) make it incredibly difficult to attract and retain quality staff and operate at a level of efficiency and quality that is sustainable”. (Human resource manager in very large multi-state organisation)⁷³

138. The survey results demonstrate that the current NDIS funding is placing employers under immense financial pressure. The funding appears inadequate to cover the costs associated with providing disability services. Indeed, the majority of CEOs surveyed considered that the funding arrangements are deficient to such an extent that they do not enable an employer to meet their “industrial obligations”.

139. The survey results, coupled with the analysis presented by the authors of the report, lay bare the serious inadequacies of the NDIS and the very inherent limitation they place on employers to meet their legal obligations and ensure the quality and continuance of their services to persons with a disability.

⁷² UNSW Report at pages 16 – 17.

⁷³ UNSW Report at page 17.

The PC Report

140. In 2017, the PC undertook a review of the NDIS, for the purposes of informing the final design of the full scheme.⁷⁴
141. The PC highlighted the need for the number of employers and employees in the industry to grow rapidly in order to keep pace with funding increases and demand for services.⁷⁵
142. The PC Report documents the detrimental impact of the NDIS' pricing arrangements on providers and in turn, the market:

The Commission heard from many stakeholders that the NDIA's pricing methodology has, in some cases, led to perverse incentives, poor participant outcomes and hindered market development – especially for supports required by participants with complex needs. ...⁷⁶

143. It made the following finding in this respect:

FINDING 8.1

The National Disability Insurance Agency's approach to setting price caps to date has hindered market development by discouraging the provision of some disability supports. In some cases, it has led to poor participant outcomes, especially for those with complex needs. The benefits of the National Disability Insurance Scheme will not be fully realised if the Agency continues with its current pricing approach.⁷⁷

144. The submissions and evidence that were put before the PC are consistent with the UNSW Report in various respects, including supporting the following propositions:
- (a) Price caps imposed in relation to services provided to participants with complex needs are inadequate and as a result, people with such needs

⁷⁴ PC Report at page 5.

⁷⁵ PC Report at page 12.

⁷⁶ PC Report at page 33.

⁷⁷ PC Report at page 304.

are “struggling to find providers willing and able to provide services to them”.⁷⁸

(b) Many providers presented anecdotal evidence of price caps for attendant care being too low.⁷⁹

145. A survey presented to the PC by National Disability Services (a body representing disability service organisations) showed that only 55% of disability support organisations reported making a profit in 2015 – 2016 and 40% of respondents budgeted to make a profit in 2016 – 2017.⁸⁰

146. The PC observed that the uncertainty and low confidence amongst providers in the sector was not conducive to building the capacity of the market. It expressed a concern that there is “a serious risk that both existing and potential disability support providers will choose to provide their services elsewhere”.⁸¹

147. The PC Report demonstrates that a multitude of consequences have flowed from deficiencies in the NDIS and the implications they have for providers. Importantly, the PC Report highlights the extent to which providers are struggling to profit under the scheme and the long-term implications of this for the market.

148. It is trite to observe that the imposition of additional employment costs in such circumstances will only serve to exacerbate the thin markets referred to by the PC, which have resulted from providers failing to invest in their organisation to build its capacity and from providers opting to not provide the relevant services at all.

⁷⁸ PC Report at pages 297 – 298.

⁷⁹ PC Report at page 300.

⁸⁰ PC Report at page 303.

⁸¹ PC Report at page 304.

The McKinsey Report

149. In June 2017, the Board of the NDIA commissioned McKinsey & Company to undertake the IPR and investigate the appropriateness of the NDIA's pricing.⁸² The review included "extensive consultation" with stakeholders such as providers and peak bodies.⁸³ The process of the IPR is set out at pages 11 – 12 of the McKinsey Report.

150. The following issues of relevance were raised by stakeholders during the consultation process:

- (a) Current loadings for complex participants do not fully reflect the additional costs of serving these participants, such as higher wages for a more skilled workforce, additional time required for training and reporting, and higher supervision ratios.⁸⁴
- (b) Current travel allowances do not adequately cover the costs of provider travel and participant transport in regional areas and isolated communities.⁸⁵
- (c) The assumptions underpinning the pricing model are flawed, for reasons similar to those identified in the UNSW Report.⁸⁶

151. The following important key findings were made:

- (a) There are certain markets for which undersupply is a risk in the future:⁸⁷

Providers raised issues about price levels inhibiting the growth and development of a skilled workforce. Some providers believe there is a risk of supply shortage as demand increases towards Full Scheme, and there are anecdotal reports that some providers are choosing to reduce their services or

⁸² McKinsey Report at page 3.

⁸³ McKinsey Report at page 4.

⁸⁴ McKinsey Report at page 4.

⁸⁵ McKinsey Report at page 4.

⁸⁶ McKinsey Report at pages 14 – 15.

⁸⁷ McKinsey Report at page 5.

not grow beyond their existing service levels due to pricing constraints. Some providers believe there is also potential that new participants and participants with complex needs could have difficulty finding a service provider if the market is not growing at the necessary rate to meet demand. ...⁸⁸

- (b) A “substantial number” of providers were unable to operate profitably at the applicable pricing caps.⁸⁹ The following extract from the McKinsey Report is particularly relevant:

The financial sustainability of providers in the NDIS is critical to ensuring ongoing supply of supports to participants. While providers may be able to absorb losses for a period, operating in the NDIS needs to be attractive in the long term for enough providers to meet the growth in demand.⁹⁰

152. The McKinsey Report demonstrates that the NDIS has placed a substantial number of employers in an unsustainable position. Those who are unable to profit under the scheme are in turn unable to increase their capacity to provide their services and may ultimately choose not to continue to provide those services at all. The grant of the Unions claims, in circumstances where no funding has been made available by the NDIS to cover the additional employment costs, would serve only to compound the difficulties currently faced by employers.

5.4 The Relevance of the NDIS to these Proceedings

153. The inherent connection between the Award and government funding has long been accepted by the Commission.
154. For example, in the context of proceedings concerning the ERO, the Full Bench stated as follows: (our emphasis)

[270] There is considerable evidence in this matter and widespread acceptance by the parties that a major reason for the actual wage rates in the SACS industry is the level of funding provided by governments. This situation appears to be similar across the industry, even in parts which are less female dominated than others such as community legal work. ...

⁸⁸ McKinsey Report at page 17.

⁸⁹ McKinsey Report at pages 5 and 27.

⁹⁰ McKinsey Report at page 24.

[271] We deal now with funding so far as it relates to the possible effects on the industry if the application is granted in whole or in part. Opponents of the claim and supporters alike all agreed that if remuneration is increased in the SACS industry as a result of these proceedings, employment levels and services will be affected unless the additional costs are fully met by government. It was also suggested that there is a significant part of the industry which is not dependent on government funding at the moment and the effect on employers in that part should also be taken into account. We were also told that a number of employers fund their operations through a combination of government funding and reserves, as well as income from philanthropy.

[272] We accept that there is widespread reliance on government funding and that 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 on employment and service provision.⁹¹

155. When the tribunal ultimately decided to make the ERO, the Commonwealth Government's commitment to increase funding to meet the additional employments costs that would flow from the order was a central consideration that led the majority to conclude that the order jointly proposed by the relevant parties and the Commonwealth should be made: (our emphasis)

[4] We made provision for further submissions and encouraged the parties to hold discussions. ... On 17 November 2011, the applicants and the Commonwealth lodged a Joint Submission setting out a number of agreed matters. In particular, the submission contained an agreed outcome, subject to some matters of detail.

...

[14] The Commonwealth drew our attention to the Prime Minister's announcement on 10 November 2011 that the Australian Government would provide over \$2 billion during the six-year implementation period. It is committed to fund its share of the programs which it funds directly and also in proportion its share of the joint state/federal funding through specific purpose payments and national partnership payments. While the way in which those funding commitments will be applied will be the subject of discussions between relevant parties, it was made clear in submissions that the Australian Government is committed to meeting its share of the burden that will flow from any decision that is given in this case and there is no suggestion of a limit at the figure of \$2 billion.

...

[65] The Commonwealth has given a commitment to fund its share of the increased costs arising from the proposals. While some state governments are opposed, no government has indicated it will be unable to fund its share. On the other hand there are significant risks which need to be considered. For example, there will be an impact on employers in relation to programmes and activities which are not government funded. As a number of opponents of the proposals pointed out, any

⁹¹ *Equal Remuneration Case* [2011] FWA 2700 at [270] – [272].

order we make has the potential to affect employment levels and service provision where costs cannot be recovered. We are also concerned about the effect on the finances of a number of the states. We have decided that in the circumstances these risks can be satisfactorily addressed by an extension to the length of the implementation period.⁹²

156. Whilst the funding model that now applies in the sector is different to that which applied at the time that the ERO was made, the tribunal's observations regarding the reliance of the sector on government funding and the adverse implications that would flow for employers if it were to increase employee entitlements in the absence of funding increases, remain apposite.

157. In 2017, a Full Bench of the Commission made findings about the operation of the NDIS in the context of a claim made by ABI and the NSW Business Chamber to vary the part-time provisions of the Award. Relevantly, the Commission found that:

[630] ... In pricing items, the NDIA has been aggressive in trying to set the absolute minimal cost so as to control the cost to government of the NDIS as a whole. ...⁹³

158. Whilst the Commission dismissed the claim, its reasoning involved a detailed consideration of the evidence before it regarding the NDIS.⁹⁴ The relevance of the NDIS was affirmed in the Commission's concluding paragraph in relation to the proposal:

[643] The ABI's application is therefore rejected. However we emphasise that the conclusions we have reached about it are made at a time when the NDIS is still a long way from full implementation and are therefore necessarily speculative to a degree. The issues raised by the ABI's application may require further review if, after the NDIS has been fully implemented, a different picture emerges.⁹⁵

159. Consistent with the approach previously taken by the Commission and its predecessor when determining claims to enhance terms and conditions in the Award, in our submission, the Commission should in these proceedings have

⁹² *Equal Remuneration Order* [2012] FWAFB 1000 at [4], [14] and [65].

⁹³ *4 yearly review of modern awards – Casual employment and Part-time employment* [2017] FWCFB 3541 at [630].

⁹⁴ *4 yearly review of modern awards – Casual employment and Part-time employment* [2017] FWCFB 3541 at [636] – [642].

⁹⁵ *4 yearly review of modern awards – Casual employment and Part-time employment* [2017] FWCFB 3541 at [643].

regard to the funding arrangements applying to employers covered by the Award. This is because the funding arrangements under the NDIS currently impose limitations on the price that can be charged by providers to their clients for their services. This places an inherent limitation on the capacity of employers to recover any additional costs flowing from variations to the Award. Additionally, it appears that the terms of approved participant plans place further limitations on the extent to which employers are able to claim additional amounts (for example, because plans limit the purpose or “support” for which certain funding can be used).

160. Furthermore, the material relied upon by the Unions in these proceedings demonstrates that:

- (a) The current funding levels are insufficient to cover the costs associated with providing disability services. The analysis contained in the UNSW Report and the feedback received from surveyed CEOs further demonstrates that the funding model does not take adequate account of the terms and conditions currently stipulated in the Award and that employers, as a result, consider that the funding is insufficient to cover the relevant costs.
- (b) A substantial number of employers are unable to make a profit under the current funding arrangements.
- (c) The limited funding is having adverse consequences for the extent and quality of services provided by employers. This in turn has consequences for employment opportunities.
- (d) The limited funding is having adverse consequences for the extent to which employers are able to provide career progression and training to their employees. This again has consequences for service delivery.

161. Whilst the Government has recently announced that NDIS funding will increase effective 1 July 2019, the limited information available about those increases does not suggest that they will be of a sufficient magnitude to

address employers' existing difficulties with operating under the scheme. There is nothing to suggest that the problems identified in the UNSW Report with the RCM will be alleviated by the funding increases. In any event, the increases are certainly not sufficient to cover the additional costs that would flow from the grant of the Unions claims.

162. In our submission, the grant of the Unions' claims will serve only to exacerbate the existing concerns voiced by employers about their viability under the scheme and their ability to continue to provide services to persons with a disability. If the Award were varied as sought by the Unions, employers will be faced with substantial additional costs for which there is no funding and no scope to recover from those who need and access their services.
163. The operation of the NDIS and the constraints it places on employers covered by the Award should, in our respectful submission, form the cornerstone of the Commission's consideration of the impact of the Unions claims on employers. Such a consideration necessarily leads to the inevitable conclusion that employers cannot and should not be saddled with the with the additional employee entitlements sought by the Unions in these proceedings.

6. OVERTIME, WEEKEND AND PUBLIC HOLIDAY RATES FOR CASUAL EMPLOYEES

164. United Voice seeks that the Award be varied to require the payment of the casual loading during overtime where it is currently expressly excluded.
165. The HSU seeks that the Award be varied to require the payment of the casual loading during the performance of ordinary hours on a weekend and work on public holidays.
166. Ai Group opposes the claims and submits that they should be dismissed.

United Voice's Case

167. United Voice relies on the following propositions in support of its claim:
- (a) The 'default approach' adopted by the Commission in Penalty Rates Decision is apposite and one of "general application" in the modern awards system; and
 - (b) Section 134(1)(da) supports the grant of the claim. Subsuming the casual loading in the overtime and penalty rates "means that a casual employee is not compensated for disutility determined to apply for the hours worked".
168. United Voice does not appear to rely on any evidence in support of its claim.

The HSU's Case

169. The HSU relies on the following propositions in support of its claim:
- (a) The proposed approach is consistent with the purpose of the casual loading which is to compensate employees for "the paid leave entitlements available to permanent employees which are forgone by reason of their less secure position";

- (b) Weekend and public holiday penalty rates compensate employees for a different purpose (i.e. the disutility associated with working on public holidays); and
- (c) The approach adopted by the Commission in the Penalty Rates Decision (i.e. the 'default approach' to calculating the casual loading and overtime / penalty rates).

170. The HSU does not appear to rely on any evidence in support of its claim.

Prior Consideration of the Relevant Issues

171. The issue of weekend penalty rates and overtime for casual employees was considered by the Commission during the two year review of modern awards.

172. When made, the Award did not entitle casual employees to weekend penalty rates for ordinary hours of work. Casual employees were, however, entitled to the casual loading for work performed on a weekend. The ASU sought the expansion of the entitlement to weekend penalty rates to casual employees.⁹⁶

173. The ASU also sought variations to the overtime provisions such that casuals would be entitled to receive overtime rates in the same circumstances as full-time employees, in addition to the casual loading.⁹⁷ Casual employees were not entitled to overtime rates under the Award at that time.

174. In its decision, the Commission stated as follows in relation to the ASU's claim to expand weekend penalty rates:

[31] The ASU submits that this provision has only recently become relevant because of the operation of the transitional provisions; it is an anomaly because it did not reflect the position in any previous award and it has its genesis in a draft provided by Jobs Australia with no explanation by the AIRC for its adoption.

[32] These submissions are contested by some employers who point to the history in some awards of weekend penalties in lieu of casual loadings for casual employees working on weekends. Jobs Australia submits that the provision was in the exposure draft of the award but concedes that the identical award provision in the Aged Care

⁹⁶ *Re Australian Municipal, Administrative and Clerical Services Union* [2013] FWC 4141 at [30].

⁹⁷ *Re Australian Municipal, Administrative and Clerical Services Union* [2013] FWC 4141 at [34].

Award was subsequently amended to provide for a loading for weekend work performed by casuals.

