Australian Industry Group

Application to vary the *Social, Community, Home Care and Disability Services Industry Award 2010*

Submission

(AM2023/11)

20 December 2023

AM2023/11

APPLICATION TO VARY THE *SOCIAL, COMMUNITY, HOME CARE AND DISABILITY SERVICES INDUSTRY AWARD 2010*

1. INTRODUCTION

1. An application has been made by Mr Steven Secker (**Applicant**) in the Fair Work Commission (**Commission**) to vary the *Social, Community, Home Care and Disability Services Industry Award 2010* (**Award**).

2. The specific consequences of the variations advanced by the Applicant are somewhat unclear. In substance, however, it appears that he seeks the following:

   (a) An entitlement to the existing travel allowance at clause 20.7(a), and payment for time spent travelling, in respect of travel undertaken by an employee from their home to the first client's premises, and from the last client's premises to their home (**Claim for Travel to/from Home**)[1]; and

   (b) An entitlement to the existing travel allowance in clause 20.7(a), and payment for time spent travelling, in respect of travel undertaken during a break between separate periods of work (**Travel during a Break Claim**)[2]; and

   (c) Where travel is undertaken after a broken shift, if the costs of such travel exceed the applicable broken shift allowance prescribed by clause 20.12 of the Award, the employee should be paid for the costs associated with that travel instead of the broken shift allowance (**Travel after a Broken Shift Claim**)[3].

[1] Application dated 15 May 2023, response to Q2.4 paragraph [1] and Q2.5 paragraphs [1]-[5]. Amended application dated 27 July 2023, response to Q2.4 and Q2.5 at paragraphs [1]-[4]. Applicant's submissions dated 30 October 2023, paragraphs [6]–[15].

[2] Application dated 15 May 2023, response to Q2.4 paragraph [2] and Q2.5 paragraph [6]. Applicant's submissions dated 30 October 2023, paragraph [16].

[3] Application dated 15 May 2023, response to Q2.5 paragraph [7]. Amended application dated 27 July 2023, response to Q2.5 paragraph [5]. Applicant's submissions dated 30 October 2023, paragraph [17].

(together, the '**Claims**').

3. The Applicant has filed the following materials in support of his Claims:

   (a) An application dated 15 May 2023;

   (b) An amended application, together with the proposed variation to clause 20.7(a), dated 27 July 2023;

   (c) A submission in support of his Claims dated 30 October 2023; and

   (d) A letter from the Applicant's colleague / a retired support worker,[4] Cheryl Thomas, dated 19 October 2023

   (together, the '**Applicant's Material**').

4. The Australian Industry Group (**Ai Group**) files this submission in accordance with paragraph [1](a) of the directions issued by the Commission on 14 November 2023 (**Directions**) and in response to the matters raised in the Applicant's Material.

5. Ai Group strongly opposes the Claims, for the reasons articulated in this submission. As we set out below, issues associated with payment for travel were recently considered by the Commission in major proceedings concerning the Award. After considering detailed submissions and evidence about the relevant issues, the Commission decided against introducing entitlements of the nature now pursued by the Applicant. The Applicant's Material does not disclose any probative reason for departing from the approach previously determined by the Commission.

2. THE STATUTORY FRAMEWORK

6. The Applicant asserts that he is employed under the Award, however, we have not been able to determine if that is in fact the case, as the name of his employer is not disclosed in the Applicant's Material. We would also note that the Applicant

[4] The letter of Ms Thomas describes herself as a colleague of the Applicant, however the Applicant's submissions dated 30 October 2023 at paragraph [9] describes her as a '*now retired support worker*'.

has not filed any evidence that establishes his employment status. To that end, it is not clear whether the Applicant has standing to make the Claims under s.158 of the *Fair Work Act 2009* (Cth) (**FW Act**).

7. Section 157 of the FW Act empowers the Commission to vary the Award as sought by the Applicant only if it is satisfied that making a determination to that effect is necessary to achieve the modern awards objective.

8. The modern awards objective is defined at s.134(1) of the FW Act:

> (1) The FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:
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> (a) relative living standards and the needs of the low paid; and
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> (aa) the need to improve access to secure work across the economy; and
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> (ab) the need to achieve gender equality in the workplace by ensuring equal remuneration for work of equal or comparable value, eliminating gender-based undervaluation of work and providing workplace conditions that facilitate women's full economic participation; and
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> (b) the need to encourage collective bargaining; and
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> (c) the need to promote social inclusion through increased workforce participation; and
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> (d) the need to promote flexible modern work practices and the efficient and productive performance of work; and
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> (da) the need to provide additional remuneration for:
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> (i) employees working overtime; or
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> (ii) employees working unsocial, irregular or unpredictable hours; or
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> (iii) employees working on weekends or public holidays; or
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> (iv) employees working shifts; and
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> (e) the principle of equal remuneration for work of equal or comparable value; and
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> (f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and
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> (g) the need to ensure a simple, easy to understand, stable and sustainable modern awards system for Australia that avoids unnecessary overlap of modern awards; and

