

BEFORE THE FAIR WORK COMMISSION

Fair Work Act 2009 (Cth)

Title of matter: 4 yearly review of modern awards—Social, Community, Home Care and Disability Services Industry Award 2010

Matter Number: AM2018/26

Document: Submissions pursuant to Fair Work Commission Amended Directions dated 8 September 2021

Date: 15 September 2021

Lodged by: Australian Federation of Employers and Industries

Address for Service: Australian Federation of Employers and Industries
PO Box A233, Sydney South NSW 1235

Telephone: (02) 9264 2000

Facsimile: (02) 9264 5699

Email: shue.yin.lo@afei.org.au

Background

1. On 17 August 2021, Australian Industry Group ('AiG') filed a proposal in relation to remote response. AiG's proposal is supported by submissions filed by AiG dated 25 August 2021¹ and 30 August 2021². The 25 August and 30 August submissions highlight variations made to the 17 August 2021 proposal ('AiG's second proposal').
2. On 23 August 2021, Australian Business Lawyers & Advisors ('ABLA') notified the Fair Work Commission ('FWC') that an agreement concerning remote response had been reached with certain interested parties.³ ABLA filed a draft determination reflecting the agreement ('Joint Proposal').
3. Following the hearing of claims before the Full Bench on Wednesday, 1 September 2021, the Fair Work Commission ('FWC') issued directions, that were subsequently amended on 8 September 2021, as follows ('Amended Directions'):

Remote Response

1. ABL and Ai Group are to file a joint report identifying any proposed drafting changes to the Joint Proposal by 4:00pm on Thursday 9 September 2021. Ai Group is to file a note identifying any remaining merit differences between its proposal and the Joint Proposal, as well as any written submissions in relation to the amended drafting of the Joint Proposal.
2. Other parties are to file a response to the documents filed pursuant to Direction 1, by 4:00pm on Wednesday, 15 September 2021.

4. In accordance with the Amended Directions, on 9 September 2021, ABLA and AiG filed:
 - a. a joint report identifying proposed drafting changes to the Joint Proposal;
 - b. an amended draft determination
5. On 14 September 2021, AiG filed a further submission ('AiG further submissions') on:
 - a. residual concerns regarding the drafting of the Joint Proposal;
 - b. a note on the remaining merit differences between the Joint Proposal and AiG proposal on remote response.
6. These submissions are filed pursuant to paragraph 2 of the Amended Directions.

Two proposals for remote work for consideration

7. There are two separate remote work proposals for consideration in the Social, Community, Home Care and Disability Services Industry Award 2010, being AiG's second proposal and the Joint Proposal.
8. AFEI understands the key differences between AiG's second proposal and the Joint Proposal (i.e. 'Joint Proposal' being the amended draft determination filed by AiG and ABLA on 9 September 2021) are as summarised at **Appendix A** to these submissions.

¹ Submissions of the Australian Industry Group dated 25 August 2021 at paragraphs 70 – 95.

² Submissions of the Australian Industry Group dated 30 August 2021 at paragraphs 49 – 147.

³ Including National Disability Services, The Australian Services Union, The Health Services Union, The United Workers Union.

9. AFEI observes the Joint Proposal has been the subject of significant attention. However, AiG's second proposal has not been the subject of the same level of attention or consideration by any interested parties in these proceedings.
10. AFEI respectfully submits that AiG's second proposal warrants serious consideration by the FWC for the following reasons:

AiG's second proposal provides much needed clarity that is not provided by the Joint Proposal