[33] I consider that the history of this provision indicates that it has not been subject to extensive submissions and consideration previously. I also consider that the approach taken by the Full Bench in modifying an identical provision in the aged care sector has much to commend it. It provided for the reverse of the current provision - the payment of penalties but no loading instead of loading and no penalties. I will adopt a similar approach for this award. I direct the ASU to prepare a draft variation. It will apply from 1 August 2013.⁹⁸

175. It went on to state as follows regarding the ASU's overtime claim:

[36] As I have determined that the approach of the Full Bench stated above in relation to casuals working on weekends should be adopted I will make variations to reflect this position but otherwise not vary the overtime clause.⁹⁹

176. The Commission subsequently issued a determination varying the Award as follows:

3. By deleting clause 26.2 and inserting the following clause:

26.2 Casual employees who work less than 38 hours per week will be paid in respect of their employment between midnight on Friday and midnight on Sunday in accordance with clause 26.1. The rates prescribed in clause 26.1 will be in substitution for and not cumulative upon the casual loading prescribed in clause 10.4(b).¹⁰⁰

177. The variation made by the Commission had the effect of granting casual employees an entitlement to weekend penalty rates for the performance of ordinary hours in substitution for the casual loading. The determination issued by the Commission did not vary the Award in relation to overtime.

178. The ASU appealed the decision and the determination cited above. We extract the relevant excerpts of the Full Bench's consideration of the appeal below: (our emphasis)

[11] It can be seen that the substantive difference between the new clause 26.2 proposed by the ASU to give effect to paragraph [33] of the Decision and the new clause 26.2 actually ordered by Vice President Watson was that the latter confined the benefit of weekend penalty rates to "*Casual employees who work less than 38*

⁹⁸ *Re Australian Municipal, Administrative and Clerical Services Union* [2013] FWC 4141 at [31] – [33].

⁹⁹ *Re Australian Municipal, Administrative and Clerical Services Union* [2013] FWC 4141 at [36].

¹⁰⁰ PR539625.

hours per week'. This meant under the new provision casual employees would receive a loading of 50% for ordinary hours worked on Saturdays and 100% for ordinary hours worked on Sundays, but only 25% (the general casual loading) for overtime hours worked on Saturdays or Sundays.

...

[29] In paragraph [33] of the Decision, it is reasonably apparent that Vice President Watson intended that that casual employees should be entitled to the weekend penalty rates for ordinary time work specified in clause 26.1, but that consistent with the approach taken by the Full Bench in paragraph [59] of the *Aged Care Award 2010* decision, those weekend penalty rates should be in substitution for and not in addition to the casual loading. This meant that his Honour intended that the *total* loading for casual employees should be increased from 25% to 50% for Saturdays and from 25% to 100% for Sundays.

[30] We do not consider that the ASU has succeeded in demonstrating any error in his Honour's consideration of that part of its claim which concerned the working of ordinary hours by casual employees on weekends. ...

[31] We accept that the ASU was able to demonstrate convincingly that the predominant position in the pre-existing awards and instruments was that casual employees were entitled to penalty rates for working ordinary hours on weekends of the same quantum as those applying to full-time and part-time employees in addition to payment of a casual loading. ... However, it is equally clear that as a result of the adoption of a standard 25% loading for casual employees in modern awards, a large majority of casual employees will upon the completion of the operation of the SCHCDS Award's transitional provisions have received an increase in their casual loading. In the majority of pre-existing awards and instruments, the casual loading had been 20% or less, so that many casual employees will receive a reasonably substantial increase in their ordinary rate of pay (leaving aside weekend penalties) under the SCHCDS Award. ...

...

[33] The issue of overtime penalty rates for casual employees was determined in paragraph [36] of the Decision. We consider that that paragraph can only be read in one way: that Vice President Watson understood the conclusion of the Full Bench in paragraph [59] of the *Aged Care Award 2010* decision as being applicable to overtime as well as ordinary hours worked on weekends, that the variation he had decided should be made in respect of weekend penalties in paragraph [33] of the Decision would apply to overtime as well as ordinary time hours, and that this was a sufficient response to the ASU's application for a restoration of overtime penalty rates for casual employees. In short, on the basis of what he understood had happened in the *Aged Care Award 2010* decision, Vice President Watson intended that, for overtime hours, the *total* loading for casual employees should be increased from 25% to 50% for Saturdays and from 25% to 100% for Sundays, but not otherwise increased. No party before us in the appeal suggested paragraph [36] of the Decision should be read in any other way. ABI for example described his Honour's conclusion in paragraph [36] as "*a way of killing two birds with one stone*" (the "two birds" being ordinary hours and overtime hours on weekends).

[34] The immediate difficulty with this paragraph is that it exhibits an erroneous understanding of what had occurred in respect of the AC Award. ... it is clear that the conclusion in paragraph [36] of the Decision was founded upon that misapprehension and was therefore attended by appellable error. This had the consequence, amounting to further error, that the ASU's case that the departure from the predominant position concerning overtime for casual employees in pre-existing awards and instruments constituted an anomaly arising from the award modernisation was not considered by his Honour.

[35] Consistent with the submissions of all the parties appearing in the appeal except Jobs Australia, we consider that it is necessary to find that the variation to clause 26.2 of the SCHCDS Award was also attended by appellable error. That variation limited the application of penalty rates to casual employees on weekends to those casual employees "*who work less than 38 hours per week*". The effect of the use of that expression is that *ordinary* hours worked by casual employees on weekends attract penalty rates (in substitution for the casual loading), but *overtime* hours do not (and only receive the casual loading). ... It is not consistent with Vice President Watson's intention as stated in paragraph [36] of the Decision. Nor is it consistent with the outcome which pertained in the AC Award after the *Aged Care Award 2010* decision.

[36] As a consequence of the errors we have identified in the Decision and the Determination, we grant the ASU permission to appeal and we quash paragraphs [34] to [36] of the Decision and variation A3 in the Determination. ...

Re-determination of the ASU's overtime claim

[37] We consider that the case for an award provision for overtime for casual employees is a strong one. The analyses advanced by the parties concerning the position pertaining in the pre-existing awards and instruments which were replaced by the SCHCDS Award firmly establish that, predominantly, casual employees were entitled to overtime penalty rates for any overtime worked, regardless of when it was worked. Applying the approach generally taken by the award modernisation Full Bench, whereby the most common provisions to be found in the pre-existing awards and instruments were usually adopted unless there was some good reason to the contrary, this should have led to a result whereby the SCHCDS Award contained an overtime penalty rates regime for casual employees as well as full-time and part-time employees.

[38] This did not occur. The Full Bench award modernisation decision which led to the making of the SCHCDS Award did not give any consideration to the pre-existing position with respect to overtime penalty rates for casual employees, did not state any rationale for a departure from that pre-existing position, and indeed did not deal with the issue at all. Therefore we can only conclude that the absence of overtime provisions applicable to casual employees in the SCHCDS Award was an oversight.

[39] We do not consider that there is any sound rationale for casual employees to be excluded from overtime penalty rates in circumstances where they apply to full-time and part-time employees. No such rationale was advanced by any party before us.
...

[41] The result of the omission of overtime penalty rates for casual employees, we find, is that the SCHCDS Award does not achieve the modern awards objective in s.134 because it does not provide a fair and relevant minimum safety net of terms and conditions for casual employees, and that the SCHCDS Award suffers from an anomaly arising from the award modernisation process conducted under Part XA of the *Workplace Relations Act 1996* and is thereby not operating effectively. ...

[42] There remains the question of what form that variation should take. The critical question here is whether any overtime penalty rates for casual employees should be in addition to or in substitution for the casual loading. This is a difficult question to resolve. The position which applied in the pre-existing awards and instruments in this respect was somewhat mixed. No clearly predominant position emerges. The question of whether there is a proper basis for the payment of the casual loading in addition to overtime penalty rates was not argued at the level of general principle in this case, and in any event the confined interests of the parties which appeared and made submissions in this appeal means that it is not an appropriate vehicle to decide this issue on a general basis.

...

[44] In all the circumstances we think a conservative approach is called for. We have decided to vary the SCHCDS Award to provide for a regime for overtime penalty rates which operates in substitution for the payment of the casual loading. The variation we will make will accordingly largely reflect the alternative award variation advanced by the respondents. The provision of overtime penalty rates for casual employees, even without the addition of the casual loading, will be a significant benefit for those casuals who work overtime, and will equalise the overtime cost of full-time, part-time and casual employees. The variation is, we consider, appropriate to remedy the issue of casual employees not being entitled to overtime rates which this review of the SCHCDS Award has identified, having regard to the modern award objective in s.134.

[45] We emphasise that nothing in this decision is intended to foreclose further consideration in the four yearly review process to be conducted under s.156 of the *Fair Work Act* as to whether, under the SCHCDS Award, the casual loading should be payable in addition to weekend and overtime penalty rates. The four yearly review process, which will involve the review of all modern awards, may result in general and authoritative consideration of this issue at the level of industrial principle. If so, that would provide a sound basis to revisit the issue in relation to the SCHCDS Award.¹⁰¹

179. The overtime and weekend penalty provisions in the Award, and their application to casual employees, is reflective of the above decision made by the Full Bench. The Full Bench determined that casual employees should be entitled to overtime rates and that those rates would apply in substitution for the casual loading. The Full Bench did not disturb the decision at first instance

¹⁰¹ *Re Australian Municipal, Administrative and Clerical Services Union* [2014] FWCFB 379 at [11] – [45].

to the extent that it had the consequence of varying the Award to extend the entitlement to weekend penalty rates for ordinary hours of work in substitution for the casual loading.

180. In the Preliminary Jurisdictional Issues Decision, the Commission observed that previous Full Bench decisions should generally be followed, in the absence of cogent reasons for not doing so¹⁰².
181. The Full Bench that heard and determined the ASU's claim expressly considered whether the casual loading should be payable to casual employees in addition to overtime rates. The Full Bench observed that:
- (a) The position which applied in the pre-existing awards and instruments in this respect was somewhat mixed. No clearly predominant position emerges from a review of those instruments.¹⁰³
 - (b) The variations made in the two year review to expand the entitlement to overtime rates presented a significant benefit to casual employees.¹⁰⁴
 - (c) A conservative approach was appropriate in all the circumstances.¹⁰⁵
182. These aspects of the Full Bench's reasoning are not directly referable to what has on many occasions been described as the limited scope of the two year review. That is, the Full Bench's reasoning does not appear to be encumbered or confined by the narrower scope of the review. Accordingly, in our submission, although the decision was made in a different legislative context, in the circumstances that is not a cogent reason for not following the decision.
183. Further, neither the HSU nor United Voice have so much as brought the Commission's decision to the attention of the Full Bench as presently constituted, much less attempted to deal with why it should not be followed.

¹⁰² Preliminary Jurisdictional Issues Decision at [27].

¹⁰³ *Re Australian Municipal, Administrative and Clerical Services Union* [2014] FWCFB 379 at [42].

¹⁰⁴ *Re Australian Municipal, Administrative and Clerical Services Union* [2014] FWCFB 379 at [44].

¹⁰⁵ *Re Australian Municipal, Administrative and Clerical Services Union* [2014] FWCFB 379 at [44].

184. In our submission, there is no cogent reason for departing from the Full Bench's consideration of the issue of whether casual employees should be entitled to the casual loading in addition to overtime rates.
185. The unions' claims simply seek to re-litigate the matters ventilated in the two year review. They have not pointed to any justification for departing from the Full Bench's decision regarding overtime or the Vice President's decision regarding weekend penalty rates. They have not presented any evidence or material that might justify a different approach.
186. The observations made by the Full Bench regarding the expansion of the entitlement to overtime and weekend penalty rates to casual employees remain apposite. Since the Part 10A Award Modernisation, casual employees' entitlements have materially increased. The imposition of additional employment costs in such circumstances is inconsistent with the need to ensure a stable system. Rather, the "conservative approach" adopted by the Full Bench in the two year review remains appropriate.
187. Much is made of the Penalty Rates Decision by the unions and specifically, the Commission's decision to require the payment of the casual loading in addition to weekend penalty rates in certain awards. We make the following observations regarding such submissions:
- (a) Whilst the term 'default approach' is referenced by the unions and was referenced by the Commission in the Penalty Rates Decision, the proposition that the casual loading be paid in addition to weekend and overtime penalty rates is not *in fact* the default approach adopted in the awards system. The term (i.e. 'default approach') is one that was simply coined by the PC for the purposes of its report. Quite appropriately, in our submission, a consistent approach does not in fact appear across the modern awards system.

- (b) The issue of whether casual employees are entitled to the casual loading in addition to weekend penalty rates or overtime is one that must be considered on an award-by-award basis. There may be a number of reasons why, in the instance of a particular award, the ‘default approach’ is not appropriate. Ultimately the matter is one that must be considered by the Commission by reference to the legislative constraints imposed by ss.134(1) and 138. This will necessarily involve a range of considerations including the capacity of employers to absorb the relevant additional employment costs. The history of the award entitlements may also be relevant.
- (c) The adoption by the Commission of the PC’s ‘default approach’ in the context of a small number of awards where the Commission decided to reduce Sunday penalty rates does not constitute “general and authoritative consideration of [the] issue at the level of industrial principle”, as contemplated by the Full Bench that heard the ASU’s appeal. Accordingly, the basis for revisiting the issue, as contemplated by that Full Bench, does not arise.¹⁰⁶

Section 138 and the Modern Awards Objective

188. There is no evidence or material that might justify the proposition that the provisions proposed by the HSU or United Voice are *necessary* to ensure that the Award achieves the modern awards objective. This legislative precondition created by s.138 remains central to the Commission’s consideration of the claims, notwithstanding the union’s reliance on the PC’s ‘default approach’ and its recent implementation in a small number of awards. Neither of those matters displace the criteria created by ss.138 and 134(1).
189. The union’s submissions do not comprehensively address s.138 or s134(1) of the FW Act. We nonetheless make the following observations about various factors listed under s.134(1):

¹⁰⁶ *Re Australian Municipal, Administrative and Clerical Services Union* [2014] FWCFB 379 at [45].

- (a) **Section 134(1)(a):** there is no evidence dealing with the impact of the claim on the relative living standards and needs of the low paid. In the circumstances, we consider that s.134(1)(a) does not advance the unions' case. The Commission cannot properly conclude that the relative living standards and needs of the low paid will be enhanced or improved if the claim is granted. Further and in any event, even if the Commission were to conclude that the claims would benefit the relative living standards and needs of the low paid, this is but one consideration that must be weighed against a range of other matters.
- (b) **Section 134(1)(b):** the grant of the claim may have an adverse impact on the need to encourage collective bargaining. To the extent that the absence of an entitlement to the casual loading during overtime and weekends currently incentivises employees to engage in collective bargaining, the variations proposed would extinguish that incentive.
- (c) **Section 134(1)(c):** there is no evidence that might enable the Commission to conclude that the grant of the claim will improve social inclusion through increased workforce participation. To the extent that it deters employers from engaging casual employees, it may in fact undermine workforce participation. In the circumstances, we consider that s.134(1)(c) does not advance the unions' case.
- (d) **Section 134(1)(d):** the proposed variation undermines the need to promote flexible modern work practices and the efficient and productive performance of work. This is particularly so to the extent that it causes employers to alter their rostering arrangements (including decreased reliance on casual employees) in a way that results in inefficiencies or undermines productivity.

Our submissions in relation to ss.134(1)(c) and 134(1)(d) are better understood when regard is had to the importance of and reliance on casual employees in the industry.

In its decision regarding casual and part-time employment common issues, the Full Bench cited the material before it regarding the proportion of the workforce that constituted casual employees: (our emphasis)

[633] At the time of hearing, according to data collected and benchmarked by NDS, there were about 26,000 disability support workers in Australia, of which 23% were full-time, 35% were part-time, 37% were casual, and 6% were on fixed-term contracts. ... There was some evidence that some employers had increased the usage of casuals in order to meet the work demands of the NDIS, against their preference to employ mainly permanent part-time employees, mainly because of the variability associated with the one-on-one attendances which are a new industry feature introduced as part of the NDIS.¹⁰⁷

It is our understanding that the precise starting time of the provision of a service to a particular participant in the scheme can change from day-to-day, week-to-week, depending on the preference of the client. Further, clients may cancel appointments or alter the nature of the services sought at short notice. As a result, many providers utilise casual labour in order to ensure that their workforce is sufficiently flexible and agile, so as to enable it to meet its clients' demands.