(h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

This is the ***modern awards objective.***

9. In a decision[5] concerning a number of claims to reduce penalty rates in a range of modern awards (***Penalty Rates Decision***), the Commission said as follows about s.134(1) of the FW Act: (footnotes removed)

> **[115]** The modern awards objective is to 'ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions', taking into account the particular considerations identified in sections 134(1)(a) to (h) (the s.134 considerations). The objective is very broadly expressed. The obligation to take into account the s.134 considerations means that each of these matters, insofar as they are relevant, must be treated as a matter of significance in the decision making process. No particular primacy is attached to any of the s.134 considerations and not all of the matters identified will necessarily be relevant in the context of a particular proposal to vary a modern award.
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> **[116]** While the Commission must take into account the s.134 considerations, the relevant question is whether the modern award, together with the NES, provides a fair and relevant minimum safety net of terms and conditions. As to the proper construction of the expression 'a fair and relevant minimum safety net of terms and conditions' we would make three observations.
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> **[117]** First, fairness in this context is to be assessed from the perspective of the employees and employers covered by the modern award in question. So much is clear from the s.134 considerations, a number of which focus on the perspective of the employees (e.g. s.134(1)(a) and (da)) and others on the interests of the employers (e.g. s.134(1)(d) and (f)). Such a construction is also consistent with authority. In *Shop Distributive and Allied Employees Association v $2 and Under (No. 2)* Giudice J considered the meaning of the expression 'a safety net of fair minimum wages and conditions of employment' in s.88B(2) of the *Workplace Relations Act 1996* (Cth) (the WR Act). …
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> …
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> **[120]** Second, the word 'relevant' is defined in the Macquarie Dictionary (6th Edition) to mean 'bearing upon or connected with the matter in hand; to the purpose; pertinent'. In the context of s.134(1) we think the word 'relevant' is intended to convey that a modern award should be suited to contemporary circumstances. As stated in the Explanatory Memorandum to what is now s.138:
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> > '527 … the scope and effect of permitted and mandatory terms of a modern award must be directed at achieving the modern awards objective of a fair and relevant safety net *that accords with community standards and expectations*.' (emphasis added)

[5] *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001.

[121] Finally, as to the expression 'minimum safety net of terms and conditions', the conception of awards as 'safety net' instruments was introduced by the *Industrial Relations Reform Act 1993* (Cth) (the 1993 Reform Act). The *August 1994 Review of Wage Fixing Principles decision* summarised the changes made to the legislative framework by the 1993 Reform Act. In particular, the Commission noted that:

> 'The Act now clearly distinguishes between the arbitrated award safety net and the bargaining stream. It intends that the actual wages and conditions of employment of employees will be increasingly determined through bargaining at the workplace or enterprise.
>
> Under the Act the Commission, while having proper regard to the interests of the parties and the wider community, is now required to ensure, so far as possible, that the award system provides for 'secure, relevant and consistent wages and conditions of employment' (s 90AA(2)) so that it is an effective safety net 'underpinning direct bargaining' (s 88A(b)).'[6]

10. Finally, s.138 of the FW Act requires that a modern award can contain provisions only to the extent that they are necessary to achieve the modern awards objective:

> A modern award may include terms that it is permitted to include, and must include terms that it is required to include, only to the extent necessary to achieve the modern awards objective and (to the extent applicable) the minimum wages objective.

11. Section 138 limits the scope of provisions that may be included in a modern award. Ultimately, a modern award cannot include a term if it is not necessary to achieve the modern awards objective.

12. Later in these submissions, we address why the Applicant's Claims are not necessary to ensure that the Award achieves the modern awards objective.

3. THE 4 YEARLY REVIEW

13. The 4 yearly review of the Award involved major proceedings, in which a Full Bench of the Commission considered a suite of significant proposed changes to the Award. This included three claims in respect of travel, which were summarised by the Commission as follows:

> **[560]** The ASU and UWU seek to insert a new award term - clause 25.7 - Travel Time, as follows:
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> '**25.7 Travel Time**

[6] *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [115] – [121].

(a) Where an employee is required to work at different locations they shall be paid at the appropriate rate for reasonable time of travel from the location of the preceding client to the location of the next client, and such time shall be treated as time worked. The travel allowance in clause 20.5 also applies.

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

[561] The HSU's claim involves 2 variations to the SCHADS award. First, the HSU seeks a new subclause 25.6(d) to provide a payment for travel that may be undertaken in the course of a break during a broken shift, as follows:

'**25.6 Broken shifts**

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

[562] Second, the HSU seeks a new entitlement to a travel allowance for disability support workers and home care workers of $0.78 per kilometre in respect of all travel. In particular, the HSU seeks to vary clause 20.5(a), as follows:

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

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

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

(c) between the locations of any client appointments on the basis of the most direct available route.' (proposed variation in underlined text)[7]

14. The unions' claims overlap substantially with the Applicant's Claims. To some extent, however, the Claims advanced in these proceedings appear to go further, by also seeking payment for time spent travelling to the first client and home from the last client.

