BACKGROUND PAPER 3

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, 31 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.

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1. Introduction

[1] On 4 May 2021 the Commission issued a decision[1] in relation to the Tranche 2 claims in the *Social, Community, Home Care and Disability Services Industry Award 2010* (SCHADS Award) (the *May 2021 Decision*) in which the Full Bench rejected a number of claims,[2] decided to make a number of variations to the SCHADS Award and expressed some *provisional* views in respect of certain issues.

[2] Interested parties were initially directed to file any submissions and evidence in respect of the Full Bench's *provisional* views and the draft determination by 4.00pm (AEST) on Tuesday 27 July 2021. These directions were subsequently varied on a number of occasions and the timeline extended, at the request of various parties. Ultimately, any submissions and evidence were to be filed by no later than 4.00pm (AEST) on Tuesday 3 August 2021.

[3] On 3 August 2021 the Commission issued a Statement[3] in which it agreed to a request from a number of employer and union parties to amend the directions so that the issues relating to remote response and damaged clothing would be dealt with separately from those that were to be the subject of the hearing on 6 August 2021. The conference in respect of remote response and damaged clothing took place at 9.30am (AEST) on Thursday 19 August 2021 before Deputy President Clancy.

[4] The matter was listed for Hearing on Friday, 6 August 2021 at 9:30am. The transcript of the hearing is available here.

[5] During the course of the proceedings on 6 August 2021, a broad consensus emerged that aspects of the broken shift issue should not be determined to finality on that day.

[6] In a Statement[4] published on 9 August 2021 (*9 August 2021 Statement*), the Full Bench decided that the following matters in respect of the broken shift issue will be the subject of a further opportunity to file submissions and evidence:

1. NDS' proposal that the first sentence of clause 25.6 of the draft determination be amended to read:

   'This clause only applies to day workers who are social and community service employees when undertaking disability services work and home care employees.'

2. NDS' proposal that clause 25.6(d) of the draft determination be amended to read:

   'Payment for a broken shift will be at ordinary pay with weekend and overtime penalty rates, including for time worked outside the span of hours, to be paid in accordance with clauses 26 and 28.'

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[1] [2021] FWCFB 2383 ('*May 2021 Decision*').

[2] Ibid at [1262].

[3] [2021] FWCFB 4716.

[4] [2021] FWCFB 4863.

3. The ASU proposal that clause 25.6(d) of the draft determination be amended as follows:

> 'Payment for a broken shift will be at ordinary pay with shift, weekend, public holiday, and overtime, penalty rates to be paid in accordance with clauses 26~~, and~~ 28, 29 and 34.'

4. The ASU proposal that, in the absence of a provision for paid travel time, the SCHADS Award should provide a clear statement that employees must not be required to travel between work locations during their meal breaks and that overtime should be payable until an employee is allowed a meal break free from travel.[5] The ASU has filed a draft determination in respect of this issue.

[7] The *9 August 2021 Statement* included a direction that any submissions and evidence in respect of remote response, damaged clothing and the particular issues set out in [6] above were to be filed by no later than 4.00pm (AEST) on Wednesday, 25 August 2021. Any submissions and evidence in reply are to be filed by no later than 4.00pm (AEST) on Monday 30 August 2021.

[8] In a decision published on 25 August 2021[6] (the *August 2021 Decision*) the Full Bench decided to vary the SCHADS Award in the following ways:

Broken shifts

1. The Full Bench confirmed its *provisional* view that the additional remuneration for working a broken shift should be expressed as a percentage of the standard rate.

2. Two technical amendments are made in respect of the requirement that an employee's consent be given on each occasion that they work a 2 break broken shift:

    - To provide that if a part-time employment agreement under clause 10.3 includes the working of a 2 break broken shift then there is no need for an additional requirement that consent be obtained on each occasion that the 2 break broken shift is worked.

    - To delete the reference to 'rostered to work' in clause 25.6(b) as it may have the unintended consequence of requiring that an employee's consent to work a 2 break broken shift be given at least 2 weeks before the shift is worked.

Minimum payments

3. The determination arising from the decision will include a transitional arrangement applying to minimum payments for part-time employees. The

[5] ASU submission, 3 August 2021 at [41].

[6] [2021] FWCFB 5244.

particular characteristics of the transitional arrangement are the subject of a *provisional* view set out later.

Roster changes

4. Clause 25.5(d)(ii) will be varied as follows:

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

(A) (A) if the change is proposed by an employee to accommodate an agreed shift swap with another employee, subject to the agreement of the employer; 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.’

Client cancellation

5. Clause 25.5(f)(i) will be amended as follows:

‘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 where a client reschedules a scheduled home care or disability service.’

6. Clauses 25.5(f)(ii)(B), (iv)(A), (v) and (vii)(C) from the draft determination have been amended such that they refer to ‘part of a shift’ or to a ‘service’, rather than to just a ‘shift’.

7. Clause 25.5(f)(vi) – dealing with ‘double dipping’ – is to be deleted from the draft determination.

9. The requirement to publish make-up time on a normal roster will be removed and will be replaced by a requirement to provide the employee with 7 days’ notice of the make-up time (or a lesser period by agreement).

10. An additional term will be added to subclause 25.5(f)(vi) as follows:

‘(E) an employee who works make-up time will be paid the amount payable had the employee performed the cancelled service or the amount payable in respect of the work actually performed, whichever is the greater.’

Travel time

11. Further consideration of the various travel time claims will be deferred until the variations in respect of minimum payment and broken shifts have been in operation for 12 months.

Overtime

12. The Full Bench confirmed its *provisional* view that overtime is payable in respect of work performed by day workers outside the ordinary span of hours. Clause 28.1(a) of the draft determination will be amended slightly, as follows:

> ‘28.1 Overtime rates
>
> (a) Full-time employees
>
> A full-time employee will be paid the following payments for all work done in addition to their rostered ordinary hours on any day <u>and</u>, <u>in the case of day workers, for work done</u> outside the span of hours <u>under clause 25.2(a)</u>~~(day workers only):~~’

13. The Full Bench confirmed its *provisional* view that, in respect of part-time employees, the SCHADS Award should be varied in 2 respects:

    1. To make it clear that working additional hours is voluntary, and

    2. To 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.

14. The following amendments will be made to clause 10.3(g)–Review of guaranteed hours in the draft determination:

- Clause 10.3(g)(i) will be amended as follows:

> ‘(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)<u>, or as subsequently varied under clause 10.3(e),</u> to ~~reflect the ordinary hours regularly being worked~~ <u>increase their guaranteed hours</u>…’

- The example below clause 10.3(g)(iii) will be deleted.

- A new clause 10.3(g)(viii) will be inserted as follows:

> ‘(viii) An employee cannot make a request for a review of their guaranteed hours when:
>
> (A) The employee has refused a previous offer to increase their guaranteed hours in the last 6 months; or
>
> (B) The employer refused a request from the employee to increase their guaranteed hours based on reasonable <u>business</u> grounds in the last 6 months.’

24 Hour Care clause

15. Clause 31.2(b) of the draft determination, in relation to quantum of leave, will be amended to limit the provision of the additional week of annual leave to employees who have worked at least eight 24-hour care shifts 'during the yearly period in respect of which their annual leave accrues.'

Equal remuneration

16. A minor amendment will be made to the headings of the table in the Note at the end of clause 15.

Operative date

17. The variations arising from these proceedings will commence operation from the first pay period on or after 1 July 2022.

[9] The matters set out above have now been decided.

[10] There are only 2 matters arising from the *August 2021 Decision*:

1. The *provisional* view regarding the particular characteristics of the transitional arrangements that will apply to minimum payments for part-time employees.

2. Any technical amendments to the revised draft determination set out at Attachment 1 to *August 2021 Decision*.

[11] In the *August 2021 Decision* the Full Bench's expressed the *provisional* view that the transitional arrangements applying to minimum payments for part-time employees should have the following characteristics:

1. Limited scope:

   (a) it only applies to part-time employment arrangements which:

      (i) were entered into before 1 March 2022; <u>and</u>

      (ii) provide for a period of continuous work of less than 3 hours for social and community services employees (except when undertaking disability services work) and 2 hours for all other employees(and therefore are affected by the variation).

2. It imposes an obligation to consult and negotiate in good faith regarding changes to the agreed pattern of work.

3. If no agreement is reached, then the employer can unilaterally alter the agreed pattern of work to provide for periods of continuous work of 3 or 2 hours (depending on the nature of the work performed), with 28 days' notice in writing.

4. Any unilateral alteration to the agreed pattern of work cannot come into operation before 1 July 2022 (the implementation date of the minimum payment term).

5. The transitional arrangements will come into operation on 1 March 2022 and cease operation (and be removed from the Award) on 1 October 2022.

[12] A draft term giving effect to this *provisional* view is set out at [90] of the *August 2021 Decision*.

[13] Submissions in respect of the matters arising from the *August 2021 Decision* were to be filed when parties filed their reply submissions on Monday, 30 August 2021.

[14] Initial submissions were received from the following interested parties:

- ABI
- AFEI
- Ai Group
- ASU
- HSU
- NDS
- UWU

[15] Submissions in reply were received from:

- ABI
- AFEI
- Ai Group
- ASU
- Challenge Community Services
- HSU
- NDS

[16] The UWU confirmed that it did not intend to file any reply submissions.[7]

[17] In summary, the remaining outstanding issues concern:

- Damaged clothing;

- Remote response;

- Broken shifts; and

- Matters arising from the *August 2021 Decision*.

[7] UWU correspondence, 30 August 2021.

[18] The hearing in respect of the remaining matters is to take place at 9:30am (AEST) on Wednesday 1 September 2021.

2. Damaged Clothing

[19] In the *May 2021 Decision* the Full Bench concluded 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.[8]

[20] The parties were directed to confer about the form of a suitable variation. The issue has also been discussed at conferences held on 27 May and 19 August 2021.

[21] The parties' discussions have been productive and most parties agree that the SCHADS Award be varied to include the following term:

> **20.3 Laundering of clothing other than uniforms**
>
> (a) If during any day or shift, the clothing of an employee is soiled in the course of the performance of their duties, the employee will be paid the daily laundry allowance under clause 20.2(b) per day or shift provided that:
>
> (i) As soon as reasonably practicable the employee provides notice of the soiling and, if requested, evidence that would satisfy a reasonable person of the soiling and/or how it occurred; and
>
> (ii) At the time the clothing was soiled the employee had complied with any reasonable requirement of the employer in relation to the wearing of personal protective equipment either provided or paid for by the employer in accordance with 20.2(d).
>
> **20.4 Repair and replacement of clothing other than uniforms**
>
> (a) If the clothing of an employee is soiled or damaged (excluding normal wear and tear), in the course of the performance of their duties, to the extent that its repair or replacement is necessary, the employer must reimburse the employee for the reasonable cost incurred in repairing or replacing the clothing with a substitute item, provided that:
>
> (i) As soon as reasonably practicable the employee provides notice of the soiling or damage 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) At the time the clothing was soiled or damaged the employee had complied with any reasonable requirement of the employer in relation to the wearing of personal protective equipment either provided or paid for by the employer in accordance with 20.2(d); and
>
> (iii) The damage or soiling of an employee's clothes is not caused by the negligence of the employee.
>
> (b) 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.

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[8] *May 2021 Decision* at [882].

[22] Ai Group supports the proposed variation and submits that the proposal:[9]

(a) Addresses the various views expressed by the Full Bench in the *May 2021 Decision* in relation to damaged clothing;

(b) Provides a level of compensation for laundering of soiled clothing that is aligned with the approach adopted under clause 20.2 of the Award in relation to the laundering of uniforms;

(c) Will require reimbursement of reasonable costs incurred in repairing clothing or replacing with a substitute item of clothing;

(d) Includes sensible notice and evidence requirements relating to the relevant factual matters that give rise to the obligation to make the payments contemplated by the clause incorporates a level of flexibility in relation to such matters; and

(e) Limits an employer's liability to cover the costs of damage to clothing that has occurred where an employee has not complied with reasonable requirements of the employer in relation to the wearing of personal protective equipment or negligence.

[23] The proposed variation is supported by Ai Group, AFEI;[10] NDS;[11] HSU;[12] and UWU.[13]

[24] In its reply submission ABI also supported the proposed variation, subject to what it characterised as 'very minor technical drafting amendments.'[14] In particular, ABI proposes that the reference to a 'daily' allowance in clause 20.3(a) be removed, given that the allowance payable under clause 20.2(b) of the Award is not expressed as a daily allowance. ABI's proposed amendments are set out in mark up below:

'20.3 Laundering of clothing other than uniforms

(a) If during any day or shift, the clothing of an employee (other than a uniform) is soiled in the course of the performance of their duties, the employee will be paid the ~~daily~~ laundry allowance under clause 20.2(b) per ~~day or~~ shift provided that:

(i) As soon as reasonably practicable the employee provides notice of the soiling and, if requested, evidence that would satisfy a reasonable person of the soiling and/or how it occurred; and

(ii) At the time the clothing was soiled the employee had complied with any reasonable requirement of the employer in relation to the wearing of personal protective equipment either provided or paid for by the employer in accordance with 20.2(d).

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[9] Ai Group Submission, 25 August 2021 at [100].

[10] AFEI Submission, 25 August 2021 at [20]-[21].

[11] NDS Submission, 25 August 2021 at [4].

[12] HSU Submission, 25 August 2021 at [17]-[18].

[13] UWU Submission, 25 August 2021 at [29].

