

Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Further Submission – Remote Response

*Social, Community, Home Care and
Disability Services Industry Award 2010
(AM2018/26)*

14 September 2021

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GROUP

AM2018/26 SOCIAL, COMMUNITY, HOME CARE AND DISABILITY SERVICES INDUSTRY AWARD 2010

1. INTRODUCTION

1. This submission addresses Ai Group's concerns with the drafting of the amended joint proposal filed on 9 September 2021 (**Joint Proposal**). It also identifies any remaining merit differences between Ai Group's Proposal and the Joint Proposal.

2. RESIDUAL CONCERNS REGARDING THE DRAFTING OF THE JOINT PROPOSAL

2. Ai Group acknowledges that we have had constructive discussions with the representative of ABI in the context of the preparation of the joint report dated 9 September 2021 (**Joint Report**) and the development of the associated amended proposal. This has resolved several of our concerns regarding the previous version of the proposal. We nonetheless continue to hold concerns about aspects of the drafting of the Joint Proposal.

Drafting issues associated with the definition of remote work

3. The definition of '*remote work*' has been clarified through the variations to clause 25.10(b)(i). It is now clearly only intended to capture work of permanent employees that is outside their ordinary hours of work and not rostered in accordance with clause 25.5. We do however remain concerned that it is not entirely clear when work undertaken by a casual employee would constitute remote work. More specifically, it is not clear what constitutes a 'designated shift' as contemplated in clause 25.10(b). Some casuals will undoubtedly be engaged on an as needs basis and absent any formal rostering or scheduling arrangement that could be obviously described as a 'designated shift'. We have addressed this issue in previous submissions.

4. The term '*designated workplace*' used in clause 25.10(b)(iii) should be defined. As currently framed, it is not clear who designates the workplace. It is also not clear that it would not include an employee's home. Ai Group suggests the inclusion of a definition such as that which we have proposed.¹

Drafting issues related to the rates of remuneration

5. Ai Group is concerned that the drafting of the proposed clause 25.10 pertaining to the remuneration that the clause requires to be paid is unclear or, at the very least, confusing.
6. For clarity, we understand that the clause is now intended to operate as follows:
 - (a) If an employee undertakes remote work within a specified time period (i.e. between 10am and 6pm or 6pm and 10am) the employee obtains an entitlement to be paid for a minimum period of time in accordance with clause 25.10(c).
 - (b) The minimum period of time is specified as being either 15 minutes, (a period to be determined by the Commission) or one hour's pay, depending upon which of the abovementioned periods the work is undertaken in and whether or not the employee is 'on call'.
 - (c) The minimum period of time is paid at the minimum rate of pay, but a higher rate may apply to any proportion of the period that is spent actually working.
7. We respectfully submit that it is unclear what occurs when the remote work traverses the relevant time periods which trigger the different minimum payment periods. For example:
 - (a) If an employee is required to take a brief 5-minute call at 9.57pm what payment would be required? We would assume that a 15-minute minimum payment applies, but it might also be argued that a ½ hour or 1-hour minimum payment applies (depending on whether ABI or the Unions'

¹ Set out at paragraph 82 of Background Paper 3.

position on clause 25.10(c)(i)(C) is adopted) given the work is partly performed after 10pm.

8. What is required where multiple instances of remote work occur at times that would attract different minimum payment periods is even less clear. For example:
 - (a) If an employee takes a 5-minute call at 9.52pm and then a 2-minute call at 10.02pm, what payment would be required? Again, we would assume that a 15-minute minimum payment applies, but it might also be argued that a ½ hour or 1 hour minimum payment applies (depending on whether ABI or the Unions' position on clause 25.10(c)(i)(C) is adopted) given the work is partly performed after 10pm.
 - (b) If an employee takes a 5-minute call at 9.52pm, a 2-minute call at 10.02pm on a 5 minute call at 11pm, what payment should apply? It is unclear to us how this would be determined.
 - (c) If an employee takes a 5-minute call at 9.52pm, a 2-minute call at 10.02pm and a 10 minute call at 11pm and a 5 minute call what payment should apply? It is unclear to us how this work be determined.
9. It does not appear to us that clauses 25.10(c)(ii) or (iii) adequately deal with these issues.
10. Relevantly, it is unclear whether clause 25.10(c)(ii) requires that the time be "worked continuously" for the entire duration of the minimum payment period for the provision to apply, or whether it might apply in circumstances where an instance of remote work triggers the minimum payment and then there is a separate instance of remote work that commences later in the minimum payment period but continues for a period beyond the end of the minimum payment period.
11. Clause 25.10(c)(iii) provides that "...where multiple instances of remote work are performed within the applicable minimum payment period, only one minimum payment period is triggered." It is not however clear which minimum payment period is triggered.