15. During the 4 yearly review, the unions also advanced claims to introduce new minimum payment periods, extend existing minimum payment periods and introduce various restrictions on the performance of broken shifts.[8] These claims, together with their proposals in respect of travel, were the source of significant

[7] *4 yearly review of modern awards—Social, Community, Home Care and Disability Services Industry Award 2010—Substantive claims* [2021] FWCFB 2383 (**May 2021 Decision**) at [560] – [562].

[8] May 2021 Decision at [242] – [556].

controversy and were strongly opposed by employer organisations, including Ai Group. They were the subject of extensive submissions and evidence, as well as multiple days of hearings before the Commission.

16. In considering those claims, the Commission made the following findings: (footnotes omitted)

…

1. Employees in home care and certain work in disability services have no 'base location' where they start and finish each day. A key feature of the duties of such employees is the provision of services in the clients' homes or other sites at the direction of the employer.

2. Home care workers and many disability services support workers are required to travel to various locations to provide services to clients.

3. Time spent by employees travelling varies depending on which clients they support on any given day and where they reside, and a range of factors may affect how long it takes an employee to travel from one location to another on any given day.

4. Most employees are not paid for time spent travelling to and from clients, (which includes travelling between clients and travelling to the first client / from the last client). Some employees covered by the Award can be travelling to and from clients for significant periods of time without payment.

5. There are a range of practices adopted by some employers to remunerate employees in respect of time spent travelling...

6. As mentioned earlier, employees report a range of adverse consequences with working broken shifts with short engagements and unpaid travel time (see finding 6 above at [232]).[9]

17. In relation to the issue of broken shifts and minimum payment periods, the Commission decided to:

(a) Introduce new and increased minimum payment periods. Specifically, the Commission decided to insert a three hour minimum payment period for all part-time and casual *'social and community service employees (except when undertaking disability work)'* and a two hour minimum payment period for all other part-time and casual employees.

[9] May 2021 Decision, at paragraph [584].

(b) Implement significant new restrictions on the performance of broken shifts, including by:

(i) Defining a broken shift as a shift consisting of 2 separate periods of work with a single unpaid break (other than a meal break). Two breaks are permitted if agreed by the employer and employee.

(ii) Expressly requiring that the minimum payment periods apply to each portion of a broken shift.

(iii) Prescribing a broken shift allowance, payable for each such shift. A higher allowance applies if the broken shift consists of two breaks.[10]

18. The Commission determined that: (emphasis added)

> **[585]**… minimum engagement, broken shifts and travel time are inter-related. They each impact on how work is organised and the remuneration for that work. All parties acknowledge the connection between these issues. For example, the ASU accepts that if its claim for paid travel time is successful then the quantum of its broken shift allowance claim (15%) should be less; because the claimed loading includes a component to compensate for the disutility of unpaid travel time.
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> …
>
> **[587]** The changes we propose to make are likely to result in changes to rostering practices and to how work is organised. It may also change the extent of 'unpaid' travel between engagements. Further, the broken shift allowance we propose is intended to compensate for 2 disutilities: (emphasis added)
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> • the length of the working day being extended because hours are not worked continuously, and
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> • the additional travel time and cost associated with effectively presenting for work on 2 occasions.
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> **[588]** As a general proposition we accept that employees should be compensated for the time spent travelling between engagements. But framing an award entitlement to address this issue raises several issues, including the circumstances in which any payment is to be made and the calculation of that payment. We are also conscious of the s.134 considerations, in particular:
>
> • the needs of the low paid
>
> • the impact on employment costs and the regulatory burden, and

[10] May 2021 Decision, at [1264].

- the need to ensure that any provision is simple and easy to understand.[11]

19. Following its May 2021 Decision, the Commission proceeded to convene a conference with the parties on 27 May 2021. In a subsequent decision, the Full Bench said as follows:

> **[229]** At the conference held on 27 May 2021, the President noted that since the various claims with respect to travel time were made the circumstances have changed in that we have decided to vary the minimum payments term and the broken shifts term. The President observed that:
>
> > 'once the changes are made around minimum engagement and broken shifts and they've operated for a period, that parties have liberty to have the matter called back on and can pursue a particular outcome in relation to travel time.'
>
> We endorse these remarks. It seems to us that it is likely that employers will seek to change rosters and patterns of work in response to our decisions in respect of minimum payment periods and broken shifts. These changes may well reduce the incidence of unpaid travel time.
>
> **[230]** We have decided to defer further consideration of the various travel time claims until the variations in respect of minimum payment periods and broken shifts have been in operation for 12 months.[12]