[14] ABI Submission, 30 August 2021 at [49]-[51].

20.4 Repair and replacement of clothing other than uniforms

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

> (i) As soon as reasonably practicable the employee provides notice of the soiling or damage 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) At the time the clothing was soiled or damaged the employee had complied with any reasonable requirement of the employer in relation to the wearing of personal protective equipment either provided or paid for by the employer in accordance with 20.2(d); and
>
> (iii) The damage or soiling of an employee's clothes is not caused by the negligence of the employee.

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

Q1: Question for all parties other than ABI: What do you say about ABI's drafting amendments?

3. Remote Response

[25] 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.'

[26] 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.'

[27] The current on call allowances in the SCHADS Award are $20.12 (clause 20.9(a)) and $39.84 (clause 20.9(b)) respectively.

[28] 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'.

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

[30] There were initially 3 claims in respect of remote response and recall to work overtime, by ABI, the HSU and ASU. The ABI claim went through a number of different iterations and, as we shall see, the HSU subsequently withdrew its claim.

[31] The various claims were considered in the *May 2021 Decision*[15] and the following findings were made in respect of this issue:[16]

> 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.

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[15] *May 2021 Decision*, Section 5.6.

[16] *May 2021 Decision* at [719].

2. Given the nature of the SCHADS sector it is necessary to have arrangements in place for out of hours work.

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.

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).

[32] The Full Bench concluded that the evidence did not support any findings beyond these general propositions.

[33] At [722] of the *May 2021 Decision* the Full Bench concluded that it was necessary to introduce a term dealing with remote response work and made 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.

[34] At [730] of the *May 2021 Decision* the Full Bench said:

> '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
- 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.'

[35] At [732] of the *May Decision* the Full Bench stated that it was nor persuaded that 'the ASU's proposed minimum payments are warranted.' The ASU's proposal required that all remote response work be paid at overtime rates and that if the employee is not 'on call' (and hence not receiving an 'on call' allowance) they are paid overtime rates for a minimum of 2 hours. If they are 'on call' the minimum payment proposed was one hour at overtime rates.

[36] The Full Bench stated that it saw the logic inherent in the structure of ABI's minimum payment regime but took a different view as to the minimum periods prescribed. The Full Bench expressed the *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, the Full Bench noted 'that there is an inter-relationship between the minimum payment period and the rate of payment.'[17]

[37] The form of a remote response term has been the subject of on-going discussions between the parties. These discussions have been productive and with one exception, most of the parties have reached agreement as to the content of a 'remote work' clause, as well as the consequential amendments to existing clauses 20.9 and 28.4 of the SCHADS Award.

[38] In correspondence dated 23 August 2021 ABI set out the terms of the parties' agreement.

[39] The parties to the agreement are ABI; NSW Business Chamber Ltd; Aged & Community Services Australia; Leading Age Services Australia, NDS, ASU, HSU and UWU (collectively, the Joint Parties)

[40] The Joint Parties support the variation of the SCHADS Award to insert a new clause 25.10 as follows:

'**25.10 Remote work**

(a) This clause applies where an employee is required by their employer to perform remote work.

(b) For the purpose of this clause, remote work means the performance of work by an employee at the direction of, or with the authorisation of, their employer that is:

(i) not part of their rostered working hours (or, in the case of casual employees, not a designated shift); and

(ii) not additional hours worked by a part-time employee under clause 28.1(b)(iii) or 10.3(e) or overtime contiguous with a rostered shift; and

(iii) not required to be performed at a designated workplace.

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[17] *May 2021 Decision* at [733].

(c) Minimum payments for remote work

(i) Where an employee performs remote work they will be paid for the time spent performing remote work, with the following minimum payments applying:

A. where the employee is on call between 6.00am and 10.00pm – a minimum payment of 15 minutes' pay;

B. where the employee is on call between 10.00pm and 6.00am – a minimum payment of [to be determined];

C. where the employee is not on call - a minimum payment of one hour's pay;

D. where the remote work involves participating in staff meetings or staff training remotely - a minimum payment of one hour's pay.

(ii) Any time worked continuously beyond the minimum payment period outlined above will be rounded up to the nearest 15 minutes and paid accordingly.

(iii) Where multiple instances of remote work are performed on any day, separate minimum payments will be triggered for each instance of remote work performed, save that where multiple instances of remote work are performed within the applicable minimum payment period, only one minimum payment period is triggered.

(d) Rates of pay for remote work

(i) Remote work will be paid at the minimum hourly rate unless one of the following exceptions applies:

A. Where remote work is performed outside the span of 6am-8pm, it will be paid at the rate of 150% for the first two hours and 200% thereafter or, in the case of casual employees, at 175% for the first two hours and 225% thereafter;

B. Where the remote work results in an employee working in excess of 38 hours per week or 76 hours per fortnight, it will be paid at the applicable overtime rate prescribed in clause 28.1;

C. Where the remote work results in an employee working in excess of 10 hours per day, it will be paid at the rate of 150% for the first two hours and 200% thereafter;

D. Where remote work is performed on Saturdays, it will be paid at the rate of 150% or, in the case of casual employees, 175%;

E. Where remote work is performed on Sundays, it will be paid at the rate of 200% or, in the case of casual employees, 225%;

F. Where remote work is performed on public holidays, it will be paid at the rate of 250% or, in the case of casual employees, 275%.

(ii) The rates of pay in clause 25.10(d)(i) above are in substitution for and not cumulative upon the rates prescribed in clauses 26, 28, 29, and 34.

(e) Other requirements

An employee who performs remote work must maintain and provide to their employer a time sheet or other record acceptable to the employer specifying the time at which they commenced and concluded performing any remote work and a description of the work that was undertaken. Such records must be provided to the employer within a reasonable period of time after the remote work is performed.

(f) Miscellaneous provisions

The performance of remote work will not count as work or overtime for the purpose of the following clauses:

(i) Clause 25.3 - rostered days off;

(ii) Clause 25.4 - rest breaks between rostered work;

(iii) Clause 28.3 - rest period after overtime;

(iv) Clause 28.5 - rest break during overtime.'

[41] For convenience we refer to the Joint Parties' proposed term as the 'Joint Proposal'.

[42] At [22] of its submission ABI makes the following observations in relation to the Joint Proposal and how it is intended to operate:

'(a) The proposed clause 25.10 is intended to regulate circumstances where an employee, who is not 'at work' or otherwise rostered to work or performing work at a particular time, is required to perform work remotely without physically attending a designated workplace.

(b) Clause 25.10 is intended to apply (and is expressed to apply) where an employee is required by their employer to perform 'remote work' as defined by clause 25.10(b).

(c) The term 'remote work' was adopted in favour of 'remote response work', as the word 'response' was considered unnecessary, might not always be an accurate description of the work, and could cause confusion. In any event, the term 'remote work' is a defined term so the label that is used does not have any material impact on the scope of the clause. What is important is the definition rather than the label.

(d) Clause 25.10(b) contains a definition of 'remote work'. In short, the definition is intended to capture circumstances where an employee performs work outside of their normal working hours and away from a designated workplace.

(e) The definition limits the clause to only such work that is performed 'at the direction of, or with the authorisation of, their employer'. This is an important (and appropriate) element and will prevent an obligation to payment being triggered where an employee elects to perform duties outside of their working hours that were not required to be performed (or not required to be performed at that time).

(f) The definition caters for casual employees who might not have 'ordinary' or 'normal' or 'rostered working hours' by incorporating the notion of a 'designated shift' for casuals. We consider that this language clarifies how the clause applies for casual employees, in that 'remote work' is work that is not part of a casual's 'designated shift'.

(g) The definition also makes it clear that where an employee performs overtime that is contiguous with a rostered shift (e.g. a rostered shift extends past the scheduled finishing time), such work is not 'remote work'.

(h) Equally, the definition makes it clear that where a part-time employee agrees to perform additional hours beyond their agreed pattern of work under clause 10, such additional hours are not 'remote work'.

(i) Those provisions are appropriate safeguards to ensure that agreed additional hours for parttime employees do not lose the benefit of the applicable minimum engagement purely by the work being performed away from a designate workplace.

(j) This definition of 'remote work' is preferred to the definition originally proposed by our clients (which is reproduced at [722] of the Decision). The reason for this is that if a definition is created which is narrow and does not encapsulated all forms of work, it would lead to a situation where uncertainty would remain as to how certain duties that fell outside the definition was to be regulated.

(k) Consideration was given as to whether it was necessary to include a carve-out to the definition of 'remote work' to make it clear that 'remote work' does not include 'the performance of personal tasks that are incidental to maintaining their employment' (including things such as an employee reviewing or managing their own roster, communicating with their employer about their availability for work, or accepting additional hours, calling in sick, etc.). However, the parties to the agreed position formed the view that as such activities do not amount to the 'performance of work' within the general industrial meaning of that phrase, it was unnecessary to include such a carve-out. Certainly, it is not the parties' intention for those incidental activities to constitute 'remote work' or trigger any entitlement under the clause.

(l) Turning to the payment provisions, clause 25.10(c) provides minimum payments or minimum payment periods for remote work. The quantum of the minimum payments depends on:

(i) whether or not the employee is on-call at the time the remote work is performed;

(ii) in the case of employees who are on-call, the time of the day the work is performed; and

(iii) whether the work constitutes participation in staff meetings and/or staff training.

(m) It is proposed that where employees who are not on call perform remote work, the applicable minimum payment will be one hour's pay as set out in clause 25.10(c)(i)(C). This is consistent with the proposal advanced by our clients during the hearing (as reproduced at [659] of the Decision).

(n) Equally, where an employee participates in staff meetings and/or training in circumstances where they are not required to attend a designated workplace, it is proposed that the applicable minimum payment would be one hour's pay as per clause 25.10(c)(i)(D).

(o) Where an employee is on call, the parties have agreed that the minimum payment should be 15 minutes' pay where the work is performed between 6am and 10pm. This is an appropriate minimum payment and reflects the fact that employee is on-call and is being paid the on-call allowance.

(p) The parties have not reached agreement on the applicable minimum payment for remote work performed between 10pm and 6am by employees who are on-call. We address this matter in more detail at paragraphs 36-47 below.

(q) Clause 25.10(c)(ii) provides that where work is performed beyond the applicable minimum payment period, the time worked will be rounded up to the nearest 15 minutes.

(r) Clause 25.10(c)(iii) deals with how the minimum payments operate in circumstances where multiple instances of remote work are performed on any given day.

(s) Clause 25.10(d) deals with the rate of payment. The default position that has been adopted is that remote work will be paid at the applicable minimum rate of pay (based on the employee's classification) unless one of the circumstances specified in clauses 25.10(d)(i)(A)-(F) applies.

(t) The scenarios at (A)-(F) reflect the existing rules in the Award. That is, remote work would be paid at a premium rate where:

- (i) it is worked outside the span of 6am-8pm;
- (ii) it results in an employee working in excess of 38 hours per week or 76 hours per fortnight;
- (iii) it results in an employee working in excess of 10 hours per day;
- (iv) it is performed on a Saturday, Sunday or public holiday.

(u) We consider those rules around the rate of payment to be appropriate and in keeping with the existing rules in the Award.

(v) Clause 25.10(d)(ii) contains interaction rules in respect of the premiums contained in the Award. In short, the rates of pay outlined in clause 25.10(d) will apply in substitution for and not cumulative upon the rates prescribed in clauses 26, 28, 29, and 34. This accords with the general approach adopted in the Award.

(w) Clause 25.10(e) requires an employee to maintain and provide to their employer a time sheet or other record acceptable to the employer specifying the time at which they commenced and concluded performing any remote work and a description of the work that was undertaken. The clause requires employees to provide such records within a reasonable period of time after the remote work is performed. Our clients consider this to be a sensible administrative provision to aid the effective operation of the provision.

(x) Lastly, clause 25.10(f) specifies certain interaction rules regarding clause 25.10. The clause makes it clear that the performance of remote work will not count as work or overtime for the purpose of clauses 25.3, 25.4, 28.3 and 28.5. This has the effect of ensuring that the performance of remote work does not disrupt rostering or prevent an employee from commencing work on the following day as rostered.'

Q2: Question for all parties other than ABI: Does any party take issue with ABI's observations about how the proposed clause is intended to operate?

[43] To facilitate the inclusion of a new 'remote work' provision, the Joint Parties also propose a consequential amendment to clause 28.4 which serves to clarify that clause 28.4 only applies where an employee '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'. In

other words, the amendment to the existing clause 28.4 serves to confirm that where an employee performs remote work as defined by clause 25.10, clause 28.4 will not apply. A consequential amendment has also been proposed to clause 20.9 of the Award.

[44] A marked-up version of the proposed consequential amendment is set out below:

20.9 On call allowance

~~(a)~~ An employee required by the employer to be on call (i.e. available for recall to duty <u>at the employer's or client's premises and/or for remote work</u>) will be paid an allowance of<u>:</u> ~~2.0% of the standard rate in respect to~~

> <u>(a)</u> <u>$20.63 for</u> any 24<u>-</u>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~~.~~<u>; or</u>
>
> (b) <u>$40.84</u> ~~The allowance will be 3.96% of the standard rate~~ in respect of any other 24<u>-</u>hour period or part thereof <u>on a Saturday, Sunday</u>, or ~~any~~ public holiday ~~or part thereof~~.

28.4 Recall to work overtime

An employee <u>who is</u> recalled to work overtime after leaving the ~~employer's or client's premises~~<u>workplace and requested by their employer to attend a workplace in order to perform such overtime work</u> 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.

