



BACKGROUND PAPER 1

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

**4 yearly review of modern awards—Award stage—Group 4—*Social, Community, Home Care and Disability Services Industry Award 2010*—
substantive claims
(AM2018/26)**

MELBOURNE, 9 AUGUST 2021

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

Remote Response/Recall to Work Overtime

Background

[1] Clause 28.4 of the SCHADS Award deals with ‘Recall to work overtime’ and states:

‘28.4 Recall to work overtime

An employee recalled to work overtime after leaving the employer’s or client’s premises will be paid for a minimum of two hours’ work at the appropriate rate for each time so recalled. If the work required is completed in less than two hours the employee will be released from duty.’

[2] Clause 20.9 of the Award, ‘On Call allowance’ states:

‘20.9 On call allowance

(a) An employee required by the employer to be on call (i.e. available for recall to duty) will be paid an allowance of 2.0% of the standard rate in respect to 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.

(b) The allowance will be 3.96% of the standard rate in respect of any other 24 hour period or part thereof, or any public holiday or part thereof.’

[3] The current on call allowances in the SCHADS Award are \$20.63 (clause 20.9(a)) and \$40.84 (clause 20.9(b)) respectively.

[4] 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’.

[5] The SCHADS Award does not currently directly address work performed outside of ordinary hours that does not require travel to a physical workplace.

[6] ABI and the ASU are pursuing claims in respect of this issue.

[7] The submissions and witness evidence relevant to remote response/recall to work claims are attached to this Background Document.

The ABI Claim

[8] Later, some minor amendments were made to ABI’s proposed variation in its further amended draft determination filed on 10 February 2020. In its final form ABI proposes the following variations:

‘3. By deleting clause 20.9 and inserting in lieu thereof:

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 duties) will be paid an allowance of:

- (i) \$19.78 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) \$39.16 in respect of any other 24 hour period or part thereof on a Saturday, Sunday, or public holiday.

4. By inserting at clause 3.1:

3.1 In this Award, unless the contrary intention appears:

Workplace means a place where work is performed except for the employee’s residence.

5. By deleting clause 28.4 and inserting in lieu thereof:

28.4 Recall to work

- (a) An employee who is recalled to work overtime after leaving the workplace and requested by their employer to attend a 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.

6. By inserting new clauses 28.5 and 28.6:

28.5 Remote response when not on call

- (a) An employee who is not required to be on call and who is requested to perform work by the employer via telephone or other electronic communication away from the workplace (a remote response request) will be paid at the appropriate rate for a minimum of one hour's work on each occasion a remote response request is made, provided that multiple remote response requests made and concluded within the same hour shall be compensated within the same one hour's payment. Any time worked continuously beyond one hour will be rounded to the nearest 15 minutes and paid accordingly.
- (b) Any further requests to perform remote response work will be paid an additional one hour for each time so requested provided that multiple remote response requests made and concluded within the same hour shall be compensated within the same one hour's payment.
- (c) An employee who performs work in accordance with this clause 28.5 must maintain and provide to their employer a time sheet specifying the time at which they commenced and concluded performing any work away from the workplace 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.
- (d) The employer is not required to pay an employee for any time spent performing work away from the workplace in accordance with this clause if the employee does not comply with the requirements of clause 28.5(c). Clause 28.5(d) does not apply if the employer has not informed the employee of the reporting requirements.
- (e) Clause 28.5 does not apply to an employee performing remote response duties in accordance with clause 28.6 of this Award.