- (e) **Section 134(1)(da):** this is a neutral consideration. We refer to and rely on the relevant observations of the Full Bench in the Penalty Rates Decision¹⁰⁸ regarding this provision of the Act, as cited earlier in this submission. The Award already provides additional remuneration for the performance of overtime as well as work performed on a weekend or public holiday. The absence of an entitlement to the casual loading does not alter this position.
- (f) **Section 134(1)(e):** the principle of equal remuneration for work of equal or comparable value is not relevant to this matter.

¹⁰⁷ 4 yearly review of modern awards – *Casual employment and Part-time employment* [2017] FWCFB 3541 at [633].

¹⁰⁸ 4 yearly review of modern awards – *Penalty Rates* [2017] FWCFB 1001 at [184] – [202].

- (g) **Section 134(1)(f):** it is axiomatic that an expansion of the circumstances in which the casual loading is payable will increase employment costs. The claim, if granted, would therefore have an adverse impact on business.

We refer also to the submissions made above regarding the extent to which casual employees form a crucial part of some employers' service delivery model. In such circumstances, the implications of the claim would, in our submission, be very significant.

Further, as we have previously submitted, significant portions of the industry covered by the Award are dependent on NDIS funding. The NDIS does not provide funding for the additional employment costs contemplated by the proposed clause. The labour cost assumptions underpinning the NDIS funding arrangements do not contemplate the payment of a 25% loading for overtime or for work performed on a weekend or public holiday. The impact on business is compounded in these circumstances. Employers are unable to recover the additional costs from participants in the scheme because of the pricing caps imposed by the NDIS. The circumstances of employers in this industry can readily be distinguished from those in others as a consequence of the funding arrangements. This of itself warrants a different approach to the 'default', as described by the PC.

- (h) **Section 134(1)(g):** the need to ensure a stable system tells against the grant of the claim, as we have earlier articulated. Further, the current clauses are simple and easy to understand. They clearly and expressly remove the entitlement to the casual loading during overtime or weekends. The proposed provisions do not serve to make the Award any simpler or easier to understand.

Further and in any event, a desire to make the Award 'simpler' should not override the numerous other considerations that weigh against the grant of the claim.

190. A proper foundation for the unions' claims has not been made out. Ai Group submits that they should be dismissed.

7. EXCURSIONS

191. United Voice seeks the following amendment to clause 25.9(a)(ii) of the Award:

25.9 Excursions

Where an employee agrees to supervise clients in excursion activities involving overnight stays from home, the following provisions will apply:

(a) Monday to Friday excursions

- (i) Payment at the ordinary rate of pay for time worked between the hours of 8.00 am to 6.00 pm Monday to Friday up to a maximum of 10 hours per day.
- (ii) The employer and employee may agree to accrual of time instead of overtime payment for all other hours. Time accrued will be calculated at the overtime rate.
- (iii) Payment of sleepover allowance in accordance with the provision of clause 25.7.

(b) Weekend excursions

Where an employee involved in overnight excursion activities is required to work on a Saturday and/or Sunday, the days worked in the two week cycle, including that weekend, will not exceed 10 days.

192. The variation would have the effect of expressly requiring that where an employer and employee agree that the employee will accrue time off in lieu of payment for overtime, the time will be accrued at the relevant overtime rate.

United Voice's Case

193. In support of this variation United Voice contends:

- (a) That s.134(1)(da) is contravened by the current terms of clause 25.9(a)(ii), which is “ambiguous as to whether employees will be compensated for working overtime” and the proposed variation would satisfy s.134(1)(da) by ensuring that workers who “are required” to undertake excursion shifts at “unsocial hours” are compensated appropriately;

- (b) That it is unfair to employees that they be provided with the accrual of time as opposed to being paid overtime;
 - (c) That time off in lieu of overtime “clearly benefits employers” and does not reflect “the true value of the work undertaken by the employee”;
 - (d) That the current clause allows employers to apply pressure to employees to accept accrual of time at an hour for hour rate instead of paying overtime or accrual of time at the overtime rate; and
 - (e) That there is a “power imbalance” between the employer and employee which makes the current provision problematic.
194. Ai Group opposes the variation proposed by United Voice. We contend that there is little to support the circumstantial assertions made by United Voice concerning the power and influence of employers over their employees. In respect of the statutory arguments, we submit that the union’s assessment of those provisions is misguided and inconsistent with decisions already made as part of the current award review.

The Nature of Clause 25.9 and the General TOIL Clause

195. We first address the current award clauses dealing with access to ‘time off in lieu of payment for overtime’ (**TOIL**). This includes both 28.8 and clause 29.5 of the Award.
196. Clause 28.8 of the Award provides a general capacity for employees and employers to agree on an arrangement that involves an employee taking TOIL. It reflects an outcome of the Award Flexibility Common Issues Proceedings. Relevantly, it provides that time off will be calculated on an hour for hour basis. That is, it operates in the opposite manner than what is being pursued by the union in the context of clause 25.9.
197. Clause 25.9 serves a different purpose to clause 28.8. It provides a separate mechanism enabling the accessing of a comparable arrangement in very specific and narrow circumstances. It only operates in circumstances where

an employee agrees to supervise clients in excursion activities involving overnight stays from home. Unlike the general TOIL provisions, it does not apply in a context where an employee has been directed to perform overtime. Rather it operates in circumstances where the 'overtime work' has been performed on a voluntary basis.

198. Clause 25.9 addresses the unique circumstances of the sectors covered by the Award. In this context, it may properly be regarded as a fair and relevant element of the safety net.
199. In the current proceedings, no party has questioned the appropriateness of clause 25.9 generally. The only amendment sought is to the rate at which time off should be calculated. Moreover, no party has sought to argue that the provisions of clause 28.8 should be amended.
200. Ai Group's overarching contention in relation to this claim is that United Voice has failed to establish that the proposed variation is warranted. No serious case for the specific change pursued by the unions has been advanced. There has been no attempt to examine the history of the provision or to lead evidence establishing that it operates in a problematic manner. The submissions do little more than articulate the union's opinion on what constitutes a fair approach.
201. Moreover, it would be anomalous for clause 25.9 to require that time off in lieu of overtime be calculated at overtime rates, while the general TOIL provision operates on a time for time basis.

Section 134(1)(da) of the Act

202. Ai Group submits that United Voice's reliance on s.134(1)(da) to support the proposed variation is misguided and additionally appears to operate from the starting point that s.134(1)(da) is an objective that prevails over all others. Such a proposition is patently false.

203. The operation of s.134(1)(da) was relevantly considered by a Full Bench in the Penalty Rates Decision at paragraphs [184] – [202], which we have extracted earlier in this submission.
204. In light of the Full Bench’s reasoning, Ai Group submits that United Voice has failed to:
- (a) Apprehend that s.134(1)(da) makes “additional remuneration” the relevant consideration, with such remuneration being additional to that which is paid for working “ordinary hours”¹⁰⁹. Clause 25.9(a)(ii) in its current terms and in the terms proposed by the United Voice variation is concerned with time (or more appropriately time off), not additional remuneration. In that context it is arguable that s.134(1)(da) warrants no consideration in relation to United Voice’s proposed variation.
 - (b) Consider the balance between s.134(1)(da) and the other considerations listed at s.134(1). Section s.134(1)(da) is a relevant consideration; it is *not* a statutory directive that additional remuneration must be paid to employees¹¹⁰.
 - (c) Understand that the relationship between any additional remuneration and the hours worked is not fixed and will depend on, among other things, the circumstances and context pertaining to work under the particular modern award.¹¹¹ The fact that 25.9(a)(ii) operates with two layers of consent, the first being employee agreement to supervise clients in excursion activities involving overnight stays from home, and the second being agreement to take time off in lieu of overtime payments is relevant in considering whether an additional benefit greater than “time for time” should be conferred on employees. In our

¹⁰⁹ Penalty Rates Decision at [192].

¹¹⁰ Penalty Rates Decision at [195] – [198].

¹¹¹ Penalty Rates Decision at [199].

submission, having regard to the consent required by the clause, a greater benefit is not warranted or justifiable.

205. It is also relevant in the context of s.134(1)(da) that the Award does in fact provide additional remuneration for employees working overtime hours; those provisions being found at clause 28 of the Award. The fact that the Award also provides for a mechanism under which time off may be taken - and only with agreement between the employer and employee as an additional flexibility - does not diminish the fact that the Award already clearly addresses this consideration.

The “Unfairness” Argument

206. Beyond the bald assertion that United Voice does not consider it “fair” for employees to receive time off in lieu of being paid at overtime rates, there is nothing of substance in the union’s submissions to further address this point.
207. The starting position for employees that work overtime in the circumstances contemplated by clause 25.9 is that they receive payment at the appropriate overtime rate. It is only with employee agreement that a time off arrangement can be applied and it would seem therefore axiomatic that where the provision is being utilised, an employee finds that time off (and not overtime penalties) is unfair in its operation to them. The paternalistic approach of the union does not take into account the benefit of ‘time off in lieu’ arrangements for employees.
208. The proposed variation may in fact have negative impacts on those employees who are presently providing their agreement to be released with TOIL. It may result in employers ceasing to agree to such arrangements. Such negative consequences could occur in circumstances where it is simply not practical and achievable for an employer to provide an employee with time off at overtime rates. It could also occur if an employer simply ceases to see a benefit in acceding to an employee request to take TOIL in circumstances where the period of absence must be calculated at overtime rates.

209. If the period of time which would need to be covered were to increase by a factor of 50% or 100%, this could have a profound impact on the ability and/or willingness of an employer to provide their agreement. It would, in our view, negate a key benefit to the employer of agreeing to TOIL under the current clause. This contention is of course premised on a view that the current award does not currently contain any requirement that TOIL be calculated at penalty rates.

The “employer benefit” argument

210. Whilst the current provision permits an employer to avoid liability for overtime rates, the existence of this benefit is not a basis for the proposed variation. Awards must operate in a manner this fair having regard to the perspective of both employees and employers. Indeed, any variation to the Award which reduces or removes this benefit would be a negative consideration when considered in the context of s.134(1)(f).

211. Further, United Voice’s contention fails to engage with the notion that the current terms of the Award also apply to create a benefit for employees and that for some employees, TOIL may be far more beneficial. The fact that the terms of clause 29.5(a)(ii) can only be accessed with agreement from the employee suggests that time off in lieu will only likely be triggered where it is mutually beneficial to both the employee and the employer and not otherwise.

The “pressure” and “power imbalance” argument

212. UV have provided no evidentiary basis for their contention about “pressure” being placed on employees to sacrifice their overtime penalty payments in lieu of time off or the purported “power imbalance” which they say is relevant to their claim.

213. Ai Group also notes that there are comprehensive protections under the FW Act to protect employees from coercion or adverse action for exercising or making a complaint in relation to a workplace right¹¹².
214. In the context of United Voice's argument about pressure and power imbalance, two things need to be said about these protections:
- (a) United Voice have provided no evidence or submissions which would indicate that proceedings are being instituted for employees under this Award as a result of coercion or pressure from employers over matters where "employee agreement" is the relevant criteria; and
 - (b) These provisions act as a strong disincentive to punish those employers who are engaging in inappropriate conduct with their employees. These provisions of the FW Act are the appropriate statutory setting to manage pressure and coercion in relation to the employment entitlements. It is not necessary to make variations to the relevant provisions of the Award in order to introduce a further layer of protection.

Section 138 and the Modern Awards Objective

215. United Voice has clearly failed to establish an evidentiary basis to justify that the variation proposed is *necessary* to ensure that the Award achieves the modern awards objective.
216. Beyond a consideration of s.134(1)(da) the union's submissions do not address s.138 or s.134(1) of the Act. Ai Group submits the following in relation to the various factors listed under s.134(1):
- (a) **Section 134(1)(a):** there is no evidence dealing with the impact of the claim on the relative living standards and needs of the low paid. In the circumstances, we consider that s.134(1)(a) does not advance the union's case. The Commission cannot properly conclude that the

¹¹² Sections 340 and 343 of the FW Act.

relative living standards and needs of the low paid will be enhanced or improved if the claim is granted.

- (b) **Section 134(1)(b):** there is no evidence that granting the variation would encourage collective bargaining. To the extent that the proposed award variation delivers United Voice, other unions or employees an outcome which they might otherwise pursue through enterprise bargaining, the factor might be said to weigh against the granting of the claims. Ai Group is aware of some enterprise agreements operating in the industry that contain similar provisions¹¹³.
- (c) **Section 134(1)(c):** there is no evidence that might enable the Commission to conclude that the grant of the claim will improve social inclusion through increased workforce participation. It is however foreseeable that the variation may cause employers to be less willing to agree to employees taking time off in lieu of providing a payment. This reduction in flexibility may hamper the ability of employees who utilise the current provision to balance their work and personal commitments and as such may undermine their ability to participate in the workforce. In the circumstances, we consider that s.134(1)(c) would weigh in favour of rejection of the claim.
- (d) **Section 134(1)(d):** the proposed variation undermines the need to promote flexible modern work practices and the efficient and productive performance of work by necessitating longer staff absences in circumstances where time off in lieu is granted under the clause. The additional costs and restrictions that would flow from the variation may also mean that the work of servicing clients on excursions is simply not able to be undertaken.
- (e) **Section 134(1)(da):** we have already addressed the operation of s.134(1)(da) in the submissions above concerning United Voice's

¹¹³ *Mission Australia Service Delivery Enterprise Agreement 2016 – 2019* at clause 39.3(d).

arguments. We submit it is a neutral consideration in relation to this claim.

- (f) **Section 134(1)(e):** the principle of equal remuneration for work of equal or comparable value is not relevant to this matter.
- (g) **Section 134(1)(f):** The claim if granted will increase the accrual of time being provided to employees in the circumstances contemplated by clause 29.5 by a factor of at least 50% and up to 100% (depending on the number of overtime hours worked). The claim, if granted, would therefore have an adverse impact on business, in particular rostering practices of employers.
- (h) **Section 134(1)(g):** In our view, the current award can properly be read so as to enable time off in lieu of overtime to be accrued on a “time for time” basis. Ai Group would not however oppose a variation being made to the award to clarify this outcome. This would assist to ensure that the award is simple and easy to understand.
- (i) **Section 124(1)(h):** There is no evidence dealing with the impact of the claim on employment growth, inflation and the sustainability, performance and competitiveness of the national economy. This is accordingly a neutral consideration.

217. In accordance with the above submissions there is no appropriate justification for the UV claim. Ai Group submits that it should be dismissed.

8. FIRST AID ALLOWANCE

218. Clause 20.4 of the Award requires the payment of a first aid allowance to employees where:
- (a) The employee is required by the employer to hold a current first aid certificate; and
 - (b) The employee is required to perform first aid at their workplace; unless the employee is a home care employee, in which case the clause applies if the employee is required by the employer to be responsible for the provision of first aid to other employees of the employer in a given week.
219. The allowance is prescribed as a percentage of the standard rate. At the time of preparing this submission, the first aid allowance for a full-time employee equates to \$16.03 each week. Part-time and casual employees are entitled to the allowance on a pro-rata basis, by reference to the number of ordinary hours they work each week.
220. The HSU is seeking the insertion of a new clause 20.4(c) in the following terms:

20.4 First aid allowance

(a) First aid allowance—full-time employees

A weekly first aid allowance of 1.67% of the standard rate per week will be paid to a full-time employee where:

- (i) an employee is required by the employer to hold a current first aid certificate; and
- (ii) an employee, other than a home care employee, is required by their employer to perform first aid at their workplace; or
- (iii) a home care employee is required by the employer to be, in a given week, responsible for the provision of first aid to employees employed by the employer.