Q3: Question for the Joint Parties: The consequential amendments delete the existing provisions which express the quantum of the allowances as a percentage of the standard rate. How is it proposed that the allowances be varied (see s.149)?

[45] ABI submits that the Joint Proposal provides a fair and reasonable minimum safety net of conditions for employees performing remote work. Further, ABI submits that the agreed position:

- is consistent with the observations made by the Full Bench in the Decision of 4 May 2021 at [721]-[722];
- adequately resolves the Full Bench's concerns around complexity in terms of the rate of pay issue (see [737]-[738] of the Decision); and
- meets the modern awards objective.

[46] In respect of the proposed monetary payments contained in the Draft Determination, ABI notes that in the *May 2021 Decision*, the Full Bench observed that the determination of an appropriate monetary entitlement for remote response 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.

[47] ABI notes that in relation to the value of work performed by employees when undertaking remote work, there was limited evidence before the Commission about the precise nature of the work that is performed by employees away from a designated workplace. However, the evidence tended to suggest that the work is generally of an administrative or

operational nature, and includes such tasks as organising rostering, responding to operational queries, and providing phone advice to employees. ABI submits:

> 'As a general proposition, the evidence suggested that the value of work undertaken by employees performing 'remote work' is either equivalent to, or less than, the value of the work performed by the relevant employee whilst at work. Certainly, it is doubtful that an employee performing remote work would be expected to perform tasks beyond their skillset or classification level. On that basis, the value of work consideration would support an outcome where employees are paid at the applicable minimum hourly rate for their classification under the Award when performing remote work. The Draft Determination adopts this approach.
>
> Turning to the disutility associated with remote work, the Full Bench has already determined that:
>
> > (a) the disutility is less than that experienced by employees who are recalled to a physical workplace; and
> >
> > (b) the disutility is also less for employees who are not 'on call' as compared to those who are 'on call' to be recalled to a physical workplace.
>
> Our clients would add a further point: the disutility associated with remote work is less than that for performing work in the normal manner (i.e. attending work as rostered). This is because employees are not required to get ready for work, get dressed in work clothing, travel to the workplace and travel home. On that basis, the disutility associated with remote work is arguably less than the disutility associated with working a rostered shift.
>
> The only disutility associated with remote work is:
>
> > (a) the inconvenience of the prospect of having your leisure time disturbed (if you are on-call);
> >
> > (b) the inconvenience of having your leisure time disturbed (if you are required to perform remote work); and
> >
> > (c) the inconvenience of being required to perform remote work at unsocial hours (if you are required to perform work at unsocial hours).
>
> The disutility at (a) above is appropriately compensated by way of an on-call allowance which is already a feature of the Award. No party sought to increase the quantum of the on-call allowance through the course of these proceedings.
>
> The disutility at (b) above is addressed by establishing an appropriate quantum of the payment to be made to an employee for the time spent performing remote work. In this regard, we submit that the extent of the disutility is quite modest by reason of the fact that the work can be performed remotely via phone or email, and employees are:
>
> > (a) not required to attend the workplace to perform the work;
> >
> > (b) not required to undertake the other usual incidental tasks associated with attending work (e.g. travelling to/from the workplace, getting dressed and ready for work, incurring travel costs, etc.); and

(c) in most cases, not required to perform work for more than a very short period of time (e.g. the evidence suggests that most form of remote work involve short phone calls or simple tasks that take a very short period of time to complete).

The disutility at (c) above is appropriately addressed by providing greater payments during the evening period.

Having regard to both the value of work consideration and the disutility consideration, our clients consider that the payment regime provided for in the Draft Determination strikes the appropriate balance.'[18]

The disputed issue

[48] The Joint Parties have agreed that the minimum payment that should apply to work performed between 6am and 10pm, by employees who are on-call, should be 15 minutes' pay.

[49] However, the parties were unable to reach agreement on what the minimum payment period should be where an employee who is on-call performs remote work between 10pm and 6am.

[50] ABI submits that the appropriate minimum payment for such work is 30 minutes' pay and advances 5 points in support of that position:

1. In determining whether to make the Draft Determination that has been put forward, the Commission should place weight on the fact that the Draft Determination has been put forward by agreement between eight interested parties which include the three relevant trade unions as well as five employer/industry associations.

2. If the Commission is to endorse the Draft Determination, it must ensure that each of the relevant minimum payments are appropriate and proportionate when they are considered against each other. For example, in determining what the appropriate minimum payment for work performed between 10pm and 6am by employees who are on-call, the Commission should have regard to the fact that the parties are advocating for a 15 minute minimum payment for work performed by on-call employees during 6am - 10pm. The evening minimum payment should therefore be set having regard to the day minimum payment. They should be proportionate with each other.

3. The Commission must assess the relative disutility between remote work performed during 6am-10pm by employees who are on call and remote work performed during 10pm-6am by employees who are on call. Under both scenarios, the employee will be on-call and will be in receipt of the oncall allowance. There is no evidence to suggest the nature of the work would be any different. The only difference is the time at which the work is performed. In our submission, the additional disutility associated with performing remote work during 10pm-6am would not warrant a minimum of more than twice the daytime

[18] ABI Submission, 30 August 2021 at [28]-[35].

minimum payment. This supports setting a minimum payment of no more than 30 minutes.

4. Weight must be given to the rate of payment that is proposed to apply. Under the proposed clause 25.10(d)(i)(A), the rate of pay for remote work performed between 10pm and 6am will in all cases be no less than 150% of the minimum rate (175% for casuals), and in some cases will be 200% (225% for casuals). This is compared to the rate of payment for daytime remote work which, in the vast majority of cases, will not attract a premium rate and will be paid at the minimum rate.

   This is a significant factor. When the rate of pay is taken into account, under our advocated position, in most cases the position will be:

   (a) remote work performed between 6am-10pm by on-call employees will be attract a 15 minute minimum payment at the minimum rate; compared with

   (b) remote work performed between 10am-6am by on-call employees will be attract a 30 minute minimum payment at 150%.

   In dollar terms, this results in the minimum payment for 'evening' work being triple the minimum payment for 'daytime' remote work.

5. Weight must be also be attributed to the fact that on-call employees will receive the on-call allowance under clause 20.9.

[51] NDS supports the position advanced by ABI and submits:

> 'We agree that the minimum payment for an employee who is on-call between 10pm and 6am should be higher due to the disutility associated with late night calls. Agreement has not been reached regarding this and the proposed clause does not specify a minimum payment. We propose a minimum payment of 30 minutes. Once again, we take account of the likelihood that many calls will be quite short in duration and consider that this provides a proportionate entitlement.'[19]

[52] The ASU supports the Commission's *provisional* view that the minimum payment should be 1 hour for remote work when not on call, between 6.00am and 10.00pm should be 1 hour.

[53] The ASU relies on its previous evidence and submissions about the disutility associated with remote work. The ASU has filed additional witness statements in respect of this issue:

- Witness Statement Feargus John Macbeth Manning
- Witness Statement of Paul McKenzie
- Witness Statement of Daniel Trickett.

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[19] NDS Submission, 25 August 2021 at [16].

[54] The ASU submits that the additional witness statements 'further proves the disutility associated with performing remote response work' including: [20]

- disruption of domestic chores and parental responsibilities, with an impact on the worker's partner and/or children;

- work at unsocial times, such as early mornings, late nights, Saturdays, Sundays and public holidays;

- a requirement to remain within areas of good mobile phone reception (a significant limitation in regional and rural areas);

- a requirement to remain close to their place of residence, because the tasks expected by their employer cannot be performed efficiently on a mobile phone or tablet;

- a requirement to hold themselves ready to return to the physical workplace even where most work would be performed remotely;

- a requirement to use their own personal property when working remotely, including personal computers and internet service; and

- significant hours of work.

[55] The ASU makes the following particular points about the additional evidence filed:

> 'Both Daniel Trickett and Paul McKenzie gave evidence about the ways that being rostered oncall has impacted their personal lives. Mr Trickett and Mr McKenzie both needed to remain close to home when they were rostered on-call and could not spend any time in a location that had poor mobile phone reception. This was because they needed to be able to respond immediately if required to work. They could be recalled to work at the physical work or to work remotely. Mr McKenzie reported feeling anxious due the anticipation of being called. Many employees find themselves in similar circumstances to Mr Trickett and Mr McKenzie when on-call – they do not know whether they will be required to provide a remote response or physically attend a workplace when they are called upon.
>
> Mr Trickett and Mr McKenzie describe the significant impact that being on-call can have on an employee's livelihood – this will only be heightened for those employees who are required to provide remote response when not rostered on-call. An employee in these circumstances is unlikely to have made alternative arrangements in relation to caring responsibilities and food preparation, and would likely experience significant disruptions to any leisure activities.
>
> Additionally, the evidence filed by the ASU in these proceedings demonstrates that employees in the SCHDS Sector can and will exceed the minimum engagements in the Joint Proposal. The evidence of Mr McKenzie demonstrates that he worked approximately 15 hours over the 2020 New South Wales June Long Weekend, including 5 hours and 45 minutes on the Queen's Birthday Public Holiday.
>
> Additionally, the evidence of Mr McKenzie and Mr Trickett demonstrates that it is possible to organise work in the disability sector without relying on supervisors to work on call. Caringa,

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[20] ASU Submission, 30 August 2021 at [70].

who employ both Mr Trickett and Mr McKenzie, have recently employed a number of rostering clerks to handle many of the administrative duties that were previously performed by on-call employees. As noted by Mr Trickett, the higher cost associated with paying overtime to employees on-call was a significant factor in the Caringa making this decision.'[21]

Q4: Question for all other parties: What do you say about the evidence filed by the ASU?

[56] The ASU also submits that the minimum engagements and rates of pay prescribed by the Joint Proposal are not unusual:

> 'Indeed, if remote response was paid at the employee's minimum rate of pay in the SCHDS Award, it would be the only federal award to do so.
>
> Relevantly:
>
> • The Nurses Award 2020 provides for a 1-hour minimum payment at overtime rates for employees who are required to perform work 'via telephone or other electronic communication away from the workplace'.
>
> • The Contract Call Centres Award 2020 provides for a range of minimum engagements for remote work (between 30 minutes and 1 and a half hours depending on the time of day), paid at overtime rates. There is no on-call term in the award.
>
> • The Telecommunications Services Award 2020 provides for a range of minimum engagements for technical services stream employees performing remote work (between 30 minutes and 1 and a half hours depending on the time of day), paid at overtime rates.
>
> • The Local Government Award 2020, the Victorian Local Government Award 2015 and the Water Industry Award 2020 pay overtime rates for 'remote response' as defined by the Award.
>
> • In the Telstra Award 2015, an employee working at home will be paid at overtime rates for the hours actually worked when rostered on-call, and an employee who works remotely when they are not rostered on-call would receive 200% of their ordinary rate of pay.'[22]

[57] Attachment A to the ASU's submission is summary of remote work terms in the Modern Awards, Modern Enterprise Awards and State Reference Public Sector Awards.

[58] It is convenient to note here that Attachment A to AFEI's reply submissions contains a commentary on the modern awards containing remote work provisions identified by the ASU. In summary, AFEI submits:

> 'Remote work provisions are not common in Modern Awards. The ASU's table identifies a number of enterprise-based instruments and public sector instruments, that also are arguably enterprise-based instruments, and only five modern awards that contain remote work provisions. The enterprise-based instruments should not be considered relevant as comparators for the SCHADS Award.

[21] ASU Submission, 26 August 2021 at [71]-[74].

[22] ASU Submission, 26 August 2021 at [76].

In relation to the five modern awards, AFEI makes the following observations:

i. the coverage of the Contract Call Centres Award 2020 (CCCA) is considerably narrower than the SCHADS Award. As noted below the highest classification is Contract Call Centre Industry Technical Associate. Remote work performed by senior employees and managers of contract call centre operations is not covered by the CCCA and in all likelihood such employees would be award free;

ii. similarly the coverage of Telecommunications Award 2020 (TA) is more limited than the SCHADS Award, again more senior employees and managers are not covered by the TA, and the remote work provisions are limited in the TA to the Technical stream only;

iii. the Nurses Award 2010 (NA) is an occupational award, and unlike the SCHADS Award does not apply to most, if not all, employees within an organisation. Moreover, the two highest classifications of registered nurses are exempt from the NA's overtime payments; and

iv. of the five modern awards identified by the ASU, the Local Government Industry Award 2020 (LGIA) and the Water Industry Award 2020 (WIA) are the most comparable to the SCHADS Award in employee coverage, and it appears that the remote work provisions are not limited to any particular employees. The remote work entitlements, however, appear to be significantly different to the Joint Proposal. Neither the LGIA nor the WIA contain minimum payments, other than rounding-up payment for actual time work to the nearest 15 minutes, nor do the two awards make any distinctions between the time remote work is performed.'[23]

Q5: Question for the ASU: What does the ASU say in reply to AFEI's commentary on the modern awards containing remote work provisions?

[59] The HSU also supports a 1 hour minimum payment between 10pm and 6am and submits:

> 'the disutility of being disturbed between the hours of 10pm and 6am is patently more than any disutility to an employee receiving a call/ email during the day or earlier hours of the evening.'[24]

[60] The UWU also supports a 1 hour minimum payment between 10pm and 6am.[25]

[61] In reply ABI summarises the submissions advanced by the Union parties in support of a 1 hour minimum payment:

1. They accept that remote work should attract a shorter minimum payment than the minimum engagements / minimum payments that otherwise apply under the Award.

