
Fair Work Commission: 4 yearly Review of modern awards

REPLY SUBMISSION

**4 YEARLY REVIEW OF MODERN AWARDS: (AM2018/26)
SOCIAL, COMMUNITY, HOME CARE AND DISABILITY SERVICES
INDUSTRY AWARD 2010 - SUBSTANTIVE ISSUES**

FILED ON BEHALF OF:

- **AUSTRALIAN BUSINESS INDUSTRIAL**
- **BUSINESS NSW (THE NSW BUSINESS CHAMBER LTD)**
- **AGED & COMMUNITY SERVICES AUSTRALIA**
- **LEADING AGE SERVICES AUSTRALIA**

30 AUGUST 2021

BACKGROUND

1. This reply submission is made in accordance with the directions of the Commission as outlined in a Statement dated 9 August 2021.¹
2. This reply submission responds to matters raised in the submissions of the following other parties:
 - (a) The Australian Services Union (**ASU**) on 26 August 2021;
 - (b) The Health Services Union (**HSU**) on 25 August 2021;
 - (c) The United Workers' Union (**UWU**) on 25 August 2021;
 - (d) Australian Federation of Employers and Industries (**AFEI**) on 25 August 2021;
 - (e) The Australian Industry Group (**Ai Group**) on 25 August 2021; and
 - (f) National Disability Services (**NDS**) on 25 August 2021.
3. This reply submission is made on behalf of:
 - (a) Australian Business Industrial (**ABI**);
 - (b) Business NSW (the NSW Business Chamber Ltd) (**NSWBC**);
 - (c) Aged & Community Services Australia (**ACSA**); and
 - (d) Leading Age Services Australia (**LASA**).
4. We thank the Commission for the opportunity to make this submission.

¹ [2021] FWCFB 4863.

REMOTE WORK

5. On 4 May 2021, a Full Bench of the Fair Work Commission handed down a decision concerning the Commission's review of the *Social, Community, Home Care and Disability Services Industry Award 2010* (the **Decision**).²
6. The Decision dealt with proposed variations to the *Social, Community, Home Care and Disability Services Industry Award 2010* (the **Award**). The Decision included a number of provisional views regarding certain matters, including in relation to the issue of 'remote response' work.
7. By letter dated 23 August 2021, a new proposal in respect of 'remote work' was put forward as an agreed position between a range of parties (including our clients). The terms of the proposed remote work clause were agreed with the exception of one discrete element of the proposed clause that is not agreed. The agreed position is set out in the Draft Determination enclosed with the letter of 23 August 2021 (the **Agreed Clause**).

Submissions of AFEI

8. We note that AFEI have indicated in their submissions that they intend to comment on the Agreed Clause in their reply submissions to be filed on 30 August 2021.
9. Our clients will deal with those matters at the hearing on 1 September 2021 via oral submissions.

Submissions of Ai Group

10. Ai Group also foreshadowed in their submissions that they anticipate commenting on the Agreed Clause in their submissions in reply.
11. Our clients will deal with those matters at the hearing on 1 September 2021 via oral submissions.

Submissions of NDS

12. We support the submissions of NDS as set out in paragraphs [6]-[28] of their submission. In particular, we note that NDS also calls for the relevant minimum payment for on-call employees during 10pm-6am to be 30 minutes, which is consistent with our clients' position.

Submissions of the Union Parties

13. The ASU, HSU and UWU (collectively, the **Union Parties**) advance submissions in support of the Agreed Clause. We endorse those submissions.
14. There is only one matter that is not agreed between the Union Parties and our clients: the minimum payment period in respect of remote work performed between 10pm-6am by employees who are on-call.

² [2021] FWCFB 2383.

The non-agreed matter

15. The scope of the dispute between the parties is as follows:
- (a) our clients submit that the minimum payment should be 30 minutes' pay.
 - (b) the Union Parties submit that the minimum payment should be 1 hour's pay.
16. Our clients have advanced submissions in support of a 30 minute minimum payment period.³
17. The submissions advanced by the Union parties in support of a 1 hour minimum payment can be summarised as follows:
- (a) Firstly, they accept that remote work should attract a shorter minimum payment than the minimum engagements / minimum payments that otherwise apply under the Award;⁴
 - (b) Secondly, the Full Bench already provisionally rejected a 45-minute minimum payment advanced by our clients during the hearing;⁵
 - (c) Thirdly, the Full Bench in the Decision expressed the provisional view that the appropriate minimum payment period should be 1 hour;⁶
 - (d) Fourthly, the provisional view referred to in (d) 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';⁷ and
 - (e) Fifthly, 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.⁸
18. We address these submissions below.

The first point

19. The first point outlined above is uncontroversial as between the Union Parties and our clients and provides no more support for the Union Parties' contended minimum payment period as it does for our clients' contended minimum payment period.

The 'provisional view' argument

20. The second and third points outlined above rely on the provisional views expressed by the Full Bench in their Decision. In short, the Unions seek to rely on the Commission's provisional view as to minimum payments in support of a 1 hour minimum payment and invite the Commission to place weight on those provisional views.

