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3 August 2021

The Hon. Justice IJK Ross
Fair Work Commission
11 Exhibition Street
Melbourne VIC 3000

By email: chambers.ross.j@fwc.gov.au

Dear Justice Ross,

Re. AM2018/26 Social, Community, Home Care and Disability Services Industry Award 2010 – Ai Group Submissions, Evidence and Application for Confidentiality Order

We refer to the above matter.

As previously communicated by the Health Services Union (**HSU**) to the Fair Work Commission (**Commission**), parties with an interest in this matter, including the Australian Industry Group (**Ai Group**), have had numerous discussions about the Commission's decision of 4 May 2021[1] since it was issued. Regrettably, despite the extensive resources we devoted to that process, the parties were ultimately unable to reach agreement in relation to any of the matters in issue.

Accordingly, consistent with the amended directions[2] issued by the Commission on 23 July 2021, Ai Group files the following:

1. Written submissions.

2. An application for a confidentiality order. The application relates to each of the witness statements filed by Ai Group in these proceedings.

3. A witness statement from Craig MacArthur.

4. A witness statement from Christopher Chippendale.

5. A witness statement from Richard Cabrita.

6. A witness statement from Christopher Nillsen.

7. A witness statement from Aleysia Leonard.

[1] *4 yearly review of modern awards—Social, Community, Home Care and Disability Services Industry Award 2010* [2021] FWCFB 2383.
[2] *4 yearly review of modern awards—Social, Community, Home Care and Disability Services Industry Award 2010* [2021] FWCFB 4426 at [10](2).

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We enclose two copies of each of the witness statements. The reason for adopting this approach is explained in our application for a confidentiality order. In light of the application made, we respectfully request that only those copies of the witness statements that contain redactions should be uploaded to the Commission's website.

Ai Group notes the Full Bench's adoption[3] of the course of action proposed by Australian Business Lawyers and Advisors in its correspondence to the Commission earlier today regarding the issues of *'remote response work'* and *'damaged clothing'*. The written submissions we file today nonetheless deal with these matters, because it was not apparent until earlier today that all of the parties agreed that they should not be dealt with in the written material to be filed today and / or during the proceedings listed on Friday.

We wish to make clear, however, that by filing these submissions, we do not seek to have the matters dealt with by the Commission during the aforementioned hearing and we may seek to file further submissions in relation to these matters in accordance with the directions issued by the Commission today.

Yours sincerely,

Brent Ferguson
Director – Major Cases, Workplace Relations Advocacy and Policy

Ruchi Bhatt
Principal Adviser – Workplace Relations Policy

[3] *4 yearly review of modern awards—Social, Community, Home Care and Disability Services Industry Award 2010* [2021] FWCFB 4716.

Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Submission

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

3 August 2021

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

1. INTRODUCTION

1. The Australian Industry Group (**Ai Group**) files this submission in response to a decision[1] issued by the Fair Work Commission (**Commission**) on 4 May 2021 (**Decision**).

2. The submission responds to the following key issues:

   (a) The provisional view expressed by the Commission in the Decision about shift swaps by employee agreement.

   (b) The application of minimum payment periods and broken shift provisions to time spent attending meetings, training and / or professional development activities.

   (c) Remote response work.

   (d) A damaged clothing allowance.

   (e) The provisional view expressed by the Commission in the Decision that the variations to be made to the Award will commence operation on 1 October 2021 (**Proposed Operative Date**).

   (f) Various issues arising from the draft determination published by the Commission with the Decision.

3. In addition, Ai Group files and relies on the following witness statements:

   (a) Craig MacArthur (National Finance Lead, Aged Care Services – Corporate Services & Finance, Life Without Barriers (**LWB**)).

   (b) Richard Cabrita (Operations Manager – ACT, LWB).

   (c) Christopher Chippendale (Executive Lead Disability Engagement, LWB).

[1] *4 yearly review of modern awards—Social, Community, Home Care and Disability Services Industry Award 2010—Substantive claims* [2021] FWCFB 2383.

(d) Aleysia Leonard (Human Resources Business Partner, Programmed Health Professionals Pty Limited).

(e) Christopher Nillsen (Project Manager – Shared Services, LWB).

2. THE COMMISSION'S PROVISIONAL VIEWS

4. Ai Group makes the following submissions in respect of the provisional views expressed by the Commission in the Decision.

2.1 The Remote Response Minimum Payments

5. We refer to section 4 of this submission.

2.2 Roster Changes by way of Shift Swaps

6. Paragraph [643] of the Decision expresses the provisional view that: (emphasis added)

> **[643]** While we are not prepared to vary 25.5(d) in the manner proposed by ABI we see merit in varying the clause to permit the variation of a roster by mutual agreement in circumstances where the variation is proposed by an employee to accommodate an agreed shift swap with another employee. In our view such a facilitative change does not run the risk of employees feeling pressured to accommodate employer requests to change their shift. It is our provisional view that clause 25.5(d)(ii) be varied as follows:
>
> (ii) However, a roster may be changed at any time:
>
> (A) if the change is proposed by an employee to accommodate an agreed shift swap with another employee; or
>
> (B) to enable the service of the organisation to be carried on where another employee is absent from duty on account of illness, or in an emergency.[2]

7. Ai Group does not oppose the Commission's provisional view above, provided that the proposed clause 25.5(d)(ii) makes clear that a roster variation is not required where employees agree to a shift swap, unless it is accepted or agreed by the employer. That is, the Award should not proceed on the basis that where employees agree to a shift swap, a variation to the roster will necessarily be made. Whilst Ai Group does not oppose the Award being varied to contemplate the proposition that employees may agree to swapping shifts, any consequential variation to the roster should not be mandated by the Award. Ultimately, whether the roster is varied to reflect the employees' agreement should be left to the employer's prerogative.

[2] Decision at [643].

8. In our submission, there are various reasons why an employer must retain the prerogative to determine whether a roster will be varied to accommodate an agreed shift swap. For example:

   (a) It cannot be assumed that all employees have the skills, competence and experience to support all clients.[3] It is essential that employers have an opportunity to ensure that an employee with the appropriate skills mix is rostered for each relevant shift. An automatic variation to a roster by reason of a shift swap agreed between employees would result in employers no longer having the scope to do so.

   (b) A client may have informed the employer that they only wish to be supported by certain employees, or that they do not wish to be supported by certain employees. The reasons for such requests can vary but may include past experience, a preference to be supported by someone of a particular gender, a preference (or need) to be supported by someone who is able to speak a certain language other than English, a preference (or need) to be supported by someone who understands specific cultural sensitivities etc.[4] An employer should be in a position to ensure that the client is supported appropriately, having regard to their requests.

   (c) Certain employees may have specific knowledge of the needs and preferences of certain clients. Rostering a different employee because of an agreed shift swap may disrupt the continuity of care afforded to the client.

   (d) Implementing shift swaps agreed between employees may result in inefficient outcomes. For example, it may result in longer travel times, the need to provide handovers or to contact the ordinarily rostered employee about various client-specific matters such as questions regarding the care to be provided to the client.

[3] Witness statement of Richard Cabrita at [76].

[4] Witness statement of Richard Cabrita at [69].

(e) The employer may wish to roster the employee who is not ordinarily rostered to work on the relevant shift to perform other work at that time.

(f) The implementation of a shift swap may result in various consequences for the relevant employees' hours of work and the wages owing to them. For example:

(i) The employee who agrees to perform the work may be entitled to overtime rates for that work.

(ii) The performance of the work by the employee who agrees to undertake it may result in the employee not receiving a break to which they are otherwise entitled (e.g. a break between shifts) and may give rise to concerns associated with fatigue management.

(iii) The employee who agrees not to perform the work may have a contractual entitlement to be afforded that work and / or payment for that period of time (e.g. a part-time employee who has agreed contractually to perform certain hours of work).

9. For all of the reasons set out above, the proposed clause 25.5(d)(ii) should be amended to read as follows:

(ii) However, a roster may be changed at any time:

(A) if the change is proposed by an employee in respect of an agreed shift swap with another employee, <u>that the employer has agreed to accommodate</u>; or …

10. The provision, as amended, would ensure that its operation is fair to employers[5] and would moderate the impact of the clause on them[6]. Further, the provision as proposed in the draft determination, could not otherwise be said to promote flexible modern work practices and the efficient and productive performance of work.[7]

[5] Section 134(1) of the Act.

[6] Section 134(1)(f) of the Act.

[7] Section 134(1)(d) of the Act.

11. Finally, we note that the submission we have advanced above appears to be consistent with the Full Bench's provisional view. In particular, the Commission has expressed the view that the Award should *'permit'*, rather than mandate, a roster variation where it is agreed by employees. Further, the draft clause proposed by the Commission states that a roster *'may'* be changed in the relevant circumstances. Nonetheless, the proposed clause should in our submission, for avoidance of doubt, be varied as we have submitted.

3. MEETINGS, TRAINING AND PROFESSIONAL DEVELOPMENT ACTIVITIES – MINIMUM PAYMENTS & BROKEN SHIFTS

12. At paragraph [376] of the Decision, the Full Bench granted interested parties an opportunity to advance submissions and evidence in respect of the proposition that the new two hour minimum payment requirement should not apply to time spent attending meetings, training and / or professional development activities (**Meetings and / or Training**).

13. In response, Ai Group submits that, for the reasons that follow:

    (a) The Commission's decision that part-time and casual employees should be paid for at least two hours for each shift or portion of a broken shift should not apply where such employees attend Meetings or Training that is less than two hours in duration.

    (b) If a part-time or casual employee is required to attend Meetings or Training without being required to attend a physical workplace (i.e. where the Meeting or Training is conducted via an online platform or via telephone (**Remote Meetings and / or Training**)), no minimum payment period should apply.

    (c) If a part-time or casual employee is required to attend Meetings or Training at a physical workplace, a minimum payment of not more than one hour should apply.

14. In addition, Ai Group submits that attendance at Remote Meetings and / or Training should not attract the application of the broken shift provisions (i.e. proposed clauses 20.10 and 25.6). For example:

    (a) If an employee works on a shift on a given day and later that day, after a break (other than a meal break), attends a Remote Meeting and / or Training, those two instances of work should not be taken to constitute a broken shift and accordingly, the employee should not be entitled to the broken shift allowance.

(b) If an employee works a broken shift with one break, and later that day, after another break, the employee attends a Remote Meeting and / or Training, the employee's agreement to perform that work should not be required and the employee should not be entitled to a higher broken shift allowance.

15. Ai Group advances the following contentions in support of its position.

16. *First,* Meetings and / or Training attended by employees covered by the Award are typically less than two hours in duration.[8] It follows that if a minimum payment requirement of two hours applies to Meetings and / or Training, employees will commonly be required to be paid for time in addition to that which is spent attending the relevant Meeting and / or Training.

17. *Second,* not all Meetings and / or Training requires employees to attend a physical workplace. Remote Meetings and / or Training are commonly being utilised in the sector, whereby employees attend remotely, via an online platform or telephone. Remote Meetings and / or Training can be attended by employees from their respective homes or another location of their choosing. The underlying justification for minimum engagement and payment periods, which was expressed as follows by a Full Bench in the *Casual and Part-time Common Issues* proceedings, is not relevant in such instances: (emphasis added)

> **[245]** After a review of the relevant authorities the Part-time and Casual Employment Case the Full Bench observed that the rationale for minimum engagement terms in modern awards was to ensure that:
>
> > 'the employee receives a sufficient amount of work, and income, for each attendance at the workplace to justify the expense and inconvenience associated with that attendance by way of transport time and cost, work clothing expenses, childcare expenses and the like. An employment arrangement may become exploitative if the income provided for the employee's labour is, because of very short engagement periods, rendered negligible by the time and cost required to attend the employment. Minimum engagement periods are also important in respect of the incentives for persons to enter the labour market to take advantage of casual and part-time employment opportunities (and thus engage the consideration in paragraph (c) of the modern awards objective in s.134).'

[8] Witness statement of Richard Cabrita at [104] and [108] and witness statement of Christopher Nillsen at [102].

> **[246]** As we said in the Aged Care Substantive Claims Decision, the short point made in the relevant authorities is that minimum engagement terms protect employees from exploitation by ensuring that they receive a minimum payment for each attendance at their workplace to justify the cost and inconvenience of each such attendance.[9]

18. Whilst the prevalence of Remote Meetings and / or Training has increased as a result of the COVID-19 pandemic, there is no indication that they are temporary measures. The evidence suggests the contrary.[10]

19. *Third,* the evidence demonstrates that the duration of Remote Meetings and / or Training is commonly considerably less than two hours[11] and that in some instances, it may require as little as 5 minutes.[12]

20. *Fourth,* the evidence demonstrates that employers permit employees to determine *when* they undertake Remote Training.[13] That is, employees are at liberty to decide the day and time at which they undertake the Remote Training. This further removes the scope for any disutility that may be experienced by an employee when participating in such training.

21. *Fifth*, the various funding arrangements that apply to the disability and home aged care sectors make limited accommodation for costs associated with Meetings and / or Training. The introduction of a requirement to pay employees for at least two hours in each such instance, in circumstances where the duration of the Training and / or Meeting is in fact far less, will result in the imposition of significant additional employment costs which cannot be recovered through the existing funding arrangements. Further, it is not clear that the funding arrangements will be altered to accommodate for this.[14]

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[9] *4 yearly review of modern awards – Social, Community, Home Care and Disability Services Industry Award 2010* [2021] FWCFB 2383 at [245] – [246].

[10] Witness statement of Richard Cabrita at [107] – [108].

[11] Witness statement of Richard Cabrita at [104] and [108] and witness statement of Christopher Nillsen at [102].

[12] Witness statement of Christopher Nillsen at [102].

[13] Witness statement of Christopher Nillsen at [99] – [101].

[14] Section 134(1)(f) of the Act.

22. *Sixth,* the imposition of a mandatory two hour minimum payment may deter employers from providing training to their employees[15], which could adversely affect the extent to which employees are afforded an opportunity to develop new skills and refine existing skills. It may also ultimately affect the quality of the care provided to the employers' clients.

23. *Seventh,* it would not be '*fair*' to employers[16], in all the circumstances, to require at least two hours' pay for each instance in which an employee attends Meetings and / or Training, particularly Remote Meetings and / or Training. Such a requirement would also be out-of-step with the provision of a '*relevant*' safety net that reflects contemporary standards and working practices[17] and could not be said to promote flexible modern work practices[18].

24. A minimum payment of not more than one hour in respect of Meetings and / or Training requiring attendance at a workplace would strike a more fair and appropriate balance than the imposition of a two hour minimum payment.

25. *Eighth,* any requirement to pay a broken shift allowance on account of attendance at a Remote Meeting and / or Training would further compound the unfairness and other adverse consequences for employers described above.

26. *Ninth,* due to the limitations to be imposed on the number of times a shift can be broken, attendance at Remote Meetings and / or Training could cause significant disruption to the delivery of care to employers' clients. If attendance at a Remote Meeting and / or Training constitutes a portion of a broken shift, and an employee can perform work on only two portions of a broken shift on any given day (or three, with the employee's agreement), an employer may be left with the task of having to either try to reschedule a client's support session or find another employee to deliver the service. This may be difficult to achieve[19] and may

[15] Witness statemen of Richard Cabrita at [110].

[16] Section 134(1) of the Act.

[17] Section 134(1) of the Act.

[18] Section 134(1)(d) of the Act.

[19] Witness statement of Richard Cabrita at [65] – [80].

ultimately affect the continuity of care delivered to clients. It would also increase the regulatory burden facing employers[20].

27. The application of the broken shift restrictions in such circumstances would be inconsistent with the need to promote flexible modern work practices and the efficient and productive performance of work[21]. To the extent that it results in additional employment costs (e.g. because another employee is rostered to provide care to certain clients in lieu of the employee attending the relevant Remote Meeting or Training), this would impose an additional burden on employers[22].

[20] Section 134(1)(g) of the Act.

[21] Section 134(1)(d) of the Act.

[22] Section 134(1)(g) of the Act.

4. REMOTE RESPONSE

28. In the current tranche of proceedings, various claims were advanced which would have a potential bearing on the payment that an employee will receive when they are recalled to work overtime (as currently contemplated by clause 28.4 of the Award), required to be *'on call'* as contemplated by clause 20.9 of the Award, or undertaking what has been termed *'remote response work'*.