[23] AFEI Submission, 30 August 2021 at [11].

[24] HSU Submission, 25 August 2021 at [12].

[25] UWU Submission, 25 August 2021 at [25]-[26].

2. The Full Bench already provisionally rejected a 45-minute minimum payment advanced by our clients during the hearing.

3. In the May 2021 Decision the Full Bench expressed the provisional view that the appropriate minimum payment period should be 1 hour.

4. The provisional view referred to in 3 above should be adopted as it was 'reached with regard to the appropriate balance to be struck between the interaction between an appropriate minimum payment in the circumstances and the rate of payment to be applied to such work'.

5. The disutility associated with performing remote work between 10pm and 6am is 'patently more' than the disutility associated with performing remote work during the day.

Q6: Question for the Union parties: Do you take issue with ABI's summary of the Union's submissions?

[62] ABI's reply to these submissions is summarised below.

(i) The first point

[63] ABI submits that the first point 'is uncontroversial provides no more support for the Union Parties' contended minimum payment period as it does for our clients' contended minimum payment period.'[26]

(ii) The 'provisional view' argument

[64] The second and third points rely on the *provisional* views expressed in the *May 2021 Decision*.

[65] ABI submits that the Union's submission is 'paradoxical and ironic' given that:

- the Union Parties have agreed to, and support, a 15 minute minimum payment for on-call employees during the span of 6am-8pm, which departs from the provisional view expressed by the Commission in the Decision;
- in so doing, the Union Parties are advocating for a minimum payment that departs from the provisional view contained in the Decision; and
- in support of the 15 minute minimum payment, the ASU appears to suggest that the Commission should not place material weight on the provisional view.

[66] ABI submits that:

> 'the Union Parties seek to place weight on the Commission's provisional view in respect of the minimum payment to apply for on-call employees performing work between 10pm-6am.

[26] ABI Submission, 30 August 2021 at [19].

With respect, the Union Parties' position lacks credibility.

The provisional views were just that: provisional. It is open to the Commission to depart from those provisional views. This is particularly the case where:

(a) a group of no less than eight interested parties (including all three unions) have reached an agreement on a 'remote work' clause which contains a 'day time' minimum payment period that departs from the Commission's provisional view;

(b) the provisional view as to minimum payments was made in circumstances where the proposed *rate* of pay was unclear; and

(c) it is broadly accepted that the *rate of pay* is interrelated to the *minimum payment*.

In the circumstances, it is appropriate that the Commission not place any material weight on their provisional view at [733], and instead determine the issue having regard to the additional clarity that has arisen from the filing of the Agreed Clause, and on the basis of the merit of the submissions now put before the Commission.'[27]

(iii) 'Appropriate balance' argument

[67] The UWU relies on the Commission's *provisional* view in support of a 1 hour minimum payment period. At [26] of their submission, the UWU submit that the Commission's provisional view 'was reached with regard to the appropriate balance to be struck between the interaction between an appropriate minimum payment in the circumstances and the rate of payment to be applied to such work'.

[68] In reply ABI submits:

'We struggle with that submission.

Clearly, the issues of minimum payment and the rate of payment are interrelated. However, the provisional view expressed by the Commission in respect of minimum payments were made in circumstances where the rate of payment that would apply was wholly unclear. This is borne out in the Decision where, at [734]-[738], the Full Bench did not make any finding as to what the rate of payment should be, and effectively indicated that the rate of payment advocated by our clients was unclear.

In light of [737] of the Decision, it cannot be said that the Commission's provisional view on minimum payments were reached 'with regard to the appropriate balance to be struck between the interaction between an appropriate minimum payment in the circumstances and the rate of payment to be applied to such work'.

We submit that the opposite is in fact true: the provisional view at [733] of the Decision was made in circumstances where the proposed *rate* of payment was unclear.

That being the case, it is appropriate for the Full Bench to reconsider their provisional view at [733] now that there is greater clarity surrounding what parties say should be the *rate* of pay.

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[27] ABI Submission, 30 August 2021 at [22].

The argument advanced by the UWU at [26] of their submission must not be accepted.'[28]

(iv) 'Disutility' argument

[69] The final argument advanced by the Union Parties in support of a 1 hour minimum payment period relates to the disutility associated with the work.

[70] ABI accepts, generally speaking, that there is a greater disutility associated with employees (who are on-call) performing remote work between 10pm-6am as compared to performing remote work at 6am-10pm.[29]

[71] As ABI notes the 'crux of the debate is about the *extent* of the disutility, and the *proportionate disutility* between 'day time' remote work and 'night time' remote work by on-call employees.'[30] In respect of this issue ABI submits:

> 'The 'night time' minimum payment cannot be viewed or established in a vacuum. It must be proportionate to the 'day time' minimum payment period. It must also be set having regard to the fact that, under the Agreed clause, the applicable rate of pay will <u>in all cases be at least 150%</u>.
>
> Generally speaking, the modern awards system compensates for disutility associated with the performance of work through the imposition of premium rates: for example, working at unsocial hours attracts a night shift loading, working on the weekends attracts a weekend penalty rate, etc.
>
> In this case, the Agreed Clause provides for remote work performed outside the span of hours to be compensated at 150% for the first two hours and 200% thereafter. The rationale for this is that a premium rate should apply to compensate for the disutility associated with performing remote work at unsocial hours. This is to be contrasted with 'day time' remote work which, in most cases, will not attract a premium rate.
>
> …a one hour minimum payment goes well beyond an appropriate monetary entitlement for the type of work performed (having regard to both the value of the work and the disutility associated with the work).'[31]

Q7: Question for the Unions: What do you say in reply to the above submissions?

[72] ABI contends that if the Union Parties' proposed 1 hour minimum payment was to be adopted, it would result in 'unreasonable, disproportionate and unfair amounts of money being payable by employers' and would 'establish an award term that is inconsistent with the modern awards objective.'

[73] To demonstrate the unreasonableness of the Union Parties' submission, ABI provides an example of the amounts that would be payable to three classes of employee if they were to perform remote work during 10pm-6am while on-call:

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[28] ABI Submission, 30 August 2021 at [27]-[32].

[29] ABI Submission, 30 August 2021 at [34].

[30] ABI Submission, 30 August 2021 at [35].

[31] ABI Submission, 30 August 2021 at [36]-[39].

- SACS employee Level 2, pay point 3 (permanent employee);
- Home care employee Level 3, pay point 2 (casual employee); and
- SACS employee Level 6, pay point 2 (permanent employee).

[74] The below table sets out the minimum monetary amount that would apply to each of the sampled classifications of employees.

Classification	Mid-week			Weekend (Sunday)		
	On call allowance	**Min payment**	**Total payment**	**On call allowance**	**Min payment**	**Total payment**
SACS Level 3, pay point 3	$20.63	$51.30	**$71.93**	$40.84	$68.40	**$109.24**
Home care employee Level 3, pay point 2 (casual)	$20.63	$42.70	**$63.33**	$40.84	$54.90	**$95.74**
SACS employee Level 6, pay point 2	$20.63	$71.93	**$92.56**	$40.84	$95.90	**$136.74**

[75] The table assumes that the applicable rate of pay would be 150% for permanent employees and 175% for casual employees in relation to 'mid-week' work. Under the Joint Proposal, this would be the lowest rate that would apply to the work. The table also assumes the weekend work is performed on a Sunday. ABI advances the following submissions in respect of the table above:

> 'the proposed one hour minimum payment advocated for by the Union Parties would result in very significant payments applying to remote work. This is particularly the case where employees might, in many cases, perform work for only a very short period of time (e.g. 1-5 minutes) and without leaving their home (and potentially in some cases without even getting out of bed).
>
> The Union Parties' proposed minimum payment would also result in on-call employees being remunerated greater than employees who are not on-call and who are required to perform remote work. This would be an anomalous outcome.
>
> Put simply, the payments advocated for by the Union Parties are manifestly excessive. They bear no resemblance to the value of the work performed or the disutility associated with such work.'[32]

[32] ABI Submission, 30 August 2021 at [46]-[48].

Q8: Question for the Union parties: What do you say about the above table and ABI's submission in respect of the table?

Ai Group's Remote Response Proposal

[76] Ai Group advances separate proposal relating to remote work.

[77] It is convenient to note here that in its submission of 26 August 2021 the ASU opposes Ai Group's remote response proposal 'in its entirety' and submits that Ai Group's proposal 'significantly expands the scope of the matter beyond that of the claims advanced by the ASU, HSU and ABI':

> 'AIG's claim extends to all work where an employee does not have a designated workplace. AIG's drafting is ambiguous, but it appears that the intent is for their remote response clause to completely replace the ordinary hours, rostering and penalty rate provisions of the SCHDS Award.
>
> It is a completely novel proposal brought in the final stages of these proceedings and unsupported by any evidence. The Commission should reject it outright.'[33]

[78] Ai Group opposes elements of the Joint Proposal and submits that, in various respects, the approach proposed by Ai Group should be preferred.

[79] As a general proposition Ai Group submits:

> 'the level of support or otherwise from employer groups for a particular proposed variation is not a determinative consideration. It should be the merit of the proposals advanced, as considered through the prism of the relevant statutory context, and s.134 in particular, that should sway the Full Bench's deliberations. The clause that has the widest number of supporters should not be viewed as having inherently greater merit. Proposals should not be selected or preferred based upon their popularity.'[34]

[80] A major difference between Ai Group's Second Proposal and the Joint Proposal is the differing scope of activities that fall within the definition of *'remote response work'*. In the Ai Group proposal remote response work is defined as follows:

> '**remote response work** means the performance of 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…'

[81] Ai Group now proposes that the definition it previously advanced by 'slightly reworded and restructured' by including the following as a separate paragraph after the sentence defining remote response work:

> '**Remote response work** does not include an employee's performance of administrative tasks associated with maintaining their employment. For example, remote response work would not include any activity of an employee involving:

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[33] ASU Submission, 26 August 2021 at [80]-[81].

[34] Ai Group Submission, 30 August 2021 at [59].

(a) 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];

(b) responding to notification of cancelled shifts;

(c) responding to suggestions for make-up time for cancelled shifts in accordance with clause [X];

(d) engaging with any kind of online platform or electronic system in order to obtain or arrange when they will work; or

(e) reviewing or enquiring about their roster.'[35]

[82] Ai Group also proposes the following definition of the term *'designated workplace'*:

> '**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.'

[83] The corresponding elements of the Joint Proposal are as follows:

'25.10 Remote work

(a) This clause applies where an employee is required by their employer to perform remote work.

(b) For the purpose of this clause, remote work means the performance of work by an employee at the direction of, or with the authorisation of, their employer that is:

(i) not part of their rostered working hours (or, in the case of casual employees, not a designated shift); and

(ii) not additional hours worked by a part-time employee under clause 28.1(b)(iii) or 10.3(e) or overtime contiguous with a rostered shift; and

(iii) not required to be performed at a designated workplace.'

[84] Both proposals reflect a requirement that remote work be defined as work that is performed at the *'direction'* or *'authorisation'* of an employer. Both proposals seek to regulate payments for work that is undertaken at a '*designated workplace*'. Ai Group submits that a provision to this effect should be included in any variation to the Award.

[85] The Joint Parties propose that the term *'remote work'* be utilised instead of *'remote response work'*. Ai Group agrees with this proposal.

[86] In its submission Ai Group identifies 11 other areas of difference between its proposal and the Joint Proposal.

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[35] Ai Group Submission, 30 August 2021 at [67].

1. Scope of activities

[87] Ai Group proposes that *all* work undertaken remotely at the direction or authorisation of an employer should fall within a clause regulating the payment of remote response work. Ai Group's contention rests upon a proposition that a differing minimum payment regime should apply to work that is undertaken remotely.

[88] Ai Group identifies the following 'other salient considerations' in support of its position:[36]

1. An employee experiences less disutility when required to perform work remotely as opposed to incurring the cost and inconvenience of being required to travel to work. As such, the minimum payment attaching to such work through a minimum payment clause (as opposed to an hourly rate) should be less.

2. There is very limited evidence about remotely performed work before the Commission and no evidence to suggest that it can be bundled into two-hour blocks.

3. Permitting work to be undertaken remotely will provide an opportunity for work to be performed efficiently. For example, we doubt that it would be contested that some work can and is done by telephone in preference to employees travelling to visit a client. This includes work involving undertaking welfare checks on vulnerable clients and medication checks that involve confirming that a client has taken medication or prompting them to do so. It is axiomatic that it would be more efficient for work to be structured in this manner where possible as it avoids travelling during working hours and it would be preferable from an employee's perspective if it negates the need for unpaid travel. This would also reduce the cost burden on clients, and by extension, in the context of the NDIS and other publicly funded arrangements and services, governments.

4. In the context of the COVID-19 pandemic and widely applicable public health orders either requiring employees to work from home or preventing certain employees from entering / leaving certain Local Government Areas (including provisions in NSW specifically targeted at disability support workers), the Commission should seek to facilitate working practices that enable employees to work from home where possible.

5. The application of the clause based on the performance of work remotely is much simpler and easier to understand than one that is also based on when or the circumstances in which such hours are worked (particularly in the context of casual employment).

[89] Ai Group also submits that if the narrower scope advanced of Joint Proposal is adopted, it should not prejudice Ai Group's prospects should it subsequently pursue a separate variation to the minimum payment provisions, as contemplated in the *August 2021 Decision*.

2. Definitional issues

[36] Ai Group Submission, 30 August 2021 at [77].