11. AFEI notes and supports the identified clarity issues in AiG further submissions at paragraphs 3 to 17.
12. AiG's second proposal provides much needed clarity in relation to the regulation of remote work, when compared to the Joint Proposal. For example:
 - a. AiG's proposed definition of 'remote work' details the type of activities that would and would not fall within the remote work provision. Evidence demonstrates that clarity in this area is required.⁴
 - b. It is unclear as to what is meant by the term "designated workplace" in the Joint Proposal, which could cause significant confusion. AiG's second proposal provides a defined meaning of a "designated workplace".
 - c. In relation to the recording of time, AiG's second proposal clearly sets out:
 - i. the employee's requirement to maintain a timesheet recording the remote work and to provide that timesheet to the employer within a specified time frame (i.e. prior to the end of the next full pay period or in accordance with another arrangement as agreed); this precision and clarity is preferable to the Joint Proposal which only requires the provision of the timesheet/record "within a reasonable period";
 - ii. the requirement for an employee undertaking remote work to comply with any reasonable requirement to the use of any electronic systems for recording time undertaking the remote work (the Joint Proposal only refers to the recording of time via a timesheet or other record and makes no reference to the use of electronic systems);
 - iii. that an employer is not obligated to pay an employee for time spent performing remote work where the employer has advised the employee of the reporting requirements and the employee fails to comply with the provision of requested information. This is reasonable and should be included, a provision which appears to be absent from the Joint Proposal.
 - d. AiG's second proposal includes transitional arrangements intended to capture employees who are currently paid above award rates. There is no similar provision in the Joint Proposal and as such, it is unclear as to how the remote work provision would apply to employees receiving above award payments upon application of the provision.
 - e. AiG's second proposal provides exceptions to when certain remote work would not attract a minimum payment including circumstances where certain tasks take less than 5 minutes or 10 minutes where this is due to an employee not properly performing their

⁴ Witness Statement of Kylie Lambert dated 3 August 2021 at paragraphs 43 – 47.

work. We agree that such a provision is necessary to provide clarity and to avoid confusion/disputes arising.

Intention of Joint Proposal not reflected in Amended draft determination

13. In relation to the interaction between minimum payment provision and minimum rates provision, ABLA submits that the intended operation of the Joint Proposal is:⁵
- a. where an employee performed remote work, they will be paid for the time spent performing remote work, subject to a minimum payment period;
 - b. a minimum payment period applies, so where the time worked is less than the applicable minimum period, the employee will be paid for the minimum period;
 - c. remote work is paid at the employee's minimum hourly rate unless a premium rate applies. The premium rates of pay in clause 25.10(d)(i) are expressed to be referable to, and only apply to the performance of remote work. In other words, the premium rate would not apply to the entire minimum payment period unless remote work was performed for the entirety of that period.

14. To illustrate the above, AiG provides the following example:⁶

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

15. Assuming the above example concerns clause 25.10(d)(1)(A) of the Joint Proposal, the intention (that the premium rate would not apply to the entire minimum payment period unless remote work was performed for the entirety of that period) does not appear to be reflected in clause 25.10(d)(1)(A) of the Joint Proposal which provides "*remote work will be paid at the employee's minimum hourly rate unless one of the following exception applies...remote work performed outside the span of 6am-8pm will be paid at the rate of 150% of the minimum hourly rate for the first two hours and 200% of the minimum hourly rate thereafter....*"
16. Consequently, the drafting of clause 25.10(d) appears inconsistent with the intention behind the Joint Proposal.
17. Even if the intention of the Joint Proposal is drafted in a manner that reflects the intention (which would mean that an employer would need to calculate the minimum payment for each moment of the minimum payment period based upon whether or not the employee is working), this is not only overly complex but would create a significant administrative burden for the employer.

⁵ Submissions of ABLA dated X at paragraph 19.

⁶ Submissions of Australian Industry Group dated 14 September 2021 at paragraph 23.

18. Accordingly, the intention behind the Joint Proposal in relation to the applicability of premium rates and minimum payment periods is inconsistent with:
- a. section 134(d) Fair Work Act 2009 (Cth) ('FWA') – the need to promote flexible modern work practices;
 - b. section 134(f) FWA – the impact on business, including on productivity and regulatory burden;
 - c. section 134(g) FWA – the need to ensure a simple, easy to understand modern award system.
19. For simplicity, AiG's approach in regard to minimum payment is to be preferred. That is, "an employee would either receive 15 minutes, 30 minutes or 45minutes 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 the work. If an employee undertakes so much remote work that they earn more than the minimum payment, then they would just be paid for the work undertaken".⁷

AiG's second proposal complies with the FWC's general observations about such a term