³ Refer to our submission of 25 August 2021 at [38]-[47].

⁴ UWU submission at [26].

⁵ UWU submission at [26]; see also Decision at [733].

⁶ UWU submission at [26]; ASU submission at [53]; see also Decision at [733].

⁷ UWU submission at [26].

⁸ HSU submission at [12].

21. This submission is paradoxical and ironic given that:
- (a) 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;
 - (b) in so doing, the Union Parties are advocating for a minimum payment that departs from the provisional view contained in the Decision; and
 - (c) 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.⁹
22. Yet, on the other hand, 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.
23. With respect, the Union Parties' position lacks credibility.
24. 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*.
25. 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.
- 'Appropriate balance' argument
26. The UWWU rely on the Commission's provisional view in support of a one hour minimum payment period. At [26] of their submission, the UWWU 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'.
27. We struggle with that submission.
28. 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

⁹ ASU submission at [60] states: 'However, this was not a concluded view, and parties were invited to consider the inter-relationship between the minimum payment period and the rate of payment'.

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.

29. 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'.
30. 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.
31. 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.
32. The argument advanced by the UWU at [26] of their submission must not be accepted.

'Disutility' argument

33. The final argument advanced by the Union Parties in support of a one hour minimum payment period relates to the disutility associated with the work. It is apparent that the focus of the disutility argument is on the time the work is performed, given that it is the time which is the distinguishing feature.
34. We accept, 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.
35. 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.
36. 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 in all cases be at least 150%.
37. 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.
38. 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.
39. In our submission, 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).

The appropriate minimum payment period should be 30 minutes

40. Determining the appropriate minimum payment requires a broad evaluative judgement having regard to the value of work performed and the disutility associated with performing the work.¹⁰ It also requires the Commission to ensure proportionality between the other minimum payments that are established. For example, if a 15 minute minimum payment is established for on-call employees performing remote work between 6am-10pm, the 10pm-6am minimum payment must be proportionate.
41. We have already advanced a range of submissions in support of a 30 minute minimum payment.¹¹
42. If the Union Parties' proposed one hour minimum payment was to be adopted, it would result in unreasonable, disproportionate and unfair amounts of money being payable by employers. It would also establish an award term that is inconsistent with the modern awards objective.
43. To demonstrate the unreasonableness of the Union Parties' submission, we provide 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:
- (a) SACS employee Level 2, pay point 3 (permanent employee);
 - (b) Home care employee Level 3, pay point 2 (casual employee); and
 - (c) SACS employee Level 6, pay point 2 (permanent employee).¹²
44. 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

45. 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 Agreed Clause, this would be the lowest

¹⁰ See Decision at [729].

¹¹ Refer to our submission of 25 August 2021 at [38]-[47].

¹² These classifications have been chosen for illustration purposes.

rate that would apply to the work. The table also assumes the weekend work is performed on a Sunday.

46. As can be seen from the above table, 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).
47. 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.
48. 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.

DAMAGED CLOTHING

49. Our clients support the proposed clause set out at paragraph [98] of the Ai Group submission, which we understand has broad support from the various interested parties.¹³
50. We agree with the submissions at paragraph [100] of the Ai Group submission.
51. Our clients propose some very minor technical drafting amendments to the proposed clause as follows (with our proposed amendments in mark-up):

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).

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.

¹³ Ai Group submission dated 25 August 2021.

52. We propose 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.
53. We otherwise support the clause in the terms proposed by Ai Group.

ISSUES RELATING TO BROKEN SHIFTS

Background

54. In our submission of 25 August 2021, we addressed the potential controversy in relation to the apparent conflict between clauses 25.6 and 29.4 of the Award. In so doing, we:
- (a) outlined our clients' views on the proper construction of the Award;¹⁴
 - (b) noted the views of other interested parties and their submissions as to the practices of employers and employees over the past ~11 years;¹⁵ and
 - (c) proposed a variation to clause 29.4 that would resolve the apparent tension between clauses 25.6 and 29.4.¹⁶
55. We also outlined our clients' position in relation to the proposals that had been advanced by NDS which are recorded at points 1 and 2 of paragraph [6] of the Statement of 9 August 2021.
56. In the following part of this reply submission, we:
- (a) address the ASU proposals as recorded at points 2 and 3 of paragraph [6] of the Statement of 9 August 2021; and
 - (b) reply to the submissions of other parties.

The ASU proposal regarding payment for broken shifts

57. The ASU have proposed that clause 25.6(d) of the draft variation 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.'
58. We have already indicated that we are not opposed to clause 25.6(d) of the draft variation determination being amended to include a reference to public holiday penalty rates under clause 34.
59. However, we oppose the ASU proposal that shift loadings under clause 29 be payable in addition to the broken shift allowance.
60. Our clients have had the benefit of reviewing the detailed submissions filed by Ai Group on 25 August 2021 in relation to this issue. Our clients support those submissions.
61. By way of summary, our clients' position is that:
- (a) The ASU proposal is inconsistent with the Decision, in that the Commission has already determined that the existing payment mechanism at clause 25.6(b) should be replaced with a new broken shift allowance;¹⁷

¹⁴ See [55]-[76].