[90] Ai Group contends that there is a lack of clarity in the wording of clause 25.10(b) of the Joint Proposal, in particular, it submits that it 'is unclear what constitutes a *'designated shift'* in the context of a casual employee.'[37]

[91] ABI submits as follows in relation to the application of the clause to a casual employee:

> 'The definition caters for casual employees who might not have 'ordinary' or 'normal' or 'rostered working hours' by incorporating the notion of a 'designated shift' for casuals. We consider that this language clarifies how the clause applies for casual employees, in that 'remote work' is work that is not part of a casual's 'designated shift'.'[38]

[92] In reply Ai Group contends that ABI's submission 'does not clarify what is intended by the reference to a *'designated shift'*'[39] and submits:

> 'The evidence before the Commission does not paint a picture of employer practices generally in relation to the engagement of casual employees. It is likely that industry takes a raft of approaches to such matters. We note, for example, the submissions of Hireup that describe a system of work allocation through an online portal that directly connects thousands of disability support workers and the clients that they assist. These submissions highlight the kinds of uncertainty that would fall from the adoption of the New ABI / Union Proposal. In the context of Hireup, would all casual engagements constitute designated shifts? We would assume so, but this is far from clear.
>
> Ultimately, there is very little evidence before the Full Bench of the performance of remote response work. The evidence from a limited number of individuals as to their experience of being required to undertake work remotely, or the arrangement at play in particular workplaces, cannot be extrapolated out so as to establish general or typical circumstances in which remote work is undertaken. For our part, we understand that work is undertaken in a raft of circumstances and includes both unplanned and planned work. We do however accept that it is commonly undertaken outside of the rostered hours of a full-time or part-time employee.
>
> It is also unclear why, as a matter of merit, the proposed definition should only apply to work that is undertaken outside an employee's ordinary rostered hours of *'designated shift'*.'[40] [Footnotes omitted]

3. Interaction with clause 10.5 – the need for consequential amendments

[93] Ai Group submits that there is a contradiction or inconsistency between the Joint Proposal and clause 10.5 in the draft determination:

> 'It may be argued that the more specific remote response provisions would apply to the exclusion of clause 10.5, but we suggest that this approach to drafting is far from simple and easy to understand. This was, *in part*, the reason why we had in the last tranche of proceedings proposed

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[37] Ai Group Submission, 30 August at [83].

[38] ABI Submission, 25 August 2021 at [22(f)].

[39] Ai Group Submission, 30 August 2021 at [84].

[40] Ai Group Submission, 30 August 2021 at [85]-[87].

an exclusion from the minimum payment provisions for work that was not undertaken at a designated workplace.'[41]

4. The treatment of personal tasks incidental to the maintenance of employment

[94] Ai Group notes that the Joint Proposal 'does not include a provision expressly excluding tasks that are incidental to maintaining employment.'[42]

[95] In respect of this issue ABI advances the following submission:

> 'Consideration was given as to whether it was necessary to include a carve-out to the definition of 'remote work' to make it clear that 'remote work' does not include 'the performance of personal tasks that are incidental to maintaining their employment' (including things such as an employee reviewing or managing their own roster, communicating with their employer about their availability for work, or accepting additional hours, calling in sick, etc.). However, the parties to the agreed position formed the view that as such activities do not amount to the 'performance of work' within the general industrial meaning of that phrase, it was unnecessary to include such a carve-out. Certainly, it is not the parties' intention for those incidental activities to constitute 'remote work' or trigger any entitlement under the clause.'[43]

[96] Ai Group agrees that the abovementioned activities would not constitute work, as contemplated by the Award but is concerned 'that this may not be apparent to a lay person reading the Award. For this practical reason, we have proposed that a clause expressly identifying various common activities that would not constitute remote response work should be included in any such provision.'[44]

[97] Ai Group submits that if the Full Bench was not satisfied that implementing an express 'carve out' of certain activities from a definition of remote response work is *necessary*, it would assist if the Full Bench's decision 'expressly identifies that it is not the Commission's intention that such activities would be caught by any remote response clause. Such remarks would assist in the context of any subsequent dispute about the application of the clause.'[45]

5. *Rates of pay for remote work*

[98] As Ai Group understands it the Joint Proposal is 'intended to provide a succinct distillation of the various obligations that would arise under the broader obligations of the Award in relation to the remuneration that would apply to such work.'[46] Ai Group submits that the approach taken in the Joint Proposal does not capture 'all of the subtleties of the full terms of the Award':

> 'The proposed clauses 25.10(d)(i)(B) and (C) problematically fail to distinguish between ordinary hours of work and overtime. If the intent is that penalty rates would only be payable in relation to hours outside of ordinary hours of work as contemplated by the Award, the provisions should

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[41] Ai Group Submission, 30 August 2021 at [88].

[42] Ai Group Submission, 30 August 2021 at [89].

[43] ABI Submission, 25 August 2021 at [22(k)].

[44] Ai Group Submission, 30 August 2021 at [90].

[45] Ai Group Submission, 30 August 2021 at [91].

[46] Ai Group Submission, 30 August 2021 at [93].

provide for this. Under the proposal, it is unclear whether the relevant overtime rates contemplated would only apply if the remote work is undertaken in circumstances where the employee has completed 38 ordinary hours in the given week or 76 ordinary hours in the relevant fortnight or whether they would apply in circumstances where the employee *subsequently* works so many ordinary hours so as to exceed 38 hours in that week.

A further problem is that the remuneration is described as being paid as a percentage. The amounts to which these percentages are to be applied are not, however, specified. It should be the minimum hourly rates prescribed by the Award. It would not be appropriate to implement the wording as proposed as it could be read as requiring the application of the relevant penalties to over-Award payments. This would not be *necessary*, in the context of a safety net.

The above issues do not arise in the Ai Group's Second Proposal, which simply provides as follows:

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.'[47]

[99] Ai Group's concedes that its proposal leaves a party to read the other provisions of the Award in order to determine the rate that should apply, but submits:

'If the Full Bench is of the view that the rate that should apply to remote response work should not merely be the minimum hourly rate, and that the clause should expressly identify the rate, a different form of words to those adopted in the [Joint Proposal] would be required.'[48]

[100] In the alternative Ai Group would not oppose a provision which simply provides that all remote response work is paid at the minimum rate of pay specified in the Award.

6. Minimum payments - the differences in approaches adopted by the parties

[101] Ai Group notes that the various parties take 'somewhat divergent approaches' to identifying the minimum payment periods that should apply in relation to remote response work depending on the time of day that it is undertaken.

[102] The Full Bench has said as follows in relation to this issue:

'The ASU's proposal requires that *all* remote response work be paid at overtime rates. Further, if the employee is not 'on call' (and receiving an 'on call' allowance) they are paid overtime rates for a minimum of 2 hours. If they are 'on call' the minimum payment is one hour at overtime rates.

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[47] Ai Group Submission, 30 August 2021 at [95]-[97].

[48] Ai Group Submission, 30 August 2021 at [98].

We are not persuaded that the ASU's proposed minimum payments are warranted. We agree with Ai Group's submission in respect of this aspect of the ASU's claim:

> 'It is disproportionate to what might, at least in some instances, be a very short period of work undertaken without the employee incurring the cost or inconvenience of travelling to some other location…

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. <u>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.</u>

The rate of pay applicable to remote response work (as opposed to the minimum payment) is problematic.'[49]

[103] The Full Bench has also observed that a shorter minimum payment should apply in circumstances where the employee is being paid an 'on call' allowance.[50]

[104] Ai Group submits that it has sought to adopt a proposal that is broadly consistent with the approach adopted by the Full Bench:

> 'In short, we have proposed minimum payment periods for work between 6am and 10pm of 30 minutes, where the employee is not on call. Consistent with the logic of the Full Bench, we have proposed a lesser, but meaningful period of 15 minutes where the employee is on call. This is reasonable given the employee is being paid an on-call allowance for the disutility associated with being on call.
>
> We have proposed a smaller minimum payment period than that which was proposed by the Full Bench where the employee is not on call and nonetheless works remotely between 10pm and 6am (45 minutes as opposed to an hour). We explain the rationale for this below.
>
> Consistent with the logic of the Full Bench, we have proposed a shorter minimum payment period of 30 minutes where the employee is on call and required to work between 10pm and 6am.'[51]

[105] The Joint Proposal contemplates that work done at any time while an employee is not on call should attract a minimum payment of one hour (regardless of the time at which it is undertaken). Ai Group opposes this aspect of the proposal:

> 'It is inconsistent with the provisional view of the Full Bench that a lesser rate should apply to work undertaken between 6am and 10pm and fails to recognise the differing levels of disutility experienced by employees required to undertake remote work during the day and night. We contend that it provides too large a payment for remote work undertaken during the day and that a case for such a significant payment has not been made out.'[52]

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[49] *May 2021 Decision* at [731]-[734].

[50] *May 2021 Decision* at [237].

[51] Ai Group Submission, 30 August 2021 at [104]-[106].

[52] Ai Group Submission, 30 August 2021 at [108].

7. *Minimum Payments – the rate of pay*

[106] Ai Group submits that viewed in its totality, the minimum payments regime contemplated in the Joint Proposal is 'very different and, in some circumstances, likely to be much more costly to an employer than that proposed by Ai Group':[53]

> 'Under Ai Group's proposal, the minimum payments are calculated based on minimum Award rates. Under the New ABI / Union Proposal, the minimum payments are calculated at rates of pay that reflect the inclusion of additional loadings or penalties, depending on when the remote work is performed. The consequence of this is that the minimum payment periods become somewhat of a nonsense, because the employee will potentially receive a payment that is entirely disproportionate to the timeframes selected.
>
> To take an admittedly extreme (but no doubt real) example, under the New ABI / Union Proposal an employee who works for 1 minute (or perhaps less) in undertaking an activity such as responding to a text or other electronic message on a public holiday may be required to be paid up to 2 hours and 45 minutes. This does not strike a fair balance. Indeed, it would be grossly unfair to the employer.
>
> Further, it is unclear why, as a matter of merit, a casual employee's minimum payment should be loaded up to include a casual loading (which appears to be the approach adopted). Under the Award, the casual loading is said to be paid instead of the paid leave entitlements accrued by full-time employees. There is no apparent reason why the loading should be payable by reference to hours that may not actually be worked, and which may fall during overtime. A permanent employee would not accrue leave under the NES by reference to such hours.
>
> The approach to calculating the rate at which the minimum payments proposed by Ai Group should be adopted.
>
> As already alluded to, Ai Group acknowledges that we have proposed a minimum payment for work between 10pm and 6am that is marginally shorter than what was identified by the Full Bench. We have suggested this based on three considerations:
>
> a. We have proposed a higher rate of pay for work actually performed during remote response work than the minimum rates of pay applicable under the Award.
>
> b. Remote work will at times be of a very short duration and, in that context, we suggest that a 45 minute minimum payment strikes a fair balance.
>
> c. A cautious approach should be adopted given the notoriously difficult financial position of many employers in the sector; the raft of other costly changes being implemented as a product of these proceedings and the limited evidence before the Commission as to the frequency with which such payments may become payable.'[54] [Footnotes omitted]

[107] Ai Group submits that if the Full Bench is not persuaded that a 45 minute minimum payment is fair, it should adopt the 1 hour minimum payment provisionally considered appropriate by the Full Bench.

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[53] Ai Group Submission, 30 August 2021 at [111].

[54] Ai Group Submission, 30 August 2021 at [61]-[65].

8. Interaction between the minimum rates provision and the minimum payment provision

[108] Ai Group contends that 'various technical difficulties with the [Joint] Proposal flow from the interaction between minimum rates and minimum payment methodology adopted.'[55] In particular, because:

> 'the proposed clause requires that minimum payments be calculated by reference to various loadings which apply based on the time or day at the work is undertaken, there is no clear way to determine what penalty applies to the portion of the minimum payment period that is not worked. For example, if an employee who has undertaken 37.5 hours of work in a week undertakes 35 minutes of remote work, at what rate should the minimum payment be calculated? Similarly, what rate should apply if the remote work is undertaken between 11.45pm and 12.15am on a Friday night, or the evening before a public holiday? A raft of other similar questions could be raised.'[56]

[109] Ai Group proposes a minimum payment for remote work that is calculated by reference to minimum rates in the Award; this is said to avoid the various difficulties identified above.

[110] The relevant aspect of the Ai Group's Second Proposal is as follows:

'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.'

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[55] Ai Group Submission, 30 August 2021 at [118].

[56] Ai Group Submission, 30 August 2021 at [118].

[111] Clause X.3(b) above proposes a limitation on the application of the minimum payment provisions. In respect of this proposal Ai Group submits:

> 'The proposal is advanced in recognition of the fact that, if an employee is not on call, and is free to decline the work or, indeed, not answer their phone or email, it seems that in such circumstances, where the employee nonetheless voluntarily elects to undertake such work, *and is paid at overtime rates*, a minimum payment for 45 minutes (or an hour) is not necessary. If this proposal is *not* adopted by the Full Bench, it further justifies the more modest 45 minimum payment proposal than the 1 hour minimum payment proposal.'[57]

9. Remote meetings and training

[112] The Joint Proposal contemplates that work involving participation in meetings or staff training remotely should attract a minimum payment of 1 hours' pay.

[113] Ai Group shares the implicit view of the supporters of the Joint Proposal that such work should not attract the standard minimum payment requirements that will be applicable under clause 10 of the Award. Accordingly, Ai Group supports the implementation of a 1 hour minimum payment provision in this context but maintains the view that a lesser period than 1 hour is appropriate (at least in the context of training).