12. In relation to clause 25.10(d)(i)(c) we observe that it is unclear how the 'first two hours' will be counted so as to determine when the higher rate applies. As drafted, it could be applied in any of the following ways:
- (a) based on the first two hours of work each time remote work is performed
 - (b) based on the first two hours in a pay period;
 - (c) based on the first two hours between 'rostered or scheduled shifts
 - (d) based on the first two hours in a 24 hour period;
 - (e) based on the first two hours on a calendar day.
13. Ai Group has, in effect, previously expressed a concern that in attempting to distil the Award's various provisions relevant to determining the rates that will apply at a particular time in the manner contemplated by clause 25.10(d) would result in a loss of some of the subtleties of the Award's operation. The amendments adopted in the Joint Proposal following consultation with Ai Group reduce our concerns. However, problems still exist. In particular, it is unclear how the various penalty rates prescribed by clause 25.10(d)(i) interact. For example:
- (a) It is unclear what rate should apply to work undertaken outside the hours between 6am and 8pm on a public holiday. Should such work be paid at rates prescribed by clause 25.10(d)(i)(a) or 25.10(d)(i)(f)?
 - (b) Should work undertaken on a Sunday always be paid in accordance with clause 25.10(d)(i)(D) or would a different rate apply if one of the other clauses would also apply to such work? For example, what rates should apply if the work is also undertaken outside the 6.00am to 8.00pm span of hours or on a public holiday.
14. It is also unclear what hours are required to be taken into consideration in the calculation of the 38 hours or 76 hours per week referred to in clause 25.10(d)(i)(B). Are only ordinary hours required to be counted or are overtime hours required to also be counted?

15. It is unclear what rate of pay is required to be paid pursuant to clause 25.10(c)(ii) for the period that is not actually worked. The provision requires that '*time worked continuously beyond the minimum payment period... be rounded up to the nearest 15 minutes and paid accordingly*'. It is unclear whether penalty rates are to apply to the proportion of the 15 minutes that is not worked or whether such time is instead required to be paid at minimum rates. We assume that such time would be paid at minimum rates as it does not meet the requirements of the words '*remote work performed*' as now adopted in clauses 25(d)(i)(A) through to (d)(i)(F), but this is not apparent.
16. It is also unclear whether clause 25.10(c)(ii) operates to deem time not worked as time worked for various purposes. For example, would time that is rounded up to the nearest 15 minutes (but not actually worked) count as an employee's ordinary hours of work for various purposes under the Award and for the purposes of accrual of entitlements under the NES? The drafting of the provision is far from clear.
17. Ai Group's Proposal relating to clause 28.4 (recall to work) incorporates a reference to '*designated workplace*'. In contrast, the corresponding element of the Joint Proposal merely makes reference to '*a workplace*'. It is not clear that clause 28.4 in the Joint Proposal would not capture work undertaken at an employee's home. Adoption of Ai Group's Proposal would rectify this issue.

3. A NOTE ON THE REMAINING MERIT DIFFERENCES BETWEEN THE PROPOSALS

18. Ai Group has been directed to provide a note on the remaining merit differences between its proposal and the Joint Proposal. We understand this to mean the substantive differences between the proposals as opposed to the mere differences in the drafting of the respective provisions. We below identify what appear to be the 9 key merit differences between the respective proposals.
19. Consistent with the requirement to provide a '*note*' we do not seek to advance further comprehensive submissions about the reasons why our approach should be preferred to that adopted in the Joint Proposal. We have addressed the

justification for our proposal in previous submissions and the deficiencies in the Joint Proposal in our previous submissions filed on 3 August 2021², 25 August 2021³ and 30 August 2021⁴ and in the course of the most recent hearing.

20. *Firstly*, the proposals adopt differing definitions for what might be termed ‘*remote work*’. In substance:
- (a) Ai Group proposes a definition for remote work that focuses on where the work is undertaken. Unlike the Joint Proposal, it does not limit it to work that occurs outside of certain parameters related to when it is worked.
 - (b) Ai Group’s Proposal expressly articulates that certain administrative tasks associated with maintaining employment are not included within remote work.⁵ We observe that it appears to be common ground that such tasks would not constitute work, and as such, should not be captured by the clause. Accordingly, the merit difference between the proposal really turns on which approach provides greater clarity, or which approach better furthers the objective of ensuring that the Award is simple and easy to understand.
21. *Secondly*, the remuneration structure contemplated under each of the proposals differs significantly.
22. The minimum payment’s contemplated by Ai Group’s Proposal are set amounts calculated by reference to the minimum rates of pay prescribed by the Award. That is, an employee would either receive 15 minutes, 30 minutes or 45 minutes pay at the minimum rates of pay as a minimum payment when remote work is performed, regardless of the amount of work that is performed. The relevant rates prescribed by the other provisions of the Award would attach to the actual time spent performing such work. If an employee undertakes so much remote

² At [12] – [76] and Annexure A.