28.6 Remote response when on call

- (a) Clause 28.6 applies to an employee who is required to be on call and who is required to perform work by the employer via telephone or other electronic communication away from the workplace.
- (b) Where an employee is directed or authorised by their employer to perform remote response duties:
 - (i) between 6.00am and 10.00pm, the employee will be paid at the appropriate rate specified in this Award for any such work performed between these hours, with a minimum payment of 15 minutes. Where an employee undertakes multiple separate instances of remote response duties during a particular period and the total time spent performing those duties does not exceed 15 minutes, only one minimum payment is payable. Time worked past 15 minutes will be rounded up to the nearest 15 minutes.
 - (ii) between 10.00pm and 6.00am the employee will be paid at the appropriate rate for a minimum of 45 minutes work on each occasion a remote response request is made, provided that if multiple remote response requests are made and concluded within the same 45 minute period they shall be compensated within the same 45 minute payment. Any time worked continuously beyond each 45 minute period will be rounded up to the nearest 15 minutes and paid accordingly.
- (c) An employee who performs remote response duties must maintain and provide to their employer a time sheet specifying the time at which they commenced and concluded performing any remote response duty 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.

- (d) The employer is not required to pay an employee for any time spent performing remote duties if the employee does not comply with the requirements of clause 28.6(c). Clause 28.6(d) does not apply if the employer has not informed the employee of the reporting requirements.’

The Submissions

[9] ABI submits that its proposal is intended to provide a scheme of remuneration for situations where an employee is required, outside of their working hours, to provide advice or assistance remotely. ABI submits that this is not a novel claim or provision, and that similar types of provisions appear in:

- the *Local Government Award 2020* (at clauses 21.4(c) and 21.6(d))
- the *Local Government (State) Award 2014* (NSW) (at clause 19E)
- the *Water Industry Award 2020* (at clauses 20.4(d) and 20.6(d))
- the *Business Equipment Award 2020* (at clauses 20.6(d) and 20.7), and
- the *Contract Call Centres Award 2020* (at clauses 20.4(c), 20.7).¹

[10] The relevant extracts from the above awards are set out at Attachment H to the *May 2021 Decision*.

[11] ABI submits that its proposal provides a fair and relevant minimum safety net payment regime for this type of remote work, which is proportionate to the lower level of disutility associated with remote work.

[12] NDS supports the revised ABI claim in relation to remote response, and the consequential amendments to the on-call provisions and the recall to work overtime provisions.

[13] AFEI does not oppose the ABI claim, subject to clarification that the provisions only apply to ‘response’ duties and do not apply to employees who are under a general instruction or requirement to undertake work from home, including routine overtime work (or simply to ensure projects are completed within deadlines), which is performed from home.

[14] AFEI proposes the following amendments to ABI’s claim:²

‘28.5 Remote response when not on call

¹ This list has been updated to reflect the clause numbering of the new 2020 modern awards.

² [AFEI Submission](#), 19 November 2019 at para 1.25.

(a) An employee who is not required to be on call and who is requested by the employer to perform work on a particular occasion for a particular unplanned incident by the employer where the work is a response via telephone or other electronic communication away from the workplace.

28.6 Remote response when on call

(a) This clause applies to an employee who is required to be on call and who is required by the employer to perform work on a particular occasion for a particular unplanned incident by the employer where the work is a response via telephone or other electronic communication away from the workplace.’

[15] In reply, ABI acknowledges the concern expressed by AFEI in relation to the wording proposed by its clients for triggering the operation of the clause (that is, where an employee is ‘requested or required to perform work by the employer via telephone or other electronic communication away from the workplace’); but does not consider that the specific variation proposed by AFEI is sufficiently clear to alleviate the concern raised and submitted:

‘If the Commission is minded to introduce more precision as to the notion of “remote response work, ABI considers that the better approach to achieving this objective would be to include a definition of “remote response work” or “remote response duties”.’³

[16] Ai Group’s response to ABI’s claim is set out at [71] – [79] in its submission of 18 November 2019.

[17] Ai Group’s overarching position in relation to each of the proposals relating to remote response work is as follows:

- Ai Group is not calling for any variation to the SCHADS Award directed at imposing new obligations on employers in relation to ‘remote response’ work
- should the Full Bench nonetheless be minded to vary the SCHADS Award to include a term relating to ‘remote response’ work, Ai Group submits that ABI’s proposal ought to be preferred over that advanced by the HSU and ASU, and
- ABI’s proposal strikes a more reasonable balance between the interests of employers and employees. It is an appropriately conservative approach to the imposition of new obligations upon employers given the potential for such new provisions to have adverse consequences. There is also some difficulty of robustly assessing these matters given the nature and lack of evidentiary material relating to this issue advanced by the parties seeking the change.