20. On 18 October 2021, the Commission further determined that: (emphasis added)

> **[244]** …There is an interrelationship between the remuneration for broken shifts and travel time. In setting the broken shift allowances, we have taken into account the additional travel time associated with effectively presenting for work on 2 occasions. It follows that if the SCHADS Award is subsequently varied to provide a payment for travel time, the quantum of the broken shift allowances may require downward adjustment.[13]

21. It is apparent from the above passages that the Commission, after considering claims that were substantially similar to those advanced by the Applicant in these proceedings, determined that:

    (a) The question of whether the Award should provide for payment for travel is interrelated with the operation of minimum payment periods and the broken shift provisions. A proposal to vary one entitlement should not be considered in isolation; rather, it and should be considered in the context of

[11] May 2021 Decision, at [585] and [587] – [588]

[12] *4 yearly review of modern awards — Social, Community, Home Care and Disability Services Industry Award* [2021] FWCFB 5244 (**August 2021 Decision**), at paragraphs [229]–[230].

[13] *4 yearly review of modern awards — Social, Community, Home Care and Disability Services Industry Award* [2021] FWCFB 5641 (**October 2021 Decision**), at paragraph [244].

the other two entitlements. This was demonstrated by the Commission's comment that if the Award is subsequently varied to provide payment for travel time, the quantum of the broken shift allowances it had set may require downward adjustment.[14]

(b) As a result of the variations made to the minimum payment and broken shift provisions in the Award, employers will likely seek to change rosters and patterns of work, such that the incidence of *'unpaid travel time'* would be reduced.

(c) Attempting to frame an award entitlement relating to travel raised several complex issues, including the circumstances in which any payment would be made and how the entitlement would be calculated.

4. RESPONSES TO THE APPLICANT'S CLAIMS

A. The proposed variations

22. The Applicant submits that the extant clause 20.7 of the Award makes no reference to payment for travel to/from the first and last client's premises. In that regard, the Applicant proposes variations to clause 20.7(a) of the Award, which seek to make this express and to provide a method for calculating the time and distance for the purposes of deriving an employee's entitlement, as follows:

> The following to be added to 20.7(a) of the [Award]:
>
> (i) travel is to be calculated using Google mapping, or an equivalent product agreed to by both the employer and its employees, subject to all employees of the same service provider being treated the same way, allowing for the shortest or quickest route from the employee's base (or the employer's office), to first client, from each client to each subsequent client, and from the last client to the employee's base (or the employer's office).
>
> (ii) Reasonable time taken travelling to and from clients is considered work time as the employee's contract is with the employer, not with the employer's client, and entails travelling to the clients and returning to base after providing services for all scheduled clients on that day.

[14] October 2021 Decision, at paragraph [244].

(iii) deviations causing extra travel time or distance will only be paid when authorised by the employer.[15]

23. Although the proposed amendments relate to the extant travel allowance provision, it appears that they are intended to also result in payment for time spent travelling.

24. In our submission, the proposed variations above present various practical issues with calculating the amount of payment to which an employee would be entitled. For example:

(a) The proposed variation requires payment for '*reasonable time taken travelling to and from clients*'. This proposed variation does not appear to require payment for time *actually* spent travelling between the aforementioned locations, but rather, an assessment of whether such travel time is *reasonable* by reference to Google Maps or an equivalent product agreed to by the employer and its employees (and subject to all employees of the employer being treated the same way). What might be considered *'reasonable'* is unclear and susceptible to disputation.

(b) The proposed variation (which appears to be based on time) is at odds with clause 20.7(a) which calculates travel allowances by reference to kilometres travelled. The proposed variation is not simple and easy to understand.[16]

(c) The shortest route may not always be the quickest route and vice versa. The proposed variation allows for either to be acceptable in calculating travel time, meaning an employee might, for example, take the shortest route that has the most traffic and therefore requires the longest period of travel. Under proposed clause 20.7(a)(i), payment would still be required.

[15] Amended application dated 27 July 2023, response to Q2.4.

[16] FW Act, s.134(1)(g).

This is not a fair outcome for employers[17] and could foreseeably result in increased employment costs.[18]

(d) It is unclear whether the calculation of travel time is to be undertaken at the time of rostering, or at the time of travel. For example, at the time of rostering (which must take place at least 2 weeks before the commencement of the roster period)[19] travel times may differ to when this is calculated at the time of travel, given the impact daily traffic conditions have on travel times. If accepted, the proposed variation could foreseeably result in travel payments being higher than the time actually spent travelling, particularly as Google Maps and other products make assumptions on travel time based on expected traffic conditions which might not in fact materialise on the day travel is undertaken. Again, this is not a fair outcome for employers[20].

(e) Given the practical issues identified above, we further submit that it would not be appropriate for the Commission to accept that a third party platform (including Google Maps) should be the central mechanism for calculating reasonable time travelled between two points for the purposes of determining amounts payable under an award. There is no evidence before the Commission as to the accuracy of Google Maps or other alternate product in the calculation of travel time.

