

**JOINT REPORT
PREPARED BETWEEN ABI AND AI GROUP**

Background

1. Following the hearing on 1 September 2021 in this matter, the Commission made directions which included a direction that:

ABI and Ai Group are to file a joint report identifying any proposed drafting changes to the Joint Proposal. Ai Group is to provide a note identifying any remaining merit differences between its proposal and the Joint Proposal, by 4:00 pm on Wednesday 8 September 2021.

2. ABI and Ai Group have had productive discussions regarding the issues raised by Ai Group in relation to the remote work proposal that was filed on 23 August 2021 (described in Background Paper 3 as the '**Joint Proposal**') and have prepared this Joint Report in accordance with the above direction.

Drafting changes to the Joint Proposal

3. Background Paper 3, published by the Commission on 31 August 2021, summarises 11 issues or areas of difference between the Ai Group remote response proposal and the Joint Proposal.¹
4. ABI considers that 4 of the 11 issues raised by Ai Group can be described as 'drafting' issues, while the other 7 issues are more accurately described as going towards issues of merit.
5. The 4 issues going to the drafting of the Joint Proposal are:²
 - (a) Issue 2: the notion of a 'designated shift';
 - (b) Issue 3: the interaction with clause 10.5;
 - (c) Issue 5: issues relating to rates of pay;
 - (d) Issue 8: the interaction between minimum payment provision and minimum rates provision.
6. Following discussions, ABI proposes drafting changes to address three of the abovementioned matters.
7. In relation to the issue regarding the notion of a 'designated shift', ABI does not agree with the substance of the concerns raised by Ai Group, and considers that the current drafting of the Joint Proposal is suitable. Therefore, ABI considers that no drafting changes are necessary in respect of Issue 2.

¹ Background Paper 3 at [86]-[125].

² We have adopted the numbering as contained in Background Paper 3.

8. We outline below the drafting changes that are proposed in respect of the three other issues.

Issue 3: Interaction with clause 10.5

9. The concern that was raised related to the potential for the proposed minimum payment provisions at clause 10.5 of the Award³ to be seen to apply to remote work.
10. To resolve that concern, ABI proposes to insert a new subclause, at 25.10(f)(ii), to make it clear that the minimum payment provisions at clause 10.5 of the Award do not apply to 'remote work' as defined in clause 25.10.

Issue 5: Issues relating to rates of pay

11. Two concerns recorded in Background Paper 3 under the heading of Issue 5 were:
- (a) the drafting of clauses 25.10(d)(i)(B) and (C); and
 - (b) the fact that clause 25.10(d) described rates as a percentage.⁴
12. In relation to the first point, the language in the Draft Determination ("results in an employee working") lacked precision and was unclear as to whether the premium rate would apply to all work performed or only that work which exceeded 38 hours per week, 76 hours per fortnight or 10 hours per day.
13. Clauses 25.10(d)(i)(B) and (C) have been re-drafted to more clearly identify that the premium rate would only apply in respect of "remote work performed in excess of" the relevant threshold.
14. In relation to the second point, the words "of the minimum hourly rate" have been inserted after each percentage in clauses 25.10(d)(i)(A)-(F) to clearly articulate how the quantum is to be calculated.

Issue 8: Interaction between minimum payment provision and minimum rates provision

15. At [108] of Background Paper 3, Ai Group's concern is summarised in relation to the 'various technical difficulties' that are said to flow from the interaction between minimum rates and minimum payment methodology adopted.
16. This issue was addressed during the hearing on 1 September 2021.⁵
17. While ABI understands the issues raised by Ai Group, ABI considers them to be directed towards the alleged complexity or substantive operation of the Joint Proposal rather than raising drafting issues.
18. ABI does not propose any drafting change in response to the issues raised by Ai Group.
19. To confirm the intended operation of the Joint Proposal, the way in which the Joint Proposal operates is as follows:
- (a) Firstly, where an employee performed remote work, they will be paid for the time spent performing remote work, subject to a minimum payment period;

³ The proposed clause 10.5 is contained in the Revised Draft Determination which appears at Attachment 1 to Background Paper 3.

⁴ See Background Paper 3 at [98].

⁵ PN263-PN275.

- (b) Secondly, a minimum payment period applies, so where the time worked is less than the applicable minimum period, the employee will be paid for the minimum period;
- (c) Thirdly, remote work is paid at the employee's minimum hourly rate unless a premium rate applies. The premium rates of pay in clause 25.10(d)(i) are expressed to be referable to, and only apply to, the performance of remote work. In other words, the premium rate would not apply to the entire minimum payment period unless remote work was performed for the entirety of that period.

Other amendments

- 20. In addition to the issues addressed above, a number of other potential drafting issues have been discussed. These are detailed below.

Standard rate

- 21. ABI proposes to amend clause 20.9(a) and (b) of the Draft Determination to express the monetary entitlements as a percentage of the standard rate, with the applicable dollar amount included thereafter in brackets.