[18] Ai Group notes that ‘remote response duties’ does not appear to be defined in ABI’s proposal, although its meaning can be gleaned implicitly from the terms of clauses 28.5 and 28.6. Ai Group understands ‘remote response duties’ to be work that is required to be done by the employee via a telephone or other electronic device away from the workplace.

³ [ABI Submission](#), 10 February 2020 at p 58.

[19] In reply, ABI agrees with Ai Group’s characterisation of the intention of its proposal and proposed that if the Commission is minded to introduce more precision as to the notion of ‘remote response work’ or ‘remote response duties’, then this could be done by inserting a definition in the following terms:

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

- (a) Responding to phone calls, messages or emails;
- (b) Providing advice (“phone fixes”);
- (c) Arranging call out/rosters of other employees; and
- (d) Remotely monitoring and/or addressing issues by remote telephone and/or computer access.’⁴

[20] The various Unions oppose ABI’s amended claim.

The ASU Claim

[21] The ASU’s claim seeks the deletion of clause 28.4 and the insertion of a new clause, as follows:⁵

‘28.4 Recalled to work overtime

- (a) An employee who is recalled to work overtime after leaving the workplace and requested by their employer to attend a workplace in order to perform such overtime work will be paid for a minimum of two hours’ work at the appropriate overtime rate for each time recalled. If the work required is completed in less than two hours the employee will be released from duty.
- (b) An employee who is not required to be on call and who is requested to perform work by the employer via telephone or other electronic communication away from the workplace will be paid at the appropriate overtime rate for a minimum of two hours work. Multiple electronic requests made and concluded within the same hour shall be compensated within the same one hour’s overtime payment. Time worked beyond two hours will be rounded to the nearest 15 minutes.
- (c) An employee who is required to be on call and who is requested to perform work by the employer via telephone or other electronic communication away from the workplace will be paid at the appropriate overtime rate for a minimum of one hours work. Multiple electronic requests made and concluded within the same hour shall be compensated within the same one hour’s overtime payment. Time worked beyond one hour will be rounded to the nearest 15 minutes.’

[22] The ASU submits that its proposed variation gives effect to the following principles:⁶

⁴ [ABI Submission](#), 10 February 2020 at p 58.

⁵ [ASU Submission](#) 23 September 2019.

⁶ [ASU Submission](#) 23 September 2019 at para 7.

1. Remote work, like physical recall to the workplace, should be voluntary and paid at overtime rates.
 2. There should be a clear incentive for remote work to only occur while an employee is required to be on call. This can be achieved by a structure of minimum payments.
 3. A 2 hour minimum payment at overtime rates should apply where an employee works remotely when they are not required to be on call. This aligns with the minimum payment for a recall to work overtime at the physical workplace.
 4. A 1 hour minimum payment should apply where an employee works remotely when they are required to be on call. This aligns the minimum payment for remote work while on call with the minimum payment for work performed during a sleepover.
1. Further, because this is a significant expansion of the current ‘on call provision’, cl 25.3–Rostered days off should be varied to ensure that on call time counts as duty for the purposes of the clause. This is to ensure that the expansion of the scope of on call work does not reduce an employee’s personal time.

[23] The various employer interests oppose the ASU’s claim.

The Evidence

[24] In the *May 2021 Decision*, the Full Bench concluded that the evidence did not support any findings beyond the following general propositions:

1. Employees covered by the SCHADS Award are requested or required, from time to time, to perform ‘remote work’ (i.e. work away from the workplace) at times outside of their rostered working hours.
2. Given the nature of the SCHADS sector it is necessary to have arrangements in place for out of hours work.⁷
3. Employers have different practices in place for ensuring that employees are available to receive calls or otherwise respond to emergencies or other inquiries or issues that may arise.⁸
4. There is disutility associated with performing work outside of ordinary hours in circumstances where the employee is not recalled to a physical workplace (i.e. remote response work).⁹

The May 2021 Decision

⁷ Exhibit ABI6 – Witness Statement of Deb Ryan, 12 July 2019 at para 78.