25. Whilst these are just some of the fundamental issues we have identified with the proposed variations, they clearly highlight the difficulties with introducing a travel payments clause into the Award. Indeed, the practical difficulties of devising such a clause was noted by the Commission as part of the 4 yearly review proceedings, after receiving detailed submissions from the parties about these matters.[21]

[17] FW Act, s.134(1).

[18] FW Act, s.134(1)(f).

[19] Clause 25.5 of the Award.

[20] FW Act, s.134(1).

[21] May 2021 Decision, at paragraph [588].

B. The 4 yearly review

26. The Applicant submits that the proposed variations would address the issues identified as part of the 4 yearly review proceedings[22] and that consideration of the travel payments is now warranted given that more than 12 months have passed since the August 2021 Decision.[23]

27. The Applicant's Claims are substantively the same as those that were advanced by the HSU, ASU and UWU during the 4 yearly review of the Award. Those claims however, were not accepted by the Commission, despite it finding that most employees '*are not paid for time spent travelling to and from clients, (which includes travelling between clients and travelling to the first client / from the last client)*.' The Commission did not accept the unions' claims because it determined to substantially vary the Award to incorporate new minimum payment and broken shift entitlements. The Full Bench considered that those changes would likely result in employers changing their existing rostering practices, such that the incidence of *'unpaid travel time'* would be reduced.

28. We submit that there is simply no evidence before the Commission which would suggest that the existing entitlements under the Award, including minimum payments, broken shift entitlements and travel allowances are inadequate or insufficient in addressing the issues described in the paragraphs above. In our view, the concerns which were raised by the unions as part of the 4 yearly review were remedied by the various changes to the Award following those proceedings. The material before the Commission does not demonstrate that the safety net is deficient or that the Award is not achieving the modern awards objective.

29. The Commission found that the changes made to minimum payment and broken shift provisions, amongst various other changes to the Award, would '*significantly impact businesses… in particular they will increase employment costs; impose constraints on working arrangements (in particular they will have the consequence of reducing employer flexibility in rostering); and will result in*

[22] See paragraph [584] of the May 2021 Decision.

[23] Applicant's submissions dated 30 October 2023, at paragraph [10].

increased regulatory burden.'[24] In the circumstances, the Commission should approach any proposal to introduce additional employee entitlements related to travel with considerable caution. The cumulative impact of any such change when coupled with the aforementioned variations made to the Award during the 4 yearly review, may have a significant adverse impact on employers. This is particularly so given the funding constraints facing many employers in the sector; a matter that we return to later in this submission.

30. One of the underlying issues that was being considered during the 4 yearly review was that employees covered by the Award were not being provided sufficient remuneration for the effort and cost of undertaking short periods of work, including the disutility of travelling to perform such work. The unions' claims in respect of travel were just one of the mechanisms by which they sought to address that issue, alongside the claims for new and longer minimum payment periods and additional restrictions on the performance of broken shifts. Indeed, the Commission dealt with these claims together, found that they were interrelated and went so far as to state that the introduction of travel payments into the Award may warrant a reduction in the broken shift allowance.[25]

31. Accordingly, if the Commission is minded, or potentially minded, to adopt the Applicant's Claims in this matter, this would necessarily warrant a wholesale review of the extant broken shift and minimum payment period provisions too. Consideration would necessarily need to be given to whether those provisions ought to be revised, for the purposes of ensuring that the Award continues to provide a safety net that is fair to employers and employees. Specifically, we would argue that the broken shift allowance should be reduced, that the minimum payment periods should be reduced or eliminated and that various restrictions applying to broken shifts should also be removed.

32. In deciding to defer the consideration of travel payments under the Award, we anticipate that the Commission envisaged that any future consideration of such

[24] August 2021 Decision, at paragraph [312].

[25] See the Commission's remarks regarding broken shift allowances and travel payments at paragraph [244] of the October 2021 Decision.

matters should (at the very least) be informed by evidence about employers' rostering practices in response to the new minimum payment and broken shift provisions in the Award, and the incidence of *'unpaid travel'* since the implementation of those changes.[26] No such evidence has been filed in these proceedings.

33. Having regard to our submissions above, the Commission should conclude that a case has not been made out by the Applicant in support of the Claims.

C. Travel to/from the first and last client is generally not work

34. The Applicant submits that where travel is undertaken from the employee's home to the client's premises and back, such travel is undertaken in the *'course of their duties*'. We fundamentally disagree. Time spent travelling to/from the first and last client *generally* does not constitute work. Thus, no entitlement to the allowance prescribed by clause 20.7(a) does or should arise. Similarly, for this reason, an employee typically does not have an Award-derived entitlement for time spent undertaking such travel.

35. Relevantly, where such travel is undertaken, employers are not able to and do not seek to instruct the employee as to matters such as the route of travel to be undertaken or even the time of the travel. Further, it is entirely foreseeable that employees, before commencing work at the first client's premises and after finishing work at the last client's premises, may travel to other locations and not directly to the client's premises or back home. Such variables will impact upon how much time an employee spends travelling.

