Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Reply Submission

Social, Community, Home Care and Disability Services Industry Award 2010

(AM2018/26)

30 August 2021

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

1. INTRODUCTION

1. Ai Group files this reply submission in accordance with the Statement issued by the Commission on 9 August 2021.[1] It relates to the following issues:

   (a) Broken shifts and more particularly, the issues described at paragraph [6] of the Statement.

   (b) Remote response.

2. In this submission, we use the same abbreviations as we have used in our submissions of 3 August 2021, 5 August 2021 and 25 August 2021.

3. This submission has been prepared in consultation with AFEI and is also advanced on their behalf.

[1] *4 yearly review of modern awards—Social, Community, Home Care and Disability Services Industry Award 2010* [2021] FWCFB 4863.

2. BROKEN SHIFTS

4. In this part of our submissions, we respond to the various submissions made about the issues described at paragraph [6] of the Statement on 25 and 26 August 2021.

NDS' Submissions

5. NDS proposes two variations to the Award in its submissions of 25 August 2021.

6. *First,* at paragraph [38] of its submissions, NDS submits that clause 29.4 should be varied as follows:

> Shifts are to be worked in one continuous block of hours, other than when a broken shift is performed by an employee in a disability or home care service under clause 25.6, and may include meal breaks and sleepover. [sic]

7. We agree, in principle, that clause 29.4 should be varied to make clear that a shiftworker delivering disability or home care services can work a broken shift in accordance with clause 25.6; however, we submit that the variation we proposed at paragraph [43] of our submission of 25 August 2021 more clearly and succinctly achieves that outcome.

8. *Second,* at paragraphs [45] – [46] of its submissions, NDS submits that clause 28.1 should be varied to provide that overtime rates are payable for work performed outside the span of hours by a *'broken shift worker'*.

9. In our submission, the introduction of the concept of a broken shift worker is not necessary and is apt to confuse. The Award does not, in our view, contemplate a third category of worker, that is distinct from day workers and shiftworkers. Rather, a broken shift can be performed by a day worker or a shiftworker. Whilst they perform such work, they remain either a day worker or a shiftworker.

10. If a full-time shiftworker performs work outside the span of hours (generally or on a broken shift), such work will necessarily constitute work done *'in addition to their rostered ordinary hours'* and therefore, they will be entitled to overtime rates pursuant to clause 28.1(a).

11. If a part-time or casual employee performs work outside the span of hours, it is not clear that they would be entitled to overtime rates for such work; however, we do not oppose a variation to clause 28.1(b) that clarifies that overtime rates are payable in such circumstances to both day workers (as has already been proposed by the Commission) and shiftworkers.

ABI's Submissions

12. At paragraphs [73] – [74], ABI submits as follows:

> 73. When one has regard to the structure of the Award, we consider that clause 29.4 simply operates in such a way that afternoon shifts, night shifts and public holiday shifts (as defined in clause 29.2) must be worked in one continuous block and cannot be worked in a non-continuous manner.
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> 74. In other words, in order for a shift to amount to an 'afternoon shift' under the Award, it must be a continuous shift. Therefore, a broken shift which is non-continuous and finishes after 8pm is not an 'afternoon shift'. Instead, it is a 'broken shift' under clause 25.6 and the employee would be paid the afternoon shift penalty for that shift in accordance with clause 25.6(b).

13. We doubt whether the construction of clauses 25.6 and 29.4, as described above, is correct and even if it were, it would give rise to obvious uncertainties.

14. As alluded to above, in our view, the Award provides for only two categories of workers: day workers and shiftworkers. When performing work on a broken shift, an employee will constitute one or the other. If an employee is not a shiftworker, it is unclear how they could perform ordinary hours of work that extend beyond the span of hours prescribed by the Award in respect of day work (i.e. 6.00am – 8.00pm). Therefore, if, for example, work performed after 8.00pm as part of a broken shift must be treated as overtime, the very issues that we have raised about the proposition that the broken shift provision be limited to day workers, would arise.

15. It appears to us that the span of hours for day workers applies unless an employee is a shiftworker. By virtue of clause 25.2(b), an employee is a shiftworker if they *'work shifts in accordance with clause 29'*. Thus, if an employee is not working a shift in accordance with clause 29 (because the shift does not conform with clause 29.4), as contemplated by ABI, the employee is

not a shiftworker and cannot work ordinary hours beyond the span of hours prescribed by clause 25.2(a).

16. In any event, at paragraph [82] of its submissions of 25 August 2021, ABI submits that clause 29.4 should be replaced with the following:

> With the exception of social and community services employees when undertaking disability services work and home care employees, shifts are to be worked in one continuous block of hours that may include meal breaks and sleepover.