(b) First aid allowance—casual and part-time employees

The first aid allowance in 20.4(a) will apply to eligible part time and casual employees on a pro rata basis on the basis that the ordinary weekly hours of work for full-time employees are 38.

(c) First aid refresher

(i) Where an employee is required to maintain first aid certification, the employer will pay the full cost of the employee updating their first aid certification by:

a. reimbursing the employee’s registration and attendance expenses; or

b. paying the registration and attendance costs.

(ii) Attendance at first aid refresher courses will be work time and paid as such.

221. The proposed clause 20.4(c) would introduce the following entitlements to full-time, part-time and casual employees where they are required to maintain first aid certification:

(a) Reimbursement of the “registration and attendance expenses” incurred by an employee updating their first aid certification; or by “paying the registration and attendance costs”; and

(b) Time spent attending first aid refresher courses would be treated and paid for as time worked.

222. Ai Group opposes the claim and submits that the changes proposed should not be made.

The HSU’s Case

223. The HSU has made only the following submission in support of its claim: (footnotes omitted)

63. The evidence shows many employees engaged in disability support or home care roles are required to hold a current first aid certification in their roles. Even where such qualification is not explicitly required, the holding of such qualification is likely to be beneficial for the employer in that the employee is better equipped to deal with a medical emergency. Where an employee is

required to maintain their first aid certification, that they [sic] should be entitled to be reimbursed the costs of maintaining their certification by the employee.¹¹⁴

224. The HSU's evidence in support of the claim appears to be limited to the following:

- (a) The evidence of James Eddington¹¹⁵ (Legal and industrial Officer at HACSU, Tasmanian Branch). Mr Eddington expresses the view that clause 20.4 has “no practical application” to home care employees, however home care employees “may” be required by their employer to provide first aid.¹¹⁶
- (b) The evidence of William Elrick¹¹⁷ (Area Organiser for the HSU Victoria No 2 Branch). Mr Elrick expresses the opinion that “[w]ithout a first-aid certificate, an employee can't work in [the disability services] sector”¹¹⁸, without providing any proper basis for that opinion. He also gives some evidence about the costs associated with undertaking “refresher” courses.¹¹⁹
- (c) The evidence of Robert Sheehy¹²⁰ (Manager Aged Care and Disabilities at the HSU NSW / ACT / QLD Branch). Mr Sheehy expresses the opinion that “the costs of obtaining and maintaining a first aid certificate is a significant amount of money” for aged care workers who are “low paid”¹²¹ and that the HSU's members “in aged care” are “commonly required” to have a first aid certificate¹²².

¹¹⁴ HSU Submission dated 15 February 2019 at paragraph 63.

¹¹⁵ Statement of James Eddington dated 15 February 2019.

¹¹⁶ Statement of James Eddington dated 15 February 2019 at [57].

¹¹⁷ Statement of William Elrick dated 15 February 2019.

¹¹⁸ Statement of William Elrick dated 15 February 2019 at [45].

¹¹⁹ Statement of William Elrick dated 15 February 2019 at [45].

¹²⁰ Statement of Robert Sheehy dated 15 February 2019.

¹²¹ Statement of Robert Sheehy dated 15 February 2019 at [19].

¹²² Statement of Robert Sheehy dated 15 February 2019 at [18].

- (d) The evidence of a support worker who is paid by her employer to undertake “training through Red Cross”¹²³.
- (e) The evidence of a disability support worker who expresses the opinion that “you can’t get work” without current first aid certification and that the cost of first aid training “works out to ... roughly \$90 a year”¹²⁴.

225. Whilst we do not intend to deal with the evidence exhaustively at this stage, it is sufficient to note that, self-evidently, the evidence led by the HSU is not probative and does not provide a proper foundation for the imposition of an additional employment cost.

Section 138 and the Modern Awards Objective

226. There is no evidence or material before the Commission that might justify the proposition that the clause proposed by the HSU is *necessary* to ensure that the Award achieves the modern awards objective.

227. We note also that the variation proposed by the HSU is out of step with the modern awards system. At **Attachment A** we have set out all modern award clauses currently in operation that afford employees an entitlement in relation to the provision of first aid. As the analysis demonstrates, the overwhelming majority of those award provisions provide for a weekly allowance that is calculated as a proportion of the standard rate, however defined; and they do *not* afford an entitlement to separate payments regarding any costs incurred for the purposes of attending ‘refresher’ courses, registration fees or time spent attending training. The HSU has not provided any rationale for why an approach so starkly different to the vast majority of awards should be adopted by the Commission in this matter.

¹²³ Statement of Thelma Thames dated 15 February 2019 at [23].

¹²⁴ Statement of Bernie Lobert dated 15 February 2019 at [22].

228. The HSU's submissions do not address s.138 or s134(1) of the FW Act. We nonetheless make the following observations about various factors listed under s.134(1).

A Fair Minimum Safety Net

229. The proposed clause is unfair to employers in numerous respects.

230. *First*, clause 20.4 of the Award requires the payment of an allowance where the employee is required to “hold a *current* first aid certificate”. In this way, the clause already contemplates the requirements that must necessarily be fulfilled by an employee to hold a current first aid certificate, including any “refresher” training or registration fees. Further, the allowance is payable to an employee regardless of whether the employee in fact administers first aid duties.

231. Considered in this light, it appears that the allowance is payable in contemplation of any expenses incurred by an employee in order to hold a *current* first aid certificate. The insertion of the additional entitlement proposed by the HSU would amount to double-dipping in the circumstances. This is clearly unfair to employers.

232. *Second*, there is no probative evidence or other material before the Commission that establishes:

- (a) The prevalence of employees covered by the Award being required to retain current first aid certificates;
- (b) What (if any) training or refresher training is required in order for an employee to hold a current first aid certificate;
- (c) The duration of such training;
- (d) The frequency with which such training must be undertaken in order to retain a current first aid certificate (if at all);
- (e) The fees payable to attend such training;

- (f) Whether the fees payable differ between different training providers;
 - (g) Any other amounts payable to attend such training; or
 - (h) The fees payable (if any) to renew or maintain a first aid certificate.
233. In the circumstances, the Commission is respectfully unable to properly quantify the potential costs that would be incurred by employers if the claim was granted. It would be unfair to impose a new unquantified financial obligation on employers. The paucity of material filed by the HSU regarding the above key aspects of its claim further advances the proposition that there is insufficient material before the Commission to satisfy it that the proposed clause is necessary in the relevant sense.
234. *Third*, material relied upon by the Unions suggests that some employees covered by the Award are concurrently employed by more than one employer covered by the Award¹²⁵. If both employers required the employee to retain a current first aid certificate, this would appear to grant employees an entitlement to the proposed entitlements twice – once from each employer. Such a windfall gain is clearly unjustifiable.
235. *Fourth*, it is unfair that an employer is required to pay for the expenses associated with the relevant training and registration as well as attendance at such training in circumstances where:
- (a) The clause potentially creates an entitlement where the employee *perceives* that they are required to hold a current first aid certificate, even though they have not been expressly required to do so by their employer;

¹²⁵ University of NSW, Cortis N, *Working under the NDIS: Insights from a Survey of Employees in Disability Services* (June 2017) at pages 15 – 16.

- (b) The clause does not impose any parameters around the training to be undertaken by the employee, the cost of such training or the duration of that training; nor does it afford the employer any ability to determine which training course the employee in fact attends;
- (c) The clause does not create an award-derived obligation on an employee to provide evidence of the costs purportedly incurred and/or their attendance at the relevant training; and
- (d) The clause does not absolve an employer from the liability created by it in circumstances where the employee does not provide such evidence.

Section 134(1)(a) – Relative living standards and needs of the low paid

236. There is no evidence dealing with the impact of the claim on the relative living standards and needs of the low paid.
237. In the circumstances, we consider that s.134(1)(a) does not advance the union’s case. The Commission cannot properly conclude that the relative living standards and needs of the low paid will be enhanced or improved if the claim is granted.

Section 134(1)(b) – The need to encourage collective bargaining

238. The grant of the claim may have an adverse impact on the need to encourage collective bargaining.
239. The evidence demonstrates that reimbursement for “regular, updated [first aid] training”¹²⁶ is the subject of enterprise bargaining in the sector. Further, the union’s pursuit of the claim here advanced of itself demonstrates that the issue is one of importance to the HSU and by extension, it is one that may motivate

¹²⁶ Statement of Robert Sheehy dated 15 February 2019 at [18].

it to engage in collective bargaining. Any such motivation would necessarily be extinguished by the grant of the claim.

Section 134(1)(c) – The need to promote social inclusion through increased workforce participation

240. There is no evidence that might enable the Commission to conclude that the grant of the claim will improve social inclusion through increased workforce participation.

241. In the circumstances, we consider that s.134(1)(c) does not advance the union's case.

Section 134(1)(d) – The need to promote flexible modern work practices and the efficient and productive performance of work

242. Where the imposition of an additional financial obligation causes employers to minimise the extent to which employees are required to perform first aid, this would undermine the need to promote flexible modern work practices and the efficient and productive performance of work.

Section 134(1)(da) - The need to provide additional remuneration for employees working overtime; unsocial, irregular or unpredictable hours; on weekends or public holidays or shifts.

243. This is a neutral consideration in this matter.

Section 134(1)(e) – The principle of equal remuneration for work of equal or comparable value

244. This consideration is not relevant to the matter.

Section 134(1)(f) – The impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden

245. It is axiomatic that the introduction of a new financial obligation will increase employment costs. The claim, if granted, would therefore have an adverse impact on business.
246. Further, as we have previously submitted, significant portions of the industry covered by the Award are dependent on NDIS funding. The NDIS does not provide funding for the additional employment costs contemplated by the proposed clause. The impact on business is compounded in these circumstances. Employers are unable to recover the additional costs from participants in the scheme because of the pricing caps imposed by the NDIS, nor does the NDIS provide specific funding for first aid refresher training.
247. As explained earlier, the material presented by the HSU regrettably does not enable the Commission to properly measure the extent of the impact on business. Nonetheless, our very rudimentary inquiries have revealed that:
- (a) There are a range of first aid courses available. For example, the Red Cross' online resources lists the following first aid courses that are offered by it:
 - (i) Provide cardiopulmonary resuscitation;
 - (ii) Provide basic emergency life support;
 - (iii) Provide first aid;
 - (iv) Provide an emergency first aid response in an education and care setting;
 - (v) Provide first aid in remote situations;
 - (vi) Provide advanced first aid;
 - (vii) Provide advanced resuscitation; and

(viii) Manage first aid services and resources.¹²⁷

(b) The various courses incur differing fees and different providers offer the same or similar courses for different fees. The duration of the courses also vary.

248. The variability described above highlights the unfairness and potentially unjustifiable employment costs that could amount from the HSU's proposed clause, which does not afford employers any discretion or ability to determine which, if any, training course an employee attends. The proposed provision applies entirely at the discretion of the employee.

249. The impact of the claim on business would be exacerbated by the following elements of the provision proposed by the HSU:

(a) The clause applies wherever an employee "is required to maintain first aid certification". The application of the clause is not restricted to circumstances in which the employee is so required expressly by their employer. Conceivably, the clause applies even where an employee *perceives* that they are required to maintain first aid certification. Such an entitlement is clearly unjustifiable and unfair. It cannot be for the employee to determine whether they are entitled to a monetary benefit under the minimum safety net. Further, even if the entitlement is not intended to operate in that way, it is open to interpretation. At the very least, this is likely to lead to disputation and unreasonable claims being made by employees.

(b) The requirement to pay for or reimburse an employee for "registration" and "expenses" is potentially broad. For example, it may include expenses incurred by an employee travelling to and from the training. Further, the clause does not afford the employer any discretion or control over the mode of transport selected by the employee. For

¹²⁷ Red Cross, *First Aid Training FAQs: What is the difference between the courses you offer (PBELS-PFA-CPR)?* (accessed 29 March 2019).

instance, an employee may be able to drive their private vehicle to and from the training or travel via public transport but could instead elect to travel by a taxi. In any event, there is no justification for saddling an employer with such expenses.

- (c) Similarly, the clause does not afford the employer any discretion or control over the first aid course attended by the employee. As we set out above, there are various types of first aid courses and they are offered by a range of providers. The duration and cost of those courses vary. The provision appears to grant an employee complete discretion as to the course they attend and the fees they incur as a result.
- (d) The clause does not require the employee to provide any evidence regarding their purported attendance at first aid training. By extension, the clause does not absolve an employer from the obligation to make payment under the clause where an employee does not establish that they did in fact attend the relevant course, the duration of the course and the “expenses” or “costs” they incurred as a result.
- (e) The clause purports to deem time spent attending “first aid refresher courses” as time worked. It is unclear whether the time is to be treated as time worked for the purposes of the Award only, or for other purposes too; a matter which we return to below. Potentially, however, clause 20.5(c)(ii) has various cost implications for an employer in addition to the obvious additional employment cost that it creates by requiring payment for time spent at training. For example:
 - (i) The clause potentially requires that various forms of paid leave must accrue during time spent at training;
 - (ii) The performance of additional ordinary hours in a week may entitle the employee to payment at overtime rates for other work performed by the employee in circumstances where it would not otherwise have been overtime; and

- (iii) The clause appears to require payment at rates that would include applicable shift loadings, penalty rates or other relevant separately identifiable amounts.

Section 134(1)(g) - the need to ensure a simple, easy to understand, stable and sustainable modern award system

250. The clause is not simple and easy to understand.

251. For instance, the proposed clause 20.5(c)(i) requires the employer to “reimburse the employee’s registration and attendance expenses” or payment of the “registration and attendance costs”. The scope of the provisions is unclear in at least the following respects:

- (a) Subclauses 20.5(c)(i)(a) and 20.5(c)(i)(b) refer to “registration” and “attendance” costs. Crucially, the clause does not prescribe *what* those registration or attendance costs must relate to in order to require payment or reimbursement by the employer. We understand from the HSU’s submissions that the intention underpinning the clause is that it require payment or reimbursement where an employee is required to maintain a first aid certificate and incurs costs associated with training and/or registration as a result; however this has not in fact been articulated in the proposed clause.
- (b) It is unclear precisely what amounts constitute “the employee’s registration and attendance costs”. For instance, it is unclear whether the employee incurs costs associated with travelling to and from the training form part of the employee’s “attendance expenses” and therefore, must be reimbursed.

252. Further, the implications of clause 20.5(c)(ii) and treating the time spent at training as time worked are unclear, as explained above.

253. Finally, the need to ensure a stable system tells against the grant of the claim; particularly given that the claim lacks any proper foundation.

9. COMMUNITY LANGUAGE SKILLS ALLOWANCE

254. The ASU seeks two new allowances to be payable to employees who use languages other than English in the course of their duties.

255. The proposed new provision is as follows:

20.10 Community Language and Signing Work

20.10.1 Employees using a community language skill as an adjunct to their normal duties to provide services to speakers of a language other than English, or to provide signing services to those with hearing difficulties, shall be paid an allowance in addition to their weekly rate of pay.

20.10.2 A base level allowance shall be paid to staff members who language skills are required to meet occasional demands for one-to-one language assistance. Occasional demand means that there is no regular pattern of demand that necessitates the use of the staff members language skills. The base level rate shall be paid as a weekly all purposes allowance of \$45.00.

20.10.3 The higher level allowance is paid to staff members who use their language skills for one-to-one language assistance on a regular basis according to when the skills are used. The higher level rate shall be paid as a weekly all purposes allowance of \$68.00.