[114] In support of a lesser minimum payment, Ai Group submits that:

> 'that it would be somewhat anomalous for a one hour minimum payment to apply to such work if a much shorter minimum payment period is to apply in some contexts in which remote work is performed. Relevantly, the [Joint] Proposal contemplates that other remotely performed work which occurs between 6am and 10am, where an employee is on call, should only attract a minimum payment of 15 minutes pay.
>
> Further, the evidence does not establish that remote participation in training or meetings generally takes an hour. Nor does the evidence suggest that such work is arranged or undertaken in a manner that visits any significant disutility upon employees generally.'[58]

[115] If the Full Bench is minded to grant an exception from the generally applicable minimum payment provisions for remotely performed training and meetings, Ai Group proposes 'where the employee is able to determine the time at which they undertake such work, a minimum payment of 30 minutes at the minimum rate of pay should apply.'[59]

10. The rounding proposal

[116] The Joint Proposal contains a requirement that payment for time worked beyond the specified minimum payment period be rounded up to the nearest 15 minutes.

[117] Ai Group opposes the rounded up requirement and submits that:

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[57] Ai Group Submission, 30 August 2021 at [121].

[58] Ai Group Submission, 30 August 2021 at [125]-[126].

[59] Ai Group Submission, 30 August 2021 at [128].

‘The proposal unfairly requires employers to pay employees for time not worked, even though they have earnt the relevant minimum payments.

Award provisions do not generally require that payments be rounded to the nearest 15 minute increment of time (although we recognise that there are some examples), and there is no reason why it is necessary in this context.

The proposal should be delated or amended as follows to provide a more balanced approach:

> **(iv)** Any time worked continuously beyond the minimum payment period outlined above will be rounded either up or down to the nearest 15 minutes and paid accordingly.’[60]

11. Recording of time

[118] In the *May 2021 Decision* the Full Bench 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.[61]

[119] The Joint Proposal deals with this issue in the following manner:

‘Other requirements

An employee who performs remote work must maintain and provide to their employer a time sheet or other record acceptable to the employer specifying the time at which they commenced and concluded performing any remote work and a description of the work that was undertaken. Such records must be provided to the employer within a reasonable period of time after the remote work is performed.’

[120] Ai Group’s Second Proposal adopts the following approach:

‘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~~ relating to 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

[60] Ai Group Submission, 30 August 2021 at [130]-[132].

[61] *May 2021 Decision* at [722].

clause does not apply if the employer has not informed the employee of the reporting requirements.'

[121] As to clause X.5, Ai Group submits:

> 'Clause X.5 is intended to constitute a mechanism that will ensure that employees record and communicate to their employer the time they spend working remotely.
>
> Clause X.5(a)(i) contemplates traditional timesheets (these may be electronic or paper based). We have proposed that the relevant record must be provided by the end of the next pay period or in accordance with another agreed arrangement, in order to strike a reasonable balance between providing employees sufficient time to create and provide the record to their employer and the need for the employer to obtain the information at a time that is proximate to when the work was undertaken. It would not be reasonable for an employer to be required to provide payment for remotely performed work if it is not made aware of the performance of such work at or around the time that it was undertaken. This aspect of the proposal would not impose an unreasonable burden upon employees.
>
> Clause X.5(a)(ii) has been included in anticipation of employers developing more sophisticated means for capturing the performance of remote response work. This might include, for example, requiring employees to record the performance of such work through enterprise specific *'apps'* or software. Such mechanisms might foreseeably interact with other systems operated by an employer and thus reduce the administrative burden that might otherwise flow from the imposition of the proposed new obligation. We have however included a caveat that any alternate requirement to that contemplated by proposed clause X.5(a)(ii) would need to be reasonable.
>
> We have proposed clause X.5(b) in order to address the Full Bench's decision that the provision should include a mechanism that ensures employees record and communicate the hours worked to their employer. It does this by making the obligation to provide a payment contingent upon compliance with the clause.
>
> Clause X.5(b) is fair. An employee who complies with their obligations under the Award will receive payment in accordance with the Award, by force of law. The fairness of the proposed approach is reinforced by the element of the provision that stipulates, in effect, that the provision does not apply if an employer has not advised the employee of the relevant reporting requirements.
>
> For clarity, the reference to *'this clause'* in clause X.5(b) is intended to mean that clause X.5(b) does not apply if the employer has not informed the employee of the reporting requirements under clause X.5(a).'[62]

[122] Ai Group submits that:

> 'A significant deficiency in the [Joint] Proposal is that the obligation to provide a payment to an employee would not be dependent upon the employee providing the employer with a copy of a record they have created of the hours worked. Accordingly, if an employee failed to actually provide the timesheet, the employer would be left, at law, in the impossible position of having to make a payment for the remote work performed even though they may have no knowledge of what work has been undertaken as a matter of fact.'[63]

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[62] Ai Group Submission, 30 August 2021 at [137]-[142].

[63] Ai Group Submission, 30 August 2021 at [143].

[123] While the Joint Proposal provides that an employee would be required to provide a timesheet, Ai Group submits that reliance upon this alone is not sufficient, from a practical perspective:

> 'The fact that an employee may be in breach of an Award clause if they fail to provide the requisite timesheet is of no utility to an employer who is not able to comply with their obligations to provide a payment as a consequence of such non-compliance.'[64]

[124] Ai Group submits that the Joint Proposal will not ensure that an employee records and communicates to their employer time spent performing remote work and that 'there is no inherent unfairness in an employee's entitlement to payment being contingent upon their compliance with an obligation upon them under the Award.'[65]

[125] Ai Group contends that the Joint Proposal also does not provide a clear explanation of when the relevant records need to be provided to their employer.

Q9: Question for the Joint Parties: The proponents of the Joint Proposal are invited to respond to each of Ai Group's criticisms and proposed amendments.

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[64] Ai Group Submission, 30 August 2021 at [144].

[65] Ai Group Submission, 30 August 2021 at [146].

4 Quantum of Broken Shift Allowance

[126] In the *May 2021 Decision* the Full Bench expressed the following *provisional* views:[66]

1. An employee working a '1 break' broken shift under clause 25.6 should receive a broken shift allowance of 1.7% of the standard rate per broken shift ($17.10 per broken shift).

2. The broken shift allowance payable for a '2 break' broken shift should be set at 2.5% of the standard rate ($25.15 per broken shift).

[127] The *provisional view* as to the quantum of the allowance is contested.

[128] The Union's support the *provisional* view as to the quantum of the broken shift allowances. A number of the employer parties take a different view.

[129] ABI submits that the proposed quantum is 'too high'. ABI contends that other changes which the Commission has decided to make 'will go a significant way to ameliorating the issues with the broken shifts clause (such as fragmented working patterns and very short shifts)'. The particular changes highlighted by ABI are:

- implementing a two-hour minimum engagement for each part of a broken shift for part-time and casual employees in the home care and disability services streams;

- limiting broken shifts to consisting of two portions of work (and one break) or, by agreement with an individual employee (on a per occasion basis), three portions of work (and two breaks).

[130] As to the proposed quantum, ABI submit that 'it is clear that there is a huge disparity across the modern award system in terms of the allowances applying in relation to broken shifts'; 'broken shift allowances range from $2.53 per day to $17.18 per day, with most being towards the lower end of the range'.[67]

[131] ABI contends that if the Commission's provisional view is affirmed the SCHADS Award 'will become home to the highest broken shift allowance across the entire modern award system'.[68]

[132] ABI accepts that the setting of the quantum of the broken shifts allowance requires the exercise of broad judgment; but submits that the *provisional* amounts are too high. In particular, ABI contends that the proportional difference between the two allowances should not be as significant:

> 'In our submission, the introduction of a requirement that 'two break' broken shifts can only be worked by agreement with an individual on a per occasion basis means that the 'two break'

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[66] *May 2021 Decision* at [1266].

[67] ABI Submission, 3 August 2021 at [16].

[68] Ibid at [20].

allowance should not be set as high comparative to the 'one break allowance' as currently proposed.'[69]

[133] ABI also submit that its position in respect of the quantum of the broken shift allowances is advanced on the basis that the allowances address the disutility associated with performing work on a non-continuous basis 'as well as the additional travel time and cost associated with working broken shifts and in place of the currently payable shift penalties'.[70] In particular, ABI's position is advanced on the basis that there will be no further variation to the award to introduce further entitlements in relation to travel time.

[134] ABI submits that the proposed broken shift allowances be adjusted downwards to **1.5%** ($15.47) and **2.0%** ($20.63) on the basis that 'this will provide employees with a reasonable amount of compensation for the disutility associated with working broken shifts, and still result in the allowances being at "towards the upper end of the range" compared to other modern awards'.[71]

[135] AFEI notes that the provisional quantums are set towards the upper end of the range in other modern awards (which range from 0.28% to 2.29%) and does not agree that the broken shift allowances in the SCHADS Award should be set towards the upper end of the range in other modern awards, for 3 reasons:

1. A comparison with other modern awards is not a sound basis for determining the quantum of allowance appropriate for the SCHADS Award as it is intended to specifically address the needs of the disability services and home care industries.

2. The introduction of a 2 hour minimum engagement term will ameliorate the disutility of working broken shifts.

3. In light of the determinations made by the Commission the disutility of working broken shifts is diminished and 'allowances towards the 'upper end' of the scale is not justified and should be reduced'

[136] AFEI proposes that the broken shift allowances be:

- **1.3%** of the standard rate for a 1 break shift; and

- **2.0%** of the standard rate for a 2 break shift.

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[69] Ibid at [25].

[70] Ibid at [27].

[71] Ibid at [22].

5. Matters arising from the August 2021 Decision

[137] There are 2 matters arising from the *August 2021 Decision* about which parties were provided an opportunity for comment:

1. The *provisional* view regarding the particular characteristics of transitional arrangements that will apply to minimum payments for part-time employees (set out at [129] and [130] of the *August 2021 Decision*).

2. Any technical amendments to the revised draft determination set out at Attachment 1 to the *August 2021 Decision* (and at **Attachment 1** to this document).

5.1 Transitional arrangements in relation to minimum payments to part-time employees

[138] In the *August 2021 Decision* the Full Bench *decided* that the determination arising from its decision will included a transitional arrangement applying to minimum payments for part-time employees.

[139] The Full Bench expressed the *provisional* view that such a transitional arrangement should have the following characteristics:

1. Limited scope:

   (a) it only applies to part-time employment arrangements which:

      (i) were entered into before 1 March 2022; and

      (ii) provide for a period of continuous work of less than 3 hours for social and community services employees (except when undertaking disability services work) and 2 hours for all other employees(hours (and therefore are affected by the variation).

2. It imposes an obligation to consult and negotiate in good faith regarding changes to the agreed pattern of work.

3. If no agreement is reached, then the employer can unilaterally alter the agreed pattern of work to provide for periods of continuous work of 2 or 3 hours (depending on the type of work being performed), with 28 days' notice in writing.

4. Any unilateral alteration to the agreed pattern of work cannot come into operation before 1 July 2022 (the implementation date of the minimum payment term).

5. The transitional arrangements will come into operation on 1 March 2022 and cease operation (and be removed from the Award) on 1 October 2022. The commencement date of 1 March 2022 will provide employers and employees with an appropriate period of notice of the new minimum payment provisions.

[140] A draft term which gives effect to this *provisional* view is set out below:

'10.5A Transitional arrangements applying to minimum payments for part-time employees

Clause 10.5A operates from 1 March 2022 until 1 October 2022.

NOTE: From 1 July 2022, this award will include a requirement for part-time employees to be paid for the following minimum number of hours, at the appropriate rate, for each shift or period of work in a broken shift: social and community services employees (except when undertaking disability services work)—3 hours; all other employees—2 hours (the **minimum payment requirements**). This clause provides transitional arrangements for the minimum payment requirements.

(a) Clause 10.5A applies in relation to agreements made under clause 10.3(c) before 1 March 2022, where the employee's agreed regular pattern of work includes shifts or periods of work in broken shifts of less than:

- **(i)** 3 hours for social and community services employees (except when undertaking disability services work);
- **(ii)** 2 hours for all other employees.

(b) The employer must discuss the relevant minimum payment requirements with the employee and genuinely try to reach agreement on a variation to the agreement made under clause 10.3(c) that will make each of the employee's shifts or periods of work in broken shifts consistent with the hours specified in clause 10.5A(a)(i) or (ii) and will reasonably accommodate the employee's circumstances.

(c) Notwithstanding any prior agreement between the employer and the employee and despite clause 10.3(e), if the employer has genuinely tried to reach an agreement with the employee under clause 10.5A(b) but an agreement is not reached (including because the employee refuses to confer), the employer may vary the agreement made under clause 10.3(c) to provide for shifts or periods of work in broken shifts that are consistent with the hours specified in clause 10.5A(a)(i) or (ii), by providing 28 days' notice to the employee in writing.

(d) A variation by the employer under clause 10.5A(c) varies the agreement between the employer and employee made under clause 10.3(c).

(e) A variation made under clause 10.5A(c) must not come into operation before 1 July 2022.

(f) Clause 10.5A(c) 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.'

[141] Interested parties were invited to comment on the Full Bench's *provisional* view and the draft term, in the reply submissions to be filed on 30 August 2021.

[142] The ASU submits that the Commission should adopt the *provisional* view as to the characteristics of the transitional arrangement save that the transitional arrangements should commence on 1 January 2021 and should only apply to employment arrangements made before 1 January 2021. The ASU also proposes a number of amendments to the draft term.