17. We agree, in principle, that clause 29.4 should be varied to make clear that a shiftworker delivering disability or home care services can work a broken shift in accordance with clause 25.6; however, we submit that the variation we proposed at paragraph [43] of our submission of 25 August 2021 more clearly and succinctly achieves that outcome.

HSU's Submissions

18. The HSU has repeated its support for the variation sought by the ASU to the broken shift provision proposed by the Commission. We rely on our submission of 25 August 2021 at paragraphs [47] – [69] in this regard.

19. The HSU also submits that clause 29.4 of the Award should be varied such that it expressly provides that despite it, shiftworkers may work a broken shift in accordance with clause 25.6. We agree, in principle, that such a variation should be made; however, we submit that the variation we proposed at paragraph [43] of our submission of 25 August 2021 more clearly and succinctly achieves that outcome than the HSU's proposed amendment.

20. The union has advanced the proposition that the Award should be varied by the Commission pursuant to s.160 of the Act on the basis that there is an ambiguity. It appears that the HSU is, in effect, contending that there is an arguable case that the relevant provisions are susceptible to more than one meaning.

21. In our most recent submission, we dealt with the proper interpretation of clauses 25.6 and 29.4.[2] As we there set out, we accept that the application of clause 25.6 to shiftworkers is unclear. Although we contend that it is reasonably arguable that clause 25.6 provides an exception to clause 29.4, we recognise that on one view, the former cannot be reconciled with the other and that as a result, the Award may be read as prohibiting the performance of an afternoon or night shift that is broken.

22. As a result, we do not oppose the HSU's submission that the Award is ambiguous in the sense required by s.160 of the Act. Moreover, we submit that the relevant provisions give rise to an uncertainty, for the purposes of s.160 of the Act. The meaning of the term *'uncertainty'* in this context was considered by a Full Bench of the Commission in relation to an application made by Ai Group to vary the coverage of the *Horticulture Award 2020* as follows: (emphasis added)

> **[152]** The decision of Senior Deputy President Polites in *Re. Public Service (Non Executive Staff – Victoria) (Section 170MX) Award 2000* provides further clarity on the meaning of 'uncertainty'. In this case, an award clause was varied on the basis that the clause was uncertain. In doing so, His Honour adopted the following definition of 'uncertainty':
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> > 'In that respect I respectfully adopt the submission made by the State of Victoria that the term "uncertainty" means the quality of being uncertain in respect of duration, continuance, occurrence, liability to chance or accident or the state of not being definitely known or perfectly clear, doubtfulness or vagueness. Those are extracts for the Concise Oxford Dictionary adopted by Commissioner Whelan in *Re: Shop Distributive and Allied Employees Association v. Coles Myer* [Print R0368]. In my view, as I have indicated, this provision clearly falls within that definition.'[3]

23. The application of clause 25.6 to shiftworkers is plainly uncertain.

24. Nonetheless, it is not necessary for the Commission to be satisfied that it has power to vary the Award pursuant to s.160 of the Act. The Commission can (and should) exercise its powers to vary the Award as part of the 4 yearly review of modern awards, even if it is not established that an ambiguity or uncertainty of the requisite kind exists. We continue to rely on our previous submission in this regard.

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[2] Ai Group submission dated 25 August 2021 at [8] – [34].

[3] *4 yearly review of modern awards – Horticulture Award 2010* [2017] FWCFB 6037 at [152].

UWU's Submissions

25. The UWU has reiterated that clause 25.6(b) should be varied as per its earlier proposal, which was in the same terms as that which has been advanced by the ASU. We rely on our submission of 25 August 2021 at paragraphs [47] – [69] in this regard.

26. The UWU submits that there are *'three courses of action available'*[4] to the Commission; those being:

    (a) That the controversy concerning whether shiftworkers can perform broken shifts is not resolved through these proceedings.

        Detailed submissions have been made by the parties regarding the issue, as it has arisen squarely in the context of these proceedings. Unless the Commission concludes that the material before it does not enable it to determine how the Award should be varied in respect of this matter, the Commission should do so. The uncertainty flowing from the extant provisions and the potential for disputes to arise between individual employees and their employers about their application is clearly undesirable.

        Further, such a situation would be inconsistent with the need to ensure that the Award is simple and easy to understand.[5]

    (b) That the Award is varied to require that a shiftworker cannot perform a broken shift.

        This proposition is, in essence, the corollary of what was advanced by NDS. For the reasons explained at paragraphs [35] – [42] of our submission of 25 August 2021, it should not be adopted.

[4] UWU submissions dated 25 August 2021 at [21].

[5] Section 134(1)(g) of the Act.

(c) That the draft determination is amended as proposed by the UWU and that the Award is varied to make clear that shiftworkers can perform broken shifts.

We agree that the Award should be varied to make clear that shiftworkers can perform brokens shifts; however, we otherwise oppose the UWU's proposal. We continue to rely on paragraphs [47] – [69] of our previous submission.