29. The Full Bench has described the scope of the remote response issue in the following manner:

> **[647]** One of the issues raised during the review is how the SCHADS Award operates in circumstances where an employee, who is not 'at work' or otherwise rostered to work or performing work at a particular time, is contacted and required to undertake certain functions remotely without physically attending the employer's premises (such as providing information to the employer over the telephone). It is convenient to refer to such work as 'remote response work'.[23]

30. Various claims, amended claims and counter claims pertaining to the remote response work and recall to work issues have been advanced in the context of these proceedings. Detailed submissions about the various proposals have been advanced by the parties. The evolution of the parties' consideration of such issues is no doubt, in part, a consequence of previous productive engagement between them in relation to this issue (including with the assistance of the Commission) prior to the last hearing.

31. Nonetheless, the Full Bench has not granted any of the claims proposed. It did however conclude that it is necessary to introduce a term in the Award dealing with remote response work.[24]

[23] Decision at [647].

[24] Decision at [722].

32. The Full Bench did not propose a specific provision. Instead, it made the following general observations:

> **[722]** We agree that it is necessary to introduce an award term dealing with remote response work and make the following general observations about such a term:
>
> 1. A shorter minimum payment should apply in circumstances where the employee is being paid an 'on call' allowance.
>
> 2. There is merit in ensuring that each discrete activity (such as a phone call) does not automatically trigger a separate minimum payment.
>
> 3. A definition of 'remote response work' or 'remote response duties' should be inserted into the Award. We note that ABI proposes the following definition:
>
> 'In this award, remote response duties means the performance of the following activities:
>
> (a) Responding to phone calls, messages or emails;
>
> (b) Providing advice ("phone fixes");
>
> (c) Arranging call out/rosters of other employees; and
>
> (d) Remotely monitoring and/or addressing issues by remote telephone and/or computer access.'
>
> 4. The clause should include a mechanism for ensuring that the time spent by an employee working remotely is recorded and communicated to their employer.[25]

33. The Decision sets out various deficiencies and problems with the previously advanced proposals and, in particular, various difficulties with the approach adopted in relation to the selection or identification of the rate of remuneration to be applied to remote response work.

34. The issues associated with remote response work, including the rate of remuneration that should be applied to such activities, have not yet been the subject of proper consideration in a conference, as contemplated by the Full Bench at paragraph [738] of the Decision. Detailed consideration of the matter was not feasible in the conference convened on 27 May 2021.

[25] Decision at [722].

35. There is currently no further proposal before the Commission relating to remote response work. Further, Ai Group is not aware of any further proposal from the relevant union parties in relation to remote response work. If a further proposal is advanced by any party through their material which is filed on 3 August 2021, Ai Group may seek an opportunity to obtain feedback from industry and file further material in response to such matters. This is essential, as a matter of fairness, given the potentially very significant effect that a remote response clause could have upon Ai Group's members.

Appropriate Next Steps

36. Given the circumstances, Ai Group contends that it is appropriate that a further conference be convened by the Full Bench, as contemplated at paragraph [738] of the Decision. We contend that this should be convened as soon as possible after the conduct of the hearing on 6 August 2021, in order to facilitate the resolution of all outstanding matters being considered in the current proceedings.

37. In the interests of advancing the matter in a timely manner Ai Group sets out, at **Annexure A** to this submission, a suite of potentially appropriate provisions dealing with the remote response work / recall to work overtime issues and the payment of an on call allowance. We provide an explanation of the reasons for key elements of the proposed approach below.

38. In advancing the annexed proposal we are not ourselves calling for the imposition of a new provision dealing with remote response work. Rather, we have adopted this course because the Full Bench has determined that it is necessary to introduce a term in the Award dealing with this matter.

A Potential Definition of Remote Response Work

39. The Full Bench has indicated that a definition of remote response work should be inserted into the Award.[26]

[26] Decision at [722].

40. The assumption underpinning the most recent proposal advanced on behalf of Australian Business Lawyers and Advisors' (**ABLA**) clients was that remote response work would constitute the performance of particular activities rather than all work undertaken away from an employer's designated workplace (i.e. at home). Ai Group agrees with this approach.

41. We also note that there is potentially a degree of interconnection between the new minimum payment provisions and the remote response work clause. As submitted at section 7.2 of these submissions, when an employee is not required to attend a particular workplace, the proposed new minimum payment provisions should not apply. Where such work constitutes remote response work, it should instead be regulated by any new provision dealing specifically with remote response work.

42. Ai Group proposes that the following definitions relevant to the issue of remote response work be inserted into clause 3.1 of the Award:

> **designated workplace** means a place where work is performed in accordance with the requirements of an employee's employer, other than an employee's residence or such other location that the employee chooses to work.
>
> **remote response work** means:
>
> The performance of the following work by an employee whilst not at a designated workplace if the employee has been directed or authorised by their employer to undertake such work in these circumstances:
>
> (i) responding to phone calls, messages or emails;
>
> (ii) providing advice (i.e. 'phone fixes'); and
>
> (iii) arranging call out/rosters of other employees.
>
> Remote response work does not include:
>
> (i) Responding to any form of electronic communication in circumstances where it is not required that such a response be provided outside of ordinary working hours.
>
> (ii) Briefly responding to a telephone call, message or email (i.e. where this does or should reasonably take less than 5 minutes) where this is essential to the health or safety of a client and a consequence of the employee not undertaking, or not properly undertaking, a task that they were required to perform whilst at work (e.g. calls to clarify whether a client has been given medication in

circumstances where handover notes have not been properly completed by the employee).

(iii) Undertaking administrative tasks associated with maintaining their employment, including: communicating with their employer in order to indicate whether they are willing to work hours outside of their roster hours or undertake a shift which is broken twice in accordance with clause X; responding to notification of cancelled shifts; responding to suggestions for make-up time for cancelled shifts in accordance with clause X; engaging with any kind of on-line platform or electronic system in order to obtain or arrange when they will work; reviewing or enquiring about their roster; renewing their driver's license if this is a requirement of their role; and either obtaining or providing a copy of related information to their employer.

43. The proposed definitions build upon those previously advanced by ABLA's clients. The purpose of most aspects of the proposal are self-evident. We nonetheless provide a brief explanation of the rationale behind each element of the proposal below.

44. Importantly, we propose that remote response work be defined as only including work that an employer has *'directed or authorised'* an employee to undertake. This is essential in order to ensure that an employer is able to manage the potential cost impacts associated with the proposed new clause.

45. The definition is intended to capture work that takes place at a location selected by the employee. This could include, but is not limited to, an employee's residence. The definition does not capture work that is undertaken away from an employer's premises but nonetheless at some other site that the employee is required to attend given the nature of the work (i.e. a client's residence, hospital, police station or other specific location).

46. The definition includes a limited exclusion for very short periods of work, in limited circumstances; namely where the need for such work to be undertaken by the employee arises from a deficiency in their own performance of work whilst at work, if such work must nonetheless be undertaken to ensure the health and safety of a client. This would include, for example, an employee answering a call from a colleague to clarify whether a particular task was undertaken during the employee's period of work.

47. This exclusion is intended to be a practical way of ensuring that the provision does not provide a disproportionate benefit to an employee in circumstances where they only undertake a small amount of work, the employer has no choice but to call upon them to perform such work, and the employee is the cause of such work needing to be done outside of their rostered or ordinarily allocated working time.

48. There may also be merit in including a further general exclusion for remote response work that only takes an extremely short period of time (i.e. responding to a text message). It would obviously not be fair for such work to trigger an entitlement to a significant payment.

The Rate of Remuneration

49. The Full Bench has made the following observations of relevance to the issue:

    (a) Determining the appropriate monetary entitlement for this type of work involves an assessment of the value of the work and the extent of disutility associated with the time at which the work is performed.[27]

    (b) There is disutility associated with performing remote response work but there is less disutility associated with employees performing such work, as compared to being recalled to a physical workplace or being 'on call' to return to a particular workplace.[28]

    (c) The Australian Services Union (**ASU**) proposed that all remote response work be paid at overtime rates; that employees who are not on call be paid overtime rates for a minimum of two hours and that employees who are 'on call' receive a minimum payment of one hour at overtime rates. Such proposals were considered by the Full Bench to be unwarranted.[29]

[27] Decision at [729].

[28] Decision at [730].

[29] Decision at [731] – [732].

(d) There is an inter-relationship between the minimum payment period and the rate of payment.[30]

(e) The formulation of an entitlement that is based around the '*rate of pay applicable to remote response work*' or the '*appropriate rate of pay*' (as proposed by ABLA) is in various respects problematic.[31]

50. The Full Bench also recognised the logic inherent in the structure of ABLA's clients' proposed minimum payment regime but expressed a provisional view that the minimum payment for remote response work performed between 6.00am and 10.00pm should be 30 minutes and that the minimum payment between 10.00pm and 6.00am should be one hour.[32]

51. In light the Full Bench's comments, Ai Group has proposed a different scheme of remuneration to that previously advanced by other parties.

52. In essence, we propose that an employee be paid for the time they spend undertaking remote response work based on the rate of pay that the Award would ordinarily require for the performance of such work (subject to some caveats, which seek to address concerns raised by the Full Bench). However, this would be underpinned by an entitlement to a minimum payment for the incidence of the performance of such work. Such minimum payments would be based on the applicable minimum rates of pay in the Award (i.e. the base rates of pay for their classification) multiplied by a specified period of time, depending on the time at which the remote response work is undertaken.

53. Put another way, we propose that the remuneration be calculated on a time worked basis in accordance with the other provisions of the Award in order to compensate an employee for the disutility of undertaking work at a particular time (and in a way that is directly proportionate to the amount of time spent performing such work), and that this be underpinned by a guaranteed minimum payment

[30] Decision at [733].

[31] Decision at [734] – [738].

[32] Decision at [733].

which compensates for the disutility of the incidence of such work (i.e. being disturbed during time off).

54. The proposed approach would ensure that employees are paid appropriately for the disutility of working at the particular time that they are called upon to perform remote response work. For example;

    (a) If the work is undertaken on a weekend, they would receive weekend penalty rates;

    (b) If the work is undertaken in circumstances that would attract overtime rates, they will be paid overtime rates; and

55. We have also addressed a concern raised by the Full Bench at paragraph [737] of the Decision by excluding any entitlement to shift loadings. An employee undertaking remote response work will not be working a shift and accordingly, the payment of a shift loading would not be justified.

56. In advancing this proposal, we acknowledge that if our suggested approach was adopted, there would be some complexity for employers and employees in that the rate of pay would be dependent upon a range of variables. A requirement to instead only pay for remote response work at the relevant minimum rate of pay prescribed by the Award would negate such considerations.

57. For clarity, under our proposal, an entitlement to a minimum payment calculated based upon the relevant minimum rates (i.e. base rates applicable under the Award) would underpin the entitlement for an employee to be paid at the relevant rate (including applicable loadings and penalties) prescribed by the Award, but the employee would not necessarily receive both. That is, the minimum payments would only apply if the employee did not actually undertake a sufficiently long period of work so as to entitle them to a greater payment.

58. We have based the proposed minimum payments on the minimum rates in the Award because we contend that there would be little justification for including penalty rates that are ordinarily applicable for working at particular times or occasions when the employee may not actually be working for the entirety of the period contemplated by the minimum payment term. For example, clauses 26 and 28 of the Award prescribe, in effect, penalty rates for work *performed* on a Saturday, Sunday or during overtime hours.

59. In relation to the quantum of the minimum payment, we have proposed that the Full Bench should depart from the provisional view that either a 30 minute or 1 hour minimum payment should be applied given that:

    (a) The Full Bench has indicated that a shorter minimum payment should apply in circumstances where the employee is being paid an 'on call' allowance.[33] We have accordingly suggested a shorter minimum payment in this context.

    (b) We have proposed rates of remuneration for time worked which are higher than the minimum rates specified in the Award.

    (c) The potential for any minimum payments above what we have proposed would be disproportionate in circumstances where only a relatively short period of work is undertaken.

    (d) The merit of maintaining a differential level of payment based on whether an employee is on call.

    (e) The need to adopt a cautious approach to the introduction of this new entitlement in circumstances where the evidence does not permit a robust assessment of its potential impact to be made by the Full Bench and in the context of sectors where employers have a notoriously limited capacity to absorb additional costs.

[33] Decision at [722](1).

Discrete Activities and Separate Minimum Payments

60. The Full Bench has indicated, in effect, that there is merit in ensuring that each discrete activity constituting remote response work (such as a phone call) does not automatically trigger a separate minimum payment.[34]

61. Ai Group proposes the following provisions to address this issue:

> **X.4 Calculation of payments when remote response work is undertaken on multiple occasions**
>
> (a) If an employee undertakes remote response work on separate instances during a period in which they are on call, or otherwise during 24 consecutive hours, the remuneration that they are entitled to be paid in accordance with clause X.1 for undertaking such work may be applied in satisfaction of the minimum payment required to be paid under clause X.2 or X.3.
>
> (b) If an employee performs separate instances of remote response work during a period in which they are not on call, or otherwise during a period of 24 consecutive hours, the employee will not be entitled to multiple minimum payments but will be entitled to the greatest minimum payment applicable under clause X.3.
>
> **Note:** Clause X.4 operates to ensure that an employee does not receive multiple minimum payments as a consequence of undertaking remote response work on multiple occasions during a single period in which an employee is 'on call' or a single 24 hour period. For example, if an employee who is not on call undertakes remote response work from 9.00pm to 9.10pm and then from 1.00am to 1.10am they will receive a minimum payment of 45 minutes.

Recording Time Worked

62. The Full Bench has indicated that a clause dealing with remote response work should include a mechanism for ensuring that the time spent by an employee working remotely is recorded and communicated to the employee.[35]

63. Ai Group suggests the following clause:

> **X.5 Recording of time worked and communication requirements**
>
> (a) An employee who performs remote response work must either:
>
> (i) Maintain and provide to their employer a time sheet specifying the time at which they commenced and concluded performing any remote

[34] Decision at [722](2).

[35] Decision at [722](4).

response work and a description of the work that was undertaken. This record must be provided to the employer prior to the end of the next full pay period or in accordance with any other arrangement as agreed between the employer and the employee.

(ii) Comply with any reasonable requirement by their employer that the use of an electronic system for recording the time spent undertaking remote response work and the nature of the work undertaken.

(b) An employer is not required to pay an employee for any time spent performing remote response work if the employee does not comply with the requirements of clause X.5(a). This clause does not apply if the employer has not informed the employee of the reporting requirements.

64. The power to include clause X.5(a) in the Award would arise from s.142 of the Act.

Transitional Arrangements

65. Ai Group understands that, in the absence of specific regulation under the Award of payment for remote response work, employers currently adopt a variety of approaches to remunerating employees for such activities. Relevantly, remote response work is often undertaken by senior employees who are remunerated in such a way as to provide compensation for such work through over-Award payments.

66. We note that there is limited evidence about the performance of remote response work and industry practices relating to payment for such work. Nonetheless, the evidence of Ms Ryan, CEO of Community Care Options Limited, cited at paragraph [706] of the Decision, provides an example of one way in which an employer elects to remunerate such work.

67. It is fair that an employer who has set an employee's remuneration at above-Award levels be able to apply such payments in satisfaction of any new Award-derived entitlement. There is particular force to such a proposition in circumstances where the employer might have envisaged that the compensation provided to an employee would compensate for what has now been termed *'remote response work'*, even if this was not explicitly set out in any contractual agreement between the parties.

68. We contend that it is necessary to include a clause providing for transitional arrangements relating to the implementation of a new obligation to provide payment in relation to remote response work. A potentially suitable clause would be as follows:

> **X.6 Transitional Arrangements**
>
> The monetary obligations imposed on employers by this clause may be absorbed into over award payments made to an employee who was employed prior to the inclusion of this clause in the award on [insert commencement date of award variations].

69. The wording of this proposed provision is drawn largely from the absorption provision included in clause 2.2 of all modern awards when they were first made.

70. In proposing this approach, we observe that the Commission is charged with ensuring that awards set a fair and relevant *minimum* safety net of terms and conditions.[36]

71. A provision that permits an employer to apply over-Award payments in satisfaction of a newly imposed obligation relating to the payment of remote response work strikes a fair balance between the interests of both employers and employees. It would be unfair for an employer to be required to provide an employee with the new remote response payment, in addition to over-Award payments that an employer has agreed to pay in the absence of any specific Award requirement to separately pay for remote response work in a particular way.

72. For completeness, we contend that such a provision could be included in a modern award pursuant to s.139 of the Act, on the basis that it is about minimum wages[37] or penalty rates[38], in the sense that it prescribes the manner in which an award term dealing with such matters, in the context of remote response work, can be satisfied.