³ At [70] – [95].

⁴ At [49] – [147].

⁵ An amendment to Ai Group’s Proposal to deal with this matter is set out at paragraph 81 of Background Paper 3.

work that they earn more than the minimum payment, then they would just be paid for the work undertaken. This approach is intended to:

- (a) Ensure an employee receives a meaningful minimum payment to compensate them for the disutility of being required to work (potentially unexpectedly) in circumstances where a relatively short period of active work may be undertaken, while also providing that where a not insignificant period of work is undertaken the payment is based on the rates that would ordinarily attach to such work.
 - (b) Be workable from a payroll perspective by identifying set minimum payments that attach to the occurrence of remote work.
23. In contrast, the Joint Proposal effectively prescribes minimum payment periods, as opposed to minimum payments. Consequently, an employer needs to calculate the minimum payment for each moment of the minimum payment period based upon whether or not the employee is working. This might mean, for example, that if an employee who is not on call took two 10-minute phone calls, one at 10.00pm and another at 10.30pm (on a day that was not a Saturday, Sunday or public holiday), an employer would need to:
- (a) pay the first 10 minutes between 10.00pm and at penalty rates (equivalent to at least time and a half / 150%)
 - (b) pay for the 10 minutes between 10.20pm and 10.30pm at minimum rates
 - (c) pay for the 10 minutes between 10.30pm and 10.40pm at penalty rates
 - (d) pay for a further 20 minutes at the minimum rate
24. The Joint Proposal would, in some instances, be much more expensive than Ai Group's Second Proposal because it builds the penalty rates into the minimum payments. It would also be more onerous and complicated for an employer to apply from a payroll perspective.
25. *Thirdly*, the amount of time that is used to calculate the minimum payments differs under the respective proposals.

26. Relevantly, Ai Group's Proposal provides for differentiated minimum payments at all times based upon whether or not an employee is 'on call'. That is, Ai Group's Proposal provides for a lesser minimum payment at all times of the day or night if the employee is on call compared to if they are not on call. In contrast, the Joint Proposal contemplates a minimum payment of one hour for all remote work performed when an employee is not on call.
27. It should also be noted that the Ai Group Proposal contemplates a minimum payment of 30 minutes for work performed between 6.00am and 10.00pm when the employee is not on call and a minimum payment of 15 minutes when the employee is on call. The Joint Proposal similarly provides for a minimum payment of 15 minutes between 6.00am and 10.00pm when an employee is on call, but provides for a 1 hour minimum payment when the employee is not on call at this time.
28. For remote work undertaken between 10.00pm and 6.00am the Ai Group proposes minimum payments for 30 minutes when an employee is on call and 45 minutes when they are not on call. ABI proposes minimum payments of 30 minutes and 60 minutes depending upon whether the employee is on call and the unions propose minimum payments of 60 minutes.
29. Ai Group's proposal does not deal specifically with minimum payments for meetings and training undertaken remotely. Instead, such work would attract the same remuneration as all other remote work. The Joint Proposal provides that meetings and training would attract a minimum payment of one hour's pay.⁶
30. For context, we observe that the *provisional* view of the Full Bench expressed in the May Decision was that the minimum payment for remote response work performed between 6.00pm and 10.00pm should be 30 minutes and that the minimum payment between 10.00pm and 6.00am should be 1 hour.⁷ It was also noted that there is an inter-relationship between minimum payment periods and the rate of payment. Further, it appears to have been decided that a shorter

⁶ Clause 25.10(c)(i)(d).

⁷ *4 yearly review of modern awards—Social, Community, Home Care and Disability Services Industry Award 2010—Substantive claims* [2021] FWCFB 2383 at [733].

minimum payment period should apply in circumstances where an employee is being paid an on-call allowance.⁸