[143] The draft term provides that the transitional arrangements commence operation on 1 March 2022 and that employment agreements entered into after this date are not subject to the transitional arrangements (see clause 10.5A(a) of the proposed term). As to this element of the proposed term the ASU submits:

> 'There is inherent logic in the Commission's provisional view that the operative date of the clause should also limit the applicability of the transitional arrangements. At a certain point after the determination of the matter, but before the operative date of the decision, an employer will have had sufficient notice of the variation to the minimum payment term that if they make new working arrangements where employees are required to work for a short period than the minimum payment, that is their informed choice and they should live with the consequences.'[72]

[144] The ASU then submits that 1 January 2022, *not* 1 March 2022, is the appropriate date 'because the transitional arrangements should capture fewer employments and should allow more time for negotiation'.[73] In support of this position the ASU submits:

> 'The minimum payment periods were decided in the May Decision. Employers have been on notice that these minimum payments would be applied at some time in the near future since that time even if they did not know the exact operative date of the decision. They can, and should, have been preparing to implement the decision. At this point the unfairness to the employee of entering into an employment arrangement that may be unilaterally altered within six months should outweigh any possible unfairness to an employer that they would have to pay them more than the time they are engage to work.
>
> Additionally, a longer transitional period before the operative date of the decision is desirable. If the transitional arrangements commence in March 2022, then employers and employees would have a much short period of time to negotiate new arrangements before unilateral variations were made. A longer transitional period before the operative date would employers to negotiate with the employees without rushing. This may mean fewer unilateral variations are notified under clause 10.5A(c).'[74]

[145] The Full Bench expressed the *provisional* view that the transitional arrangements term imposes an obligation to consult and negotiate in good faith regarding changes to the agreed pattern of work.

[146] The draft term seeks to implement that *provisional* view at proposed clause 10.5A(b), which states:

> 'The employer must discuss the relevant minimum payment requirements with the employee and genuinely try to reach agreement on a variation to the agreement made under clause 10.3(c) that will make each of the employee's shifts or periods of work in broken shifts consistent with the hours specified in clause 10.5A(a)(i) or (ii) and will reasonably accommodate the employee's circumstances.'

[147] The ASU supports this *provisional* view but contends that the draft term does not fully reflect the *provisional* view:

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[72] ASU Submission, 30 August 2021 at [12].

[73] ASU Submission, 30 August 2021 at [13].

[74] ASU Submission, 30 August 2021 at [14]-[15].

> 'However, the Draft Determination does not fully reflect the provisional view. There is no obligation to consult an employee before giving notice of a new working arrangement under clause 10.5A(c). The draft term only obliges an employer to discuss the minimum payment requirements with an employee and genuinely seek agreement for a change to an agreement made under 10.3(c).'[75]

[148] The ASU contends that in the context of the proposed clause 10.5A, 'seeking agreement is a distinct concept from consultation.'[76] The ASU submits that this is a significant distinction because there is no obligation under clause 10.5A(c) that:

- that there be any connection between the notified working arrangements and those discussed with the employee while genuinely seeking agreement under clause 10.5(b); or
- that the working arrangements imposed by clause 10.5A(c) accommodate the employee's specific circumstances.

[149] The ASU also submits that the draft term does not place any limitations on the characteristics of the working arrangement that may be notified to the employee. In particular, the ASU submits that the notified working arrangement could possibly:

- increase or decrease the employee's guaranteed weekly hours of work;
- change the employee's days of work;
- increase or decrease the number of days on which the employee works
- change the employee's starting and finishing times; and
- notify hours of work at times when the employee is unavailable.

[150] In these circumstances the ASU submits:

> 'the risk to the employee is that they will be required to accept completely novel working arrangements that may not accommodate their circumstances.'[77]

[151] The ASU proposed 2 specific amendments to the draft term:

> **(b)** before taking any action under clause 10.5A(c) or 10.5A(d), an employer must give an employee written notice that they are an employee to whom clause 10.5A applies.
>
> **(e)** Clause 8A applies if an employer proposes to give notice under clause 10.5A(d).

[152] The ASU advances 2 points in support of the proposed changes:

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[75] ASU Submission, 30 August 2021 at [17].

[76] ASU Submission, 30 August 2021 at [18].

[77] ASU Submission, 30 August 2021 at [20].

1. Regular and stable hours of work are important to part-time employees. In particular, regular and stable part-time hours of work allow people with caring responsibilities, who are more commonly women, to reconcile their work and family commitments. Many working parents will structure their hours of work around the availability of formal childcare and informal childcare (such as a grandparent). Affordable, convenient and suitable formal childcare is not necessarily available at short notice. If the employer changes a parent's days of work or starting and finishing times, they may not be able to find alternative child care arrangements within the 28-day notice period. Some employees may simply quit their employment. A significant proportion of disability workers are women, so this issue is likely to arise.

2. Part-time employees may have other employment, including elsewhere in the disability or home care sectors. Employees may therefore be subject to conflicting notices under clause 10.5A.

[153] The ASU proposes 2 further changes to the proposed term:

1. Increase the notice period in clause 10.5A(c) from 28 days to 84 days.

2. Include a dispute settling procedure that would permit the Commission to arbitrate the dispute.

[154] As to the first proposed change, the ASU submits:

> 'The 84-day notice period (12 weeks or roughly 3 months) would allow more time for an employee to make alternative arrangements for medical, caring and educational obligations as well and negotiate with other employers about their hours of work. It strikes a better balance between the interests of employers and employees. If the transitional arrangements commence on 1 January 2022 as proposed by the ASU, then there will be plenty of time before the variations commence operation to make orders.'[78]

[155] As to the inclusion of a power to arbitrate a dispute, the ASU submits:

> 'If the employer is to be given a power to unilaterally vary the hours of work of an employee who otherwise would be guaranteed that those hours of work would not change without their agreement, there should be a disputes settling procedure. This should include an express power for the FWC to arbitrate the matter. This would not be an exercise of the Commonwealth's judicial power, because it would be based in the consent of the employer and the employee. The employer can be said to consent to arbitration because it would have been on notice under this provision that the FWC had power to arbitrate. An employer would not be obliged to use s 10.5A(c) because it could take a number of steps to avoid using the term. It could simply pay whatever was owed to the employee under the new minimum payment terms, it could restructure its business, or it could continue negotiations for a new agreeable pattern of work.'[79]

[156] The ASU's proposed amendments to the draft term are set out below, in mark up:

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[78] ASU Submission, 30 August 2021 at [28].

[79] ASU Submission, 30 August 2021 at [29].

‘10.5A Transitional arrangements applying to minimum payments for part-time employees

Clause 10.5A operates from 1 ~~March~~January 2022 until 1 October 2022.

NOTE: From 1 July 2022, this award will include a requirement for part-time employees to be paid for the following minimum number of hours, at the appropriate rate, for each shift or period of work in a broken shift: social and community services employees (except when undertaking disability services work)—3 hours; all other employees—2 hours (the **minimum payment requirements**). This clause provides transitional arrangements for the minimum payment requirements.

(a) Clause 10.5A applies in relation to agreements made under clause 10.3(c) before 1 ~~March~~January 2022, where the employee’s agreed regular pattern of work includes shifts or periods of work in broken shifts of less than:

(i) 3 hours for social and community services employees (except when undertaking disability services work);

(ii) 2 hours for all other employees.

(b) before taking any action under clause 10.5A(c) or 10.5A(d), an employer must give an employee written notice that they are an employee to whom clause 10.5A applies.

~~**(b)**~~**(c)** The employer must discuss the relevant minimum payment requirements with the employee and genuinely try to reach agreement on a variation to the agreement made under clause 10.3(c) that will make each of the employee’s shifts or periods of work in broken shifts consistent with the hours specified in clause 10.5A(a)(i) or (ii) and will reasonably accommodate the employee’s circumstances.

~~**(c)**~~**(d)** Notwithstanding any prior agreement between the employer and the employee and despite clause 10.3(e), if the employer has genuinely tried to reach an agreement with the employee under clause 10.5A(b) but an agreement is not reached (including because the employee refuses to confer), the employer may vary the agreement made under clause 10.3(c) to provide for shifts or periods of work in broken shifts that are consistent with the hours specified in clause 10.5A(a)(i) or (ii), by providing ~~28~~84 days’ notice to the employee in writing.

(e) Clause 8A applies if an employer proposes to give notice under clause 10.5A(d).

(f) A variation by the employer under clause 10.5A(c) varies the agreement between the employer and employee made under clause 10.3(c).

~~**(e)**~~**(g)** A variation made under clause 10.5A(c) must not come into operation before 1 July 2022.

(h) The Fair Work Commission may deal with a dispute about a notice given under clause 10.5A(d), including mediation or conciliation, by making a recommendation or expressing an opinion, or by arbitration.

~~**(f)**~~**(i)** Clause 10.5A(c) 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.’

[157] The HSU supports the ASU's submission and the changes proposed to the draft term; with one exception. For the reasons set out at [4]-[12] of the HSU's reply submissions it proposed that the transitional arrangements only apply to employment arrangements made *before* 1 October 2021. In particular, the HSU seeks the following amendment to proposed clause 10.5A(a):

> **(a)** Clause 10.5A applies in relation to agreements made under clause 10.3(c) before 1 ~~March 2022~~October 2021, where the employee's agreed regular pattern of work includes shifts or periods of work in broken shifts of less than:
>
> **(i)** 3 hours for social and community services employees (except when undertaking disability services work);
>
> **(ii)** 2 hours for all other employees.

[158] In its reply submission of 30 August 2021, the NDS submits that it has no objection to proposed clause 10.5A.

Q10: Question for ABI, AFEI, Ai Group and NDS: Do you contest the provisional view regarding transitional arrangements? Do you have any comments in respect of the draft term?

Q11: Question for parties other than the ASU and HSU: What do you say in response to the amendments to proposed clause 10.5A advanced by the ASU and HSU?

Attachment 1 – Revised Draft Determination

MA000100 PRXXXXXX

DRAFT DETERMINATION

Fair Work Act 2009
s.156—4 yearly review of modern awards
s.157—FWC may vary etc. modern awards if necessary to achieve modern awards objective

4 yearly review of modern awards – Social, Community, Home Care and Disability Services Industry Award 2010
(AM2018/26 and AM2020/100)

SOCIAL, COMMUNITY, HOME CARE AND DISABILITY SERVICES INDUSTRY AWARD 2010
[MA000100]

Social, community, home care and disability services

JUSTICE ROSS, PRESIDENT
DEPUTY PRESIDENT CLANCY
COMMISSIONER LEE MELBOURNE, XX MONTH 2021

Four yearly review of modern awards – Award stage – Group 4A awards – substantive issues – Social, Community, Home Care and Disability Services Industry Award 2010.

A. Further to the decisions issued by the Full Bench of the Fair Work Commission on 4 May 2021 ([2021] FWCFB 2383) and XX MONTH 2021 ([2021] FWCFB XXXX), the above award is varied as follows:

1. By deleting clause 10.3 and inserting the following:

10.3 Part-time employment

(a) A part-time employee is one who is engaged to work less than 38 hours per week or an average of less than 38 hours per week and who has reasonably predictable hours of work.

(b) The terms of this award will apply to part-time employees on a pro-rata basis on the basis that the ordinary weekly hours of work for full-time employees are 38.

(c) Before commencing employment, the employer and employee will agree in writing on:

(i) a regular pattern of work including the number of ordinary hours to be worked each week (**the guaranteed hours**), and

(ii) the days of the week the employee will work and the starting and finishing times each day.

(d) The agreed regular pattern of work does not necessarily have to provide for the same guaranteed hours each week.

(e) The agreement made pursuant to clause 10.3(c) 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.

(f) Nothing in clause 10.3(e) requires an employee to agree to any change in their guaranteed hours.

(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), or as subsequently varied under clause 10.3(e), to increase their guaranteed hours.

(ii) The employer must respond in writing to the employee's request within 21 days.

(iii) The employer may refuse the request only on reasonable business grounds.

(iv) Before refusing a request made under clause 10.3(g)(i), 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.

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

(vi) 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.

(vii) 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.

(viii) An employee cannot make a request for a review of their guaranteed hours when:

(A) The employee has refused a previous offer to increase their guaranteed hours in the last 6 months; or

(B) The employer refused a request from the employee to increase their guaranteed hours based on reasonable business grounds in the last 6 months.

2. By deleting clause 10.4(c).

3. By renumbering clause 10.5 as 10.6.

4. By inserting a new clause 10.5 as follows:

10.5 Minimum payments for part-time and casual employees

Part-time and casual employees will be paid for the following minimum number of hours, at the appropriate rate, for each shift or period of work in a broken shift:

(a) social and community services employees (except when undertaking disability services work)—3 hours;

(b) all other employees—2 hours.

5. By inserting a new clause 10.5A as follows:

10.5A Transitional arrangements applying to minimum payments for part-time employees

Clause 10.5A operates from 1 March 2022 until 1 October 2022.

NOTE: From 1 July 2022, this award will include a requirement for part-time employees to be paid for the following minimum number of hours, at the appropriate rate, for each shift or period of work in a broken shift: social and community services employees (except when undertaking disability services work)—3 hours; all other employees—2 hours (the **minimum payment requirements**). This clause provides transitional arrangements for the minimum payment requirements.