ASU's Submissions and Evidence

27. Ai Group agrees with the submissions of the ASU that it is not necessary for the Commission to determine whether the Award, as presently drafted, permits the performance of broken shifts by shiftworkers.[6] Though we have made detailed submissions about the interpretation of the relevant clauses, we are not, as such, calling upon the Commission to make a determination as to what the proper construction of the relevant provisions is. We agree with the ASU's characterisation of the Commission's task in the context of the review and concur with the proposition that the Commission can discharge its statutory obligation to ensure that the Award satisfies the modern awards objective without forming a concluded view as to the proper meaning of the extant provisions.

28. The ASU also submits that:

(a) The evidence suggests that there is no significant need for shiftworkers to perform broken shifts in the context of disability services. (**First Proposition**)

(b) Confining the performance of broken shifts to day workers would ensure that the Award achieves the modern awards objective. (**Second Proposition**)

[6] ASU submission dated 26 August 2021 at [20].

(c) If the Award does (or will) permit the performance of broken shifts by shiftworkers, employees should in those circumstances be entitled to both the shift allowances prescribed by clause 29 and the broken shift allowance provisionally determined by the Commission. (**Third Proposition**)

29. We deal with each of these propositions below.

The First Proposition

30. We note that the First Proposition advanced by the ASU is confined to disability services. The ASU does not seek to make the same or a similar submission about the provision of home care. The broken shift clause, however, applies to both types of work, as does clause 29, which concerns shiftwork.

31. We also note that Ai Group and other employer organisations that represent the home care sector contend that there is a need for shiftworkers to work broken shifts and that such work is, in fact, performed in the sector.

32. In the absence of any contest as to the aforementioned factual proposition, the Commission should in our submission accept it, even if it is of the view that the evidence before it does not establish it.[7]

33. Ai Group opposes the First Proposition. For the reasons explained at paragraphs [40] – [41] of our submission of 25 August 2021, we contend that there is a need for shiftworkers to be able to work broken shifts.

34. It is curious that the ASU seeks to now advance this position, given the comments it made during recent proceedings before Deputy President Clancy.[8] That is, during those proceedings, the ASU argued that there is a *'significant amount of work that may be rostered in the evenings or the early mornings'*[9], that there are *'well-established patterns in the industry of shiftworkers working broken*

[7] *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Melbourne and Metropolitan Tramways Board* (1965) 113 CLR 228 at 243.

[8] Ai Group submission dated 25 August 2021 at [38].

[9] Transcript of proceedings on 19 August 2021 at PN442.

shifts'[10] and that the Award has been applied in this way *'for nearly a decade now'*[11].

35. We also note that the ASU's submissions[12] describe specific forms of support provided to clients which, in some circumstances, necessarily occurs after 8pm. It is not atypical for a support worker to perform work after 8pm for the purposes of assisting a client to get ready for bed. This work takes place routinely and regularly in respect of such clients; that is, it is typically not ad hoc or irregular work. It is fair and appropriate that such work can form part of an employee's ordinary hours of work. Employers and clients would face considerable uncertainty if all such time is deemed overtime.

36. The ASU goes on to submit that all broken shifts performed in residential settings are undertaken by day workers. In support of this proposition, they rely on:

    (a) The evidence of Feargus Manning. Mr Manning is an employee of The Disability Trust.

        Self-evidently, the evidence of one employee in relation to one employer cannot be relied upon to substantiate the proposition that throughout the sector, broken shifts are not performed by shiftworkers in residential settings.

    (b) The evidence of William Elrick at paragraph [23], which is extracted below:

        > In group homes workers will often do a morning shift and an afternoon shift, such as 7am – 10am and then 3pm – 10pm. In home support workers generally have a more fragmented working pattern and may be required to do several shifts in a day. For example, rosters of 7am – 9am, 11am – 1pm, and then 5pm – 7pm are common. These shifts are normally for the purposes of providing meal assistance and personal care to clients.[13]

        In our submission, Mr Elrick's evidence in fact demonstrates that employees *do* perform broken shifts that involve work after 8pm in

[10] Transcript of proceedings on 19 August 2021 at PN455.

[11] Transcript of proceedings on 19 August 2021 at PN452.

[12] ASU submission dated 26 August 2021 at [39].

[13] Page 2936 of the Court Book.

residential settings, such as group homes. As we understand the first sentence of the extracted paragraph above, Mr Elrick's evidence was that certain employees often perform separate portions of work in the morning (e.g. 7am – 10am) and later in the day (e.g. 7pm – 10pm); thereby constituting a broken shift that includes work after 10pm.

37. The Commission should not find that shiftworkers do not perform broken shifts in residential settings or that in such environments, work is consistently arranged in the manner described by the ASU in its submissions. In making this submission, we note that it is inconsistent with our understanding of the manner in which work is arranged by at least some employers in group home settings.