¹⁵ See [79]-[81].

¹⁶ See [82]-[83].

¹⁷ Decision at [554].

- (b) The proposed broken shift allowances were determined by the Commission on the basis that they will replace any entitlement arising from clause 25.6(b) of the Award;
 - (c) The proposed quantum of the broken shift allowances, if adopted, would result in them being the most generous allowances, in monetary terms, across the entire modern awards system;
 - (d) The quantum of those proposed broken shift allowances was struck on the basis that they replaced any existing entitlement to a shift allowance under clause 25.6(b); and
 - (e) The combination of a broken shift allowance *and* a shift allowance under clause 29 would result in significant additional employment costs for employers.
62. In our submission of 3 August 2021, our clients argued that the quantum of the broken shift allowance should be reduced and set out the reasons for that submission.¹⁸ Those submissions were made in circumstances where there was no suggestion that shift allowances under clause 29 would apply in addition to the broken shift allowances.
63. If shift allowances under clause 29 are to be payable in addition to the broken shift allowance, the quantum of the broken shift allowance must be reduced even further than that proposed by our clients in our submission of 3 August 2021.
64. We also raise an additional issue with the ASU proposal that shift allowances under clause 29 apply to broken shifts. In our submission, there is no merit basis for a 12.5% afternoon shift loading or a 15% night shift loading to apply to parts of a broken shift that take place during the day and not at unsocial hours.
65. For example, if one portion of a broken shift is worked between 11am - 1pm and the other portion of work takes place between 7pm - 9pm, there does not appear to be any rational merit basis for the 11am - 1pm portion of work to attract a 12.5% 'afternoon shift' loading. We agree with the Ai Group submission at [67] that shift loadings are, on their face, intended to compensate employees for the disutility of performing work late in the day or early in the morning.
66. There is no justification for requiring the payment of shift allowances in respect of portions of a broken shift that occur during the span of ordinary hours for day workers.
67. For the reasons outlined above, the ASU proposal should not be adopted.
68. If the Commission is inclined to have shift loadings under clause 29 apply to broken shifts, we agree with and support the Ai Group submission¹⁹ that:
- (a) The quantum of the proposed broken shift allowance should be substantially reduced; and
 - (b) The shift allowances should be payable only for that portion of a broken shift that enlivens the entitlement to the shift allowance.

¹⁸ See [11]-[28].

¹⁹ See Ai Group submission at [68].

The ASU proposal regarding travelling and meal breaks

69. Pursuant to a Draft Determination filed on 9 August 2021, the ASU propose that the Award be varied to include a new clause 27.3 in the following terms:

27.3 Travel during meal and tea breaks

If an employer requires an employee to travel during a meal break or a tea break that time spent travelling will count as work and will be paid as such for the purposes of this clause.

70. Very limited submissions were made by the ASU in support of this variation. As far as we can discern, the submissions made in support of this variation extend to:

- (a) three paragraphs in the submission filed by the ASU on 3 August 2021; and
- (b) one paragraph in the submission filed by the ASU on 26 August 2021, which merely refers back to the submissions made on 3 August 2021.

71. The submissions advanced by the ASU in support of the variation consist of:

- (a) a generalised assertion, unsupported by evidence, to the effect that, 'given current practices in the sector', it is 'likely' that employers will require employees to travel during their work breaks;²⁰
- (b) a submission as to the hypothetical operation of clause 27.1(b) of the Award if the ASU's claim for paid travel time had been adopted (which it was not);²¹ and
- (c) a broad submission to the effect that the Award should be varied in a particular manner which, puzzlingly, is inconsistent with the terms of the variation actually sought by the ASU.²²

72. In short, the variation proposed by the ASU would not appear to actually achieve what the ASU submits should occur.

73. Our clients are opposed to the ASU proposal for the following reasons:

- (a) Firstly, the Commission has determined that the 'various travel time claims' will be deferred until the variations in respect of minimum payment periods and broken shifts have been in operation for 12 months.²³ We consider that the ASU claim is clearly related to concerns regarding travel time, and so it is appropriate that it be treated in the same manner as other travel time claims;
- (b) Secondly, the ASU have failed to articulate a merit basis for the variation. In this regard, we note the lack of any detailed submissions advanced in support of the variation, and an

²⁰ ASU submission of 3 August 2021 at [39].

²¹ ASU submission of 3 August 2021 at [40].

²² ASU submission of 3 August 2021 at [41]. The description of what the ASU are wishing to achieve, as outlined in paragraph [41] of the ASU submission of 3 August 2021, is not consistent with the terms of the variation sought.

²³ See [2021] FWCFB 5244 at [230].

apparent lack of evidence establishing the facts that are said to underpin the rationale for the variation;

- (c) Thirdly, the ASU proposal appears to be advanced on the basis of speculation as to potential future practices under the Award, rather than some evidentiary foundation for the variation;
- (d) Fourthly, the ASU proposal would not actually achieve what the ASU appear to wish to achieve.

AUSTRALIAN BUSINESS LAWYERS & ADVISORS
30 August 2021