⁸ Some employers have dedicated ‘on call teams’, while others utilise the general workforce who may be on call from time to time.

⁹ [2021] FWCFB 2383 at para. [719]

[25] The Full Bench decided that it was necessary to introduce an award term in the SCHADS Award dealing with remote response work and made the following 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.'¹⁰
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.

[26] As to the monetary entitlements for remote response work the Full Bench said:

'Determining an 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. In the *Penalty Rates Case*, the Full Bench observed at [202]:

'A central consideration in this regard is whether a particular penalty rate provides employees with 'fair and relevant' compensation for the disutility associated with working at the particular time(s) to which the penalty attaches.'

As mentioned earlier, we accept that there is disutility associated with performing remote response work. However, the level of disutility associated with employees performing remote response work is less than that experienced by employees who are recalled to a physical workplace or who are 'on call' to be recalled to work, as employees are not required to:

- stay in the vicinity of the workplace while on-call
- keep themselves, their work clothes and transport in a state of readiness while on-call for a possible recall to work

¹⁰ [ABI Submission](#), 10 February 2020, p 58.

- spend time travelling to or from the workplace if recalled to work, or
- incur additional travelling expenses (such as public transport fares, petrol or road tolls) if recalled to work.¹¹

[27] The Full Bench rejected the ASU’s proposal that *all* remote response work be paid at overtime rates.¹²

[28] In relation to the minimum payments in respect of remote response work the Full Bench said:

‘We see the logic inherent in the structure of ABI’s minimum payment regime but take a different view as to the minimum periods prescribed. Our *provisional* view is that the minimum payment for remote response work performed between 6.00am and 10.00pm should be 30 minutes and the minimum payment between 10.00pm and 6.00am should be 1 hour. However, we note that there is an inter-relationship between the minimum payment period and the rate of payment.

The rate of pay applicable to remote response work (as opposed to the minimum payment) is problematic.

The ASU contends that all remote response work is to be paid at overtime rates, regardless of whether the work is undertaken during overtime or ordinary hours.

ABI’s amended claim provides that all remote response work is paid at ‘the appropriate rate’. Proposed clause 28.6(b)(i) states that ‘the employee will be paid at *the appropriate rate specified in this Award for any such work performed between these hours*’.

It seems to us that the expression ‘the appropriate rate’ lacks clarity in this context and is apt to confuse. The ‘appropriate rate’ for such work depends on a range of factors, such as:

- Is the employee a full-time, part-time or casual employee?
- Is a shift allowance applicable?
- In which sector does the employee work? (e.g. if the employee is a full-time employee different overtime rates apply depending on whether they are a ‘disability services, home care and day care employee’ or a ‘social and community services an crisis accommodation employee’: see clause 28.1(a))
- Does the remote response work constitute work in excess of 38 hours per week?
- Is the remote response work being performed on a Saturday or Sunday?

It seems to us that ABI’s formulation – ‘the appropriate rate’ – gives rise to considerable complexity; a simpler formulation would be preferable. In our view, this issue requires further consideration and will be the subject of a conference. Prior to the conference, ABI will be asked

¹¹ May 2021 Decision at [729] – [730]

¹² May 2021 Decision at [731] – [732]

to provide further elaboration as to the meaning of ‘the appropriate rate’, as applied in a range of circumstances. A Notice of Listing for the Conference will be issued shortly.’¹³

[29] A conference was subsequently held on 27 May 2021. The transcript of the conference is available [here](#).