38. The ASU's simplistic submissions that work outside the span of hours should be rearranged such that the hours are worked continuously ignores the practical difficulties facing employers in relation to the scheduling of work. Indeed, the Commission has found that:

    (a) Employers are less able to organise work in a way that is most efficient for them due to reforms that have affected the sector in recent years.[14]

    (b) Greater choice and control for customers has led to greater rostering challenges.[15]

39. In addition, we refer to the uncontested evidence filed by Ai Group that deals with similar issues.[16]

40. The evidence does not establish that the instances in which work cannot be reorganised in continuous shifts are *'marginal'*, as submitted by the ASU.[17]

[14] Decision at [218](10)(f).

[15] Decision at [218](10)(g).

[16] Witness statement of Richard Cabrita at [65] – [78] and witness statement of Aleysia Leonard at [36] – [44].

[17] ASU submission dated 26 August 2021 at [28].

41. The ASU similarly over-simplifies and overstates the accessibility of individual flexibility arrangements and enterprise agreements as potential solutions for employers who require shiftworkers to perform broken shifts. Clearly, in either instance, employees would need to be *'better off overall'* and in the context of enterprise agreements, it would be necessary for all other relevant statutory criteria to be satisfied in order for the agreement to be approved by the Commission. Many small and medium enterprises, particularly not-for-profits, do not have the resources or the expertise required to implement either strategy as a means of circumventing inflexibilities imposed by the Award. It is unfair and inappropriate that absent the capacity to institute such measures, which impose a significant regulatory burden, employers will be saddled with Award restrictions that do not permit such arrangements.

The Second Proposition

42. We oppose the Second Proposition (that is, that confining the performance of broken shifts to day workers would ensure that the Award achieves the modern awards objective). In particular:

    (a) There is no evidence or other material to suggest that such an Award term would improve the relative living standards and needs of the low paid.[18]

    (b) It is unlikely that this matter alone will encourage collective bargaining.[19]

    (c) We consider it unlikely that such an Award term would promote social inclusion through increased workforce participation.[20]

    (d) The need to promote flexible modern work practices and the efficient and productive performance of work tells strongly against the ASU's proposition.[21]

[18] Section 134(1)(a) of the Act.

[19] Section 134(1)(b) of the Act.

[20] Section 134(1)(c) of the Act.

[21] Section 134(1)(d) of the Act.

(e) The need to promote additional remuneration for employees working shifts, or *'unsocial, irregular or unpredictable hours'* is a neutral consideration.[22] Shiftworkers are entitled to shift allowances that afford them additional remuneration for working shifts. In addition, the Commission has provisionally determined that a new broken shift allowance will be introduced in the Award, which would compensate employees for any irregularity or unpredictability experienced by employees for performing work on a broken shift. Ai Group has not opposed this aspect of the Commission's decision; our submissions relate only to the quantum of the allowance that should be payable if it is to apply in addition to shift allowances.

(f) The principle of equal remuneration for work of equal or comparable value is a neutral consideration.[23]

(g) Confining the performance of broken shifts to day workers would have an adverse impact on employers.[24] In particular, if work performed after 8pm and before 6am cannot form part of an employee's ordinary hours:

(i) This may disturb existing arrangements (noting that, in our submission, it is at least reasonably arguable that such arrangements are currently permitted by the Award). Employers would face the regulatory burden associated with rearranging this work, for which they would need to engage with employees and / or clients.

Depending on the employer's capacity to rearrange work, clients may ultimately face some disruption to the delivery of services to them, including an inability to continue to access services as and when they wish to receive them.

[22] Section 134(1)(da) of the Act.

[23] Section 134(1)(e) of the Act.

[24] Section 134(1)(f) of the Act.

(ii) Employers would face considerable uncertainty for the purposes of developing their rosters, because an employee can potentially refuse to work overtime.

(iii) Some employers may face increased employment costs by virtue of a requirement to pay overtime rates for such work.

(iv) Employers may suffer a loss of productivity and, simultaneously, the continuity of care available to clients may be compromised. For example, it may no longer be plausible for an employer to roster the same employee to provide support to an employee on more than one occasion through the course of the day – once during the morning and again at night, to assist them to get ready for bed.

(h) The need to ensure that the Award is simple and easy to understand can be satisfied in more than one way.[25] It is not necessary that the broken shift provision be confined to day work in order to achieve this. If the Award made clear that broken shifts can be worked by dayworkers and shiftworkers, the Award would also be simple and easy to understand.

43. Accordingly, and for the reasons set out at paragraphs [35] – [42] of our submissions of 25 August 2021, the Award should not be varied to limit the application of the broken shift provisions to day workers.