Use of the phrase "minimum hourly rate"

- 22. The phrase "minimum hourly rate" appears in clause 25.10(d) of the Joint Proposal. It has also been included in clauses 25.10(d)(i) (A)-(F), for the reason explained in paragraph 14 above.
- 23. The current Award does not use this terminology. The current Award currently only refers to weekly rates of pay in clauses 15, 16 and 17.
- 24. The latest version Exposure Draft, however, does contain the term 'minimum hourly rate'.⁶
- 25. ABI considers it appropriate to use the term. However, for present purposes, to ensure the clause works with the current Award, ABI proposes a new clause 25.10(f)(i) as follows:
 - (i) In this clause, the term 'minimum hourly rate' means the weekly rates prescribed by clauses 15, 16 and 17 (as applicable) divided by 38.
- 26. It is envisaged that the above sub-clause can be removed following the finalisation of the Exposure Draft for this Award and/or the conduct of the plain language redrafting process relating to the instrument.

Drafting correction to clause 25.10(d)(i)(C)

- 27. The casual rates of pay had inadvertently not been spelled out in the Joint Proposal. This has now been rectified.

Amended Draft Determination

- 28. The drafting changes referred to above have been incorporated into an Amended Draft Determination which is **attached** to this Joint Report. The changes are shown in mark-up for ease of reference.
- 29. The Amended Draft Determination proposes amendments to the Draft Determination filed on behalf of a range of parties on 23 August 2021.

⁶ Exposure Draft published on 15 March 2019.

Remaining drafting concerns

30. ABI has endeavoured to resolve some of the drafting concerns raised by Ai Group, however has not been able to resolve all concerns.
31. Ai Group will identify the remaining drafting concerns they have with the Joint Proposal in a separate submission.

9 September 2021



AMENDED DRAFT DETERMINATION

Fair Work Act 2009

s.156 - 4 yearly review of modern awards

4 YEARLY REVIEW OF MODERN AWARDS – SOCIAL, COMMUNITY, HOME CARE AND DISABILITY SERVICES INDUSTRY AWARD 2010

(AM2018/26)

XXXX

XXXX

XXXX

XXXX, XX XXXX 2021

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

A. Further to the decision issued on XXX in AM2018/26 ([2021] FWCFB XXXX), the above award is varied as follows:

1. By inserting 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 ordinary hours of work rostered ~~working hours in accordance with clause 25.5~~ (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.
- (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 employee's 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% of the minimum hourly rate for the first two hours and 200% of the minimum hourly rate thereafter or, in the case of casual employees, at 175% of the minimum hourly rate for the first two hours and 225% of the minimum hourly rate thereafter;~~
 - B. ~~Where the remote work results in an employee working~~ Remote work performed 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~~ Remote work performed in excess of 10 hours per day, it will be paid at the rate of 150% of the minimum hourly rate for the first two hours and 200% of the minimum hourly rate thereafter or, in the case of casual employees, 175% of the minimum hourly rate for the first two hours and 225% of the minimum hourly rate thereafter;
 - D. ~~Where remote work is performed on a Saturdays, it will be paid at the rate of 150% of the minimum hourly rate or, in the case of casual employees, 175% of the minimum hourly rate;~~
 - E. ~~Where remote work is performed on a Sundays, it will be paid at the rate of 200% of the minimum hourly rate or, in the case of casual employees, 225% of the minimum hourly rate;~~
 - F. ~~Where remote work is performed on a public holidays, it will be paid at the rate of 250% of the minimum hourly rate or, in the case of casual employees, 275% of the minimum hourly rate.~~

(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

(i) In this clause, the term 'minimum hourly rate' means the weekly rates prescribed by clauses 15, 16 and 17 (as applicable) divided by 38.

(ii) Where remote work is performed, the minimum payments at clause 10.5 do not apply.

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

- (i) A. Clause 25.3 - rostered days off;
- (ii) B. Clause 25.4 - rest breaks between rostered work;
- (iii) C. Clause 28.3 - rest period after overtime;
- (iv) D. Clause 28.5 - rest break during overtime.

Formatted: Indent: Left: 3.81 cm, No bullets or numbering

2. By deleting clause 20.9 and inserting in lieu thereof:

20.9 On call allowance

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

(a) 2.0% of the standard rate (\$20.63) for any 24 hour period or part thereof during the _____ period from the time of finishing _____ ordinary duty on Monday to the time of finishing _____ ordinary duty on Friday; or

(b) 3.96% of the standard rate (\$40.84) in respect of any other 24 hour period or part thereof _____ on a Saturday, Sunday, or _____ public holiday.

MA000100

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

28.4 Recall to work

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

- B. This determination comes into operation from XX XXXX 2021. In accordance with s.165(3) of the *Fair Work Act 2009* these items do not take effect until the start of the first full pay period that starts on or after XX XXXX 2021.

[Insert the Seal of the Fair Work Commission]

XXXX