36. The application of clause 20.7 (or as it then was, clause 20.5) was considered by Commissioner Saunders in *Re Alzheimer's Australia WA Ltd*[27]*.* Here, an application was made for the approval of an enterprise agreement that contained a provision similar to clause 20.7(a). Relevantly, Commissioner Saunders stated that: (emphasis added)

[26] See August 2021 Decision at paragraphs [229] – [230].

[27] [2016] FWCA 4863.

> **[7]** The SACS Award does not specify when an employee commences their duties, whereas the Agreement does. Clause 18.8 of the Agreement makes clear that an employee commences their duties each day on arrival at the first place of work and finishes work on departure from the last place of work for the day. For a Support Worker who travels to and between the residences of clients, the residences of the clients are the Support Worker's places of work (clause 18.9 of the Agreement).
>
> **[8]** Although the SACS Award does not expressly state when an employee commences their duties, if an employee made a claim under the SACS Award for the payment of a travel allowance in respect of their travel from their home to the residence of their first client for the day in circumstances where the employee's usual practice was to travel from their home directly to the residence of a client, I am of the view that such a claim would not succeed. That is because an employee's duties do not commence until they arrive at their workplace. For an employee who is engaged to provide services at the residences of clients, the employee's places of work are the residences of their clients. Accordingly, the SACS Award would, in my view, be given the same interpretation as clauses 18.8 and 18.9 of the Agreement in the circumstances to which I have referred.
>
> **[9]** Because the Agreement confers on a Support Worker an entitlement to the payment of a travel allowance insofar as the Support Worker is required to travel more than 20km from their home to the residence of a client whereas the SACS Award does not, the Agreement provides a benefit over and above the SACS Award. Accordingly, in my view, the motor vehicle allowances in the Agreement are more beneficial than the motor vehicle allowances in the SACS Award.

37. The emphasised parts of the passage above directly deals with the Applicant's submission, namely that an employee's duties do not commence until they arrive at the workplace, which in this case, is the relevant client's premises. As a general proposition, work does not commence from when the employee leaves their home to go to work, noting that an employee's contract of employment may provide otherwise.

38. The Applicant further submits that there should be no inconsistency between the position in relation to payment for travel between the employer's office and the client's premises, and travel between the employee's home and the client's premises.

39. Clause 20.7(a) of the Award is directed at compensating an employee for the costs of travel undertaken in the '*course of their duties*'. If travel is undertaken between the employer's office and the client for the purposes of picking up supplies and attending meetings/training (as noted in the Applicant's submissions),[28] such travel *may* constitute travel that is undertaken at the

[28] Applicant's submissions dated 30 October 2023, paragraph [4].

direction of their employer and in the course of the employee's duties. Whether time spent travelling constitutes work requires a consideration of matters including:

(a) the contractual arrangement in place between the parties; and

(b) whether there has been any express instruction by the employer for the employee to undertake the relevant travel.

D. Other matters

40. The Applicant submits that if employees were required to attend the employer's office prior to or after travelling to a client's premises, this would result in congestion and increased risk of injury in the car park. It would also be more costly to first travel to the office before attending the first client's premise and before returning back home after finishing work with the last client.[29]

41. The Applicant's submission assumes that if travel payments are not made for travel between the employee's home and the first/last client's premises, employees will attend the employer's office before or after attending a client's premises in order to attract travel payments. There is however no evidence of employees doing so under the extant Award provisions.

42. The Applicant also raises a number of other seemingly irrelevant matters which purportedly support his Claims. In our submission, the assertions identified below (even if they were accepted to be true), are not factors relevant to determining whether the proposed variations meet the modern awards objective for the purposes of ss.157, 158 and 134 of the Act:

(a) Worker's compensation does not cover travel to/from the first and last client.[30]

[29] Application dated 15 May 2023, response to Q2.5, paragraph [5]. Applicant's submissions dated 30 October 2023, paragraph [7] and [15].

[30] Applicant's submissions dated 30 October 2023, paragraph [9], referencing the letter from Cheryl Thomas dated 19 October 2023.

(b) Cost of travel to/from the first and last client is a legitimate tax deduction, as it is a cost incurred in producing income.[31]

(c) The alternative to paying for travel per kilometre is to provide the employee with a car specifically for work use.[32]

(d) The impact of Centrelink calculations.[33]

E. Travel during a Break Claim

43. The Applicant submits that breaks between shifts are too short and inadequate to be used for personal reasons; therefore, time spent traveling during a break between shifts should be payable, in addition to the existing travel allowance in clause 20.7, minimum payment entitlements and broken shift allowances.

44. We respond as follows.

45. *First* and foremost, the Applicant has not provided any evidence of his rostering arrangements so as to provide the parties and the Commission with the opportunity to ascertain the length of his breaks. Needless to say, there is no evidence before the Commission of the prevalence of such circumstances arising in the industry more generally.