[36] Section 134(1) of the Act.

[37] Section 139(1)(a) of the Act.

[38] Section 139(1)(e) of the Act.

On-Call Allowance

73. We propose that the current clause 20.9 of the Award, which deals with payment of an on call allowance, should be amended to require payment where an employee is required to be available either to return to duty at an employer's premises or to undertake remote response work. This would align the provision to the other variations we have proposed.

74. The specific amendment that we propose is the replacement of the current clause 20.9 in the Award with the following clause:

> **20.9 On call allowance**
>
> An employee required by the employer to be on call (i.e. available for recall to duty at the employer's or client's premises and/or for remote response work) will be paid an allowance of:
>
> (i) $20.63 for any 24 hour period or part thereof during the period from the time of finishing ordinary duty on Monday to the time of finishing ordinary duty on Friday; or
>
> (ii) $40.84 in respect of any other 24 hour period or part thereof on a Saturday, Sunday, or public holiday.

Recall to Work Overtime

75. As observed by the Full Bench (and the HSU), the Award does not currently directly address work performed outside of ordinary hours that does not require travel to a physical workplace.[39]

76. The current clause 28.4 of the Award should be amended to clarify that it only applies to work undertaken at a physical workplace. This is necessary to ensure the Award is simple and easy to understand.[40] The current clause is far from clear. Appropriate alternate wording for such a provision, given the other changes we propose relating to remote response work, would be as follows:

> **28.4 Recall to work overtime request when on call**

[39] Decision at [648].

[40] Section 134(1)(g) of the Act.

An employee who is recalled to work overtime after leaving the workplace and is required by their employer to attend a designated workplace in order to perform such overtime work will be paid for a minimum of two hours' work at the appropriate rate for each time recalled. If the work required is completed in less than two hours the employee will be released from duty.

5. DAMAGED CLOTHING

77. The Full Bench determined not to grant the damaged clothing allowance clause proposed by the Health Services Union (**HSU**). However, the following view was expressed by the Full Bench in the Decision:

> **[882]** It seems to us that an award variation is warranted to provide for the reimbursement of reasonable costs associated with the cleaning or replacement of personal clothing which has been soiled or damaged in the course of employment. The issue then becomes the form of such an award term.[41]

78. The Decision at paragraph [890] directed the parties to confer about the form of a suitable variation and indicated that a conference would be convened to facilitate such discussion. Ahead of the contemplated conference Ai Group shared a document with the major employer and union parties involved in these proceedings, which outlined the various principles that we contended should be reflected in a proposed damaged clothing clause. On 27 May 2021, such matters were canvassed during a conference on a without prejudice basis.

79. Our consideration of the damaged clothing issue has subsequently been refined as a result of further engagement with the unions, employer parties and industry. In this regard, we have developed and shared a proposal in respect of the damaged clothing issue with the relevant major parties. Ultimately, discussions between the parties regarding this proposal, and the issue of damaged clothing more broadly, have not been completed as the focus of discussions has instead been on various other matters falling from the Decision and due to the imperative for the parties to focus their attention on the preparation of evidence and submissions.

Appropriate Next Steps

80. As it currently stands, there is no specific proposal before the Commission beyond the claims that have already been rejected. Nor has any specific proposal been suggested by the Full Bench.

[41] Decision at [882].

81. Moreover, it is not clear that the current directions contemplate the resolution of the damaged clothing issue through the filing of written material and the conduct of the hearing on 6 August 2021. Nor is there any scope for the parties to file any written submissions or evidence in reply to any new damaged clothing proposal now advanced.

82. Given this context, and the status of discussions between the parties, Ai Group contends that the damaged clothing issue should not be determined at this stage. Instead, it should be for scheduled for consideration in a further conference before the Commission in the near future.

83. In the interest of advancing the issue, and without ourselves calling for the imposition of new obligations upon employers relating to treatment of damaged clothing, we nonetheless advance a potentially acceptable clause for consideration by interested parties and the Full Bench (if the Full Bench remains minded to further address this issue):

20.3 Laundering, Repair, and Replacement of Clothing other than Uniforms

(a) If during any day or shift, the clothing of an employee is soiled in the course of their performance of duties required by their employer, the employee will be paid a laundry allowance of $0.32 per day or shift provided that:

(i) The employee provides notice and, if requested, evidence that would satisfy a reasonable person of the soiling and how it occurred; and

(ii) The employee complied with any reasonable requirement of the employer in relation to the wearing of personal protective equipment at the time the clothing was soiled.

(b) If the clothing of an employee is soiled or damaged (excluding normal wear and tear), in the course of their performance of duties required by their employer and to the extent that its repair or replacement is necessary, the employer must reimburse the employee for the reasonable cost of repairing the item of clothing or replacing it with a reasonably priced substitute item, provided that:

(i) The employee provides notice and, if requested, evidence that would satisfy a reasonable person of the soiling or damage, how it occurred, and the reasonable repair or replacement costs;

(ii) The employee complied with any reasonable requirement of the employer in relation to the wearing of personal protective equipment, at the time the clothing was soiled or damaged;

(iii) The employee complied with any reasonable requirement of the employer in relation to the nature of clothing that is to be worn or not worn in the

performance of work, at the time that their clothing was soiled or damaged; and

(iv) The employee has not, and is not eligible to, recover such costs through any workers compensation legislation.

(c) This clause will not apply where the damage or soiling of an employee's clothes is caused by the negligence of the employee.

(d) This clause will not apply where an employee is permitted or required to wear a uniform supplied by the employer or is entitled to any payment under clause 20.2.

84. The proposal is intended to address various views expressed by the Full Bench in the Decision in relation to damaged clothing. It is also intended to adopt a similar approach to that adopted in clause 20.2 of the Award, which deals with circumstances where an employee is required to wear a uniform or other specialised clothing or equipment. A copy of this proposal has been provided to the unions and employer associations involved in these proceedings well before the filing of these submissions.

85. We understand that there is a shared view amongst at least some of the unions and employer parties who have seen the above proposal, that there would be utility in further discussing these matters. Ai Group would be supportive of this occurring with the assistance of the Commission in the interest of bringing this matter to a conclusion as quickly as possible.

6. THE PROPOSED OPERATIVE DATE

86. The Commission has provisionally determined that the proposed variations to the Award will have an operative date of 1 October 2021.

87. Ai Group opposes this provisional view. We submit that the variations should not commence operation for at least 12 months from the date on which the terms of all of the variations to be made to the Award are finalised and published by the Commission in the form of a determination.

6.1 The Approach Previously taken by the Commission in these Proceedings

88. In September 2019, the Commission decided[42] to vary the Award, in the context of these proceedings, to require the payment of the casual loading for work performed by a casual employee on weekends, public holidays and during overtime.

89. Subsequently, in October 2019, the Commission decided [43] that the aforementioned variations to the Award would not commence operation until 1 July 2020 (**Transitional Arrangements Decision**).

90. In its decision, the Commission said as follows: (emphasis added)

> **[14]** Ai Group advances seven propositions in support of its position:
>
> (i) The changes will have a significant adverse impact upon employers who make substantial use of casual employment arrangements, particularly those that make substantial and systematic use of casual employment arrangements on weekends.
>
> (ii) Many employers in this sector that provide services to National Disability Insurance Scheme (NDIS) participants are 'struggling, or indeed failing to maintain profitable operations'.
>
> (iii) It is difficult for many employers to cover unforeseen and unbudgeted cost increases. It is fair that they be afforded significant advanced notice of substantial cost increases.

[42] 4 yearly review of modern awards—Group 4—*Social, Community, Home Care and Disability Services Industry Award 2010*—Substantive claims [2019] FWCFB 6067.

[43] 4 yearly review of modern awards—Group 4—*Social, Community, Home Care and Disability Services Industry Award 2010*—Substantive claims [2019] FWCFB 7096.

(iv) Employers will need time to assess and, if warranted and possible, implement changes to their workforce structure or service offering in light of the changes, including the substitution of casual labour with permanent labour. It cannot be assumed that an employer's workforce will accept such a change which may impede implementation and as such this may not be change that can be implemented easily or quickly.

(v) A greater period of time will provide an opportunity to seek a change in funding arrangements (or more specifically NDIS pricing restrictions) to cover the increased costs from the Commission's decision.

The Full Bench has already recognised that unfunded costs increases may result in a reduction in services to vulnerable members of the community; that the level of funding is a product of the political processes; that it may take time for funding changes to be implemented and that such matters can be addressed by appropriate transitional arrangements. (see September 2019 decision at [137] – [141])

(vi) It is foreseeable that as a result of the *September 2019 Decision* some employers will elect to cease the provision of some services to NDIS participants, unless there is a change to NDIS funding arrangements, therefore:

'It is … in the interest of such employers, the NDIS participants who will lose access to such arrangements and ultimately the casual employees that may lose or at least see the curtailment of their employment opportunities with such employers for there to be sufficient time for the carefully consideration and orderly implementation of such changes'

(vii) The delayed implementation of the increase may enable the commencement of changes flowing from the September Decision to be coordinated with the commencement of any other changes to the Award that may fall from these proceedings. In the interests of simplicity, it is desirable that, as far as possible, the outcomes of this stage of the review of the Award not be implemented in a piecemeal manner. This will also enable employers to make a more holistic assessment about what changes they may make to their operations as consequence of the cumulative impact of any changes to the Award flowing from review.

…

[22] In the *Penalty Rates – Transitional Arrangements decision* the Full Bench made the following observation about the determination of transitional arrangements:

'the determination of appropriate transitional arrangements is a matter that calls for the exercise of broad judgment, rather than a formulaic or mechanistic approach involving the quantification of the weight accorded to each particular consideration.'

[23] The Full Bench went on to observe that the following matters were relevant to its determination of transitional arrangements in relation to the *reduction* of penalty rates.

(i) The statutory framework: any transitional arrangements must meet the modern awards objective and must only be included in a modern award to the extent necessary to meet that objective. The Full Bench also noted that it must perform its functions and exercise its powers in a manner which is 'fair and just' (as required by s.577(a)) and must take into account the objects of the Act and 'equity, good conscience and the merits of the matter' (s.578).

(ii) Fairness is a relevant consideration, given that the modern awards objective speaks of a '*fair* and relevant minimum safety net'. Fairness in this context is to be assessed from the perspective of both the employees *and* employers covered by the modern award in question. The Full Bench said "while the impact of the reductions in penalty rates on the employees affected is a plainly relevant and important consideration in our determination of appropriate transitional arrangements, it is not appropriate to 'totally subjugate' the interests of the employers to those of the employees."

[24] We adopt the above observations and propose to apply them to the matter before us.

…

[27] As mentioned in the *September 2019 Decision,* we accept that these variations will increase employment costs and to the extent that full time or part-time permanent employees are substituted for casuals, the variations may reduce flexibility.

…

[31] We also acknowledge that many employers covered by the SCHADS Award are not-for-profit organisations who rely on funding from a range of sources to provide their services. The Survey Results show that almost nine in ten (87.2 per cent) enterprises that responded to the survey receive a significant proportion of their income from the Commonwealth, State or Local Government. Further, we accept that an increase in employment costs *within* a budget cycle may place such organisations under financial pressure. It is appropriate that a reasonable transition period be determined in order to provide such organisations with an opportunity to seek an increase in funding.

[32] It is also relevant that the social, community, home care and disability services industry is undergoing structural change by reason of reforms that have been (and continue to be) implemented across the country.

[33] Against these considerations, the fact that a significant proportion of employees covered by the SCHADS Award may be regarded as 'low paid' within the meaning of s.134(1)(a) is a consideration in favour of *not* deferring or phasing-in these variations.

[34] Further, in the *September 2019 Decision* we accepted that the existing rates for casuals working overtime and for work on Saturdays, Sundays and public holidays are not fair and proportionate to the disability experienced by casual employees working at these times. This too is a consideration which tells against the deferral or phasing in of the variations.

[35] In our view, an appropriate fair and just balance between these considerations is to provide that the increases in overtime, weekend and public holiday rates for casuals will commence operation, in full, from 1 July 2020.

[36] We accept ABI's submission that it is more efficient, from a payroll administration perspective to *defer* the increases rather than introduce them by phased instalments. A deferral until 1 July 2020 provides a reasonable time period for the enterprises affected to seek a compensatory change in funding arrangements (or more specifically NDIS

pricing restrictions) and to consider/implement the substitution of casual employees for permanent full time and part time employees.[44]

91. As can be seen from the extract above, the Commission decided to postpone the operative date of the variations for the following reasons:

    (a) The variations would increase employment costs.

    (b) The variations would reduce the flexibility previously available to employers.

    (c) Many employers covered by the Award are not-for-profit organisations who rely on funding from a range of sources to provide their services. A reasonable transitional period should be provided in order to afford such organisations an opportunity to seek an increase in funding.

    (d) An increase in employment costs within a budget cycle may place not-for-profit organisations under financial pressure.

    (e) The social, community, home care and disability services industry is undergoing structural change by reason of reforms that have been (and continue to be) implemented across the country.

92. We return to the relevance of the Transitional Arrangements Decision to the issues now before the Commission below.

6.2 Relevant Findings Previously made by the Commission

93. In the Decision, the Commission made the following findings which, in our submission, are also relevant to the issue of the appropriate operative date:

    Findings about Employers covered by the Award

    (a) Many service providers in the social, community, home care and disability industries are not-for-profit organisations.[45]

[44] 4 yearly review of modern awards—Group 4—*Social, Community, Home Care and Disability Services Industry Award 2010*—Substantive claims [2019] FWCFB 7096 at [14] – [36].

[45] Decision at [218](2).

(b) There have been significant regulatory changes in the disability and home care sectors over recent years.[46]

(c) As a result of the aforementioned reforms:

(i) Service providers now have less certainty in relation to revenue.[47]

(ii) Service providers are exposed to greater competition for business.[48]

(iii) Employers are less able to organise work in a manner that is most efficient for them.[49]

(iv) Greater choice and control for consumers has led to greater rostering challenges.[50]

(d) The principle of 'consumer-directed care' involves providing individual consumers with choice and control over what services are provided to them, when and where those services are provided, how those services are provided and by whom those services are provided.[51]

(e) Employers are under greater market pressure than before to accommodate the needs and preferences of clients and this has a flow on effect to how work needs to be organised.[52]

These findings are relevant because they highlight the nature of many organisations covered by the Award and the various challenges they are facing. As a consequence, the premature introduction of the proposed Award variations will have a significant impact on employers in the aged and disability care sectors. The findings also support the proposition that employers are, in various

[46] Decision at [218](6).

[47] Decision at [218](10)(a).

[48] Decision at [218](10)(d).

[49] Decision at [218](10)(f).

[50] Decision at [218](10)(g).

[51] Decision at [218](8).

[52] Decision at [218](23).

ways, constrained in their ability to develop rosters and schedules for client care of their choosing. This will necessarily limit the extent to which employers are able to vary their rosters and schedules for client care in response to the Decision as they see fit.

Findings about Funding Arrangements

(f) The National Disability Insurance Agency (**NDIA**) imposes price controls on various forms of support provided by limiting the prices that registered providers can charge and by specifying the circumstances in which participants can be charged for those services.[53]

(g) The Efficient Cost Model (**ECM**), which informs the NDIA's pricing decisions,[54] does not contain any specific provision for, or does not account for, a range of actual and contingent costs prescribed by the Award which are associated with delivering services[55].

(h) The ECM also contains other assumptions that have the effect of further underestimating the true costs of service providers delivering services under the National Disability Insurance Scheme (**NDIS**).[56]

(i) The NDIA has been aggressive in its price regulation activities in trying to set the absolute minimal cost to control the cost to government of the NDIS as a whole.[57]

(j) Employers in the disability services sector have been under significant financial strain since the introduction of the NDIS.[58]

[53] Decision at [218](12).

[54] Decision at [218](14).

[55] Decision at [218](17).

[56] Decision at [218](18).

[57] Decision at [218](20).

[58] Decision at [218](21).

(k) The transition to the NDIS has been financially very challenging for some employers.[59]

(l) The Commonwealth Home Support Program (**CHSP**) relies on grants for funding and, except for recent additional funds being provided to existing providers to increase their services, at no time recently has there been an open round for funding, funding has not been available on an annual basis and there is no clarity as to when funding will be released.[60]

(m) Home Care Packages (**HCPs**) are directly allocated to the person requiring support rather than to providers. The participant selects their preferred provider.[61]

(n) The home care sector is experiencing changes similar to the NDIS because of consumer-directed care.[62]

(o) There has been a decline in the overall performance of home care providers.[63]

These findings are relevant because they highlight the existing deficiencies in the various funding models that apply to employers in the aged and disability care sectors and the challenges that providers face as a result. These challenges will be compounded if additional employment costs are imposed on employers before the relevant funding arrangements are altered to account for the variations to be made to the Award.