The Third Proposition

44. Ai Group opposes the Third Proposition (i.e. that if the Award does (or will) permit the performance of broken shifts by shiftworkers, employees should in those circumstances be entitled to both the shift allowances prescribed by clause 29 and the broken shift allowance provisionally determined by the Commission). We continue to rely on our submissions of 25 August 2021 at paragraphs [47] – [69].

[25] Section 134(1)(g) of the Act.

45. The ASU argues that the shift allowances prescribed by clause 29 of the Award and the proposed broken shift allowance compensate employees for different disutilities. In response, Ai Group contends that the two amounts *should* be struck on the basis that they compensate employees for different disutilities, however because of the manner in which the Commission conceived of the operation of clause 25.6(b) of the Award, the proposed broken shift allowance is inappropriately high. We refer in particular to paragraphs [52](d) and [60] of our 25 August 2021 submission.

46. The ASU also submits that the proposed broken shift allowances are *'unlikely to significantly increase costs for employers'*[26] for the reasons articulated at paragraph [35] of its submissions.

47. The ASU's arguments are misconceived. There is no basis for finding that it is *'unlikely that a shift worker will work a broken shift that is also a night, afternoon or public holiday shift'*[27]. We again note that the proposition advanced is squarely inconsistent with the representations made by the ASU during proceedings before Deputy President Clancy and with the contentions advanced by employer parties.

48. Moreover, the ideological argument that employers *'can and should re-organise work in the most efficient way possible'*[28] is unfounded and ignores the operational realities facing employers covered by the Award. We refer to the submissions made above in this regard.

[26] ASU submission dated 26 August 2021 at [35].

[27] ASU submission dated 26 August 2021 at [35].

[28] ASU submission dated 26 August 2021 at [35].

3. REMOTE RESPONSE

49. Ai Group has filed a comprehensive proposal relating to remote work. Our position has evolved over time and in light of matters raised in discussions with other interested parties. The issue has been addressed in two sets of submissions.

50. On 23 August 2021, ABI sought leave to file the New ABI / Union Proposal. Submissions in support of the proposal have been advanced by various parties, but the most fulsome have been advanced by ABI. The proposal was not the subject of consideration at the conference convened by the Commission on 19 August 2021.

51. Ai Group opposes elements of the New ABI / Union Proposal and submits that in various respects, the approach proposed by Ai Group should be preferred. There are however elements of consistency between it and Ai Group's Second Proposal.

52. These submissions firstly address the significance that the Full Bench should place on the support or otherwise of interested parties for the respective proposals. We then seek to address the specific elements of the New ABI / Union Proposal and in so doing, where relevant, seek to identify why, in some respects, Ai Group's Second Proposal should be preferred.

53. Ultimately, the Full Bench does not need to decide whether one approach should be adopted in totality over the other. As observed by the Full Bench in the context of proceedings associated with the review of the *Professional Employees Award 2020:*

> **[69]** We would also observe that the Commission is not required to make a decision in the terms applied for and, in a Review, may vary a modern award in whatever terms it considers appropriate, subject to its obligation to accord interested parties procedural fairness and the application of relevant statutory provisions, such as ss.134, 138 and 578. [29]

[29] *4 yearly review of modern awards — Professional Employees Award 2010 — Substantive claims* [2020] FWCFB 2057 at [69].

54. We have had a very limited period of time to consider the New ABI / Union Proposal. It has certainly not been feasible to advance any evidence in the timeframes afforded. We nonetheless seek to address the issues we have identified with it in the time afforded.

What significance should be afforded to the position of the respective parties?

55. There is no universal consent position that has been reached between the interested parties in relation to remote work.

56. Ai Group's Second Proposal is supported by AFEI. Collectively, the membership of these registered employer associations includes a very significant number of employers covered by the Award. This includes many of the largest employers covered by the Award, as well as many smaller operators and affiliated associations who also represent employers covered by the Award.

57. The only employer to participate in the conference scheduled by the Commission, I CAN Network Limited, was supportive of Ai Group's Second Proposal.[30] NDS has previously advised the Commission that they are not opposed to Ai Group's Second Proposal and of their assessment that it reflects the principles that were outlined in the Decision.[31]

58. It is, at this stage, unclear whether all the parties who support the New ABI / Union Proposal are opposed to the Ai Group proposal. This should not be assumed merely because they have proffered an alternate proposal as a potential compromise position.

59. Regardless of the above considerations, 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

[30] Transcript of proceedings on 19 August 2021 at PN319.

[31] Transcript of proceedings on 19 August 2021 at PN310.

number of supporters should not be viewed as having inherently greater merit. Proposals should not be selected or preferred based upon their popularity.