46. *Second*, under the Award, a broken shift constitutes 2 periods of work with 1 unpaid break other than a meal break, or 3 periods of work with 2 unpaid breaks other than a meal break (provided that the employee agrees to perform a broken shift under such arrangement). In either case, a broken shift is characterised by an unpaid break(s) which splits up periods of work. During such breaks, employees are free from duty and able to undertake other personal activities. Indeed, evidence filed in the 4 yearly review proceedings demonstrated that in some circumstances employees travel to a separate location (such as their

[31] Applicant's submissions dated 30 October 2023, paragraph [12].

[32] Applicant's submissions dated 30 October 2023, paragraph [18].

[33] Application dated 15 May 2023, covering email and response to Q2.5, paragraph [4]. Applicant's submissions dated 30 October 2023, paragraph [14].

home) in the intervening period between clients.[34] In that regard, travel that is undertaken during an unpaid break would not constitute a part of the employee's duties.

47. *Third*, the Applicant seems to suggest that the broken shift allowance that is payable would be less than the time and cost of travel that is undertaken during a break. In our submission, the Commission in determining the quantum of the broken shift allowance which now features in the Award, has already taken into account the disutility associated with presenting for work on 2 occasions.[35] The Applicant has provided no cogent reason or evidence as to why the Commission should revisit the adequacy of the broken shift allowance in compensating employees for this particular disutility in respect of travel undertaken as part of performing a broken shift.

F. Travel after a Broken Shift Claim

48. The Applicant submits that if payment for travel immediately after a broken shift would exceed the broken shift allowance, the employee should be paid for travel in lieu of the broken shift allowance.[36]

49. The circumstances contemplated by this element of the Applicant's Claims are not clear. To the extent that the Applicant is referring to travel undertaken from the last client to their home, we have dealt with this scenario extensively in our earlier submissions.

5. THE CURRENT FUNDING ARRANGEMENTS

50. In considering the Applicant's Claims, it is important to note that many employers covered by the Award operate under tightly constrained funding arrangements under the National Disability Insurance Scheme (**NDIS**).

[34] Transcript of proceedings on 15 October 2019 at PN468 (cross-examination of Ms Stewart) and PN527 (cross-examination of Mr Fleming).

[35] May 2021 Decision, at paragraph [587].

[36] Amended application dated 27 July 2023, response to q2.5 paragraph [5]. Applicant's submissions dated 30 October 2023, paragraph [17].

51. The following is stated in the current edition of the NDIS pricing guidelines 2023-24: (emphasis added)

Provider Travel

Providers can only claim from a participant's plan for travel costs in respect of the delivery of a support item if all of the following conditions are met:

- The NDIS Pricing Arrangements and Price Limits indicates that providers can claim for Provider Travel in respect of that support item; and
- The proposed charges for the activities comply with the NDIS Pricing Arrangements and Price Limits and
- The activities are part of delivering a specific disability support item to that participant; and
- The support is delivered directly (face-to-face) to the participant; and
- The provider explains the activities to the participant, including why they represent the best use of the participant's funds (that is, the provider explains the value of these activities to the participant); and
- The provider has the agreement of the participant in advance (that is, the Agreement between the participant and provider should specify the travel costs that can be claimed); and
- The provider is required to pay the worker delivering the support for the time they spent travelling as a result of the agreement under which the worker is employed; or the provider is a sole trader and is travelling from their usual place of work to or from the participant, or between participants.

52. As is apparent from the above extract, NDIS funding in respect of travel undertaken by employees providing '*core supports*' is constrained by the fact that funding is available only if the client agrees that the employer may claim the funding. Such agreement would diminish the amount of funding available to the client to utilise in respect of other services or supports. Unless an employer declines to provide the relevant services if the client does not agree to the funding being claimed, there is, as such, no imperative for a client to consent to the funding being claimed.

53. We understand that these funding arrangements are not determinative of the matter, having regard to the Commission's comments as part of the 4 yearly

review proceedings.[37] In our submission, however, the funding constraints above nevertheless weigh heavily against the grant of the Applicant's Claims, as it would be unfair if employers are prohibited under the NDIS from recovering the costs that would be associated with paying an employee for time spent travelling pursuant to the Applicant's Claims, unless the clients agree to apportioning a part of their funding towards that particular purpose.

54. In circumstances where clients agree to spend their funding for travel payments, this may limit the extent to which they are able to access other services and essential care. This could plainly have a very negative impact on those that access the employers' services. This is an important discretionary consideration that weights against the grant of the Claims.

6. SECTION 138 AND THE MODERN AWARDS OBJECTIVE

55. Ai Group contends that the Applicant's Claims are not necessary in the sense contemplated by s.138 of the Act. In the submissions below, we address the mandatory considerations contemplated by s.134(1).

The relative living standards and the needs of the low paid (s.134(1)(a))

56. There is no evidence that the Applicant's Claims will materially improve the relative living stands and needs of the low paid.