Findings about Service Delivery and Working Arrangements

(p) Many clients have a preference for continuity of care in the sense that care is provided by the same employee or group of employees.[64]

[59] Decision at [218](24).

[60] Decision at [218](26).

[61] Decision at [218](26).

[62] Decision at [218](28).

[63] Decision at [218](27).

[64] Decision at [218](9).

(q) Short shifts or engagements are a very common feature in the home care and disability services sectors. Some employees are engaged for only 30 minutes and in some instances for only 15 minutes.[65]

(r) It is common for consumers in the home care and disability services sectors to request services of a short duration.[66]

(s) Broken shifts are commonly utilised by employers covered by the Award and there is a very high incidence of broken shifts in the home care and disability services sectors.[67]

(t) Most employees are not paid for time spent travelling to and from clients.[68]

(u) Most client cancellations occur in the 24 hours prior to the commencement of the scheduled service.[69]

(v) Client cancellation events are not uncommon.[70]

(w) The frequency of client cancellations causes significant rostering challenges for employers.[71]

(x) Employers encounter difficulties in finding alternate work for employees at the time of their rostered shift when a scheduled client service is cancelled by the client.[72]

These findings are relevant primarily because they highlight that extant working arrangements and practices in the sector deviate substantively from the revised Award provisions determined by the Commission in various ways. This goes to the impact that the proposed variations will potentially have on employers.

[65] Decision at [232](1).
[66] Decision at]322](3).
[67] Decision at [232](2).
[68] Decision at [232](4).
[69] Decision at [784](3).
[70] Decision at [784](4).
[71] Decision at [784](5).
[72] Decision at [784](6).

Findings about Employees covered by the Award

(y) It is common for employees to be employed by and to be performing work for more than one employer covered by the Award.[73]

This finding is relevant because it highlights an additional challenge facing employers in the context of preparing rosters and will, therefore, undermine the extent to which employers are able to implement roster changes in response to the Decision.

94. In addition, in the Transitional Arrangements Decision, the Commission noted that:

(a) The *Australian Disability Workforce Report* of July 2018 notes that 46% of disability support workers are casual employees.[74]

(b) In a survey administered by the Commission in the context of these proceedings, in the 4-week period from 4 to 31 March 2019, 75% of enterprises that responded to the survey employed casual employees that were covered by the Award.[75]

This is relevant because whilst grappling with the Decision and the implications it has for their enterprise, many employers are also facing the compliance burden flowing from the recently introduced casual conversion provisions in the *Fair Work Act 2009* (**Act**).

6.3 Ai Group's Evidence

95. The evidence led by Ai Group in these proceedings supports the propositions set out below.

[73] Decision at [218](3).

[74] Transitional Arrangements Decision at [28].

[75] Transitional Arrangements Decision at [30].

The Impact of the Decision and Proposed Award Variations

96. *First,* the variations proposed to the Award will have the effect of increasing employment costs.[76] Some employers will face significant increases in employment costs.[77] Indeed, some will face unsustainable increases to their employment costs, which pose a threat to the viability of their ongoing ability to provide some or all of the relevant services that they currently provide.[78]

97. *Second,* some employers commonly roster broken shifts that are broken more than once and / or twice.[79]

98. *Third*, in order to comply with the variations proposed by the Commission to the broken shift provisions contained in the Award, some employers will need to alter the way in which they currently implement broken shifts. For example, they will need to eliminate broken shifts that have more than two breaks and they will need to assess the extent to which they can practicably implement broken shifts with two breaks.[80]

99. *Fourth,* in order to mitigate the cost impact of the proposed variations to the Award, employers will need to make alterations to the arrangements that they currently have in place. For example, they may seek to rearrange work such that employees have, as far as reasonably practicable, productive work that is of the same duration as the minimum payment periods.[81]

[76] Witness statement of Richard Cabrita at [44] – [45] and [55] and witness statement of Aleysia Leonard.

[77] Witness statement of Richard Cabrita at [47] – [51].

[78] Witness statement of Richard Cabrita at [52] and [58].

[79] Witness statement of Richard Cabrita at [27] – [33] and witness statement of Aleysia Leonard.

[80] Witness statement of Richard Cabrita at [53] – [54] and witness statement of Aleysia Leonard.

[81] Witness statement of Richard Cabrita at [46] – [52] and witness statement of Aleysia Leonard.

100. *Fifth,* in order to make alterations of the nature contemplated in the preceding two paragraphs, employers will need to:

(a) Analyse their rosters in order to identify the circumstances in which they do not conform with the variations to be made to the Award and / or they will give rise to new or enhanced employee entitlements.[82]

(b) Consult their clients, one by one, as to whether they are agreeable to altering when they receive their services and from which support worker.[83]

(c) Consult their employees as to whether they are agreeable to work different and / or additional hours of work.[84]

101. The processes described above require careful, considered analysis. They cannot be wholly automated. Moreover, they require one-on-one engagement with clients and employees and due to the somewhat circular nature of the exercise, may require repeated engagement. They will necessarily require a significant period of time to complete.[85]

102. *Sixth,* employers providing in-home aged care services face regulatory requirements that have the effect of prohibiting them from unilaterally determining when a client will receive their services and which employee will deliver those services, where the client has identified where and / or how they wish to receive those services. Clients commonly express such preferences.[86] Employers consider that they cannot simply unilaterally determine where and / or how such clients will receive their services.[87]

[82] Witness statement of Richard Cabrita at [61] – [62] and witness statement of Aleysia Leonard.

[83] Witness statement of Richard Cabrita at [88] – [98] and witness statement of Aleysia Leonard.

[84] Witness statement of Richard Cabrita at [59] and [81] – [87].

[85] Witness statement of Richard Cabrita at [62], [89] – [90] and [114] – [116] and witness statement of Aleysia Leonard.

[86] Witness statement of Richard Cabrita at [65] – [67] and [69] and witness statement of Aleysia Leonard.

[87] Witness statement of Richard Cabrita at [70] – [74] and witness statement of Aleysia Leonard.

103. Specifically, employers are required to observe the *'Aged Care Quality Standards'*[88], which relevantly provide that:

(a) Organisations must demonstrate that *'each customer is supported to exercise choice and independence, including to … make decisions about their own care and the way care and services are delivered'*.[89]

(b) Organisations must demonstrate that each consumer gets *'safe and effective personal care, clinical care, or both personal care and clinical care, that … [is] tailored to their needs'*.[90]

104. Employers' compliance with the aforementioned requirements is monitored and enforced by the Aged Care and Quality Commission (**Aged Care Commission**). For example:

(a) The Aged Care Commission *'uses a range of regulatory tools to monitor compliance and detect possible noncompliance'* including through site audits and consumer complaints.[91]

(b) The Aged Care Commission can take a range of enforcement actions including the imposition of financial penalties, varying or reducing the providers' accreditation period, seeking civil penalties, imposing sanctions and / or revoking a providers' registration.[92]

105. *Seventh,* employers face various other challenges associated with rostering employees and scheduling client services for reasons that include increased client demand for services at particular times of the day; employee availability; the need to potentially employ additional staff; the need to ensure that employees are only rostered to perform work for which they possess the necessary

[88] *Aged Care Act 1997* (Cth) at section 54-1(1)(d).

[89] Annexure RC-1 at page 1.

[90] Annexure RC-1 at page 2.

[91] Annexure RC-2 at page 7.

[92] Annexure RC-2 at pages 12 – 21.

capability, skills, experience and qualifications; the geographic location of clients and funding constraints.[93]

106. These factors further complicate the task of rearranging rosters and client support schedules, and undermine the extent to which an employer is able to implement rostering arrangements that suit its operational needs.

107. *Eighth,* employers will need to reconfigure their payroll, rostering and / or time and attendance systems (**Systems**) to reflect the variations to be made to the Award.[94]

108. *Ninth,* the period of time required to reconfigure the Systems is dependent in part on the availability of providers who offer such services and of the period of time that they will require to undertake the work.[95]

109. At least some such service providers have indicated that they are not in a position to provide the relevant services until October 2021.[96] Further, at least one such service provider has indicated that they will require approximately 4 months to complete the relevant work.[97]

110. *Tenth,* the implementation of changes to Systems also involves the testing of those Systems, once they have been reconfigured. The testing phase is a time consuming and resource intensive approach, which can take several months to complete.[98]

111. If the testing phase reveals any difficulties / complexities, the service provider will need to be re-engaged in order for them to amend the systems reconfiguration. The systems will then need to be tested again.[99]

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[93] Witness statement of Richard Cabrita at [68], [75] – [98] and witness statement of Aleysia Leonard.

[94] Witness statement of Christopher Nillsen at [42] – [44], witness statement of Richard Cabrita at [59] and witness statement of Aleysia Leonard.

[95] Witness statement of Christopher Nillsen at [52] – [58] and [89].

[96] Witness statement of Christopher Nillsen at [56].

[97] Witness statement of Christopher Nillsen at [56].

[98] Witness statement of Christopher Nillsen at [59] – [71] and witness statement of Aleysia Leonard.

[99] Witness statement of Christopher Nillsen at [66] – [68] and witness statement of Aleysia Leonard.

112. *Eleventh,* employers will face significant additional costs associated with the reconfiguration of their Systems. This will include fees payable to the business' retained to reconfigure the Systems.[100]

113. *Twelfth,* employers will need to implement new and / or varied business processes in light of the variations to be made to the Award. Examples include processes for considering and responding to requests made by part-time employees for increased guaranteed hours, processes for seeking employee agreement to work a shift that is broken twice, processes for determining when an employee is entitled to reimbursement for damaged clothing, procedures for determining when evidence will be required from employees in respect of reimbursement for damaged clothing, procedures for determining when evidence will be required from employees performing remote response work, the form of the evidence required and so on.[101]

114. *Thirteenth,* various cohorts of employees employed by employers covered by the Award will need to be trained in respect of the changes to be made to the Award and the impact that they will have on the employers' operations, business processes and / or Systems. This will include employees who prepare and amend rosters, employees who liaise with clients about their care plans and their service requests, payroll staff and frontline support workers who deliver the services to the employers' clients.[102]

[100] Witness statement of Christopher Nillsen at [56], [58] and [78] – [79].

[101] Witness statement of Christopher Nillsen at [81] – [85].

[102] Witness statement of Richard Cabrita at [59] and [99] – [101], witness statement of Aleysia Leonard and witness statement of Christopher Nillsen at [72] – [77].

The NDIS

115. *First,* the funding arrangements currently in place do not take into account the Award variations determined by the Commission in the Decision.[103] The NDIA has not yet made any changes to the NDIS' funding arrangements in response to the Decision or in relation to the proposed variations to the Award.[104]

116. *Second,* changes to the NDIS are not automatically made when the Award is varied[105]; save for increases made to minimum wages prescribed by the Award as a consequence of the Commission's Annual Wage Review, which are typically taken into account by the NDIA.

117. *Third,* changes to the level of funding made available for the NDIS by the Commonwealth Government are not necessarily made when the Award is varied.[106]

118. *Fourth,* the NDIA has not foreshadowed making any changes or any intention to make changes to the NDIS' funding arrangements in response to the Decision or in relation to the proposed variations to the Award.[107]

119. *Fifth,* the NDIA has not commenced a formal process through which providers can make submissions about the impact that the Decision or the proposed variations to the Award will have on their operations and the changes that should, as a consequence, be made to the NDIS' funding arrangements.[108]

120. *Sixth,* typically, the NDIA's pricing arrangements are reviewed annually and revised arrangements apply from 1 July.[109]

[103] Witness statement of Chris Chippendale at [23], Annexure CC-2 and Annexure CC-3.
[104] Witness statement of Chris Chippendale at [23], Annexure CC-2 and Annexure CC-3.
[105] Witness statement of Chris Chippendale at [43] and [49].
[106] Witness statement of Chris Chippendale at [46].
[107] Witness statement of Chris Chippendale at [42] and [45] – [46].
[108] Witness statement of Chris Chippendale at [46] and [49](d).
[109] Witness statement of Chris Chippendale at [18].

121. *Seventh,* the NDIA has foreshadowed that it will next review its pricing arrangements during August 2021 – December 2021, with the revised arrangements commencing operation from 1 July 2022.[110] However, despite giving similar indications in the past, the NDIA's review has on occasion occurred during the first half of the calendar year and employers have had limited or no notice of the revised pricing arrangements before they commence operation.[111]

122. *Eighth,* changes made to funding arrangements can have consequences for employers' operations and may cause employers to revise their operational arrangements.[112]

123. *Ninth,* changes recently made to the NDIS' funding arrangements in respect of Supported Independent Living (**SIL**) services are posing a further financial strain on employers who rely on NDIS funding for the provision of such services.[113]

124. *Tenth,* employers intend to lobby the NDIA to change its pricing arrangements in light of the variations to be made to the Award, because they will increase the cost of delivering disability services by providers.[114]

125. *Eleventh,* some previous lobbying efforts have resulted in the NDIA making alterations to its funding arrangements, however this has not always been the case.[115]

126. *Twelfth,* the Commonwealth Government has recently publicly questioned the ongoing financial sustainability of the scheme.[116] This casts considerable doubt over the extent to which the NDIA will decide to release additional funding to accommodate the various additional employment costs that will flow from the Decision, or even some of them.

[110] Witness statement of Chris Chippendale at [24].

[111] Witness statement of Chris Chippendale at [25] – [26].

[112] Witness statement of Chris Chippendale at [27](b) and witness statement of Aleysia Leonard.

[113] Witness statement of Chris Chippendale at [30] – [38].

[114] Witness statement of Chris Chippendale at [44].

[115] Witness statement of Chris Chippendale at [52] – [53].

[116] Witness statement of Chris Chippendale at [54] – [56].

The CHSP

127. *First,* the CHSP funding currently afforded to employers does not take into account the costs that they will incur as a consequence of the Award variations determined by the Commission in the Decision.[117]

128. *Second,* the level of funding received by an employer is generally not automatically increased when the Award is varied or when the costs incurred by the employer for delivering the relevant services increase.[118]

129. *Third,* the funding provided to an employer through the CHSP may be less than the costs in fact incurred by that provider for the delivery of the relevant services.[119]

130. *Fourth,* the Department of Health (**DoH**) has not foreshadowed making any changes or that it will consider making changes to the CHSP funding arrangements in response to the Decision or in relation to the proposed variations to the Award.[120]

131. *Fifth,* the DoH has not outlined a formal process through which providers can seek an increase to the level of funding they receive in relation to the services they are already contracted to provide.[121]

132. *Sixth,* funding provided to employers through the CHSP is not the subject of periodic or regular reviews, except for yearly increases made to the funding levels to reflect increases to the Consumer Price Index (**CPI**).[122]

[117] Witness statement of Craig MacArthur at [11] – [15].

[118] Witness statement of Craig MacArthur at [14] – [15].

[119] Witness statement of Craig MacArthur at [21].

[120] Witness statement of Craig MacArthur at [24].

[121] Witness statement of Craig MacArthur at [25].

[122] Witness statement of Craig MacArthur at [14].

133. *Seventh,* employers intend to request that the DoH provide additional funding through the CHSP to them, because they will face increased costs associated with the delivery of aged care services.[123] In order to do so, they need to first identify the revised cost of providing their services.[124]

134. *Eighth,* employers' scope to recover additional costs by increasing the quantum of the financial contribution sought from their clients is limited.[125]

HCPs

135. *First,* the DoH has not made or foreshadowed making any changes to HCPs in response to the Decision or in relation to the proposed variations to the Award.[126]

136. *Second,* the level of funding afforded through HCPs is not the subject of periodic or regular reviews, except for yearly increases made to the funding levels to reflect increases to the Consumer Price Index (**CPI**).[127]

137. *Third,* providers cannot increase the prices charged to existing clients receiving funding from a HCP, without their agreement. The process of obtaining agreement from clients is a time-consuming and resource intensive process, because various steps must be taken to ensure that the client has given their informed consent.[128]

138. *Fourth,* if providers increase the prices they charge for their services and the level of funding available to clients is not increased, clients will have access to less funding from which they can access aged care services.[129]

[123] Witness statement of Craig MacArthur at [28].
[124] Witness statement of Craig MacArthur at [27] – [28].
[125] Witness statement of Craig MacArthur at [29] – [31].
[126] Witness statement of Craig MacArthur at [47] – [48].
[127] Witness statement of Craig MacArthur at [47].
[128] Witness statement of Craig MacArthur at [39] – [44].
[129] Witness statement of Craig MacArthur at [38].