20.10.4 Such work involves an employee acting as a first point of contact for non-English speaking service users or service users with hearing difficulty. The employee identifies the resident's area of inquiry and provides basic assistance, which may include face-to-face discussion and/or telephone inquiry.

20.10.5 Such employees convey straightforward information relating to services provided by the employer, to the best of their ability. They do not replace or substitute for the role of a professional interpreter or translator.

20.10.6 Such employees shall record their use of community language skills.

20.10.7 Where an employee is required by the employer to use community language skills in the performance of their duties

a) the employer shall provide the employee with accreditation from a language/signing aide agency

b) The employee shall be prepared to be identified as possessing the additional skill(s)

c) The employee shall be available to use the additional skill(s) as required by the employer.

20.10.8 The amounts at 20.10.2 and 20.10.3 will be adjusted in accordance with increases in expense related allowances as determined by the Fair Work Commission.

256. Ai Group opposes the claim and submits that it should not be granted.

Deficiencies in the Proposed Clause

257. There are a number of obvious difficulties that would flow from the implementation of the proposed clause, as well as a range of serious deficiencies in the manner in which it is constructed. We deal with these issues first, before more directly addressing the arguments advanced by the ASU and matters associated with the modern awards objective, including the matters that must be taken into account pursuant to s.134.

258. The first obvious problem with the clause is that it does not clearly define what is a 'community language skill'. It may be inferred from the term and the remainder of the clause that it is an ability to communicate in a language other than English, however the provision does not establish any clear criteria against which an employee could be assessed and said to possess and utilise such skills. Clauses 20.10.4 and 20.10.5 come closest to defining the term:

20.10.4 Such work involves an employee acting as a first point of contact for non-English speaking service users or service users with hearing difficulty. The employee identifies the resident's area of inquiry and provides basic assistance, which may include face-to-face discussion and/or telephone inquiry.

20.10.5 Such employees convey straightforward information relating to services provided by the employer, to the best of their ability. They do not replace or substitute for the role of a professional interpreter or translator.

259. The clause does not require any particular level of proficiency in the relevant language so as to entitle the employee to the payment of the allowance. The description of such employees as conveying straightforward information relating to services provided by the employer "to the best of their ability" falls well short of providing a workable basis for determining who should be eligible.

260. We here also observe that while clause 20.10.7 mandates that an employer who requires an employee to use community language skills “shall provide the employee with accreditation from a language/signing aide agency”, it is entirely unclear what this requires. No explanation is provided in the ASU’s submissions.
261. Further difficulties flow from the fact that eligibility to the entitlement under the proposed clause appears to only arise if the employee is using the relevant skill “as an adjunct” to their normal duties.¹²⁸ Adopting the ordinary meaning of the term “adjunct”, this appears to mean that payment would apply in circumstances where the use of the skill was separate and not essential to the employee’s ordinary or normal duties.¹²⁹ That is, it appears that if an employee is engaged to perform services that routinely or normally included the exercise of community language or signing skills, the employee would *not* receive the allowance pursuant to the proposed clause.
262. Although we are not suggesting that employees who have been engaged to utilise community language or signing skills as a normal part of their duties as opposed to an adjunct to such duties should receive an additional payment (and we note that such a claim is not part of these proceedings) a difficulty with the ASU’s proposed approach is that it is likely to result in uncertainty as to when the clause would have application. Difficult questions may arise as to the line between an employee’s normal duties and the adjunct exercise of such skills and it cannot reasonably be that this assessment is based on what tasks are identified in a job advertisement, as appears to be impliedly suggested, by the ASU submissions. The clause is far from simple and easy to understand.

¹²⁸ Clause 20.10.1.

¹²⁹ The Macquarie Dictionary defines adjunct to mean “1. something added to another thing but not essentially a part of it...”.

263. We note that both employee witnesses advanced by the ASU would not actually be eligible for the allowance, given their evidence suggests that their use of community language skills forms part of their normal duties.
264. Another problem with the claim is that the proposed clause appears to entitle an employee to payment whenever an employee simply *uses* their community language or signing skills.¹³⁰ The clause does not confine the application of the entitlement to circumstances where an employer requires the employee to utilise such skills. Nor is it confined to circumstances where the utilisation of the skill is either essential or even beneficial to the provision of the service. This unfairly leaves an employer with no ability to manage their exposure to liability for the proposed allowance.
265. Any argument that the proposed entitlement is justifiable or necessary, in the sense contemplated by s.138, is also undermined by the fact that an employee does not have to undertake any kind of training or acquire any particular qualification in order to be entitled to the additional payment. The payment is accordingly not in the nature of a reimbursement or contribution to the expense they have occurred in acquiring the relevant skills. Nor could it be said to be fair because of the extra effort an employee may have undertaken in order to acquire the skills. Rather, an employee who simply possesses these language skills by virtue of their background would potentially be eligible for a payment if they happen to use such skills (at their own initiative) in the course of their work.
266. The approach to establishing eligibility to the proposed entitlement can be contrasted with the approach often taken within awards in the context of other allowances payable for the exercise and possession of particular skills and qualifications. Take for example first aid allowances. In this regard, an employee is typically only required to receive a first aid allowance if they are

¹³⁰ Clause 20.10.1

appropriately qualified and either required or appointed to perform, or be responsible for performing, first aid. The Award provides (our emphasis):

20.4 First aid allowance

(a) First aid allowance—full-time employees

A weekly first aid allowance of 1.67% of the standard rate per week will be paid to a full-time employee where:

- (i)** an employee is required by the employer to hold a current first aid certificate; and
- (ii)** an employee, other than a home care employee, is required by their employer to perform first aid at their workplace; or
- (iii)** a home care employee is required by the employer to be, in a given week, responsible for the provision of first aid to employees employed by the employer.

(b) First aid allowance—casual and part-time employees

The first aid allowance in 20.4(a) will apply to eligible part time and casual employees on a pro rata basis on the basis that the ordinary weekly hours of work for full-time employees are 38.

267. The above clause provides an example of the manner in which awards deal with additional entitlements in circumstances where an employee possesses and is required to exercise special skills.

268. A clause that provides an entitlement to employees using community language skills but does not contain comparable criteria for eligibility to that which applies in the context of first aid allowance is unjustifiable. Of course, the criteria would need to be somewhat different given the different subject matter that the two clauses are dealing with. However, the short point is that the proposal lacks the kind of rigour surrounding eligibility that could be expected of an award clause affording an entitlement to a substantial monetary allowance.

269. It is also notable that the first allowance clause set out above provides a mechanism for calculating a pro-rata entitlement for part-time and casual employees. This is a matter we will return to later.

The Quantum of the Proposed Allowances

270. The proposed clause contemplates two different allowances being payable. A “base level allowance of \$45 and a higher level allowance of \$68. The relevant elements of the clause are as follows:
- 20.10.2** base level allowance shall be paid to staff members who language skills are required to meet occasional demands for one-to-one language assistance. Occasional demand means that there is no regular pattern of demand that necessitates the use of the staff members language skills. The base level rate shall be paid as a weekly all purposes allowance of \$45.00.
- 20.10.3** The higher level allowance is paid to staff members who use their language skills for one-to-one language assistance on a regular basis according to when the skills are used. The higher level rate shall be paid as a weekly all purposes allowance of \$68.00.
271. The ASU have not identified any reasoning behind their selection of the quantum of the proposed allowances. Consequently, the Commission has no basis upon which it could reasonably conclude that the specific allowances proposed are *necessary* in the sense contemplated by s.138. This alone warrants rejection of the claim.
272. The criteria for eligibility to one allowance over the other is also unclear and arguably illogical. The base level allowance is payable when there is no regular pattern of demand for the skills, while the higher allowance is payable in circumstances where the assistance is provided on a “regular basis”.
273. It is also unclear whether these allowances are to be paid every week to an employee, regardless of whether the skills are utilised in that period. It appears to us that the base level allowance would be payable to an employee every week, regardless of whether the skill is used in that week, provided that there is a requirement for the employee to occasionally use the skill. In contrast, it seems that the higher allowance is only payable when the skills are actually used, although this is far from clear. In support of this interpretation we observe that the allowance is paid “...*according to when the skills are used.*” However, it seems anomalous that an employee who regularly uses the

relevant skill would only sometimes receive a payment, while an employee who occasionally use the relevant skill.

274. It is not reasonable for an allowance to be payable each week regardless of whether the skill is actually used in that period. Such an approach could mean that an employee who utilises the skill on just a handful of occasions could be eligible to a regular significant additional payment. This is obviously unfair to an employer.
275. It is also unclear why the allowance has been characterised as an “all-purpose allowance”. Characterising the allowances in this manner raises uncertainties about whether and how various other clauses under the Award intended to interact with the new provision. For example, is the intention that various penalty rates specified in the Award would be applied to the allowance so as compound the quantum that is payable? The ASU submission does not address such matters or the threshold issue of why it would be necessary for the allowance to be characterised as all-purpose allowances.
276. The ASU has also failed to explain why the new allowances are set as weekly allowances. The union does not propose that there be any provision for calculating a pro-rata entitlement for casual or part-time employees. There is no apparent reason why an employee who potentially works as little as one hour in a given week should be eligible to receive the same allowance as an employee who work 38 hours a week. Given the high proportion of employees covered by the Award who work on either a casual or part-time basis, structuring the allowance in this manner could have significant adverse cost implications for employers. Many employers covered by the award have large workforces but comparatively few employees who work hours equivalent to those of a full-time employee.

Clause 20.10.7 of the Proposed Provision

277. There are also a range of deficiencies in the drafting of clause 20.10.7. The proposed clause provides:

20.10.7 Where an employee is required by the employer to use community language skills in the performance of their duties

a) the employer shall provide the employee with accreditation from a language/signing aide agency

b) The employee shall be prepared to be identified as possessing the additional skill(s)

c) The employee shall be available to use the additional skill(s) as required by the employer.

278. We have already identified the uncertainty regarding what the obligation to provide the employee with accreditation from a language /signing aide agency requires. To this we add that the union has also failed to identify how much of an administrative burden this would impose upon employers and has not advanced any evidence to enable the Commission to assess the costs that may be associated with obtaining the accreditation.

279. It is also unclear whether subclauses 20.10.7(b) and (c) are intended to be requirements that must be met if an employee is to be eligible to receive the entitlement or whether they are obligations that are imposed upon an employee if they are "...required by the employer to use community language skills in the performance of their duties". This issue is simply not addressed by the unions.

The Adjustment of the Allowance

280. Clause 20.10.8 attempts to provide for the adjustment of the allowance. It provides:

20.10.8 The amounts at 20.10.2 and 20.10.3 will be adjusted in accordance with increases in expense related allowances as determined by the Fair Work Commission.

281. The reference to expense related allowances raises a question about whether the clause is intended to be an expense related allowance. If it is, it is entirely unclear what expense it could be said to be related to. In any event, simply indicating that the allowance will be adjusted in accordance with increases in expense related allowances as determined by the Commission is meaningless. There is no single basis or benchmark by which all expense related allowances are determined. In this regard clause 20.1 of the award provides:

20.1 Adjustment of expense related allowances

- (a) At the time of any adjustment to the standard rate, each expense related allowance will be increased by the relevant adjustment factor. The relevant adjustment factor for this purpose is the percentage movement in the applicable index figure most recently published by the Australian Bureau of Statistics since the allowance was last adjusted.
- (b) The applicable index figure is the index figure published by the Australian Bureau of Statistics for the Eight Capitals Consumer Price Index (Cat No. 6401.0), as follows:

Allowance	Applicable Consumer Price Index figure
Board and lodging	Weighted average eight capital cities—CPI
Clothing, equipment and tools allowance	Clothing and footwear group
Meal allowances	Take away and fast foods sub-group
Vehicle/travel allowance	Private motoring sub-group

282. The union has not identified an appropriate adjustment factor for this allowance.

Conclusions Regarding Deficiencies in the Proposed Clause

283. The above identified deficiencies in the drafting of the provision and the problems that it will consequently generate weigh against any assertion that the provision is a necessary element of a fair and relevant minimum safety net of terms and conditions. At the very least, the proposal is inconsistent with a consideration of the need to ensure a modern award system that is simple and

easy to understand. However, it also likely to have adverse impact on employers covered by the Award, in the sense contemplated by s.134(1)(f).

284. We acknowledge that the Commission is not restricted to varying an award in the terms claimed. However, the problems that we have here identified are fundamental to the operation of the provision and the justification for their implementation. They cannot be remedied by mere amendment to the wording of the provision, without fundamentally altering the nature of the claim pursued. Given the seriousness and breadth of the deficiencies, the claim ought be rejected.

The ASU's Case

285. At paragraph 36 of the ASU's submission, the union boldly asserts that the variation will:

- (a) Recognise and endorse the fundamental principles of the ERO which recognise equal work in the social and community services sector.
- (b) Better position community sector organisations to meet the policy challenge of ensuring access to equity for Australia's culturally and linguistically diverse population.
- (c) Assist in the provision of the highest standard of effective professional communication, programmes and services that are responsive to the needs of all Australians.
- (d) Be an efficient and effective use of limited resources in the community sector, allowing less reliance upon external translators and interpreters.
- (e) Be capacity building for the community sector workforce, which is currently the fastest growing sector in the country.

286. In response we observe:

- (a) The ASU's submissions are highly speculative, unreasonably optimistic and not properly established through the limited evidence advanced.

- (b) The ASU has also made no effort, beyond mere assertion, to explain how the variation would recognise and endorse the fundamental principles of the ERO.
- (c) There is no apparent basis for concluding that imposing a new obligation on employers to pay employees more to perform duties that many already perform will constitute an efficient or effective use of the limited resources of the sector.
- (d) The ASU submissions are focussed on achieving broad policy objectives, rather than establishing that the variation is necessary to achieve the narrower modern awards objective, as articulated in s.134.

287. The union also points to the uncontentionous proposition that Australia is one of the most diverse societies in the world and that many people in our society speak one or more languages other than English and use those languages in their working lives.¹³¹ Such a submission is uncontentionous. However, an assertion that this somehow has such a profound impact on the work undertaken by those covered by the Award so as to warrant special terms and conditions of employment for this sector is not, in our view, properly made out.

288. In this regard, we first make the general observation that the need to operate in the context of a multicultural society is not unique to the circumstances of employers and employees covered by the Award. It has a relevant bearing on the operations and duties of a wide variety of employers and employees. The assertion that in some instances employees may speak or otherwise use a language other than English in the course of their work and that this may be of some assistance to their employer is not unique to the industries or occupations covered by the Award. Nonetheless, awards do not generally provide additional remuneration to employees in such circumstances.

¹³¹ ASU submission dated 18 February 2019 at paragraph 37.

289. Against this backdrop the union essentially mounts the following general arguments in favour of their proposal:

- (a) The ability for employees to speak more than one language is vital to the industry.
- (b) The use of community language skills is not compensated for by the Award or by employers who are constrained by their funding arrangements.
- (c) Bilingual workers are valued by their employers.
- (d) The use of bilingual workers covered by the Award instead of interpreters will in some instances be preferable, for various reasons.
- (e) The additional remuneration will attract employees with the relevant language skills to the sector or encourage existing employees to undertake additional training and skills development so as to render them eligible for the allowance (thus 'building the capacity of the sector').

290. Although the ASU fails to expressly reference any element of s.134, they contend that the variation will:

- (a) Promote flexible modern work practices and the efficient and productive performance of work, by attracting skilled staff to the sector and thus reducing the costs associated with the sector's reliance on interpreters.
- (b) Addresses the needs of the low paid providing additional remuneration.