60. The relevance of the position of interested parties, such as relevant industrial associations, was described by the Full Bench in proceedings associated with the review of the *Professional Employees Award 2020*:

> **[64]** While the position of interested parties – such as APESMA and Ai Group – in respect of a proposed variation to a modern award remains a relevant consideration, such views are accorded less weight than in the past. The nature of modern awards under the Act is quite different from the awards made under previous legislative regimes. In times past awards were made in settlement of industrial disputes and the respondent parties to such awards were the parties to the relevant industrial dispute. Modern awards perform a very different function to that performed by awards of the past.
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> **[65]** Modern awards are not made to prevent or settle industrial disputes between particular parties. Rather, the purpose of modern awards, together with the National Employment Standards and national minimum wage orders, is to provide a safety net of fair, relevant and enforceable minimum terms and conditions of employment for national system employees (see ss.3(b) and 43(1)).
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> **[66]** Modern awards are essentially regulatory instruments which apply to, or cover, certain persons, organisations and entities (see ss.47 and 48), but these persons, organisations and entities are not 'respondents' to the modern award in the sense that there were named respondents to awards in the past. The nature of this shift is made clear by s.158 which sets out who may apply for the making of a determination making, varying or revoking a modern award. Under previous legislative regimes the named respondents to a particular award would automatically have the requisite standing to make such applications; that is no longer the case.
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> **[67]** A consequence of the shift in the nature and purpose of modern awards is that the weight to be given to the views of interested parties is, generally speaking, less now than it was previously.
>
> **[68]** … we must decide for ourselves whether the variations proposed have merit and are necessary to ensure that the award achieves the modern awards objective. [32]

61. Having regard to the above-described context of the current legislative scheme, Ai Group has sought to set out cogent reasons for the Second Ai Group Proposal and, through these submissions, addresses the relative merits or deficiencies in the New ABI / Union Proposal.

[32] *4 yearly review of modern awards — Professional Employees Award 2010 — Substantive claims* [2020] FWCFB 2057 at [64] - [68].

The application of a 'remote work' clause

62. The definition of *'remote response'* was not determined by the Full Bench in the Decision.

63. Competing definitions have now been proposed in the Ai Group Second Proposal and the New ABI / Union Proposal. It is a contested matter and Ai Group has squarely put in issue the proposition that it should be based on the nature of the work performed, and absent a consideration of whether or not the work is performed outside an employee's normal or rostered hours.

64. A major difference between Ai Group's Second Proposal and the New ABI / Union Proposal is the differing scope of activities that fall within the definition of *'remote response work'*. Both proposals now suggest a definition that is much broader than the definition that was previously proposed by ABI and identified in the Decision. The relevant elements of the respective proposals are set out below.

65. The key element of Ai Group's proposed definition of remote response work is 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…

66. In the context of these proceedings, there has been debate as to whether various activities incidental to an employee's employment should be caught by the definition of remote response work. To that end, we proposed that the Award should expressly clarify that an employee's performance of various administrative tasks associated with the maintenance of their employment should be excluded from any definition of remote response work.

67. If the Full Bench is minded to incorporate such an express exclusion, we suggest that the following slightly reworded and restructured (although not substantively different) approach to the drafting of the provision that we previously advanced should be included as a separate paragraph after the sentence defining remote response work set out above:

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:

(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.

68. For clarity, we also proposed 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.

69. The corresponding key elements of the New ABI / Union 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.

70. We note at the outset that both proposals reflect a requirement that remote work should be defined as work that is performed at the *'direction'* or *'authorisation'* of an employer. A provision to this effect should be included in any variation to the Award.

71. ABI has proposed that the term *'remote work'* be utilised instead of *'remote response work'*. We agree with this proposal.

72. Both proposals seek to regulate payments for work that is undertaken at a *'designated workplace'*. This approach should be adopted.

73. This then brings us to areas of difference between the two proposals. A convenient starting point is a consideration of the divergent approaches to the *scope* of activities covered by the proposals.

74. In short, Ai Group has proposed 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. A central rationale for Ai Group's contention rests upon a proposition that a differing minimum payment regime should apply to work that is undertaken remotely.

75. As we have previously identified, although the finalisation of the remote response and minimum payment issues have been split into separate proceedings, there is degree of interconnectedness between these matters. For our part, we had envisaged complimentary variations that would exclude from the application of the minimum payment provisions work undertaken remotely (or for that matter remotely performed training) and that provide a different and more appropriate regime for remotely performed work.

76. Ai Group remains of the view that it is not *necessary* for a two-hour minimum payment to apply to work that does not require an employee to travel to a particular workplace. Put simply, we can see no justification, based on the reasoning of the Full Bench in the Decision, for the imposition of 2 hour minimum payment periods in the context of work not requiring attendance at a workplace. In advancing this submission, it has not been our intention to cavil with or criticise the reasoning in the Decision; we acknowledge that in the context of earlier proceedings such matters were not the focus of arguments against the union's proposed minimum engagement periods.

77. We identify, in short form, the following other salient considerations in support of our position:

(a) 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.