139. *Fifth,* employers' scope to recover additional costs by increasing the quantum of the financial contribution sought from their clients is limited for various reasons.[130]

140. *Sixth,* employers intend to engage with the DoH to ascertain whether the funding afforded through HCPs will be increased.[131]

The Veterans Home Care Program

141. *First,* the Department of Veterans' Affairs (**DVA**) has not made or foreshadowed making any changes to funding available through the Veterans' Home Care Program (**VHCP**) in response to the Decision or in relation to the proposed variations to the Award.[132]

142. *Second,* the level of funding afforded through the VHCP is reviewed by the DVA from time-to-time. The next review is slated to commence on 1 January 2022.[133]

143. *Third,* in previous instances, the DVA's review has resulted in increases that reflect increases to the CPI or thereabouts.[134]

144. *Fourth,* the DVA determines the quantum of the financial contribution to be made by an employer's client to the employer in respect of the services they receive. It is currently set at $5 per hour.[135]

145. *Fifth,* employers intend to request the DVA to make available additional funding through the VHCP, because they will face increased costs associated with the delivery of aged care services. The DVA has not, however, outlined a specific process for doing so or identified a contact person with whom providers can liaise.[136]

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[130] Witness statement of Craig MacArthur at [36], [45] and [46] and witness statement of Richard Cabrita at [56](b).

[131] Witness statement of Craig MacArthur at [38].

[132] Witness statement of Craig MacArthur at [53].

[133] Witness statement of Craig MacArthur at [52].

[134] Witness statement of Craig MacArthur at [52].

[135] Witness statement of Craig MacArthur at [51].

[136] Witness statement of Craig MacArthur at [54].

Other Challenges Facing the Disability and Aged Care Sectors

146. *First,* employers covered by the Award continue to face challenges as a consequence of the COVID-19 pandemic and they continue to devote resources to addressing those challenges.[137]

147. *Second,* employers covered by the Award are facing regulatory reform as a consequence of the Royal Commission into Aged Care Quality and Safety (**Aged Care Royal Commission**).[138]

148. *Third,* employers covered by the Award are devoting resources to implementing changes within their enterprises in light of the recommendations made by the Aged Care Royal Commission.[139]

149. *Fourth,* employers covered by the Award are facing potential regulatory reform as a consequence of the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (**Disability Royal Commission**).[140]

150. *Fifth,* employers covered by the Award are devoting resources to implementing changes within their enterprises in light of the issues being raised before and considered by the Disability Royal Commission.[141]

151. *Sixth,* employers are required to comply with obligations imposed on them by the Act in relation to offering permanent employment to casual employees by 27 September 2021. These provisions impose a significant compliance burden on employers.[142]

[137] Witness statement of Chris Chippendale at [58] – [62].

[138] Witness statement of Richard Cabrita at [111].

[139] Witness statement of Richard Cabrita at [112] – [113].

[140] Witness statement of Chris Chippendale at [63] – [67].

[141] Witness statement of Chris Chippendale at [65] – [67].

[142] Witness statement of Aleysia Leonard.

6.4 Submissions in Support of our Position

152. As the Commission observed in the Transitional Arrangements Decision, the modern awards objective is relevant to the Commission's determination of transitional arrangements and, as contemplated at s.134(1) of the Act, the notion of *'fairness'* to both employers and employees is also relevant.[143] Accordingly, the interests of employers should not be *'subjugated'* to the interests of employees.[144]

153. Whilst the Commission has determined that various terms and conditions contained in the Award, as they apply to employees, should be enhanced or improved in order to ensure that the Award achieves the modern awards objective, the introduction of those requirements on 1 October 2021 or indeed at any time within 12 months from the date of the Commission's final determination, is not *necessary* to achieve the modern awards objective because:

    (a) It would be very unfair to employers.[145]

    (b) It would not foster the efficient and productive performance of work.[146]

    (c) It would have a significant adverse impact on business, including in relation to employment costs, productivity and the regulatory burden.[147]

154. In addition, the Award changes may have adverse consequences for clients who receive the relevant employers' services.

155. The evidence called by Ai Group in these proceedings and the findings made by the Commission in the Decision demonstrate that the variations to be made to the Award will result in:

[143] Transitional Arrangements Decision at [23] – [24].

[144] Transitional Arrangements Decision at [23].

[145] Section 134(1) of the Act.

[146] Section 134(1)(d) of the Act.

[147] Section 134(1)(f) of the Act.

(a) Increased employment costs. This includes, for example, the proposed broken shift allowances, the requirement to pay part-time employees for at least two or three hours' work for each shift or portion of a broken shift, the requirement to pay casual home care employees for at least two hours' work for each shift or portion of a broken shift (instead of 1 hour), the requirement to pay employees in respect of cancelled shifts or to afford make-up time and the requirement to reimburse employees for damaged clothing.

(b) Reduced flexibility. This includes, for example, the limitation on the number of times a broken shift can be broken, the need to obtain agreement in order to roster an employee to work a broken shift that is broken twice, the proposed mechanism that enables part-time employees to request an increase to their guaranteed hours which can be refused only on reasonable business grounds, the requirement to pay an employee in respect of cancelled shifts or to afford make-up time and the requirement to pay employees for at least two or three hours' work (as applicable) for each shift or portion of a broken shift.

(c) Increased regulatory burden. For example, the need to obtain agreement from an employee in order to roster them to work a broken shift that is broken twice, the need to consider and respond to requests made by part-time employees for increased guaranteed hours of work and the need to manage accrued make-up time where client cancel scheduled services.

156. These impacts will be particularly pronounced in the context of not-for-profit organisations, which depend on the funding made available to them to deliver their services. In addition, if the additional costs are imposed during the course of a budget cycle, this will compound the pressure that will flow from these outcomes.

157. Employers should be afforded a sufficient opportunity to take steps to mitigate the impact that the Award variations will have by:

(a) Endeavouring to secure changes to the funding arrangements that apply to them. It is relevant that:

(i) None of the relevant funding bodies have yet made or expressed an intention to make any changes to the relevant funding arrangements in light of the Decision.

(ii) None of the relevant funding bodies appear to have commenced a process of consultation with employers about the impact that the Decision will have on their operations.

(iii) The NDIS has announced that the next review of its pricing arrangements will commence later this year and any revision to its pricing arrangements will commence operation on 1 July 2022.

(iv) Since the parties last had an opportunity to file material in the Commission in relation to the matter, changes have been made to the NDIS funding arrangements in relation to SIL services, which have had the effect of imposing significant additional pressure on employers.

(v) Employers are not in a position to seek specific increases to the funding available or changes to the funding arrangements until they have had an opportunity to properly assess the consequences that the Award changes will have on their operations and the extent of the cost increases that they will face.

(vi) If any funding changes are made, providers will need an opportunity to consider those changes, determine whether any further operational changes are required in response to it and / or to further engage with the relevant agency or Government department about the adequacy of the funding or the basis upon which it has been determined.

(b) Endeavouring to rearrange their working arrangements such that, as far as possible, employees are afforded at least two or three hours' work (as applicable) for each shift or portion of a broken shift so as to reduce the extent to which employers are required to pay employees for time during which they are not performing productive work.

(c) Considering and potentially implementing changes to the constitution of their workforce. For example, the evidence suggests that some employers may seek to increase the proportion of part-time employment in favour of casual employment in order to achieve greater certainty as to the availability of their employees.[148]

(d) Implementing processes and procedures that enable them to efficiently deal with matters such as obtaining agreement from employees to work shifts that are broken more than twice, deal with requests for increased guaranteed hours from part-time employees, determining eligibility to reimbursement from damaged clothing and managing accrued make up time.

(e) Implementing any other change, process or procedure needed to mitigate the financial and / or regulatory burden that will flow from the Decision.

158. Employers should also be afforded a sufficient opportunity to take steps to ensure that they will be able to comply with the revised Award terms by, for example:

(a) Eliminating shifts that are broken more than twice.

As demonstrated by the evidence, consideration will need to be given by employers to how they will be able to continue to service clients who are presently supported by employees who work on broken shifts that are broken more than twice. Not only does this require an assessment of whether other existing employees can perform such work and / or whether the relevant clients are amenable to receiving their supports at a different

[148] Witness statement of Aleysia Leonard.

time; it may also require an assessment as to whether it is necessary to employ additional employees in order to increase the numerical flexibility available to them. As is borne out in the evidence, the recruitment of staff can be a time consuming process.[149]

(b) Making the necessary changes to their Systems.

It is trite to observe that absent the necessary changes to employers' Systems, they will operate in a way that does not reflect the revised Award terms and conditions. The evidence demonstrates that the reconfiguration of such Systems and the implementation of changes to them can take several months to complete and may cause employers to incur significant costs. The evidence highlights the difficulties associated with instructing System vendors to reconfigure systems where the totality of the changes to be made to the Award are not known[150] and that to some extent, the period of time required to reconfigure Systems is dependent on the availability of third parties.

The evidence also demonstrates the substantial regulatory burden that will be imposed on employers if they are unable to implement the requisite changes to their Systems before the Award variations commence operation[151] and that the implementation of manual processes to *'work around'* the absence of automated solutions will in some cases be entirely impractical or unviable[152].

It is also relevant that such manual processes are susceptible to human error and therefore, increase the risk of non-compliance with the Award.

[149] Witness statement of Richard Cabrita at [83] – [87].

[150] Witness statement of Christopher Nillsen at [87] – [88].

[151] Witness statement of Christopher Nillsen at [91] – [98].

[152] Witness statement of Aleysia Leonard.

159. Lastly, employers should be afforded an opportunity to implement changes to their working arrangements in a careful and considered way, in consultation with their clients, so as to ensure that the principle of consumer choice and control is observed and in a way that minimises any disruption experienced by them.[153]

160. Employers covered by the Award provide services to some of the most vulnerable members of our community. It is not fair, appropriate or desirable that the quality or continuity of the care that they receive is compromised, or that, worse, employers decide that they are not in a position to continue to provide services to them in a way that is sustainable.

161. The extent to which employers are able to influence how or when clients receive their services should not be overstated. This is particularly true of aged care clients, in respect of whom, employers are bound by regulatory requirements to accommodate their clients' choices about how and when they receive care. Employers face significant potential consequences if they fail to do so.

162. It is also relevant that employers are, and have been, facing various other challenges to which they been directing their resources and will need to continue to do so. This necessarily has a bearing on the extent to which they have been and will be in a position to take the steps described above in response to the Decision. The matters to which providers have been required to devote significant attention include the Disability Royal Commission, Aged Care Royal Commission, the COVID-19 pandemic and regulatory changes concerning casual employment.

6.5 Conclusion

163. For all of the reasons set out above, the variations should not commence operation for at least 12 months from the date on which the terms of all of the variations to be made to the Award are finalised and published by the Commission in the form of a determination. We note in this regard that each of the bases upon which the Commission decided to postpone the implementation

[153] Witness statement of Aleysia Leonard and witness statement of Richard Cabrita at [116].

of changes to the Award in relation to the casual loading in the Transitional Arrangements Decision are apposite to this matter.

164. If the Commission does not accept our submissions in this regard, the Commission should, at the very least, decide that the variations will commence operation on 1 July 2022. We respectfully submit that if the Commission decides to adopt this proposition, it should move to determine the final form of the variations to be made as soon as practicable (whilst still affording a fair opportunity to the parties to address any newly proposed changes), so as to ensure that employers have the benefit of the requisite degree of certainty required in order to commence the various processes that they will need to implement in order to ensure that they are able to operate in conformance with the Award from the operative date.

7. THE DRAFT DETERMINATION

165. Ai Group makes the following submissions about the draft determination published by the Commission alongside the Decision.

7.1 Part-time Employment – Paragraph [1] of the draft determination

166. At paragraph [987] of the Decision, the Commission expressed the provisional view that the Award should be varied in two respects:

    (a) *'[T]o make it clear that working additional hours is voluntary'*; and

    (b) '*[T]o introduce a mechanism whereby a part-time employee who regularly works additional hours may request that their guaranteed hours be reviewed and increased, and their employer cannot unreasonably refuse such a request*'.[154]

167. The draft determination sets out proposed variations to the Award that reflect the Commission's provisional views. Ai Group makes the following submissions about the proposed form of those variations.

Proposed clause 10.3 – Scope of the request and agreement that may be made

168. Clause 10.3(g) contemplates the making of a request and agreement in relation to a part-time employee's hours by reference to the hours agreed between an employer and employee on engagement, in accordance with clause 10.3(c). It does not take into account the possibility that the hours agreed upon commencement may since have been varied by agreement pursuant to clause 10.3(e) of the Award.

169. The proposed clause should be varied such that it contemplates agreement reached pursuant to clause 10.3(c) as well as any agreement subsequently made pursuant to clause 10.3(e) of the Award.

[154] Decision at [987].

Proposed clause 10.3(g)(i) – Eligibility to request a review of part-time hours

170. The proposed clause 10.3(g)(i) describes the circumstances in which an employee will be eligible to request that their employer vary the agreement made pursuant to clause 10.3(c) of the Award and the nature of such a request. The proposed clause 10.3(g)(i) is in the following terms: (emphasis added)

> **(g) Review of guaranteed hours**
>
> **(i)** Where a part-time employee has regularly worked more than their guaranteed hours for at least 12 months, the employee may request in writing that the employer vary the agreement made under clause 10.3(c) to reflect the ordinary hours regularly being worked.

171. Clause 10.3(g)(i) is relevantly comprised of the following elements:

(a) The clause applies where a part-time employee has regularly worked *more* than their guaranteed hours for at least 12 months. This element of the clause appears to capture additional ordinary hours worked as well as overtime hours. Further, it requires no more than the employee working hours in addition to their *'guaranteed hours'*. It does not require any regularity to the pattern of those additional hours.

(b) The clause permits an employee to make a specific type of request. That is, the clause contemplates the making of a request that the employer vary the employee's agreed hours such that they *'reflect the ordinary hours regularly being worked'*. This element of the clause assumes that the employee is regularly working a pattern of ordinary hours that could be accommodated under clause 10.3 of the Award.

172. The aforementioned elements of the provision are, in at least one sense, contradictory. The provision proceeds on the basis that an employee who makes a request is regularly working ordinary hours that could be the subject of an agreement pursuant to clause 10.3(c) of the Award and yet an employee need not in fact be working such hours in order to be eligible to make a request.

173. As a result, by way of example, a part-time employee who regularly works hours in addition to their agreed hours would be eligible to request a variation to their agreed hours of the nature described by the proposed clause 10.3(g)(i), even though the number of additional hours worked and / or the pattern of those additional hours is not regular. As a result, a part-time employee who regularly works additional hours in circumstances where the *number* of additional hours is not regular and the days and times at which the hours worked are not regular, would nonetheless be eligible to make a request pursuant to clause 10.3(g)(i).

174. In addition, the broad eligibility criteria will potentially impose an unjustifiable and unwarranted regulatory burden on employers. That is, employers will be required to consider and respond to requests from part-time employees even if their working patterns are not characterised by sufficient regularity so as to enable a variation to their agreed hours of work which results in the employee being guaranteed a higher number of ordinary hours of work per week, with pre-determined start and finish times.

175. Further, it can reasonably be anticipated that irregularity in the additional hours worked by a part-time employee would likely cause the employer to refuse a request to vary the agreed hours because the irregularity is caused by a lack of certainty as to whether the employee can be offered additional hours on an ongoing basis and if so, when those hours will be required to be worked.

176. In addition, the proposed clause 10.3(g) does not provide for any limitation as to the frequency with which an eligible part-time employee could request that their hours of work be reviewed. Conceivably, if an employee's request is refused, they could make another request shortly (or indeed, immediately) afterward, absent any material change to the surrounding circumstances relevant to the employer's consideration of their request. The unfairness of the regulatory burden that would flow from this is self-evident.

177. In our submission, if a part-time employee makes a request that is refused on reasonable business grounds under the proposed clause 10.3(g)(iii), the employee should not be eligible to make a subsequent request under the proposed clause 10.3(g)(i) for a period of at least 6 months.

178. The proposed 6 month period fairly balances the operation of the proposed clause 10.3(g) for both employers and employees,[155] and would moderate the regulatory burden that would otherwise be placed on employers[156].