291. We respond firstly to the union's general arguments.

That the ability for employees to speak more than one language is vital to the industry

292. The ASU contends that the ability to communicate in more than one language is highly sought after by employers in the social and community sector. The evidence advanced by two employees that work in the sector paints a clear

picture of some circumstances where such are clearly useful. An employer has also given evidence about his preference for hiring employees with such skills. However, the nature of the evidence advanced does not enable a proper assessment of the extent to which such skills are utilised across the industry, much less establish that the skills are vital to the industry generally.

293. The NDIS dashboard for 31 Dec 2018, which is produced by NDIA, sets out various statistics regarding the operation of the NDIS.¹³² It states that only 8% of active participants identified themselves as being from a culturally and linguistically diverse background.
294. Although we do not dispute that instances may arise where some employees use their knowledge of languages other than English in the course of their duties, the material relied upon by the ASU does not establish the extent to which such practices in fact influence recruitment decisions.
295. To some degree the ASU submissions also appear to conflate the importance of language skills with the importance of an employee's understanding of cultural issues and/or acceptance of a particular employee within a particular community that is being serviced. They argue that the language skills are "often enhanced by a deep understanding of cultural issues associated with the language". Such arguments do not justify the proposal. The payment of the allowance is dependent only upon an employee possessing and utilising specific language skills. No element of the proposed clause requires the broader attributes referred to by the ASU. Under the ASU proposal, an employee that lacks the attributes but possess a rudimentary knowledge of a language other than English would appear to be eligible for the additional payment.
296. Ultimately, the mere fact that a particular skill may be of use to employers in a particular industry, or indeed even vital to it, does not necessitate that a

¹³² NDIA, *National Dashboard as at 31 December 2018*.

minimum safety net of terms and conditions reward employees for possession of such skills. That is the role of the labour market.

That the use of community language skills is not compensated for by the Award or by employers who are constrained by their funding arrangements

297. The union contends that employees are not compensated for their use of language skills by the base rates of pay provided by the Award because such matters are not contemplated by the classification structure.
298. The content of the Award's classification structure cannot be relied to provide a definitive guide as to what considerations have been taken into account in the setting of rates within the Award and no analysis of the history of the instrument and the rates has been provided by the union. In such circumstances the union's assertion cannot be accepted.
299. If the union contends that the rates in the Award do not reflect the value of work undertaken by employees covered by it, the proper course would be to seek an increase to such rates on work value grounds, as contemplated by section s.157 of the Act. The union appears to be seeking to avoid mounting such a case by instead seeking an all purpose allowance. Such a course appears to be intended to circumvent the limitation on the Commission's capacity to vary minimum wages in the course of the Review that flows from the operation of s.135 of the Act.
300. We do not contend that the Commission does not have the power to grant the variation proposed, as a product of s.135. However, it should not lightly exercise its discretion to do so in circumstances where such a course of actions appears, on its face, to be squarely at odds with the policy objective underpinning the operation of s.135 and s.157. At the very least, the union's case should have included an articulation of why an allowance rather than an increase to the minimum rates payable under the Award is necessary, in the sense contemplated by s.138, but no such submission has been advanced.

301. The union also asserts that community language skills are not rewarded by employers who are constrained by their funding arrangements. To the extent that the union accepts that some employers simply do not have the capacity to pay any additional amounts to their employees, on account of such constraints, we accept that veracity of the contentions. The extremely limited if not non-existent capacity of employers to meet the costs of the proposed claim is a core reason for Ai Group's opposition to it. Nonetheless, the broad proposition that no employer in this sector has any capacity to provide any form of over-award payment cannot be accepted on the evidence advanced.
302. There is, in reality, a diversity of funding arrangements in operation across the sector. We have earlier addressed the potential deficiencies in NDIS funding. Funding arrangements are often set having regard to award obligations. It cannot, however, be accepted on the material before that Commission that all arrangements provide for recovery of all costs imposed upon employers by the Awards. In fact, the analysis presented earlier in this submission demonstrates the very opposite proposition.
303. The material before the Commission does not establish that any amendment to the modern award will be a catalyst for change to funding that will enable employers to simply recover any costs imposed upon them.

That the use of bilingual employees is preferable to using interpreters

304. The ASU contends that a key benefit of engaging bilingual workers is that they, in some circumstances, enable an organisation to avoid the need for interpreters or translators to be engaged.¹³³ This is said to result in a range of benefits. Such submissions cannot be reconciled with the content of clause 20.10.5, which seems to be a definition or description what constitutes an employee who is using community language skills: (our emphasis)

¹³³ ASU submissions dated 18 February 2019 at paragraphs 45 – 51.

20.10.5 Such employees convey straightforward information relating to services provided by the employer, to the best of their ability. They do not replace or substitute for the role of a professional interpreter or translator.

305. Given the last sentence of clause 20.10.5, the arguments advanced at paragraphs 45 – 51 of the ASU’s submission regarding the substitutability of bilingual workers and interpreters or translators are of doubtful relevance. The proposed clause contemplates the work of the two categories of worker as being different.
306. At paragraph 49 of its submission, the union contends that the Government puts the burden of funding interpreters on employers. If this is correct (and the evidence does not establish that this is the case in all contexts) it would be open to employers to redirect the funds that they might otherwise spend on interpreters towards the remuneration of bilingual workers in order to secure their services. This undermines any argument that a variation is *necessary* to enable employers to reward employees for community language skills.
307. Regardless, it may be that by penalising employers that engage employees to utilise such skills through requiring them to pay a further allowance, a disincentive to the engagement of employees with such skills will be created. Alternatively, an employer faced with such an unrecoverable cost would be rationally expected to limit their exposure to it by directing employees not to engage in activities attracting the payment, unless the employer recognises there to be some greater benefit flowing from the exercise of such skills. There is however no evidence that employers generally recognise such savings.
308. Ultimately, it is not the role of the safety net of minimum terms and conditions of employment to guide, incentivise or otherwise influence employer decisions around the engagement of interpreters versus bilingual employees. This is undoubtedly, a decision that requires consideration of the particular circumstances at hand. This is properly a matter for managerial prerogative.
309. There is no imperative flowing from s.134 to seek further a broad policy objective of limiting the use of interpreters and translators in the social and

community services sector based on what might be considered the optimal form of service delivery.

That additional remuneration will attract skilled employees to the sector

310. A core argument made by the ASU for the proposal is that it will assist to attract employees to the sector. The argument should be rejected on the simple basis that the content of awards is constricted by the legislation to only terms that are *necessary* to ensure a fair and relevant minimum safety net. They should not, and indeed cannot, be set by reference to what may constitute attractive market rates to entice employees to one industry or occupation over another.
311. It must also be borne in mind that many sectors of the Australian economy face labour shortages. The sectors covered by the Award are not unique in this regard.
312. It is not the role of modern awards to intervene in the operation of the labour market so as to encourage the redistribution of labour between sectors. The resulting distortions would not only undermine the market's efficient operation and may have potential negative consequences for the broader economy. Although the evidence does not permit any firm conclusions in this regard, it raises a risk, at least at a conceptual level, that the variation may have a negative impact on the matters identified in s.134(1)(h).
313. The acceptance of the ASU's argument would have significant consequences for the broader award system. It is not uncommon for unions to argue that an award should be varied in some beneficial manner to address labour shortages in a particular sector. If such arguments were accepted in the context of the Award it would likely be a catalyst for arguments that other awards under which such employees might work should be varied to include comparable benefits. In this sense, the acceptance of the ASU argument would not be consistent with the need to ensure a *stable* modern awards system.

314. The ASU also points to competition for employees between the community sector and public sector. The fact that the public sector may be able to offer better conditions than some community-based organisations is not a justification for increasing remuneration payable under a modern award. The objective of assisting the private sector to secure workers in preference to the public sector is not a relevant consideration in the Commission's assessment of what constitutes a fair and relevant minimum safety net of term and conditions.
315. Ultimately, the evidence does not establish that the proposed variation would assist in increasing the number of employees with community language skills in the sector. It does not establish that this allowance would have any material impact on:
- (a) The number of employees who would seek employment in the sector;
 - (b) The number of relevantly skilled employees who elect to work in the sector; or
 - (c) The extent to which employees working in the sector will undertake language training in order to obtain the allowance.
316. Ai Group respectfully submits that it is unduly simplistic and optimistic to suggest that the complex challenges of attracting sufficient skilled labour to the sectors covered by the Award could be addressed by the simple inclusion of the proposed additional allowance.

Section 138 and the Modern Awards Objective

317. The ASU submit that their proposed variation is necessary for the Award to achieve the modern awards objective. Ai Group advances a contrary contention. The section below addresses the specific matters that must be taken into account by the Commission pursuant to s.134(1).

Section 134(1)(a) – Relative living standards and needs of the low paid

318. The ASU makes the observation, without referencing s.134(1)(a), that the claim addresses the needs of the low paid by providing additional remuneration to low paid workers.¹³⁴ So much can of course be said about any claim that might result in the payment of an additional monetary amount.
319. There is no detailed evidence dealing with the impact of the claim on the relative living standards and needs of low paid employees covered by the Award relative to other employees. Nor is there any detailed evidence specifically dealing with the needs of low paid employees who would receive the proposed new allowance.
320. We observe that the needs of the low paid will not be assisted if employers elect not to engage employees with community language skills out of a concern that it may expose them to the costs flowing from the proposed new award terms. There is a very real risk that this will occur if the claim is granted.
321. Regardless, the needs of the low paid are more appropriately addressed through the Annual Wage Review, rather than through allowances, the entitlement to which is based on an employee's exercise of a particular skill. We here draw an analogy to the Full Bench's reasoning regarding the extent to which penalty rates should be utilised to address such matters.¹³⁵
322. In the circumstances, we consider that the Commission should not be satisfied that s.134(1)(a) would weigh strongly in favour of the union's case.

Section 134(1)(b) – The need to encourage collective bargaining

323. The union does not suggest that a consideration of this matter would weigh in favour of its claim.

¹³⁴ ASU submission dated 18 February 2019 at paragraph 39.

¹³⁵ Penalty Rates Decision at [823].

324. The evidence demonstrates that the ASU has attempted to bargain for community language allowances, notwithstanding the fact that they may have been unsuccessful. Further, the union's pursuit of the claim here advanced of itself demonstrates that the issue is one of importance to the union. The grant of the claim would remove a motivation for the ASU and its members to continue to pursue such entitlements through bargaining.

Section 134(1)(c) – The need to promote social inclusion through increased workforce participation

325. The union does not suggest that a consideration of this matter would weigh in favour of its claim.

326. The evidence upon which the ASU intends to rely does not enable the Commission to conclude that the grant of the claim will improve social inclusion through increased workforce participation.

327. Even if it were accepted that the claim may assist the community services sector to attract more skilled employees to it, in favour of other sectors or public sector employment, this will not necessarily result in any increase in the level of workforce participation generally. It cannot be concluded that the claim will cause more employees to join the workforce. Nor can it be asserted that the claim will enable more employers to offer employment opportunities.

328. In the circumstances, the Commission should conclude that the material does not establish that a consideration of s.134(1)(c) advances the union's case.

Section 134(1)(d) – The need to promote flexible modern work practices and the efficient and productive performance of work

329. To the extent that the imposition of an additional financial obligation might cause employers to minimise the extent to which employees are permitted to use their community language or signing skills (or to the extent that they actively avoid hiring employees with such skills in order to manage the

exposure to such costs), this would undermine the need to promote flexible modern work practices and the efficient and productive performance of work.

330. Ultimately, the union's submissions amount to unsubstantiated assertion and an unrealistic hope that the payment of an additional allowance will improve the capacity of the sector to assist persons lacking English language skills by either attracting people with or incentivising current employees to undertake further training.

331. Respectfully, the Commission cannot conclude that a consideration of this matter weighs in favour of the claim.

Section 134(1)(da) - The need to provide additional remuneration for employees working overtime; unsocial, irregular or unpredictable hours; on weekends or public holidays or shifts

332. This is a neutral consideration in this matter.

Section 134(1)(e) – The principle of equal remuneration for work of equal or comparable value

333. This consideration is not relevant to the matter.

Section 134(1)(f) – The impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden

334. It is axiomatic that the introduction of a new financial obligation will increase employment costs. The claim, if granted, would therefore have an adverse impact on business.

335. Further, as we have previously submitted, significant portions of the industry covered by the Award are dependent on NDIS funding. The NDIS does not provide funding for the additional employment costs contemplated by the proposed clause. The impact on business is compounded in these circumstances. Employers are unable to recover the additional costs from participants in the scheme because of the pricing caps imposed by the NDIS,

nor does the NDIS provide specific funding for the entitlements contemplated by the ASU claim.

336. The evidence does not establish that employers will be able to obtain increases to such funding on the basis of a variation to the Award.
337. A difficulty with making any firm assessment about the extent to which the proposal will be a problem for business is that the material presented by the ASU does not enable the Commission to properly measure the extent of the impact of the claim. We do not know, within any numerical certainty, crucial matters such as:
- (a) How many employees covered by the Award possess such skills?
 - (b) How frequently such skills are utilised?
 - (c) What proportion of employers will, realistically, be able to recover any such costs through variations to the funding arrangements?
 - (d) What is required in order to obtain accreditation for an employee who utilises the relevant skills (as required by the proposed clause)?
338. It cannot be concluded, on the material advanced, that there will be any positive impact on productivity that flows from the requirement to pay the new allowance.

Section 134(1)(g) - the need to ensure a simple, easy to understand, stable and sustainable modern award system

339. For the various reasons we identified, the proposed clause is far from simple and easy to understand.
340. This consideration weighs against granting the claim.

10. PUBLIC HOLIDAYS

341. United Voice seeks the insertion of a new clause 34.2(c) as follows:

34.2 Payment for working on a public holiday

- (a) An employee required to work on a public holiday will be paid double time and a half of their ordinary rate of pay for all time worked.
- (b) Payments under this clause are instead of any additional rate for shift or weekend work which would otherwise be payable had the shift not been a public holiday.
- (c) Rosters must not be altered for the purpose of avoiding public holiday entitlements under the Award and the NES.

342. The proposed clause would prohibit roster changes for the purposes of avoiding public holiday entitlements under the Award and the NES.

343. In support of its claim, United Voice asserts that “there are some employers who are altering the rosters of part-time employees to avoid the payment of public holiday rates”.

344. There is no evidence before the Commission of this occurring. The union’s factual assertion is not made out. Accordingly, there is no basis for the variation proposed. The Commission cannot be satisfied that it is *necessary* in the relevant sense.

345. The proposed clause may rather be relied upon by employees or their union representatives as an avenue for disputing roster changes made by an employer in relation to a public holiday due to legitimate operational reasons, that are not coloured by any intention to avoid public holiday entitlements. Such disputation is unnecessarily and unjustifiably disruptive.