(a) Clause 10.5A applies in relation to agreements made under clause 10.3(c) before 1 March 2022, where the employee's agreed regular pattern of work includes shifts or periods of work in broken shifts of less than:

(i) 3 hours for social and community services employees (except when undertaking disability services work);

(ii) 2 hours for all other employees.

(b) The employer must discuss the relevant minimum payment requirements with the employee and genuinely try to reach agreement on a variation to the agreement made under clause 10.3(c) that will make each of the employee's shifts or periods of work in broken shifts consistent with the hours specified in clause 10.5A(a)(i) or (ii) and will reasonably accommodate the employee's circumstances.

(c) Notwithstanding any prior agreement between the employer and the employee and despite clause 10.3(e), if the employer has genuinely tried to reach an agreement with the employee under clause 10.5A(b) but an agreement is not reached (including because the employee refuses to confer), the employer may vary the agreement made under clause 10.3(c) to provide for shifts or periods of work in broken shifts that are consistent with the hours specified in clause 10.5A(a)(i) or (ii), by providing 28 days' notice to the employee in writing.

(d) A variation by the employer under clause 10.5A(c) varies the agreement between the employer and employee made under clause 10.3(c).

(e) A variation made under clause 10.5A(c) must not come into operation before 1 July 2022.

(f) Clause 10.5A(c) 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.

6. By deleting Note 1 and Note 2 appearing at the beginning of clause 15.

7. By inserting the following note as a new paragraph after the end of clause 15:

NOTE 1: A **transitional pay equity order** taken to have been made pursuant to item 30A of Schedule 3A to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) has effect in accordance with that item. Transitional pay equity orders operate in Queensland as provided for in items 30A (6) and (7).

8. By inserting the following note as a new paragraph after the end of clause 15:

NOTE 2: An equal remuneration order [PR525485] also applies to employees in the classifications in Schedule B—Classification Definitions—Social and Community Services Employees and Schedule C—Classification Definitions—Crisis Accommodation Employees of this award. The final rates of pay resulting from the equal remuneration order are set out below. The 'current hourly wage' and 'current weekly wage' in the tables below form employees' ordinary rates of pay for all purposes:

Equal remuneration rates for applicable Social and Community Services employees—from 1 December 2020

	Clause	Minimum weekly wage	Final Rate ERO Percentage	Current weekly wage	Current hourly wage
Classification		**$**	**%**	**$**	**$**
Social and community services employee level 2	15.2				
Pay point 1		877.60	123	1079.45	28.41
Pay point 2		905.10	123	1113.27	29.30
Pay point 3		932.60	123	1147.10	30.19
Pay point 4		957.60	123	1177.85	31.00
Social and community services employee level 3	15.3				
Pay point 1 (associate diploma/advanced certificate)		957.60	126	1206.58	31.75
Pay point 2		985.10	126	1241.23	32.66
Pay point 3 (3 year degree)		1006.10	126	1267.69	33.36
Pay point 4 (4 year degree)		1026.70	126	1293.64	34.04
Social and community services employee level 4	15.4				
Pay point 1		1054.20	132	1391.54	36.62
Pay point 2		1081.80	132	1427.98	37.58
Pay point 3		1109.60	132	1464.67	38.54
Pay point 4		1134.30	132	1497.28	39.40
Social and community services employee level 5	15.5				
Pay point 1		1162.00	137	1591.94	41.89
Pay point 2		1186.90	137	1626.05	42.79
Pay point 3		1214.60	137	1664.00	43.79
Social and community services employee level 6	15.6				
Pay point 1		1242.30	140	1739.22	45.77
Pay point 2		1269.70	140	1777.58	46.78
Pay point 3		1297.20	140	1816.08	47.79
Social and community services employee level 7	15.7				
Pay point 1		1324.70	142	1881.07	49.50
Pay point 2		1352.50	142	1920.55	50.54
Pay point 3		1380.00	142	1959.60	51.57
Social and community services employee level 8	15.8				
Pay point 1		1407.50	145	2040.88	53.71
Pay point 2		1435.10	145	2080.90	54.76
Pay point 3		1462.90	145	2121.21	55.82

Equal remuneration rates for Crisis Accommodation employees—from 1 December 2020

	Clause	Minimum weekly wage	Final Rate ERO Percentage	Current weekly wage	Current hourly wage
Classification		**$**	**%**	**$**	**$**
Crisis accommodation employee Level 1	15.3				
Pay point 1 (associate diploma/advanced certificate)		957.60	126	1206.58	31.75
Pay point 2		985.10	126	1241.23	32.66
Pay point 3 (3 year degree)		1006.10	126	1267.69	33.36
Pay point 4 (4 year degree)		1026.70	126	1293.64	34.04
Crisis accommodation employee level 2	15.4				
Pay point 1		1054.20	132	1391.54	36.62
Pay point 2		1081.80	132	1427.98	37.58
Pay point 3		1109.60	132	1464.67	38.54
Pay point 4		1134.30	132	1497.28	39.40
Crisis accommodation employee level 3	15.5				
Pay point 1		1162.00	137	1591.94	41.89
Pay point 2		1186.90	137	1626.05	42.79
Pay point 3		1214.60	137	1664.00	43.79
Crisis accommodation employee level 4	15.6				
Pay point 1		1242.30	140	1739.22	45.77
Pay point 2		1269.70	140	1777.58	46.78
Pay point 3		1297.20	140	1816.08	47.79

9. By inserting clause 20.10 as follows:

20.10 Broken shift allowance

(a) An employee required to work a broken shift with 1 unpaid break in accordance with clause 25.6(a) will be paid an allowance of 1.7% of the standard rate, per broken shift.

(b) An employee who agrees to work a broken shift with 2 unpaid breaks in accordance with clause 25.6(b) will be paid an allowance of 2.5% of the standard rate, per broken shift.

10. By deleting clause 25.5(d)(ii) and inserting the following:

(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, subject to the agreement of the employer; 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.

11. By deleting clause 25.5(f) and inserting the following:

(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 where a client reschedules a scheduled home care or disability service.

(ii) Where a service is cancelled by a client under clause 25.5(f)(i), the employer may either:

(A) direct the employee to perform other work during those hours in which they were rostered; or

(B) cancel the rostered shift or the affected part of the shift.

(iii) Where clause 25.5(f)(ii)(A) applies, the employee will be paid the amount payable had the employee performed the cancelled service or the amount payable in respect of the work actually performed, whichever is the greater.

(iv) Where clause 25.5(f)(ii)(B) applies, the employer must either:

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

(B) subject to clauses 25.5(f)(v), provide the employee with make-up time in accordance with clause 25.5(f)(vi).

(v) The make-up time arrangement can only be used where the employee was notified of the cancelled shift (or part thereof) at least 12 hours prior to the scheduled commencement of the cancelled service. In these cases, clause 25.5(f)(iv)(A) applies.

(vi) Where the employer elects to provide make-up time:

(A) despite clause 25.5(a), the employer must provide the employee with 7 days' notice of the makeup-time (or a lesser period by agreement with the employee);

(B) the make-up time must worked within 6 weeks of the date of the cancelled service;

(C) the employer must consult with the employee in accordance with clause 8A regarding when the make-up time is to be worked;

(D) the make-up time can include work with other clients or in other areas of the employer's business provided the employee has the skill and competence to perform the work; and

(E) an employee who works make-up time will be paid the amount payable had the employee performed the cancelled service or the amount payable in respect of the work actually performed, whichever is the greater.

(vii) Clause 25.5(f) is intended to operate in conjunction with clause 25.5(d) and does not prevent an employer from changing a roster under clause 25.5(d)(i) or (ii).

12. By deleting clause 25.6 and inserting the following:

25.6 Broken shifts

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

(a) Broken shift with 1 unpaid break

(i) An employer may only roster an employee to work a broken shift of 2 periods of work with 1 unpaid break (other than a meal break).

(ii) An employee rostered to work a broken shift with 1 unpaid break must be paid the allowance in clause 20.10(a).

(b) Agreement to work a broken shift with 2 unpaid breaks

(i) Despite clause 25.6(a), an employer and an employee may agree that the employee will work a broken shift of 3 periods of work with 2 unpaid breaks (other than meal breaks).

(ii) An agreement under clause 25.6(b)(i) must be made before each occasion that the employee is to work a broken shift with 2 unpaid breaks unless the working of the 2 break broken shift is part of the agreed regular pattern of work in an agreement made under clause 10.3 or subsequently varied.

(iii) An employee who works a broken shift with 2 unpaid breaks must be paid the allowance in clause 20.10(b).

(c) Where a break in work falls within a minimum payment period in accordance with clause 10.5 then it is to be counted as time worked and does not constitute a break in a shift for the purposes of clause 25.6(a)(i) or clause 25.6(b)(i).

(d) Payment for a broken shift will be at ordinary pay with weekend and overtime penalty rates to be paid in accordance with clauses 26 and 28.

(e) The span of hours for a broken shift is up to 12 hours. All work performed beyond a span of 12 hours will be paid at double time.

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

13. By deleting clause 25.7(c) and inserting the following:

(c) The span for a sleepover will be a continuous period of 8 hours. Employees will be provided with a separate room with a bed and clean linen, the use of appropriate facilities (including access to food preparation facilities and staff facilities where these exist) and free board and lodging for each night when the employee sleeps over.

14. By deleting clause 25.8 and inserting the following:

25.8 24-hour care

This clause only applies to home care employees.

(a) A **24-hour care** shift requires an employee to be available for duty in a client's home for a 24-hour period. During this period, the employee is required to provide the client with the services specified in the care plan. The employee is required to provide a total of no more than 8 hours of care during this period.

(b) An employer may only require an employee to work a 24-hour care shift by agreement.

(c) The employee will be afforded the opportunity to sleep for a continuous period of 8 hours during a 24-hour care shift and employees will be provided with a separate room with a bed and clean linen, the use of appropriate facilities (including access to food preparation facilities and staff facilities where these exist) and free board and lodging for each night when the employee sleeps over.

(d) The employee will be paid 8 hours' work at 155% of their appropriate rate for each 24-hour period.

(e) If the employee is required to perform more than 8 hours' work during a 24-hour care shift, that work shall be treated as overtime and paid at the rate of time and a half for the first 2 hours and double time thereafter, except on Sundays when overtime will be paid for at the rate of double time, and on public holidays at the rate of double time and a half. An employer and employee may utilise the TOIL arrangement in accordance with clause 28.2.

(f) An employee may refuse to work more than 8 hours' work during a 24-hour care shift in circumstances where the requirement to work those additional hours is unreasonable.

15. By deleting clause 28.1 and inserting the following:

28.1 Overtime rates

(a) Full-time employees

A full-time employee will be paid the following payments for all work done in addition to their rostered ordinary hours on any day and, in the case of day workers, for work done outside the span of hours under clause 25.2(a):

(i) disability services, home care and day care employees—for all authorised overtime on Monday to Saturday, payment will be made at the rate of time and a half for the first 2 hours and double time thereafter;

(ii) social and community services and crisis accommodation employees—for all authorised overtime on Monday to Saturday, payment will be made at the rate of time and a half for the first 3 hours and double time thereafter;

(iii) for all authorised overtime on a Sunday, payment will be made at the rate of double time;

(iv) for all authorised overtime on a public holiday, payment will be made at the rate of double time and a half; and

(v) overtime rates under this clause will be in substitution for, and not cumulative upon, the shift premiums prescribed in clause 29—Shiftwork and Saturday and Sunday work premiums prescribed in clause 26—Saturday and Sunday work.

(b) Part-time employees and casual employees

(i) All time worked by part-time or casual employees in excess of 38 hours per week or 76 hours per fortnight will be paid for at the rate of time and a half for the first 2 hours and double time thereafter, except that on Sundays such overtime will be paid for at the rate of double time and on public holidays at the rate of double time and a half.

(ii) All time worked by part-time or casual employees which exceeds 10 hours per day, will be paid at the rate of time and a half for the first 2 hours and double time thereafter, except on Sundays when overtime will be paid for at the rate of double time, and on public holidays at the rate of double time and a half.

(iii) Time worked up to the hours prescribed in clause 28.1(b)(ii) will, subject to clause 28.1(b)(i), not be regarded as overtime and will be paid for at the ordinary rate of pay (including the casual loading in the case of casual employees).

(iv) All time worked outside the span of hours by part-time and casual day workers will be paid for at the rate of time and a half for the first two hours and double time thereafter, except that on Sundays such overtime will be paid for at the rate of double time and on public holidays at the rate of double time and a half.

(v) Overtime rates payable under clause 28.1(b) will be in substitution for and not cumulative upon the shift premiums prescribed in clause 29—Shiftwork and are not applicable to ordinary hours worked on a Saturday or Sunday.

16. By deleting clause 31.2 and inserting the following:

31.2 Quantum of leave

For the purpose of the NES, a shiftworker is:

(a) an employee who works for more than 4 ordinary hours on 10 or more weekends during the yearly period in respect of which their annual leave accrues; or

(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;

and is entitled to an additional week's annual leave on the same terms and conditions.

17. By updating cross-references accordingly.

B. Item 5 of this determination comes into operation on **1 March 2022**. In accordance with s.165(3) of the *Fair Work Act 2009* this item does not take effect in relation to a particular employee until the start of the employee's first full pay period that starts on or after **1 March 2022**.

C. Items 1 to 4 and 6 to 17 of this determination come into operation on **1 July 2022**. In accordance with s.165(3) of the *Fair Work Act 2009* these items do not take effect in relation to a particular employee until the start of the employee's first full pay period that starts on or after **1 July 2022**.

<u>PRESIDENT</u>

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