179. Accordingly, we submit that clause 10.3(g)(i) should be replaced with the following:

> **(g) Review of guaranteed hours**
>
> **(i)** Clause 10.3(g) applies to a part-time employee if:
>
> **(A)** Over the preceding 12 months, they have regularly worked ordinary hours in addition to their guaranteed hours;
>
> **(B)** Those additional hours constituted a pattern of hours which, without significant adjustment, the employee could continue to perform as a part-time employee under the provisions of this award; and
>
> **(C)** The employee has not made a request pursuant to clause 10.3(g)(iii) that was refused by the employer in the preceding 6 month period.
>
> **(ii)** A part-time employee to whom clause 10.3(g) applies is an **Eligible Part-time Employee.**
>
> **(iii)** An Eligible Part-time Employee may make a request to their employer, in writing, that the agreement made under clause 10.3(c) or an agreement subsequently made under clause 10.3(e) be varied to reflect the ordinary hours regularly worked by the employee over the preceding 12 month period.

Proposed clause 10.3(g)(iii) – Example of reasonable business grounds

180. The example provided after the proposed clause 10.3(g)(iii) states as follows:

> **EXAMPLE:** Reasonable business grounds to refuse the request may include that the reason that the employee has regularly worked additional agreed hours is temporary—for example where this is the direct result of another employee being absent on annual leave. For home care employees, reasonable business grounds to refuse a request may also include the lack of continuity of funding, changes in client numbers and client preferences.

181. Ai Group submits that:

(a) The first example provided in the above paragraph is unlikely to arise in practice. That is, it is unlikely that a part-time employee will be required to

[155] Section 134(1) of the Act.

[156] Section 134(1)(f) of the Act.

regularly work additional hours for a period of at least 12 months because another employee has been absent on annual leave.

(b) The example provided in respect of home care employees is also relevant to work performed by employees classified as *'social and community services employees'* who perform disability services work.

182. Accordingly, the following amendments should be made to the example:

> **EXAMPLE:** Reasonable business grounds to refuse the request may include that the reason that the employee has regularly worked additional agreed hours is temporary~~—for example where this is the direct result of another employee being absent on annual leave~~. For home care employees and employees performing disability services work, reasonable business grounds to refuse a request may also include the lack of continuity of funding, changes in client numbers and client preferences.

183. The proposed amendments are consistent with the need to ensure that the Award is simple and easy to understand.[157]

Proposed clauses 10.3(g) – Subsequent agreement to vary hours

184. In our submission, the proposed clause 10.3(g)(v) should be amended to clarify the effect of a variation to an agreement made under the proposed clause 10.3(c). That is, if by virtue of clause 10.3(g) an employer and employee agree that the hours of work previously agreed will be varied, it should be made clear that:

(a) The revised hours of work thereafter constitute the employee's agreed ordinary hours of work; and

(b) The revised hours of work can subsequently be varied by agreement, in a manner similar to that which is contemplated by clause 10.3(e) of the Award in relation to hours agreed upon engagement.

185. We submit that this could be achieved by a new penultimate subclause in the following terms:

[157] Section 134(1)(g) of the Act.

If the employer and employee agree to vary the agreement made under clause 10.3(c) or clause 10.3(e):

(A) The hours of work agreed upon by the employer and employee will constitute ordinary hours of work; and

(B) The agreement may subsequently be varied by agreement between the employer and employee in writing. Any such agreement may be ongoing or for a specified period of time.

Redrafted proposed clause 10.3(g)

186. Having regard to the various matters raised above, Ai Group submits that the proposed clause 10.3(g) should instead be in the following terms:

(g) Review of guaranteed hours

(i) Clause 10.3(g) applies to a part-time employee if:

(A) Over the preceding 12 months, they have regularly worked ordinary hours in addition to their guaranteed hours;

(B) Those additional hours constituted a pattern of hours which, without significant adjustment, the employee could continue to perform as a part-time employee under the provisions of this award; and

(C) The employee has not made a request pursuant to clause 10.3(g)(iii) that was refused by the employer in the preceding 6 month period.

(ii) A part-time employee to whom clause 10.3(g) applies is an **Eligible Part-time Employee.**

(iii) An Eligible Part-time Employee may make a request to their employer, in writing, that the agreement made under clause 10.3(c) or an agreement subsequently made under clause 10.3(e) be varied to reflect the ordinary hours regularly worked over the preceding 12 month period.

(iv) The employer must respond to a request made in accordance with clause 10.3(g)(iii) within 21 days.

(v) The employer may refuse a request only on reasonable business grounds.

EXAMPLE: Reasonable business grounds to refuse the request may include that the reason that the employee has regularly worked additional agreed hours is temporary. For home care employees and employees performing disability services work, reasonable business grounds to refuse a request may also include the lack of continuity of funding, changes in client numbers and client preferences.

(vi) Before refusing a request made in accordance with clause 10.3(g)(iii), the employer must discuss the request with the employee and genuinely try to reach agreement on an increase to the employee's guaranteed hours that

will give the employee more predictable hours of work and reasonably accommodate the employee's circumstances.

(vii) If the employer and the employee agree to vary the agreement made under clause 10.3(c) or clause 10.3(e), as applicable, the employer's written response must record the agreed variation.

(viii) If the employer and employee do not reach agreement, the employer's written response must set out the grounds on which the employer has refused the employee's request.

(iv) If the employer and employee agree to vary the agreement made under clause 10.3(c) or clause 10.3(e):

(A) The hours of work agreed upon by the employer and employee will constitute ordinary hours of work; and

(B) The agreement may subsequently be varied by agreement between the employer and employee in writing. Any such agreement may be ongoing or for a specified period of time.

(x) Clause 10.3(g) is intended to operate in conjunction with clause 10.3(e) and does not prevent an employee and employer from agreeing to vary the agreement made under clause 10.3(c) in other circumstances.

187. We note that in clauses 10.3(g)(iv) and 10.3(g)(vi) above, we have amended the language used in the Commission's draft determination to make clear that they apply to requests made by employees in accordance with the clause.

7.2 Minimum Payments – Paragraph [4] of the Draft Determination

188. We make the following submissions about the proposed minimum payments clause found at paragraph [4] of the draft determination.

Interaction with Part-time Employment Provisions

189. The Commission has determined that two hour minimum payment provisions will apply to part-time employees. Ai Group remains deeply concerned about the adverse effect that such a variation will have upon many employers, employees and clients of operators covered by the Award. We nonetheless appreciate that that the Full Bench has not proposed to reconsider this central issue or invited submissions in relation to it.

190. The Full Bench should give consideration to including provisions in the draft determination that serve to mitigate the unfair application of this aspect of its decision in the context of part-time employees that have been engaged, in accordance with the current terms of the Award, to undertake a pattern of work that is inconsistent with the proposed new minimum payment provisions. This should include appropriate transitional arrangements. In advancing this submission we note that the variation now proposed to be made by the Full Bench differs markedly from the claim advanced by the unions and that this is the first time that the parties have had an opportunity to comment on the specific change to the Award that the Full Bench has determined is necessary.

191. The effect of a minimum payment provision, as opposed to a minimum engagement provision, is that an employee receives the payment for a minimum of two hours even if they do not undertake two hours of work.

192. It is foreseeable that the proposed new provisions will operate in a particularly unfair manner, from the perspective of an employer, in circumstances where an employee has been employed upon an agreed arrangement that their work may involve working for less than two hours during any day or part of a day. Put simply, in such circumstances, an employer may be required to pay an employee for two hours of work but would not have any capacity to require the employee to undertake productive work during such a two hour period.

193. The unfairness of such a situation is compounded by the operation of clause 10.3 of the Award. Clause 10.3(c) requires that, prior to the commencement of employment, the employer and employee must agree upon:

    (a) A regular pattern of work, which includes the number of hours to be worked each week[158] (although the same number of hours do not need to be guaranteed each week[159]);

[158] Proposed clause 10.3(c)(i).

[159] Proposed clause 10.3(d).

(b) The days of the week that the employee will be work[160]; and

(c) The starting and finishing times each day[161].

194. Clause 10.3(e) provides that an agreement made pursuant to clause 10.3 may be varied by agreement in writing between the employer and employee. This subsequent agreement may be on going or for a specific period of time. The Award does not permit an employer to require an employee to work additional hours or at different starting or finishing times in order to align their performance of work with the proposed new minimum payment provisions.

195. For completeness, we also note that various other aspects of the Award currently operate to permit the working of shifts (or parts of shifts) of less than 2 hours' duration. Relevantly:

(a) The Award does not currently require that ordinary hours of work be performed in a continuous block, except in the context of an employee engaged in shiftwork as contemplated by clause 29 (see clause 29.4). There is no corresponding provision that applies to day work.

(b) Clause 25.6, which deals with broken shifts, regulates payment for some employees working broken shifts and provides for a maximum break of 10 hours between broken shifts on successive days. It does not limit the number of breaks between shifts.

(c) There are no minimum engagement periods for part-time employees.

196. Consistent with the flexibility available under the Award, many part-time employees are engaged pursuant to arrangements that assume minimum engagement periods of less than one hour (either on a shift or part of a shift). The evidence previously adduced in the proceedings and the further evidence to be led by Ai Group in this phase of the proceedings demonstrates the adoption of such practices.

[160] Proposed clause 10.3(c)(ii).

[161] Proposed clause 10.3(c)(ii).

197. It is unfair for an employer who entered an agreed arrangement with an employee, in accordance with longstanding terms of the Award, to provide the employee with work for less than two hours, at particular times, to now have to provide a new and greater minimum payment to such employees regardless of such arrangements. It is particularly unfair if there is no requirement that the employee actually undertake a period of work which corresponds to the relevant minimum payment. In such circumstances there would be no incentive for the employee to agree to undertake such work and an employer may have no capacity to compel the performance of such work.

198. We also observe that there is a risk that employers will simply not be able to afford the new minimum payment provisions if they are out of step with the manner in which they arrange work. In other instances, there will be a commercial imperative to seek to avoid occurring the cost of paying employees for time that is not actually worked (especially where there is no funding to cover such costs). In such circumstances, it is entirely foreseeable that employers will make the decision to restructure their operations in order to remove roles that involve the performance of short engagements. This may of course have the consequence of necessitating the termination of employees. Such an outcome would not be in the interests of employees or employers. Nor would such disruptions to the current staffing arrangements of employers be conducive to the productive performance of work or indeed optimal from the perspective of clients who, for various reasons, would be best assisted by retaining the service of a particular employee.

199. To address the concerns outlined above, Ai Group proposes that the draft determination be amended to provide for the inclusion of the following provision in the Award:

> **X. X** Clause 10.5 does not apply in relation to a part-time employee employed prior to [insert date] unless they have agreed, in accordance with clause 10.3(e) to vary their agreed hours of work such that they agree to work at least 2 or 3 hours (as appliable) per shift or period of work in a broken shift (as appliable).

200. Ai Group also proposes the following further amendment be made to clause 10.5 in order to ensure that, for both part-time and casual employees, an employer is

able to require that the employee perform a corresponding amount of work to the relevant minimum payment period:

> **X.X** An employer is not required to provide the payment referred to in clause 10.5 unless the employee undertakes that number of hours of work specified in clause 10.5 during each shift or period of work during a broken shift, if requested by their employer.

201. We contend that the second proposed variation would not of itself sufficiently address the concerns we have raised about the application of the proposed new minimum payment provision. The first variation is also necessary in order to enable an employer to permanently alter their arrangements with employees and implement workforce-wide rostering and recruitment/staffing changes, as well as to align such practices with client and operational needs.

202. It is inevitable that the changes to the Award relating to minimum payments will cause changes to the manner in which work in the sector is arranged. The further amendments we propose will serve to assist employers to implement practices that align with the proposed new provisions by serving as a catalyst for employee agreement to change their working hours to reflect these requirements.

203. The variations proposed strike a balance between the interests of employers and employees. They are necessary to ensure the Award, once amended to include the new minimum payment provisions, constitutes a fair and relevant safety net as contemplated by s.134(1) of the Act.

Attendance at a Designated Workplace

204. The application of the proposed minimum engagement period will be major change to employment conditions in the sectors covered by the Award. Although minimum engagement periods are a common feature of the modern awards system, the Full Bench should be careful to ensure that the proposed amendments to clause 10.5 operate appropriately in the context of the unique requirements and context of such sectors.

205. To this end, there is a need to amend the proposed draft determination to ensure that the change does not operate unfairly, from an employer's perspective, in circumstances where employees are undertaking shorter periods of work, but are not required to actually attend a workplace. This need is particularly pronounced in circumstances where an employee may be called upon to undertake an extremely short period of work, without being required to attend a workplace.

206. It should be uncontroversial that some employees covered by the Award undertake short periods of work away from an employer designated working location. Indeed, the claims, submissions and evidence advanced by the unions in relation to remote response work were either directed at establishing, or reliant upon, the phenomenon of the performance of such activities (albeit the unions were particularly focused on the need to address the performance of such work where it occurs outside of their 'normal' or ordinary hours).

207. In the settling of the Commission's draft determination, there is a need to reconcile the phenomenon of the above-mentioned types of work practices with the central considerations of the Full Bench that culminated in the decision to implement the proposed minimum payment provisions. Relevantly, a key consideration underpinning the Full Bench's decision appears to be a determination that minimum engagement periods are justified by the requirement to attend a particular workplace. This includes of the cost of such attendance.

208. At paragraph [254] of the Decision, the Full Bench identifies that, after a review of relevant authorities, the Full Bench in the *Part-Time and Casual Employment Case* observed that the rationale for minimum engagement terms in modern awards was to ensure that: (emphasis added)

> **[254]**…'the employee receives a sufficient amount of work, and income, for each attendance at the workplace to justify the expense and inconvenience associated with that attendance by way of transport time and cost, work clothing expenses, childcare expenses and the like. An employment arrangement may become exploitative if the income provided for the employee's labour is, because of very short engagement periods, rendered negligible by the time and cost required to attend the employment. Minimum engagement periods are also important in respect of the incentives for persons to enter the labour market to take advantage of casual and part-time employment

opportunities (and thus engage the consideration in paragraph (c) of the modern awards objective in s.134.'[162]

209. The Decision also relevantly provides as follows:

> **[246]** As we said in the Aged Care Substantive Claims Decision, the short point made in the relevant authorities is that minimum engagement terms protect employees from exploitation by ensuring that they receive a minimum payment for each attendance at their workplace to justify the cost and inconvenience of each such attendance.[163]

210. Similarly, in the context of the Full Bench's ultimate consideration of the matters it was held that:

> **[339]** Minimum engagement periods protect employees from exploitation by ensuring that they receive a minimum payment for each work attendance. Further, as mentioned earlier, the principle of neutrality of treatment supports the consistent application of minimum engagement terms to casual and part-time employees.
>
> **[340]** In our view, equity and fairness require that part-time employees covered by the SCHADS Award have an entitlement to a minimum period of payment per shift.[164]

211. In short, it is not apparent from the Decision that the Full Bench has determined that a two hour minimum payment is justified in circumstances where an employee is not required to attend a particular location for work.

212. At paragraphs [341] - [372], the Full Bench turned more squarely to a consideration of the duration of a minimum engagement period. This includes a consideration of the HSU's submissions indicating a need to consider the costs expended by employees in the performance of a shift and the time and costs expended in travelling to attend shifts.[165]

213. It does not appear that the Full Bench contemplated, or at least did not significantly focus upon, the circumstances of work undertaken remotely from a designated workplace in balancing the relevant judgments so as to determine an appropriate minimum engagement period. Rather, the focus was on the context of work requiring some travel to a particular workplace.

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[162] Decision at [254].

[163] Decision at [246].

[164] Decision at [339] - [340].

[165] Decision at [344].

214. Ai Group contends that a case for applying a minimum payment period for all work undertaken away from an employer's designated workplace has not been made out. In our submission, any argument that such an entitlement is *necessary*, in the sense contemplated by s.138, is unsustainable given the Full Bench's justification for such a quantum of payment is in part, based on the costs and inconvenience of attending the physical workplace.

215. Moreover, Ai Group contends that the imposition of a two hour minimum payment would be patently unfair to an employer if it captured instances where the work was only undertaken over a very short period of time and the employee had not incurred the disutility of needing to travel to a particular workplace to perform it. Such work might include, but would not necessarily be limited to, remote response work as contemplated by the Decision.[166]

216. We also note that any notion that the adverse impact of the new minimum employment provisions may, to some extent, be mitigated by an employer's potential capacity to alter rostering practices to 'build' a shift of such a duration, will often not be applicable in the context of work in this sector which is undertaken remotely.[167] The evidence does not establish that this is feasible or what occurs in practice in the context of work undertaken away from a workplace.