Attachment A: First Aid Allowance Provisions in Other Modern Awards

Award	Clause
Airline Operations— Ground Staff Award 2010	21.8 First aid allowance If an employee is appointed by their employer to perform first aid duty and holds a current first aid qualification from St John Ambulance or a similar body, the employee is entitled to 1.68% of the standard rate per week.
Airport Employees Award 2010	21.2 Others (a) First aid allowance If an employee is appointed by their employer to perform first aid duty and holds a current first aid qualification from St John Ambulance or a similar body, the employee is entitled to an allowance at the rate of 2% of the standard rate per week.
Aluminium Industry Award 2010	15.1 First aid allowance An employee who holds first aid qualifications from St John Ambulance or an equivalent body, and who is appointed by the employer to participate in the emergency response team or to otherwise perform first aid duty, will be paid a first aid allowance of 2% of the standard rate per week in addition to the employee's weekly wage rate for the period of the appointment.
Amusement, Events and Recreation Award 2010	15.5 First aid allowance Any employee holding a first aid qualification from St John Ambulance or a similar body and who is appointed by the employer to perform first aid duties must be paid for ordinary hours an allowance of 2% of the standard rate calculated weekly or hourly as the case may be.
Animal Care and Veterinary Services Award 2010	16.2 Other than veterinary surgeons (d) First aid Where an employee is a qualified first aid attendant and is appointed by the employer to carry out the duties of such, the employee must be paid an additional amount of 1.96% of the standard rate, per week.
Aquaculture Industry Award 2010	15.1 First aid allowance Any full-time employee holding first aid qualifications from St John Ambulance and appointed by the employer to perform first aid duty will receive 0.34% of the standard rate per working day.
Asphalt Industry Award 2010	15.2 Allowances for responsibilities or skills that are not taken into account in rates of pay (b) First aid (i) If an employee is appointed by an employer to perform first aid duties they must be paid an allowance of 0.4% of the standard rate per day. (ii) To avoid any doubt: If an employee is appointed to perform first aid they must hold a current first aid certificate. Just because an employee holds a first aid certificate or occupational first aid certificate does not mean that they will be appointed by the employer in accordance with clause 15.2(b)(i).
Banking, Finance and Insurance Award 2010	18.2 Allowances for responsibilities or skills that are not taken into account in rates of pay (a) First aid allowance Where an employer is required by legislation to appoint an accredited first aid officer(s) to perform first aid duties, such appointed employee(s) must be paid 1.84% of the standard rate per week for full-time employees and a pro rata amount for part-time employees.

Attachment A: First Aid Allowance Provisions in Other Modern Awards

<p align="center">Broadcasting and Recorded Entertainment and Cinemas Award 2010</p>	<p>18.2 First aid allowance</p> <p>Where an employer appoints an appropriately qualified employee as a first aid attendant the employee will be paid an allowance of 2% of the standard rate calculated weekly or hourly as the case may be.</p>
<p align="center">Building and Construction General On-site Award 2010</p>	<p>21.10 First aid allowance</p> <p>(a) An employee who:</p> <p>(i) is appointed by the employer to be responsible for carrying out first aid duties as they may arise;</p> <p>(ii) holds a recognised first aid qualification (as set out hereunder) from the Australian Red Cross Society, St John Ambulance or similar body;</p> <p>(iii) is required by their employer to hold a qualification at that level;</p> <p>(iv) the qualification satisfies the relevant statutory requirement pertaining to the provision of first aid services at the particular location where the employee is engaged; and</p> <p>(v) those duties are in addition to the employees normal duties, recognising what first aid duties encompass by definition;</p> <p>will be paid at the following additional rates to compensate that person for the additional responsibilities, skill obtained, and time spent acquiring the relevant qualifications:</p> <p>(vi) an employee who holds the minimum qualifications recognised under the relevant State or Territory Occupational Health and Safety legislation (or, in Western Australia, a Senior First Aid certificate of Industrial First Aid certificate or equivalent qualification from the St John Ambulance Association or similar body)— 0.36% of the weekly standard rate per day; or</p> <p>(vii) an employee who holds a higher first aid certificate recognised under the relevant State or Territory Occupational Health and Safety legislation (or, in Western Australia, a Senior First Aid certificate or Industrial First Aid certificate or equivalent qualification from the St John Ambulance Association or similar body)— 0.57% of the weekly standard rate per day.</p> <p>(b) An employee will be paid only for the level of qualification required by their employer to be held, and there will be no double counting for employees who hold more than one qualification.</p>
<p align="center">Business Equipment Award 2010</p>	<p>22.1 Technical stream and Clerical stream</p> <p>(c) First aid allowance</p> <p>An employee holding a current first aid qualification from St John Ambulance or a similar body and appointed by the employer to perform first aid duties must be paid a weekly allowance of 2.35% of the standard weekly rate for any week the employee is so appointed.</p>
<p align="center">Car Parking Award 2010</p>	<p>15.1 First aid allowance</p> <p>An employee who has been trained to render first aid, who holds a current first aid qualification and who is appointed by the employer to perform first aid duty will be paid an additional 2.54% of the standard rate per week if a full-time employee or pro rata if a part-time or casual employee.</p>

Attachment A: First Aid Allowance Provisions in Other Modern Awards

<p align="center">Cement and Lime Award 2010</p>	<p>15.3 First aid allowance</p> <p>(a) An employee will be paid an additional 2.6% of the standard rate each week where the employee:</p> <p>(i) has been trained to provide first aid;</p> <p>(ii) holds a current and appropriate first aid qualification (such as a certificate from St John Ambulance or a similar body); and</p> <p>(iii) is appointed by the employer to perform first aid duty.</p> <p>(b) This payment will be regarded as part of the standard rate for all purposes.</p>
<p align="center">Cemetery Industry Award 2010</p>	<p>15.2 First aid allowance</p> <p>An employee who is appointed by the employer to perform first aid duty, who has been trained to render first aid and is the current holder of appropriate first aid qualifications such as a certificate from the St John Ambulance or similar body, will be paid an allowance of 1.2% of the standard rate per week.</p>
<p align="center">Children's Services Award 2010</p>	<p>15.4 First aid allowance</p> <p>(a) Where an employee classified below Level 3 is required by the employer to administer first aid to children within the employee's care and the employee holds a current recognised first aid qualification such as a certificate from the St John Ambulance, the Australian Red Cross or a similar body they will be paid an allowance of 1.13% of the standard rate per day. Where the employee is employed in out-of-school hours care, the allowance will be 0.15% of the standard rate per hour.</p> <p>(b) Provided that a first aid officer need not be appointed where a qualified nurse is on the premises at all times.</p> <p>(c) Where an employee is required by an employer to act as a first aid officer and they do not have current qualifications, the employer must pay the costs of any required training.</p>
<p align="center">Cleaning Services Award 2010</p>	<p>17.4 First aid allowance</p> <p>An employee who has been trained to render first aid and who is the current holder of appropriate first aid qualifications (such as a certificate from St John Ambulance or a similar body) will be paid an amount of 1.64% of the standard rate per week if they are appointed in writing by their employer to perform first aid duty.</p>
<p align="center">Clerks—Private Sector Award 2010</p>	<p>19.6 First aid allowance</p> <p>An employee who has been trained to render first aid, is the current holder of appropriate first aid qualifications such as a certificate from St John Ambulance Australia or a similar body and is appointed by an employer to perform first aid duty must be paid a weekly allowance of 1.5% of the standard rate.</p>
<p align="center">Coal Export Terminals Award 2010</p>	<p>14.5 First aid allowance</p> <p>An employee who has been trained to render first aid and who is the current holder of appropriate first aid qualifications such as a certificate from the St John Ambulance or similar body must be paid 0.76% of the standard rate per week extra if appointed by their employer to perform first aid duty.</p>
<p align="center">Concrete Products Award 2010</p>	<p>16.8 First aid allowance</p> <p>Any employee appointed by the employer to perform first aid duty, in addition to ordinary duties, will be paid 0.4% of the standard weekly rate per day in addition to their ordinary rate.</p>

Attachment A: First Aid Allowance Provisions in Other Modern Awards

<p align="center">Contract Call Centres Award 2010</p>	<p>20.2 First aid allowance</p> <p>An employee who has been trained to render first aid and who is the current holder of appropriate first aid qualifications such as a certificate from St John Ambulance or similar body must be paid a weekly allowance of 1.94% of the standard rate if appointed by their employer to perform first aid duties.</p>
<p align="center">Corrections and Detention (Private Sector) Award 2010</p>	<p>15.3 First aid training allowance</p> <p>(a) An employee will be reimbursed for the cost of training and obtaining, maintaining and upgrading any first aid qualification if required by the employer.</p> <p>(b) A first aid allowance is payable to an employee where an employee holds a Senior First Aid Certificate (also known as Apply First Aid or Workplace Level 2) and is designated by the employer to act as a First Aid Officer. The first aid allowance payable to an employee while designated as a First Aid Officer is 0.46% of the standard rate per shift (to a total of 1.98% of the standard rate per week).</p>
<p align="center">Cotton Ginning Award 2010</p>	<p>17.1 First aid allowance</p> <p>An employee who has been trained to render first aid and who is the current holder of appropriate first aid qualifications such as a certificate from the St John Ambulance or similar body must be paid an additional amount each week of 75% of the standard rate if appointed by their employer to perform first aid duty.</p>
<p align="center">Dry Cleaning and Laundry Industry Award 2010</p>	<p>15.1 First aid allowance</p> <p>An employee who has been trained to render first aid, who holds a current first aid qualification and who is appointed by the employer to perform first aid duty will be paid an additional 2% of the standard rate per week.</p>
<p align="center">Educational Services (Post-Secondary Education) Award 2010</p>	<p>15.2 First aid allowance</p> <p>An employee who has been trained to render first aid and who is a current holder of appropriate first aid qualifications (such as a certificate from St John Ambulance or a similar body) will be paid an amount of 1.5% of the standard rate per week if they are appointed in writing by their employer to perform first aid duty.</p>
<p align="center">Educational Services (Schools) General Staff Award 2010</p>	<p>16.2 First aid allowance</p> <p>(a) Application An employee who is designated by the employer to perform first aid duty, including the dispensing of medication to students in accordance with medication plans, and who holds a current recognised first aid qualification, will be paid an allowance of:</p> <p>(i) 1.65% of the standard rate per annum; or</p> <p>(ii) 1/240th of the allowance in clause 16.2(a)(i), if designated on a per day basis.</p> <p>(b) Excluded employees This allowance does not apply to:</p> <p>(i) a nurse;</p> <p>(ii) an employee employed exclusively as a first aid officer; or</p> <p>(iii) an employee whose appointment to the position of first aid officer has been taken into account in classifying their position.</p>
<p align="center">Electrical, Electronic and Communications Contracting Award 2010</p>	<p>17.3 Special allowances—expense related</p> <p>(a) First aid allowance</p> <p>An employee who has been trained to render first aid and who is the current holder of appropriate first aid qualifications such as a certificate from the St John Ambulance or similar body must be paid weekly an allowance of 2.1% of the weekly standard rate if the employee is appointed by the employer to perform first aid duty.</p>

Attachment A: First Aid Allowance Provisions in Other Modern Awards

<p align="center">Electrical Power Industry Award 2010</p>	<p>18.4 First aid allowance</p> <p>(a) An employee who has been trained to render first aid and is a current holder of appropriate first aid qualifications such as a certificate from the St John Ambulance or similar body will be paid 1.9% of the standard rate per week if appointed by the employer as a first aid officer.</p> <p>(b) Employees attending a first aid course approved and organised by the employer will be entitled to be paid for such training. Where practical, such training will be conducted during ordinary/rostered hours.</p>
<p align="center">Fire Fighting Industry Award 2010</p>	<p>17.7 Qualification allowances</p> <p>(d) A holder of a current recognised first aid certificate will receive an extra 1.95% of the standard rate per week if appointed by the employer to perform first aid duty (in the case of fire stations one such employee will be appointed per shift).</p>
<p align="center">Fitness Industry Award 2010</p>	<p>18.5 First aid allowance</p> <p>An employee who is rostered by an employer to be on first aid duty at a particular time must be paid per day 0.32% of the standard rate extra.</p>
<p align="center">Food, Beverage and Tobacco Manufacturing Award 2010</p>	<p>26.2 Other allowances</p> <p>(b) First aid allowance An employee who has been trained to render first aid and who is the current holder of appropriate first aid qualifications such as a certificate from the St John Ambulance or similar body must be paid 75.6% of the standard rate per week extra if appointed by their employer to perform first aid duty.</p>
<p align="center">Gardening and Landscaping Services Award 2010</p>	<p>15.8 First aid allowance</p> <p>An employee holding a first aid qualification from St John Ambulance or equivalent and who is appointed by the employer to perform first aid duties will be paid an allowance of 2% of the standard rate per week.</p>
<p align="center">Gas Industry Award 2010</p>	<p>15.1 Allowances for responsibilities or skills that are not taken into account in rates of pay</p> <p>(a) First aid allowance</p> <p>Where an employee holds a current first aid certificate and is appointed by the employer as a first aid attendant they must be paid an allowance of 2% of the standard rate each week.</p>
<p align="center">General Retail Industry Award 2010</p>	<p>20.9 First aid allowance</p> <p>Where an employee who holds an appropriate first aid qualification is appointed by the employer to perform first aid duty they will be paid an extra of 1.3% of the standard rate each week.</p>
<p align="center">Graphic Arts, Printing and Publishing Award 2010</p>	<p>25.2 Other allowances</p> <p>(a) First aid allowance</p> <p>An employee who has been trained to render first aid and who is the current holder of appropriate first aid qualifications such as a certificate from St John Ambulance or a similar body must be paid 2.03% of the standard weekly rate per week if appointed by their employer to perform first aid duty.</p>
<p align="center">Hair and Beauty Industry Award 2010</p>	<p>21.9 First aid allowance</p> <p>Where an employee who holds an appropriate first aid qualification is appointed by the employer to perform first aid duty they will be paid an extra of 1.3% of the standard rate each week.</p>

Attachment A: First Aid Allowance Provisions in Other Modern Awards

<p>Higher Education Industry—General Staff—Award 2010</p>	<p>Schedule C – Allowances</p> <p>Allowance: first aid</p> <p>Staff Category: Building services staff; security staff; storage services; and trades staff.</p> <p>Rate: 1.45% of SR per week</p> <p>Application: Where an employee is the current holder of appropriate staff aid qualifications (St John Ambulance) and the employer has formally appointed the employee to act as the first aid attendant.</p>
<p>Horticulture Award 2010</p>	<p>17.1 All-purpose allowances</p> <p>(d) First aid allowance</p> <p>An employee who has undertaken a first aid course and who is the holder of a current recognised first aid qualification such as a certificate from the St John Ambulance or similar body must be paid an allowance, per week, equal to 51% of the standard rate per week if they are appointed by the employer to perform first aid duty.</p>
<p>Hospitality Industry (General) Award 2010</p>	<p>21.2 Allowances for responsibilities or skills that are not taken into account in rates of pay</p> <p>(b) First aid allowance</p> <p>A full-time employee who has undertaken a first aid course and who is the holder of a current recognised first aid qualification such as a certificate from the St John Ambulance or similar body must be paid an additional allowance, per week, equal to 1.2% of the standard weekly rate if they are appointed by the employer to perform first aid duty.</p> <p>A part-time or casual employee so appointed must be paid an additional allowance, per day, equal to 0.24% of the standard weekly rate, to a maximum of 1.2% of the standard weekly rate per week.</p>
<p>Joinery and Building Trades Award 2010</p>	<p>24.2 Other allowances</p> <p>(a) First aid allowance</p> <p>An employee who has been trained to render first aid and who is the current holder of appropriate first aid qualifications such as a certificate from St John Ambulance or a similar body must be paid 75.6% of the standard rate per week extra if appointed by the employer to perform first aid duty.</p>
<p>Labour Market Assistance Industry Award 2010</p>	<p>16.2 First aid allowance</p> <p>An employee who is required by their employer to perform first aid duty at their workplace who holds a current first aid certificate issued by St John Ambulance or the Australian Red Cross Society or equivalent qualification will be paid a weekly allowance of 1.67% of the standard rate.</p>
<p>Local Government Industry Award 2010</p>	<p>15.7 First aid allowance</p> <p>(a) Where an employee who holds an appropriate first aid qualification is appointed by the employer to perform first aid duty, such an employee will be paid an additional weekly allowance of 70% of the standard hourly rate.</p> <p>(b) Clause 15.7(a) will not apply where the requirement to hold a first aid certificate is a requirement of the position.</p> <p>(c) First aid allowance is payable during periods of paid leave.</p>