(b) 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.

(c) 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.

(d) 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.

(e) 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).

78. It is open to the Full Bench to adopt a broad definition of remote response work, as proposed by Ai Group in this tranche of the proceedings.

79. We nonetheless acknowledge that the Full Bench has indicated in its decision of 25 August 2021 (**Second Decision**) that it was not persuaded that there was a sufficient evidentiary basis to grant Ai Group's proposed variation to the draft determination that would limit the application of minimum payment provisions, and that it has identified that Ai Group may pursue the matter through an application to vary the Award, once the draft determinations arising from these proceedings have been finalised.[33]

80. Given the above context, the remainder of these submissions focus on other elements of the New ABI / Union Proposal. Nonetheless, if the narrower scope advanced of the New ABI / Union Proposal is adopted by the Full Bench in these proceedings, it should not prejudice Ai Group's prospects should it subsequently pursue a separate variation to the minimum payment provisions, as contemplated by the Full Bench.

Definitional issues

81. There is a lack of clarity in the wording of clause 25.10(b) of the New ABI / Union Proposal.

82. If the application of a clause dealing with remote work is to be narrowed so that it only applies to such work when it is undertaken in specific circumstances, it is critical that such circumstances are very clearly identifiable. Accordingly, we observe the following concerns with the New ABI / Union Proposal.

[33] Second Decision at [131] – [137].

83. Firstly, it is unclear what constitutes a *'designated shift'* in the context of a casual employee. ABI submits as follows in relation to the application of the clause to a casual employee:

> **(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'.[34]

84. The submission does not clarify what is intended by the reference to a *'designated shift'*.

85. 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.[35] 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.

86. 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.

[34] ABI submission dated 25 August 2021 at [22](f).

[35] Hireup submission dated 3 August 2021 at [4].

87. 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'*.

Interaction with clause 10.5 – the need for consequential amendments

88. If the New ABI / Union Proposal is adopted, there would be a contradiction or inconsistency between the resulting new award provision and clause 10.5 in the Second 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 an exclusion from the minimum payment provisions for work that was not undertaken at a designated workplace.

The treatment of personal tasks incidental to the maintenance of employment

89. The New ABI / Union Proposal does not include a provision expressly excluding tasks that are incidental to maintaining employment. ABI submits as follows in relation to this issue:

> **(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.[36]

90. Ai Group agrees that the abovementioned activities would not constitute work, as contemplated in the context of the Award. We are however concerned, in light of feedback from members, that this may not be apparent to a lay person reading the Award. For this practical reason, we have proposed that a clause expressly

[36] ABI submission dated 25 August 2021 at [22](k).

identifying various common activities that would not constitute remote response work should be included in any such provision.

91. 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.

Rates of pay for remote work

92. The approach adopted by Ai Group, AFEI and New ABI / Union Proposal to the rates at which remote work should be paid appear to be intended to be substantively the same. However, the way that this is articulated in the respective proposals differs.

93. Ai Group understands that the New ABI / Union 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.

94. An approach to drafting that makes it easier for a party to identify the rate of pay attaching to any period of remote work should be preferred to the broader approach adopted by Ai Group. Nonetheless, the approach to drafting adopted by the New ABI / Union Proposal appears to create various difficulties. In part, this is because it does not capture all of the subtleties of the full terms of the Award.

95. 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 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.

96. 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.

97. 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.

98. In short, Ai Group's proposal leaves it to the Award to prescribe the rate that would be applicable to the remote work. We concede that this leaves a party to read the other provisions of the Award in order to determine the rate that should apply. 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 New ABI / Union Proposal would be required.

99. Alternatively, simply providing that all remote response work is paid at the minimum rate of pay specified in the Award would be simpler and would not be opposed by Ai Group.

100. For completeness, we note that it appears to be common ground that remote work should not attract a shift allowance.

Minimum payments - the differences in approaches adopted by the parties

101. 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:

> **[731]** 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.
>
> **[732]** 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…
>
> **[733]** We see the logic inherent in the structure of ABI's minimum payment regime but take a different view as to the minimum periods prescribed. Our *provisional* view is that the minimum payment for remote response work performed between 6.00am and 10.00pm should be 30 minutes and the minimum payment between 10.00pm and 6.00am should be 1 hour. However, we note that there is an inter-relationship between the minimum payment period and the rate of payment.
>
> **[734]** The rate of pay applicable to remote response work (as opposed to the minimum payment) is problematic.[37]

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.[38]

104. Ai Group has sought to adopt a proposal that is broadly consistent with the approach adopted by the Full Bench. Our proposal is outlined in detail below. 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.

[37] Decision at [731] – [734].

[38] Decision at [237].

105. 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.

106. 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.