217. The draft determination should be amended to ensure, in effect, that the proposed clause 10.5 will not apply if work is not required to be undertaken at an employer designated workplace.

218. The abovementioned issues would be addressed by amending the draft determination to include a clause within the proposed clause 10.5 to the following effect:

> The requirement to provide a minimum payment in accordance with this clause only applies in circumstances where an employee is required by their employer to attend a particular workplace.

[166] See paragraph [647] of the Decision for the explanation of what constitutes this type of work.

[167] Decision at [372].

219. Adopting the above approach would leave scope for the foreshadowed remote response clause to deal with the regulation of minimum payments for employees undertaking work away from a designated workplace.

220. In advancing these submissions, we observe that there is degree of overlap between the resolution of the matters pertaining to minimum engagements and remote response work (an overlap which was not the subject of significant, if any, attention, in the proceedings to date). The insertion of the proposed clause in clause 10.5 above would nonetheless be necessary, notwithstanding the proposed regulation of matters related to remote response work for the following reasons:

    (a) There is, at this stage, no certainty as to what would constitute remote response. The Full Bench has identified a definition proposed by one of the parties but has not itself identified a potential definition.

    (b) The definition proposed by ABLA only captures discrete activities, not all work activities that may be undertaken away from a designated workplace.

    (c) It appears that the Full Bench has only, at this stage, agreed that a clause to regulate remote response work which constitutes a subset of work undertaken away from a workplace, based on the scope of work which is identified in paragraph [647] of the Decision is remote response work.

    (d) It is unclear whether remote response work is to be dealt with to finality as a product of the hearing scheduled for 6 August or whether it will be the subject of further conferencing.

221. In proposing the above amendment to the draft determination, we are conscious that it would limit the application of minimum employment provisions in the context of both part-time and casual employment. This approach is consistent with the Full Bench's conclusion at paragraph [297] of the Decision that:

[297] The principle of neutrality of treatment and the concomitant proposition that modern award terms should not be set such as to reflect a preference for one type of employment over another, supports the consistent application of minimum engagement terms to casual *and* part-time employees.[168]

222. For completeness, we submit that that the proposed amendment to the draft determination would be necessary in the sense contemplated by s.138 of the Act.

7.3 The Equal Remuneration Order – Paragraph [7] of the Draft Determination

223. The fourth column of the two tables proposed for insertion into Note 2 of clause 15, as found at paragraph [7] of the draft determination, have been given different headings. At paragraph [1259] of the Decision, *'Final Rate Percentage'* is used as the heading in both instances.

224. In our submission, '*Final Rate ERO Percentage*' should be preferred and used in both tables, as it makes it expressly clear that the rates therein are derived from the ERO. This is consistent with the approach taken in the first of the two tables at paragraph [7] of the draft determination.

7.4 Roster Changes – Paragraph [9] of the Draft Determination

225. We refer to our submissions at section 2.2 above.

7.5 Client Cancellations – Paragraph [10] of the Draft Determination

226. Ai Group makes the following submissions about the form of the proposed client cancellation clause.

Proposed Clause 25.5(f) – Client changes to a Scheduled Service

227. The proposed clause 25.5(f) reads as follows (emphasis added):

> **(f)** Client cancellation
>
> **(i)** Clause 25.5(f) applies where a client cancels <u>or changes</u> a scheduled home care or disability service, within 7 days of the scheduled service, which a full-time or part-time employee was rostered to provide.

[168] Decision at [297].

228. It is clear from the proposed provision above as well as the existing clause 25.5(f), that it is intended to apply to both client cancellations and client *changes* to a scheduled service. However, the remainder of the proposed clause 25.5 refers only to client *cancellations* and does not refer to client *changes* (see in particular clauses 25.5(f)(ii), 25.5(f)(ii)(B), 25.5(f)(iii), 25.5(f)(iv)(A), 25.5(f)(v), 25.5(f)(vi), and 25.5(f)(vii)(B)).

229. In our submission, it should be made clear that each of the aforementioned clauses apply to both client cancellations and client changes. Accordingly, the proposed clause 25.5(f) should be amended as follows:

> **(f)** Client cancellation
>
> **(i)** Clause 25.5(f) applies where a client cancels ~~or changes~~ a scheduled home care or disability service, within 7 days of the scheduled service, which a full-time or part-time employee was rostered to provide. For the purposes of clause 25.5(f), a client cancellation includes circumstances in which a client reschedules a scheduled home care or disability service.

Proposed Clauses 25.5(f)(v) – Make-up Time

230. The final sentence of the proposed clause 25.5(f)(v) is unclear. In particular, the reference to *'these cases'* is somewhat ambiguous.

231. The final sentence of the proposed clause should be replaced with the following:

> Where the employee was notified of the cancelled shift less than 12 hours prior to the scheduled commencement of the shift, clause 25.5(f)(iv)(A) applies.

Proposed use of the Term *'Shift'*

232. Paragraph [819] of the Decision states that:

> **[819]** The use of the word 'shift' in this context may require further consideration. A shift suggests all of the work performed on a particular day, which may consist of a number of client engagements.[169]

233. We respectfully agree that the use of the word *'shift'* in the proposed clause 25.5(f) does require further consideration, for the reason articulated by the Commission. This is most clearly evident from the proposed clause 25.5(f)(ii)(B),

[169] Decision at [819].

which provides that where a *'service is cancelled by a client under clause 25.5(f)(i), the employer may … cancel the rostered shift'*. The relevant issue that arises is whether clause 25.5(f)(ii)(B) permits the cancelling of an entire shift or only that portion of the shift that relates to the service to be provided to the client that cancelled the scheduled service.

234. In our submission, clause 25.5(f) should enable the cancellation of the shift or part thereof. That is, in the event of a client cancellation, the clause should afford an employer the flexibility to cancel the whole shift or a portion of the shift.

235. A cancellation by a client may result in a need to reschedule all of the work to be performed by the employee during that shift. An employee may be rostered to perform a shift that involves servicing two clients, one after the other, at a location that requires the employee to travel a significant distance. In the event that one of those clients cancels their scheduled service, the employer may seek to cancel the whole shift and re-schedule the service required by the other employee too, because this would result in a more efficient and productive outcome in the circumstances.

236. In other situations, an employer may seek to cancel only that part of a shift that is attributable to the service that was to be delivered to the client who has cancelled their service.

237. Employers should be afforded both of the options outlined above.

238. The approach we have proposed would be consistent with the need to encourage the productive performance of work.[170] It would better enable an employer to manage client cancellations in an efficient and effective way and reduce the employment costs resulting from client cancellations.[171]

[170] Section 134(1)(d) of the Act.

[171] Section 134(1)(f) of the Act.

239. In order to give effect to the proposition we have advanced, the proposed clause 25.5(f) should be varied in the ways set out below:

(a) Clause 25.5(f)(ii)(B) should be amended as follows:

(B) cancel the rostered shift or part thereof.

(b) Clause 25.5(f)(iv)(A) should be amended as follows:

(A) pay the employee the amount they would have received had the shift or part of the shift not been cancelled; or

(c) Clause 25.5(f)(v) should be amended as follows:

(v) The make up time arrangement can only be used where the employee was notified of the ~~cancelled shift~~ cancellation at least 12 hours prior to the scheduled commencement of the shift. …

(d) Clause 25.5(f)(vii)(B) should be amended as follows:

(B) the make up time must be rostered to be performed within 6 weeks of the date of the cancelled shift or partially cancelled shift.

Interaction with Minimum Payment Requirements

240. The application of the minimum payment requirements to part-time employees in the event of a client cancellation substantially undermines the flexibility that the latter provision purportedly provides.

241. For example, an employee may be rostered to perform two hours of work, during which they are required to service two clients. If one of those clients cancels the scheduled service, the employer could, as we understand it, cancel a portion of the shift in accordance with the proposed clause 25.5(f) and the employee would be required to work for the remainder of the shift. The employer would then have the option of providing the employee with make-up time in respect of the cancelled portion of the shift, so long as the employee was provided with the requisite period of notice.

242. In such circumstances, if an employee is entitled to at least two hours' pay by virtue of the proposed clause 10.5 for the work performed on that day, notwithstanding the proposed clause 25.5(f) of the Award, the utility of the client

cancellation clause in such circumstances would be wholly undermined and employers would face the very cost that the client cancellation clause is designed to relieve employers of.

243. A similar situation may arise if an employee is rostered to perform a shift that is more than two hours in length and by virtue of a client cancellation, a part of the shift is cancelled by the employer. If one or both remaining portions of the shift are of less than two hours duration and the shift is then treated as a broken shift, by virtue of clause 10.5 it appears that the employee would be entitled to at least two hours' pay in respect of each portion of the shift. As a result, the utility of the client cancellation clause will again be undermined.

244. Similar issues also arise in respect of the obligation to provide make-up time. Read in isolation, the obligation arising from the proposed clause 25.5(f) is to provide make up time that is of an equivalent duration to the shift or portion of the shift that was cancelled. However, when read with the proposed clause 10.5, a part-time employee would be entitled to at least two hours' payment in respect of that make-up time, even if the duration of the work required is less than two hours. Further, for the reasons articulated in the evidence, it may not be practicable to schedule the make-up time immediately before or after other work, such that an employee is provided with a total of at least two continuous hours of work.[172]

245. In our submission, the combined effect of the proposed clauses 10.5 and 25.5(f) would unfairly and inappropriately limit the flexibility otherwise afforded by the client cancellation provisions. Moreover, it would:

    (a) compound the regulatory burden facing employers in relation to the management of client cancellations and provision of make-up time; and

    (b) result in unfair employment costs.[173]

[172] Witness statement of Richard Cabrita at [65] – [80] and witness statement of Aleysia Leonard.

[173] Section 134(1)(f) of the Act.

246. Accordingly, the minimum payment obligation should not apply in the circumstances described above. The proposed clause 25.5(f) should be amended as follows to give effect to this:

(a) An additional clause 25.5(f)(vii)(E) should be introduced:

(E) a part-time employee will not be entitled to the minimum payments prescribed by clause 10.5 in respect of make-up time worked.

(b) An additional clause 25.5(f)(ix) should be introduced:

(ix) Where part of a shift is cancelled in accordance with clause 25.5(f), a part-time employee will not be entitled to the minimum payments prescribed by clause 10.5 in respect of the remaining portion or portions of that shift.

247. The approach proposed is consistent with the need to promote flexible modern work practices and the efficient and productive performance of work[174] and will ensure that the Award is simple and easy to understand[175].

Interaction with Broken Shift Provisions

248. A client cancellation that results in a portion of a shift being cancelled may result in a shift being broken[176] and thereafter constituting a broken shift, as alluded to in our submissions above. It is not clear whether it is intended that the Award would apply in this way. In any event, it should in our submission be made clear that a shift that is broken by virtue of a client cancellation does not constitute a broken shift for the purposes of the proposed clauses 20.10 and 25.6.

249. If a shift is to be treated as a broken shift in the circumstances described, this would result in various adverse and unfair outcomes for employers. For example:

(a) An employer would be required to pay the broken shift allowances.

(b) An employer may need to rearrange the remaining services to be provided to clients on that day so as to ensure that the shift is not broken more than

[174] Section 134(1)(d) of the Act.

[175] Section 134(1)(g) of the Act.

[176] Witness statement of Aleysia Leonard.

twice (noting that the cancellation could relate to a shift that already constituted a broken shift with two breaks in accordance with clause 25.6).

(c) An employer may need to rearrange the remaining services to be provided to clients on that day so as to ensure that the shift is not broken more than once, unless the employee agrees (noting that the cancelation could relate to a shift that already constitutes a broken shift with one break in accordance with the proposed clause 25.6).

(d) The employer would generally need to take the steps described at paragraphs (b) and (c) above at short notice (noting that the Commission has found that most client cancellations occur in the 24 hours prior to the commencement of the scheduled service[177]).

(e) The steps described at paragraphs (b) and (c) above may require the employer to liaise with the relevant clients and endeavour to reschedule when they will receive their service and / or to identify another employee to perform additional work.

250. The evidence demonstrates the complexities and impracticalities associated with altering rosters and client service schedules[178], including taking the steps described at paragraph (e) above. Employers would clearly face a significant regulatory burden and incur additional employment costs if the broken shift provisions were to apply[179]. The impact on business is likely to be particularly significant given that *'client cancellation events are not uncommon'*[180].

251. For the reasons articulated above, an additional clause 25.5(f)(x) should be included:

(x) A shift does not constitute a broken shift for the purposes of clause 20.10 and clause 25.6 where a shift is broken due to a portion of the shift being cancelled in accordance with clause 25.5(f).

[177] Decision at [784].

[178] Witness statement of Richard Cabrita at [65] – [80] and witness statement of Aleysia Leonard.

[179] Section 134(1)(f) of the Act.

[180] Decision at [784].

252. The approach proposed is consistent with the need to promote flexible modern work practices and the efficient and productive performance of work[181] and will ensure that the Award is simple and easy to understand[182].

7.6 Broken Shifts – Paragraph [11] of the Draft Determination

253. Ai Group makes the following submissions about the proposed broken shift clause, as set out at paragraph [11] of the Draft Determination.

Proposed clause 25.6(b)(ii) – Agreement to work broken shift with two breaks

254. The proposed clause 25.6(b)(ii) of the proposed clause is in the following terms: (emphasis added)

> **(ii)** An agreement under clause 25.6(b)(i) must be made <u>on each occasion</u> that the employee will be rostered to work a broken shift with 2 unpaid breaks.

255. The above clause appears to require that agreement must be reached between an employer and employee that the employee will work a shift that is broken twice separately, in respect of each occasion on which the employers seeks to have the employee work such a shift. Accordingly, it would appear that an employer and employee cannot agree on an ongoing basis that, for example:

(a) the employee will work all broken shifts that are broken twice; or

(b) more specifically, the employee will work broken shifts that are broken twice on certain days of the week.

256. The Decision does not detail the rationale for requiring that agreement must be reached *on each occasion*. In our respectful submission, the issue should be further considered, having regard to the substantial regulatory burden that it will impose on employers[183] and the significant practical issues that it will raise, including the following:

[181] Section 134(1)(d) of the Act.

[182] Section 134(1)(g) of the Act.

[183] Section 139(1)(f) of the Act.

(a) The Award requires the preparation and provision of fortnightly rosters in respect of full-time and part-time employees, two weeks in advance of each roster period.[184] Having regard to the language used in clause 25.6(b)(i), it appears that an employer would be required to obtain an employee's agreement before the roster is published.

(b) The ability for employees to agree to work such shifts on some occasions but not others will create significant uncertainty for an employer endeavouring to not only roster employees but also schedule client services. The intersection between managing the needs, demands and requirements of aged and disabled clients with Award requirements concerning rostering and hours of work, combined with the availability of staff, gives rise to countless complex and nuanced issues. The challenges associated with the determination of client schedules and employee rosters will be significantly compounded by the approach adopted in the proposed clause 25.6(b)(ii).

(c) If an employee has been engaged on the condition that they work broken shifts, it would be unfair to invalidate such arrangements and it is foreseeable that in some instances this would jeopardise the ongoing viability of the individual's employment.

257. Ai Group has previously made similar submissions in response to the HSU's claim that broken shifts ought only be worked if the employer and employee mutually agree. Our submissions were summarised in the Decision as follows:

[511] Ai Group raises 2 further points in response to the proposal:

- if an employee could at any time simply elect to either perform or not perform a particular broken shift, it would also undoubtedly complicate rostering arrangements and potentially undermine their capacity to align with an employer's operational needs. This would be a particularly problematic development in the context of the participant driven dynamics of the NDIS, and

- it is entirely unclear how, from a practical perspective, such a clause could be fairly imposed in the context of currently engaged employees. If an employee has been engaged on the condition that they work broken shifts (or in circumstances where any agreement as to their hours of work reflect the

[184] Clause 25.6(a) of the Award.

availability of broken shifts), it would be patently unfair to invalidate such arrangements and it is foreseeable that in some instances the change would jeopardise the ongoing viability of the individual's employment.[185]

258. These submissions are also relevant to the proposed clause 25.6(b)(ii).

259. In rejecting the union's claim, the Commission appeared to endorse our submissions:

> **[513]** In these circumstances and having regard to the matters raised by Ai Group, we are not persuaded that the change proposed in respect of the default of '1 break' shifts has the requisite merit.[186]

260. Having regard to all of the above, Ai Group respectfully submits that the Commission should amend the proposed provision such that it permits an employer and employee to reach an agreement on an ongoing basis that the employee agrees to work broken shifts with two breaks. This would provide employers with greater certainty for the purposes of preparing rosters and client schedules, as well as moderate the impact of the proposed change on employers, whilst nonetheless maintaining that employees cannot be required to work a broken shift with two breaks absent their agreement.