Attachment A: First Aid Allowance Provisions in Other Modern Awards

<p align="center">Manufacturing and Associated Industries and Occupations Award 2010</p>	<p>32.2 Other Allowances</p> <p>(b) First aid allowance</p> <p>An employee who has been trained to render first aid and who is the current holder of appropriate first aid qualifications such as a certificate from the St John Ambulance or similar body must be paid 75.6% of the standard rate per week extra if appointed by their employer to perform first aid duty.</p>
<p align="center">Meat Industry Award 2010</p>	<p>26.4 First aid allowance</p> <p>An appropriately qualified employee, who acts instead of and performs the duties of a full-time first aid officer or nurse, must be paid a daily allowance calculated at the rate of 14.2% of the hourly standard rate.</p>
<p align="center">Mining Industry Award 2010</p>	<p>14.2 Allowances for responsibilities or skills that are not taken into account in rates of pay</p> <p>(b) First aid allowance</p> <p>An employee who holds first aid qualifications from St John Ambulance or an equivalent body, and who is appointed by the employer to participate in the emergency response team or otherwise to perform first aid duty, will be paid a first aid payment of 2% of the standard rate per week.</p>
<p align="center">Miscellaneous Award 2010</p>	<p>15.2 First aid allowance</p> <p>An employee who has been trained to render first aid and who is the current holder of appropriate first aid qualifications such as a certificate from St John Ambulance or similar body must be paid an extra 2% of the standard rate per week if appointed by their employer to perform first aid duties.</p>
<p align="center">Nursery Award 2010</p>	<p>20.1 All purpose allowances</p> <p>The following allowances apply for all purposes of this award: (a) First aid allowance An employee who has been trained to render first aid and who is the current holder of appropriate first aid qualifications such as a certificate from the St John Ambulance or similar body must be paid a weekly allowance of 70% of the standard rate if appointed by their employer to perform first aid duty.</p>
<p align="center">Oil Refining and Manufacturing Award 2010</p>	<p>15.2 Allowances for responsibilities or skills that are not taken into account in rates of pay</p> <p>(b) First aid allowance An employee who holds first aid qualifications from St John Ambulance or an equivalent body, and who is appointed by the employer to participate in the emergency response team or otherwise to perform first aid duties, will be paid a weekly first aid payment of 2% of the standard rate per week.</p>
<p align="center">Passenger Vehicle Transportation Award 2010</p>	<p>15.1 Responsibilities allowances</p> <p>(a) First aid allowance</p> <p>An employee who has been trained to render first aid and who is the current holder of appropriate first aid qualifications such as a certificate from St John Ambulance or similar body must be paid a weekly allowance of 1.9% of the standard rate if appointed by the employer as a first aid officer.</p>
<p align="center">Pastoral Award 2010</p>	<p>17.4 All-purpose allowances</p> <p>(b) First aid allowance</p> <p>An employee designated by the employer to render first aid in addition to his or her usual duties and who is the current holder of a recognised first aid qualification, such as one from St John Ambulance or a similar body, must be paid a daily allowance of 14% of the standard rate to carry out such work.</p>

Attachment A: First Aid Allowance Provisions in Other Modern Awards

<p align="center">Pest Control Industry Award 2010</p>	<p>15.4 First aid allowance</p> <p>An employee who has been trained to render first aid, who holds a current first aid qualification and who is appointed by the employer to perform first aid duty will be paid an additional 2.12% of the standard rate per week. Employees will be reimbursed for the cost of maintenance of a first aid kit upon presentation of receipts, if the kit is not provided by the employer.</p>
<p align="center">Pharmaceutical Industry Award 2010</p>	<p>19.7 First aid allowance</p> <p>(a) An employer must appoint, where available, an employee holding a current St John Ambulance first aid certificate or a current Red Cross Society first aid certificate to be in charge of first aid in a workplace where no industrial nurse is available. Such certificated employee must be paid, when appointed, 75.2% of the standard rate per week extra.</p> <p>(b) An employee on being requested by the employer to obtain first aid attendant qualifications of St John Ambulance standard or equivalent must, on attaining such qualifications, be reimbursed by the employer for the cost of approved books/manuals and other approved out-of-pocket expenses associated with attending the first aid course and any subsequent approved refresher courses.</p>
<p align="center">Plumbing and Fire Sprinklers Award 2010</p>	<p>21.5 Allowances for responsibilities or skills that are not taken into account in rates of pay</p> <p>(e) First aid</p> <p>An employee who is qualified in first aid and is appointed by their employer to carry out first aid duties in addition to their usual duties must be paid an additional 13.7% of the hourly standard rate per day.</p>
<p align="center">Port Authorities Award 2010</p>	<p>14.2 Allowances for responsibilities or skills that are not taken into account in rates of pay</p> <p>(a) First aid allowance</p> <p>An employee who has been trained to render first aid and who is the current holder of appropriate first aid qualifications such as a certificate from the St John Ambulance or similar body must be paid a weekly allowance of 1.8% of the standard rate if appointed by the employer as a first aid officer.</p>
<p align="center">Ports, Harbours and Enclosed Water Vessels Award 2010</p>	<p>14.15 First aid</p> <p>An employee on becoming qualified as the holder of appropriate first aid qualifications such as a certificate from the St John Ambulance or its equivalent, and who is required by the employer to perform first aid duty will be paid an allowance of 1.70% of the standard rate per week.</p>
<p align="center">Poultry Processing Award 2010</p>	<p>20.2 Other allowances</p> <p>(a) First aid allowance</p> <p>An employee who has been trained to render first aid and who is the current holder of appropriate first aid qualifications such as a certificate from the St John Ambulance or a similar body must be paid 83.2% of the standard rate per week extra if appointed by their employer to perform first aid duty.</p>
<p align="center">Premixed Concrete Award 2010</p>	<p>15.3 First aid allowance</p> <p>(a) An employee will be paid an additional 1.95% of the standard rate each week where the employee:</p> <p>(i) has been trained to provide first aid;</p> <p>(ii) holds a current and appropriate first aid qualification (such as a certificate from St John Ambulance or a similar body); and</p>

Attachment A: First Aid Allowance Provisions in Other Modern Awards

	<p>(iii) is appointed by the employer to perform first aid duty.</p> <p>(b) This payment will be paid for all purposes.</p>
Quarrying Award 2010	<p>18.4 First aid allowance</p> <p>An employee will be paid an additional 1.8% of the standard rate each week where the employee:</p> <ul style="list-style-type: none"> • Has been trained to provide first aid; • Holds a current and appropriate first aid qualification (such as a certificate from St John Ambulance or a similar body); and • Is appointed by the employer to perform first aid duty. <p>This payment will be regarded as part of the standard rate for all purposes.</p>
Racing Clubs Events Award 2010	<p>20.7 First aid attendant</p> <p>Any employee holding a first aid qualification from the St John Ambulance or a similar body and who is appointed by the employer to perform first aid duties must be paid an allowance of 2% of the standard rate calculated weekly or hourly as the case may be.</p>
Racing Industry Ground Maintenance Award 2010	<p>15.8 First aid attendant</p> <p>Any employee holding a first aid qualification from the St John Ambulance or a similar body and who is appointed by the employer to perform first aid duties must be paid an allowance of 2% of the standard rate.</p>
Rail Industry Award 2010	<p>15.2 Allowances for responsibilities or skills that are not taken into account in rates of pay—applicable to all employees</p> <p>(a) First aid allowance An employee who has been trained to render first aid and who is the current holder of appropriate first aid qualifications such as a certificate from the St John Ambulance or similar body must be paid a weekly allowance of 1.9% of the standard rate if appointed by the employer as a first aid officer.</p>
Registered and Licensed Clubs Award 2010	<p>18.2 Allowance for responsibilities or skills that are not taken into account in rates of pay—first aid allowance</p> <p>An employee who has undertaken a first aid course and who is the holder of a current recognised first aid qualification such as a certificate from the St John Ambulance or similar body and who is appointed by the employer as a first aid attendant must be paid an allowance, per week, equal to 1.2% of the standard weekly rate for all purposes.</p>
Road Transport and Distribution Award 2010	<p>16.2 Allowances for responsibilities or skills that are not taken into account in rates of pay:</p> <p>(e) First aid allowance</p> <p>An employee holding a current first aid qualification from St John Ambulance or similar body and appointed by the employer to perform first aid duty must be paid 1.6% of the standard rate in addition to wages for any week so appointed. The employer will reimburse the cost of fees for any courses necessary for any employee covered by this clause to obtain and maintain the appropriate first aid qualification.</p>
Salt Industry Award 2010	<p>15.2 Allowances for responsibilities or skills that are not taken into account in rates of pay</p> <p>(c) First aid allowance An employee who holds first aid qualifications from St John Ambulance or an equivalent body, and who is appointed by the employer to</p>

Attachment A: First Aid Allowance Provisions in Other Modern Awards

	participate in the emergency response team or otherwise to perform first aid duty, will be paid a first aid allowance of 2% of the standard rate per week.									
Seafood Processing Award 2010	<p>19.1 Allowances</p> <p>(a) First aid allowance</p> <p>An employee who has been trained to render first aid and who is the current holder of appropriate first aid qualifications such as a certificate from the St John Ambulance or similar body must be paid 75.6% of the standard rate per week extra if appointed by their employer to perform first aid duty.</p>									
Security Services Industry Award 2010	<p>15.1 Allowance rates</p> <p>(a) Wage related allowances</p> <table border="0"> <thead> <tr> <th>Allowance</th> <th>Payable</th> <th>% of standard rate</th> </tr> </thead> <tbody> <tr> <td>First aid</td> <td>per shift</td> <td>0.68</td> </tr> <tr> <td></td> <td>Maximum per week</td> <td>3.38</td> </tr> </tbody> </table> <p>15.4 First aid allowance</p> <p>A first aid allowance is payable to an employee where an employee holds a Senior First Aid Certificate (also known as Apply First Aid or Workplace Level 2) and is requested or nominated by the employer to act as a first aider.</p>	Allowance	Payable	% of standard rate	First aid	per shift	0.68		Maximum per week	3.38
Allowance	Payable	% of standard rate								
First aid	per shift	0.68								
	Maximum per week	3.38								
State Government Agencies Award 2010	<p>15.1 First aid allowance</p> <p>(a) The employer may nominate an employee as a first aid officer for a given workplace.</p> <p>(b) Where an employee so nominated holds a first aid certificate issued by the St John Ambulance Association or a qualification deemed equivalent the employer may authorise the payment to such an employee of an allowance of 1.41% of the standard rate per annum.</p>									
Stevedoring Industry Award 2010	<p>14.11 First aid allowance</p> <p>(a) An employee who has been trained to render first aid and who possesses an appropriate first aid qualification such as a St John Ambulance certificate will be paid an allowance of 2.13% of standard rate per week if required by the employer to perform first aid duties.</p> <p>(b) This allowance will not be payable to an employee who is classified as a stevedoring employee Grade 3 who performs first aid duties as a primary function.</p>									
Storage Services and Wholesale Award 2010	<p>16.2 First aid allowance</p> <p>(a) An employee, qualified to St John Ambulance standard or equivalent, if requested to act as the first aid attendant will be paid an allowance of 1.5% of the standard rate per week.</p> <p>(b) An employee, on being requested by the employer to obtain first aid attendant qualifications (St John Ambulance standard or equivalent) will, on attaining such qualification, be reimbursed by the employer for the cost of approved books/manuals and other approved out-of-pocket expenses associated with attending the first aid course.</p>									
Sugar Industry Award 2010	<p>22.15 First aid</p> <p>Any appropriately qualified employee rostered by the employer to perform first aid duty must be paid a weekly allowance of 59.59% of the standard hourly rate.</p>									

Attachment A: First Aid Allowance Provisions in Other Modern Awards

Supported Employment Services Award 2010	<p>15.2 First aid allowance</p> <p>An employee who is appointed by the employer as a first aid officer to render first aid assistance in the workplace and who maintains a current senior first aid qualification from St John Ambulance or similar body will be paid an allowance of 2.03% of the standard rate per week.</p>						
Telecommunications Services Award 2010	<p>17.1 All streams</p> <p>(b) First aid allowance An employee who has been trained to render first aid and who is the current holder of appropriate first aid qualifications such as a certificate from the St John Ambulance or similar body must be paid a weekly allowance of 2% of the standard rate if appointed by their employer to perform first aid duty.</p>						
Textile, Clothing, Footwear and Associated Industries Award 2010	<p>24.5 First aid attendant allowance</p> <p>Where an employee is appointed by the employer to be a first aid attendant and holds relevant first aid qualifications the following allowance will apply:</p> <table border="0" data-bbox="450 719 1466 875"> <tr> <td data-bbox="450 719 1018 779">Number of employees at the workplace</td> <td data-bbox="1024 719 1466 779">Allowance per week % of standard rate</td> </tr> <tr> <td data-bbox="450 808 1018 842">1 to 50 employees</td> <td data-bbox="1024 808 1466 842">1.78</td> </tr> <tr> <td data-bbox="450 844 1018 875">51 employees of more</td> <td data-bbox="1024 844 1466 875">2.24</td> </tr> </table>	Number of employees at the workplace	Allowance per week % of standard rate	1 to 50 employees	1.78	51 employees of more	2.24
Number of employees at the workplace	Allowance per week % of standard rate						
1 to 50 employees	1.78						
51 employees of more	2.24						
Timber Industry Award 2010	<p>21.13 First aid</p> <p>Where an employee holds a certificate as a first aid attendant, an additional 2% of the standard rate for each week in which three days or more have been worked will be paid to such employee. This amount will be payable in addition to any amounts paid for annual leave, personal leave and public holidays provided that this allowance will not be subject to any premium or penalty additions.</p>						
Transport (Cash in Transit) Award 2010	<p>16.1 Allowances for responsibilities or skills</p> <p>(a) First aid allowance</p> <p>An employee appointed by the employer to perform first aid must be paid 1.6% of the standard rate per week.</p>						
Travelling Shows Award 2010	<p>15.3 First aid allowance</p> <p>An employee holding a first aid qualification from St John Ambulance or a similar body and who is appointed by the employer to perform first aid duties must be paid an allowance of 2% of the standard rate, payable on a weekly or hourly basis as the case may be.</p>						
Vehicle Manufacturing, Repair, Services and Retail Award 2010	<p>19.9 First aid qualifications</p> <p>An employee holding first aid qualifications and appointed by the employer to perform first aid duty will be paid 2% of the weekly standard rate per week extra.</p>						
Waste Management Award 2010	<p>20.4 First aid allowance</p> <p>An employee appointed by the employer to perform first aid must be paid an allowance of 0.5% of the standard rate per day.</p>						
Water Industry Award 2010	<p>19.3 First aid allowance</p> <p>(a) Where an employee who holds an appropriate first aid qualification is appointed by the employer to perform first aid duty they will be paid an additional weekly allowance of 65% of the standard rate.</p> <p>(b) This clause will not apply where the requirement to hold a first aid certificate is a requirement of the position.</p>						

Attachment A: First Aid Allowance Provisions in Other Modern Awards

<p align="center">Wine Industry Award 2010</p>	<p>24.5 Skill allowances</p> <p>(c) First aid allowance An employee who is the current holder of appropriate first aid qualifications, such as a certificate from the St John Ambulance or similar body and is appointed by the employer to perform first aid duty must be paid 75.6% of the standard rate per week extra or 15.1% of the standard rate per day extra.</p>
<p align="center">Wool Storage, Sampling and Testing Award 2010</p>	<p>17.2 Responsibility and qualification allowances</p> <p>(b) First aid allowance</p> <p>An employee who holds first aid qualifications from St John Ambulance or an equivalent body, and who is appointed by the employer to participate in the emergency response team or otherwise to perform first aid duty, will be paid a first aid payment of 86% of the standard rate per week.</p>