57. Further, as already identified, employers' funding constraints may, in some circumstances, result in employers recovering amounts payable pursuant to the Applicant's Claims. As a result, some employers may decline to provide certain services, due to the travel that would be required to provide such service. To that end, the Applicant's Claims could have the perverse effect of actually reducing the amount of work available to employees.

[37] *4 yearly review of modern awards – Group 4 – Social. Community, Home Care and Disability Services Industry Award 2010 – Substantive Claims* [2019] FWCFB 6067.

58. Clearly this would also have a very significant impact on users of the employers' services too. This is an important discretionary consideration that should be taken into account.

The need to improve access to secure work across the economy (s.134(1)(aa))

59. This is a neutral consideration in this matter.

The need to achieve gender equality in the workplace by ensuring equal remuneration for work of equal or comparable value, eliminating gender-based undervaluation of work and providing workplace conditions that facilitate women's full economic participation (s.134(1)(ab))

60. This is a neutral consideration in this matter.

The need to encourage collective bargaining (s.134(1)(b))

61. The issues raised in the Applicant's Material are best dealt with at the enterprise level. This would enable parties to develop a scheme that reflects their specific practices, where they have the capacity to do so. To that end, the absence of a one-size-fits-all provision in the safety net may encourage employers and employees to engage in collective bargaining at the enterprise level.

62. Given the notoriously low margins in the sector, the proposed variations would potentially discourage employers from bargaining, as they would again raise the bar for the application of the better off overall test, in circumstances where this bar has already been significantly raised as a result of the changes flowing from the 4 yearly review proceedings.

63. This matter weighs against the Applicant's Claims.

The need to promote social inclusion through increased workforce participation (s.134(1)(c))

64. The imposition of additional unsustainable employment costs in the form of the Claims advanced by the Application may undermine workforce participation to

the extent that it results in employers no longer being able to provide some services.

65. In our submission, this matter weighs against the Applicant's Claim.

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

66. The proposed variations sought by the Applicant are not conducive to flexible modern work practices and the efficient and productive performance of work.[38] They would require payment to be made to an employee in circumstances where the employee is not engaging in productive work.

67. In our submission, this matter weighs against the Applicant's Claim.

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

68. This is not a relevant consideration in this matter and is therefore neutral.

The principle of equal remuneration for work of equal or comparable value (s.134(1)(e))

69. There is presently no material before the Commission which would suggest that the approach to regulating travel time under the Award is a product of any gender-based considerations.

70. This matter is a neutral consideration.

The likely impact of any exercise of modern award powers on business, including productivity, employment costs and regulatory burden (s.134(1)(f))

71. Many employers covered by the Award are small, not-for-profit organisations that rely very heavily on Government funding. The potential imposition of new obligations relating to payment for travel which are fundamentally out of step with

[38] FW Act, s.134(1)(d).

the NDIS funding arrangements would undoubtedly have an adverse impact on businesses. They would impose new, potentially substantial costs on employers that may not be recoverable under the NDIS.

72. The Applicant's Claims would also expose employers to costs that are potentially very difficult to forecast and budget. For example, the period of time that an employee may spend in traffic travelling might vary dramatically, depending on factors such as the time of day, the geographical location at which such travel occurs, and the software that is used to ascertain the relevant route (which, under the variations proposed by the Applicant, would further require agreement to be reached with all employees).

73. To the extent that the claims will require employers in the sector to measure or calculate time spent travelling (or notionally travelling) by their employees, in circumstances where they are not currently so required, that would impose an additional administrative burden on such employers. Employers would likely need to procure new payroll and record keeping functionalities to facilitate compliance with the new obligations.

74. This matter weighs heavily against the granting of the Applicant's Claims.

The need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards (s.134(1)(g))

75. The proposed clauses are far from simple or easy to understand. In particular, as earlier stated, the proposed variation to clause 20.7(a) requires payment for '*reasonable time taken travelling to and from clients*'. This proposed variation is at odds with clause 20.7(a) which calculates and pays the travel allowance by reference to kilometres travelled instead.

76. We also contend that the need to ensure a '*stable and sustainable modern award system*' weighs against the granting of such fundamental changes to the obligations that the Award imposes upon employers, absent any certainty for employers in being able to determine if, and to what extent, such costs can be recouped under current funding arrangements – given that funding for travel is

entirely dependent on clients agreeing to pay for such costs. There is, as earlier stated, little incentive for clients to apportion a part of their funding to cover the employee's travel costs, which consequently means that employers will be left to bear this financial burden, should the proposed variations be made.

77. Further, substantially similar claims were recently considered and were not granted by the Commission. The need to maintain a stable system tells against granting the Applicant's Claim in this context.

78. This matter weighs heavily against the granting of the Applicant's Claims.

The likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy (s.134(1)(g))

79. There is no material before the Commission to enable a proper consideration of this matter. This matter is a neutral consideration.