¹³ May 2021 Decision at [733] – [738]

**ATTACHMENT – SUBMISSIONS AND EVIDENCE – REMOTE
RESPONSE/RECALL TO WORK CLAIMS**

Part A – Index of evidence relied upon by parties

Documents

#	EXHIBIT NO.	DOCUMENT
1	ABI2	Witness Statement of Darren Mathewson - ABI -CB211
2	ABI6	Witness Statement of Deb Ryan - ABI - CB190 -
3	ABI7	Witness Statement of Scott Harvey - ABI - CB162
4	ASU1	Witness Statement of Deborah Anderson - ASU - CB1394 - Ai Group - paras 23-24; CB1396
5	ASU4	Expert Report of Dr Jim Stanford - ASU - whole
6	ASU8	Witness Statement of Emily Flett - ASU - CB1427
7	CB489	NDIA Efficient Cost Model for Disability Support Workers - ABI - CB489
8	CB501	NDIA Efficient Cost Model - ABI - CB501
9	CB1124	Court Book – draft determination - ASU - CB1124
10	CB1686	<i>Predictability and control in working schedules</i> by Dr Olav Muurlink - ASU - pp 6, 11-12, 17; CB1686
11		Stewart and Brown – <i>Aged and Financial Performance Survey</i> – Sector Report – Financial Year 2018* - ABI - CB503
12		Stewart and Brown – <i>Aged and Financial Performance Survey</i> – Sector Report – December 2018* - ABI - CB541

* ABI filed updated versions of the Stewart & Brown reports on [10 August 2020](#).

Oral evidence

#	TRANSCRIPT	WITNESS
13	Transcript	Oral Evidence of Deborah Anderson - ABI - PN1005-PN1007 - Ai Group - PN991, PN1000-PN1004, PN1011-PN1013, PN1018 - ASU - PN981-PN1030
14	Transcript	Oral Evidence of Dr Jim Stanford - ASU - PN2216-PN2289

Part B - Index of party submissions

#	DATE	PARTY	DOCUMENT
1	15 February 2019	HSU	Submission
2	15 February 2019	HSU	Amended draft determination
3	2 April 2019	ABI	Draft determination
4	2 July 2019	NDS	Submission
5	2 July 2019	ABI	Submission
6	3 July 2019	AFEI	Submission
7	12 July 2019	ABI	Submission in reply
8	13 July 2019	Ai Group	Submission in reply
9	16 July 2019	NDS	Submission in reply
10	23 July 2019	AFEI	Submission in reply
11	13 September 2019	UWU	Submission in reply
12	16 September 2019	ASU	Submission in reply - ABI and others claims
13	23 September 2019	ASU	Submission in reply and draft determination
14	2 October 2019	HSU	Submission in reply
15	15 October 2019	ABI	Amended draft determination
16	18 November 2019	HSU	Submission
17	18 November 2019	Ai Group	Submission
18	18 November 2019	UWU	Submission

#	DATE	PARTY	DOCUMENT
19	19 November 2019	AFEI	Submission - findings
20	19 November 2019	ASU	Submission
21	19 November 2019	AFEI	Submission in reply
22	19 November 2019	NDS	Submission
23	19 November 2019	ABI	Submission
242	7 February 2020	NDS	Submission – final – tranche 2
5	10 February 2020	ABI	Submission – final – further amended draft determination
26	10 February 2020	Ai Group	Submission - final
27	10 February 2020	Unions	Submission - final
28	11 February 2020	AFEI	Submission - final
29	26 February 2020	Unions	Submission in reply - final
30	26 February 2020	ABI	Submission in reply - final
31	26 February 2020	Ai Group	Submission in reply - final
32	11 March 2020	Ai Group	Submission – background paper 3
33	17 March 2020	ABI	Submission – background paper 3
34	20 March 2020	Ai Group	Submission – background paper 3
35	23 March 2020	ASU	Submission – background paper 3
36	20 July 2020	Unions	Submission
37	10 August 2020	ABI	Submission in reply
38	13 August 2020	Ai Group	Submission in reply