31. *Fourthly*, clause X.3 of Ai Group's Proposal includes an exemption for work which is voluntarily undertaken by an employee while they are not on call and which attracts overtime rates. Ai Group does not press this element of our proposal.
32. *Fifthly*, clause X.4(a) of Ai Group's Proposal deals with the manner in which work undertaken during periods when an employee is on call, or otherwise during a 24-hour period, can be applied in satisfaction of the minimum payment periods. There is no corresponding provision in the Joint Proposal given the different approach to remunerating employees for remote work, as explained above.
33. *Sixthly*, clause X.4(b) of Ai Group's Proposal deals with what happens if an employee performs multiple instances of remote work during a period while they are on call or in a 24-hour period. In short, it requires an employer to pay the highest minimum payment but does not require multiple minimum payments.
34. In contrast, clause 25.10(c)(iii) of the Joint Proposal would require multiple minimum payments be made for separate instances of remote work, unless the remote work was performed within the applicable minimum payment period. We note that the term '*applicable minimum payment period*' is not defined and it is unclear how it is to be determined in circumstances where the separate instances of remote work occur at times of the day that attract different minimum payment periods. We have addressed related issues in the section of this submission dealing with the drafting of the Joint Proposal.
35. Ai Group's Proposal does not include any requirement to calculate payment for time worked beyond the minimum payment periods or the minimum payments by rounding amounts to the nearest 15 minutes (as is contemplated by clause 25.10(c)(ii) of the Joint Proposal). That is, it does not require payment beyond the prescribed minimum payments for time which is not actually worked.

⁸ 4 yearly review of modern awards—*Social, Community, Home Care and Disability Services Industry Award 2010*—*Substantive claims* [2021] FWCFB 2383 at [722].

36. We here acknowledge that Ai Group's Proposal (like the Joint Proposal) fails to deal with what occurs where remote work traverses the two time periods that attract a minimum payment. We submit that where this occurs the starting time for the remote work should be used to determine the minimum payment period as this is most likely to impact upon whether the employee is disturbed at a time when they may be sleeping. Ai Group can provide a form of words that achieves this if the Full Bench is minded to adopt this approach.
37. *Seventhly*, Ai Group's Proposal and the Joint Proposal differ in relation to the approach taken to imposing requirements upon employees to record time spent undertaking remote work and communicating this to employees.
38. The final form of this element of our proposal is set out at paragraph [135] of our 30 August 2021 submission.
39. In short, clause 25.10(e) of the Joint Proposal:
- (a) Contemplates the provision of '*a time sheet or other record acceptable to the employer*'. There are no restrictions on the nature of '*other record[s]*' that could be required.
 - (b) Provides that the record must be provided in a "reasonable period of time after the work is performed".
 - (c) Does not provide any consequence if the record is not provided to the employer.
40. In contrast, clause X.5 of Ai Group's Proposal:
- (a) Contemplates a broader requirement for the employee to comply with the use of an electronic system for recording time spent performing remote work. It is envisaged that this might include, for example, utilising enterprise specific applications or other software.
- Importantly, the provision only requires the employee to comply with '*reasonable*' requirements.

- (b) Requires that an employee provide relevant records within a specified period (i.e., prior to the end of the next full pay period or in accordance with an otherwise agreed arrangement).
- (c) Provides that an employer is not required to pay an employee for remote work if the employee does not comply with the requirements of the clause, provided the employer has advised the employee of the requirement. This is directed at *ensuring* the relevant information is recorded and communicated to the employer.⁹ There is no corresponding provision in the Joint Proposal.
41. *Eighthly*, clause X.6 of Ai Group's Proposal contemplates transitional arrangements that are intended to moderate the adverse impact of insertion of a new monetary obligation in the Award upon employers of employees that currently pay such employees above award rates, including employers that currently remunerate employees for work that might be said to be remote work in a manner that differs from that contemplated by Ai Group's Proposal.
42. The Joint Proposal does not include any transitional arrangements
43. *Ninthly*, clause X.8 of Ai Group's Proposal carves out certain types of remote work from the application of the minimum payment provisions of Ai Group's Proposal and from the minimum payment provisions that operate (or will operate) pursuant to clause 10.5 of the Award.
44. In short, we propose that the minimum payment provisions should not be triggered by the performance of remotely performed tasks that take, or should take, *very* short periods of time to complete. We have proposed a general exemption for tasks that take less than 5 minutes, and an exemption for work that take less than 10 minutes in the limited circumstances where this is the result of an employee not properly performing their work (such as not completing

⁹ 4 yearly review of modern awards—Social, Community, Home Care and Disability Services Industry Award 2010—Substantive claims [2021] FWCFB 2383 at [722].

handover notes) and the employee's performance of the work being essential to the health or safety of an employee.

45. The Joint Proposal does not include any corresponding provision.
46. Ai Group's Proposal is intended to ensure that the new clause does not deliver an unfairly disproportionate benefit to an employee to the disutility of the work undertaken. We note that the Full Bench could adopt different thresholds to the 5 or 10 minutes proposed by Ai Group. We also observe that if the more expensive minimum payment regime contained in the Joint Proposal is adopted, there is greater force to the proposition that there should be an exemption for very short periods of work.
47. Ai Group does not press our proposed clause X.8(a).