261. Clause 25.6(b)(ii) should therefore be replaced with the following:

> **(ii)** For the purposes of clause 25.6(b)(i), an employer and an employee may agree that the employee will be rostered to work a broken shift (or broken shifts) with 2 unpaid breaks:
>
> **(A)** On an ongoing basis;
>
> **(B)** On a temporary basis;
>
> **(C)** In relation to a specific broken shift (or broken shifts);
>
> **(D)** In relation to a specific day (or days) of the roster cycle; and / or
>
> **(E)** In any other manner agreed by the employer and employee.

[185] Decision at [511].

[186] Decision at [513].

262. The proposed approach is consistent with the need to promote flexible modern work practices and the efficient and productive performance of work[187]. It will also significantly moderate the regulatory burden that will otherwise be imposed on employers[188].

7.7 24 Hour Care – Paragraph [15] of the Draft Determination

263. Paragraph [1034] of the Decision states as follows:

> **[1034]** It seems to us that the threshold should be less than the ten 24-hour-care shifts proposed by ABI; but more than the 4 shift threshold proposed by the Unions. Balancing the various considerations we have decided that the threshold should be eight 24-hour-care shifts in any 12 month period which appropriately compensates for the disutility incurred. We now turn to the other elements of ABI's proposed clause and the Unions' proposal.[189]

264. It is clear from the above excerpt that the proposed clause 31.2(b) is intended to provide an employee who has worked at least eight 24-hour care shifts *'in any 12 month period'* with an additional week of annual leave.

265. Despite this, the proposed clause 31.2(b), as currently drafted, does not express a period of time within which the eight 24-hour care shifts must be worked in order to render an employee eligible for an additional week of annual leave. Accordingly, an employee who performs eight 24-hour care shifts over, for example, a period of two years, would also be entitled to an additional week of annual leave.

266. In order to align the proposed clause 31.2(b) with the view expressed by the Full Bench in the Decision, and to ensure that the Award is simple and easy to understand[190], the proposed clause 31.2(b) should be amended as follows:

> **(b)** an employee who works at least eight 24-hour care shifts in accordance with clause 25.8 during the yearly period in respect of which their annual leave accrues; …

[187] Section 134(1)(d) of the Act.

[188] Section 134(1)(f) of the Act.

[189] Decision at [1034].

[190] Section 134(1)(g) of the Act.

267. The proposed wording adopts the language currently used in clause 31.2 of the Award and is intended mitigate the additional regulatory burden that will flow from this variation to the Award. That is, rather than a requirement to assess whether an employee works eight 24 hour care shifts in *any* 12 month period, we suggest that the relevant period of time should be the yearly period in respect of which an employee accrues annual leave, which will generally correspond with when they first commenced employment in a permanent position.

1. Insert the following definitions into clause 3.1:

designated workplace means a place where work is performed in accordance with the requirements of an employee's employer, other than an employee's residence or such other location that the employee chooses to work.

remote response work means:

The performance of the following work by an employee whilst not at a designated workplace if the employee has been directed or authorised by their employer to undertake such work in these circumstances:

(i) responding to phone calls, messages or emails;

(ii) providing advice (i.e. 'phone fixes'); and

(iii) arranging call out/rosters of other employees.

Remote response work does not include:

(i) Responding to any form of electronic communication in circumstances where it is not required that such a response be provided outside of ordinary working hours.

(ii) Briefly responding to a telephone call, message or email (i.e. where this does or should reasonably take less than 5 minutes) where this is essential to the health or safety of a client and a consequence of the employee not undertaking, or not properly undertaking, a task that they were required to perform whilst at work (e.g. calls to clarify whether a client has been given medication in circumstances where handover notes have not been properly completed by the employee).

(iii) Undertaking administrative tasks associated with maintaining their employment, including: communicating with their employer in order to indicate whether they are willing to work hours outside of their roster hours or undertake a shift which is broken twice in accordance with clause X; responding to notification of cancelled shifts; responding to suggestions for make-up time for cancelled shifts in accordance with clause X; engaging with any kind of on-line platform or electronic system in order to obtain or arrange when they will work; reviewing or enquiring about their roster; renewing their driver's license if this is a requirement of their role; and either obtaining or providing a copy of related information to their employer.

2. Insert the following new clause 20.9 in order to expand the application of the provision to contemplate remote response work:

20.9 On call allowance

An employee required by the employer to be on call (i.e. available for recall to duty at the employer's or client's premises and/or for remote response work) will be paid an allowance of:

(i) $20.63 for any 24 hour period or part thereof during the period from the time of finishing ordinary duty on Monday to the time of finishing ordinary duty on Friday; or

(ii) $40.84 in respect of any other 24 hour period or part thereof on a Saturday, Sunday, or public holiday.

3. Insert a new clause 28.4 to clarify that the provision only applies if an employee is required to return to a designated workplace:

28.4 Recall to work overtime request when on call

An employee who is recalled to work overtime after leaving the workplace and is required by their employer to attend a designated workplace in order to perform such overtime work will be paid for a minimum of two hours' work at the appropriate rate for each time recalled. If the work required is completed in less than two hours the employee will be released from duty.

4. Insert the following new provisions dealing with payment for remote response work:

X Payment for remote response work

X.1 The rate of remuneration for remote response work

(a) An employee must be paid the rate that would be payable under this award for time spent performing remote response work, not including any amount payable under:

(i) Clause 29.3 – Shift allowances and penalty rates.

(ii) Clause 20.3 – Meal allowances.

X.2 Minimum payments for remote response work - when on call

(a) An employee who is on call in accordance with clause 20.9 and undertakes remote response work must receive a minimum payment for such work calculated based on the applicable minimum rate in clause 15, 16 or 17 of this award, in accordance with the following table:

Time when remote response work is performed	Minimum payment
Between 6.00am and 10.00pm	15 minutes
Between 10.00pm and 6.00am	30 minutes

X. 3 Minimum payments for remote response work – when not on call

(a) An employee who is not on call in accordance with clause 20.9 but undertakes remote response work must receive a minimum payment for such work calculated based on the applicable minimum rate in clause 15, 16 or 17 of this award, in accordance with the following table:

Time when remote response work is performed	Minimum payment
Between 6.00am and 10.00pm	30 minutes
Between 10.00pm and 6.00am	45 minutes

(b) An employee is not entitled to the minimum payment under clause X.3 if they are entitled to overtime rates in accordance with clause 28 of this award for such work and the employee is permitted to not undertake such work but voluntarily agreed to perform it.

X.4 Calculation of payments when remote response work is undertaken on multiple occasions

(a) If an employee undertakes remote response work on separate instances during a period in which they are on call, or otherwise during 24 consecutive hours, the remuneration that they are entitled to be paid in accordance with clause X.1 for undertaking such work may be applied in satisfaction of the minimum payment required to be paid under clause X.2 or X.3.

(b) If an employee performs separate instances of remote response work during a period in which they are not on call, or otherwise during a period of 24 consecutive hours, the employee will not be entitled to multiple minimum payments but will be entitled to the greatest minimum payment applicable under clause X.3.

Note: Clause X.4 operates to ensure that an employee does not receive multiple minimum payments as a consequence of undertaking remote response work on multiple occasions during a single period in which an employee is 'on call' or a single 24 hour period. For example, if an employee who is not on call undertakes remote response work from 9.00pm to 9.10pm and then from 1.00am to 1.10am they will receive a minimum payment of 45 minutes.

X.5 Recording of time worked and communication requirements

(a) An employee who performs remote response work must either:

(i) Maintain and provide to their employer a time sheet specifying the time at which they commenced and concluded performing any remote response work and a description of the work that was undertaken. This record must be provided to the employer prior to the end of the next full pay period or in accordance with any other arrangement as agreed between the employer and the employee.

(ii) Comply with any reasonable requirement by their employer that the use of an electronic system for recording the time spent undertaking remote response work and the nature of the work undertaken.

(b) An employer is not required to pay an employee for any time spent performing remote response work if the employee does not comply with the requirements of clause X.5(a). This clause does not apply if the employer has not informed the employee of the reporting requirements.

X.6 Transitional Arrangements

The monetary obligations imposed on employers by this clause may be absorbed into over award payments made to an employee who was employed prior to the inclusion of this clause in the award on [insert commencement date of award variations].

X.7 Treatment of remote response work for other purposes under the award

(a) The performance of remote response work will not count as work for the purposes of the following clauses:

(i) Clause 25.4 – Rest breaks between rostered work.

(ii) Clause 28.3 – Rest period after overtime.

(iii) Clause 28.5 – Rest break during overtime.

Form F1 – Application (no specific form provided)

Fair Work Commission Rules 2013, subrule 8(3) and Schedule 1

This is an application to the Fair Work Commission.

The Applicant

These are the details of the person who is making the application.

Title	[ ] Mr [ ] Mrs [ ] Ms [ ] Other please specify:		
First name(s)			
Surname			
Postal address	51 Walker Street		
Suburb	North Sydney		
State or territory	NSW	**Postcode**	2060
Phone number	0405 448 119 0400 395 348	**Fax number**	
Email address	brent.ferguson@aigroup.com.au ruchi.bhatt@aigroup.com.au		

If the Applicant is a company or organisation please also provide the following details

Legal name of business	Australian Industry Group
Trading name of business	Australian Industry Group
ABN/ACN	ABN 76 369 958 788
Contact person	Brent Ferguson (Director – Major Cases, Workplace Relations Advocacy and Policy) Ruchi Bhatt (Principal Adviser – Workplace Relations Policy).

How would you prefer us to communicate with you?

[X] Email (you will need to make sure you check your email account regularly)

[ ] Post

Does the Applicant have a representative?

A representative is a person or organisation who is representing the Applicant. This might be a lawyer or paid agent, a union or a family member or friend. There is no requirement to have a representative.

[ ] Yes – Provide representative's details below

[X] No

Applicant's representative

These are the details of the person or business who is representing the Applicant.

Name of person			
Firm, union or company			
Postal address			
Suburb			
State or territory		**Postcode**	
Phone number		**Fax number**	
Email address			

Is the Applicant's representative a lawyer or paid agent?

[ ] Yes

[ ] No

The Respondent

These are the details of the person or business who will be responding to your application to the Commission.

Title	[ ] Mr [ ] Mrs [ ] Ms [ ] Other please specify:		
First name(s)			
Surname			
Postal address			
Suburb			
State or territory		**Postcode**	
Phone number		**Fax number**	
Email address			

If the respondent is a company or organisation please also provide the following details

Legal name of business	
Trading name of business	
ABN/ACN	
Contact person	

1. The Application

1.1 Please set out the provision(s) of the Fair Work Act 2009 (or any other relevant legislation) under which you are making this application.

Section 594 – confidential evidence

2. Order or relief sought

2.1 Please set out the order or relief sought.

Using numbered paragraphs, set out what you are asking the Commission to do.

1. The Australian Industry Group (**Ai Group**) seeks an order from the Fair Work Commission (**Commission**), pursuant to section 594 of the *Fair Work Act 2009* (**Act**), which prohibits the publication of certain aspects of the following witness statements (**Confidential Evidence**) filed by Ai Group in this matter on the Commission's website or in any other manner:

   (a) Witness statement of Christopher Nillsen;
   (b) Witness statement of Christopher Chippendale;
   (c) Witness statement of Craig MacArthur;
   (d) Witness statement of Richard Cabrita; and
   (e) Witness statement of Aleysia Leonard.

2. The Confidential Evidence has been highlighted, in grey, in the witness statements filed by Ai Group on 3 August 2021 (**Unredacted Statements**). In addition, we have filed copies of the witness statements in which the Confidential Evidence has been redacted (**Redacted Statements**). If the order is issued in the terms sought by Ai Group, the Unredacted Statements should not be published on the Commission's website; only the Redacted Statements should be so published.

3. A draft of the order sought is **attached** to this application.

2.2 Please set out grounds for the order or relief sought.

Using numbered paragraphs, set out the grounds, including particulars, on which you are seeking the relief set out in question 2.1.

1. The Confidential Evidence can broadly be characterised as relating to:

   (a) The witness' residential addresses and / or signatures (**First Category**).

   (b) The terms of the funding arrangements in place between the witness' employer and the relevant agency or Government department (**Second Category**).

(c) The financial consequences that the witness' employer has faced or is facing (**Third Category**).

(d) Confidential information concerning the witness' employer's systems and / or business processes (**Fourth Category**).

2. The First Category of Confidential Evidence is found in each of the witness statements. The application is made in respect of the First Category on the basis of personal privacy.

3. The Second Category of Confidential Evidence is found in the witness statement of Craig MacArthur at [8], [33] and [50].

4. The Third Category of Confidential Evidence is found in the witness statement of Christopher Chippendale at [35].

5. The Fourth Category of Confidential Evidence is found in various parts of the witness statement of Christopher Nillsen and in the witness statement of Richard Cabrita at [32] and [63].

6. The application in respect of the Second Category, Third Category, and Fourth Category of Confidential Evidence is made on the basis that the relevant information is confidential to the witness' employer and / or is commercially sensitive. It is information that is not in the public domain and if released into the public domain, it would or could affect the relevant organisations' market competitiveness and / or business interests.

7. In addition, in relation to the Fourth Category of Confidential Evidence, the application is also made on the basis that if the information is made available in the public domain, it may render the witness' employer susceptible to virtual / online security breaches. That is, the identification of each of the various payroll, rostering and time and attendance systems used by the witness' employer, as well as the service providers retained by the employer in respect of those systems, the purpose for which the systems are used and the parts of the relevant organisation that use them, would enable an external third party to more readily breach the integrity of the systems and to engage in unlawful and malicious activity.

8. The order sought will not prevent parties with a legitimate interest in this matter and the evidence filed in it from accessing the Confidential Evidence. Ai Group intends to provide the Confidential Evidence, if sought, to the representatives of the other industrial organisations appearing in these proceedings on the basis that they undertake, in writing:

(a) To treat the Confidential Evidence confidentially.

(b) That they will not use the Confidential Evidence for any purpose other than these proceedings.

(c) That they will not disclose the Confidential Evidence to a third party, except to another employee of their respective organisations if it is necessary to do so for the purposes of these proceedings.

(d) That if they disclose the Confidential Evidence to another employee of their respective organisation in accordance with paragraph (c), they must take all reasonable steps to ensure that that person also deals with the Confidential Evidence in accordance with paragraphs (a) – (d).

3. The employer

3.1 What is the industry of the employer?

Aged and disability care sectors.

4. Industrial instrument(s)

4.1 Please set out any modern award, agreement or other industrial instrument relevant to the application and their ID/Code number(s) if known.

Social, Community, Home Care and Disability Services Industry Award 2010

Signature

If you are completing this form electronically and you do not have an electronic signature you can attach, it is sufficient to type your name in the signature field. You must still complete all the fields below.

Signature	
Name	Stephen Smith Head of National Workplace Relations Policy
Date	3 August 2021

Where this form is not being completed and signed by the Applicant, include the name of the person who is completing the form on their behalf in the **Capacity/Position** section.

PLEASE RETAIN A COPY OF THIS FORM FOR YOUR OWN RECORDS

[insert print number]

DRAFT ORDER

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

4 yearly review of modern awards—Social, Community, Home Care and Disability Services Industry Award 2010

(AM2018/26)

Social, community, home care and disability services

JUSTICE ROSS, PRESIDENT
DEPUTY PRESIDENT CLANCY
COMMIISSIONER LEE

MELBOURNE, 4 AUGUST 2021

4 yearly review of modern awards – Social, Community, Home Care and Disability Services Industry Award 2010 – Confidentiality orders

1. Pursuant to s.594 of the *Fair Work Act 2009*, it is ordered that the evidence contained in the witness statements listed below, which is identified as 'Confidential Evidence' by the Australian Industry Group in the application it made on 3 August 2021, must not be published on the Fair Work Commission's website or in any other manner:

    (a) Witness statement of Christopher Nillsen;

    (b) Witness statement of Christopher Chippendale;

    (c) Witness statement of Craig MacArthur;

    (d) Witness statement of Richard Cabrita; and

    (e) Witness statement of Aleysia Leonard.

PRESIDENT

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