107. The New ABI / Union Proposal contemplates that work done between 6am and 10pm, where an employee is on call, should be 15 minutes. We agree with this proposal, albeit we disagree with the rate at which it should be paid.

108. The New ABI / Union 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.

109. ABI proposes that when on call at night a minimum payment of 30 minutes should apply. We agree with this approach, although we take a different approach to the calculation of the rate for such a payment and to the justification for it.

110. We understand that the unions propose a minimum payment in such circumstances of an hour. The unions' proposal fails to adequately account for the compensation that an employee would receive for the disutility associated with being 'on call'. A remote work clause should provide differentiated entitlements to employees who work remotely at night while on call and those that work whilst not on call.

Minimum Payments – the rate of pay

111. Viewed in its totality, the minimum payments regime contemplated in the New ABI / Union Proposal is very different and, in some circumstances, likely to be much more costly to an employer than that proposed by Ai Group.

112. 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.

113. 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.

114. 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.[39] 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.

115. The approach to calculating the rate at which the minimum payments proposed by Ai Group should be adopted.

[39] Clause 10.4(b) of the Award.

116. 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.

117. If the Full Bench is not persuaded a 45 minute minimum payment is fair in light of the above arguments, it should adopt the 1 hour minimum payment provisionally considered appropriate by the Full Bench.

Interaction between the minimum rates provision and the minimum payment provision

118. Various technical difficulties with the New ABI / Union Proposal flow from the interaction between minimum rates and minimum payment methodology adopted. 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.

119. In contrast, Ai Group proposes a minimum payment for remote work that is calculated by reference to minimum rates in the Award. This avoids the various difficulties identified above.

120. 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.

121. We note that at X.3(b), extracted above, we have proposed a limitation on the application of the minimum payment provisions. 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.

Remote meetings and training

122. The New ABI / Union Proposal contemplates that work involving participation in meetings or staff training remotely should attract a minimum payment of one hours' pay.

123. In addressing this matter, we acknowledge that the Full Bench has already declined to accept previous calls for an exclusion from the minimum payment provisions of the Award for training and meetings, and observed that a sperate application can be made to address such matters.[40] We nonetheless seek to address related issues because it is a matter that has been put in issue by the New ABI / Union Proposal. Further, we observe that remotely performed work constituting training and attendance at meetings would be caught by the Ai Group's Second Proposal and this has not yet been the subject of consideration by the Full Bench.

124. We share the implicit view of the supporters of the New ABI / Union Proposal that such work should not attract the standard minimum payment requirements that will be applicable under clause 10 of the Award. Accordingly, we would support the implementation of a one hour minimum payment provision in this context but, understandably, maintain the view that a lesser period than one hour is appropriate (at least in the context of training).

125. In support of a lesser minimum payment, we observe 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 New ABI / Union 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.

[40] Second Decision at [100].

126. 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.

127. We acknowledge the Full Bench's observations regarding the evidence relied upon by Ai Group and AFEI in relation to our previous calls for remote participation in training to be, in effect, exempt from otherwise applicable minimum payment provisions.[41] We do not here seek to suggest that the evidence establishes industry practices in relation to such matters. The evidence does however support the modest proposition that such activities can take much less than an hour and can sometimes be arranged in a manner that permits an employee to select the time at which they undertake the work. We also observe that it is not clear that such factual propositions would be seriously contested by the parties to these proceedings.

128. If the Full Bench is minded to grant an exception from the generally applicable minimum payment provisions for remotely performed training and meetings, in light of the broad support that has arisen for such an exemption, we propose that it should also provide that, 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. We can provide a form of words once the Commission has determined the broader approach that will be taken in relation to the drafting of a remote response clause if it assists.

The rounding proposal

129. The New ABI / Union Proposal contains a requirement that payment for time worked beyond the specified minimum payment period be rounded up to the nearest 15 minutes.

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

[41] Second Decision at [65] – [98].

131. 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.

132. 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.

Recording of time

133. The Full Bench has 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.[42]

134. The New ABI / Union 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.

135. Ai Group's Second Proposal adopts the following approach (we note that have made a minor correction to the drafting):

> **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~~ <u>relating to the</u> use of an electronic system for recording the time spent undertaking remote response work and the nature of the work undertaken.

[42] Decision at [722](4).

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

136. The power to include the proposed clause X.5(a) in the Award would arise from s.142 of the Act.

137. 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.

138. 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.

139. 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.

140. 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.

141. 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.

142. 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).

143. A significant deficiency in the New ABI / Union 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.

144. We appreciate that under the New ABI / Union Proposal, an employee would be required, by force of the Award, to provide a timesheet. However, 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.

145. The New ABI / Union Proposal will not ensure that an employee records and communicates to their employer time spent performing remote work, as contemplated by the Full Bench.

146. 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.

147. The New ABI / Union Proposal also does not provide a clear explanation of when the relevant records need to be provided to their employer.