20. The FWC made the following general observations about such a term:⁸

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| <ol style="list-style-type: none">1. A shorter minimum payment should apply in circumstances where the employee is being paid an 'on call' allowance.2. There is merit in ensuring that each discrete activity (such as a phone call) does not automatically trigger a separate minimum payment.3. A definition of 'remote response work' or 'remote response duties' should be inserted into the Award.4. The clause should include a mechanism for ensuring that the time spent by an employee working remotely is recorded and communicated to their employer. |
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21. AiG's second proposal satisfies the general observations made by the FWC.
22. On the other hand, the Joint Proposal concerning 'multiple instances of remote work' (the Joint Proposal provides that "where multiple instances of remote work are performed on any day, separate minimum payments will be triggered for each instance of remote work performed, save that where multiple instances of remote work are performed within the applicable minimum payment period, only one minimum payment period is triggered") appears to not be entirely consistent with point 2 of the FWC's general observations (to ensure that each discrete activity does not automatically trigger a separate minimum payment).

⁷ Submissions of Australian Industry Group dated 14 September 2021 at paragraph 22.

⁸ [2021] FWCFB 2383 at [722].

AiG's second proposal is consistent with section 134(g), section 134(f) and section 134(f) Fair Work Act 2009

23. In comparison to the Joint Proposal, AiG's second proposal furthers the following objectives:
- a. promotes flexible modern work practices and the efficient and productive performance of work;
 - b. lessens any impact on business, including on productivity, employment costs and regulatory burden; and is
 - c. simple and easy to understand.

Appendix A – AFEI summary of the key differences between AiG’s second proposal and the Joint Proposal regarding remote response

	Topic	AiG second proposal	Joint Proposal
1.	Definition of remote work	<p>‘remote 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.</p> <p>Remote work does not include an employee’s performance of administrative tasks associated with maintaining their employment. For example, remote work would not include any activity of an employee involving:</p> <ul style="list-style-type: none"> (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. 	<p>25.10 Remote work</p> <p>(a) This clause applies where an employee is required by their employer to perform remote work.</p> <p>(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:</p> <ul style="list-style-type: none"> (i) not part of their ordinary hours of work rostered working hours in accordance with clause 25.5 (or, in the case of casual employees, not a designated shift); and (ii) not additional hours worked by a part-time employee under clause 28.1(b) (iii) or 10.3(e) or overtime contiguous with a rostered shift; and not required to be performed at a designated workplace.
2.	Definition of Designated Workplace	<p>‘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.</p>	N/A

	Topic	AiG second proposal	Joint Proposal																					
3.	Minimum payments and rates for remote response work	<p><u>Minimum Payments</u></p> <table border="1" data-bbox="618 301 1308 596"> <tr> <td>On-call</td> <td>6am – 10pm</td> <td>Minimum 15 minutes pay</td> </tr> <tr> <td>On-call</td> <td>10pm – 6am</td> <td>Minimum 30 minutes pay</td> </tr> <tr> <td>Not on-call</td> <td>6am – 10pm</td> <td>Minimum 30 minutes pay</td> </tr> <tr> <td>Not on-call</td> <td>10pm – 6am</td> <td>Minimum 45 minutes pay</td> </tr> </table> <p><u>The rate of remuneration for remote response work</u></p> <p>(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:</p> <p>(i) Clause 29.3 – Shift allowances and penalty rates. (ii) Clause 20.3 – Meal allowances.</p> <p>AiG’s proposal leaves it to the Award to prescribe the rate that would be applicable to the remote work and concedes that this leaves a party to read the other provisions of the Award to determine the rate that should apply.⁹</p> <p>AiG alternatively proposes for all remote work to be paid at the minimum rate of pay.¹⁰</p>	On-call	6am – 10pm	Minimum 15 minutes pay	On-call	10pm – 6am	Minimum 30 minutes pay	Not on-call	6am – 10pm	Minimum 30 minutes pay	Not on-call	10pm – 6am	Minimum 45 minutes pay	<p><u>Minimum Payments</u></p> <p>Where employee performs remote response work, employee to be paid for time spent performing remote work, with</p> <table border="1" data-bbox="1335 403 2054 552"> <tr> <td>On-call</td> <td>6am – 10pm</td> <td>Minimum 15 minutes</td> </tr> <tr> <td>On-call</td> <td>10pm – 6am</td> <td>Minimum payment to be determined</td> </tr> <tr> <td>Not on-call</td> <td></td> <td>Minimum 1 hour’s pay</td> </tr> </table> <p>application of the following minimum payments:</p> <p><u>The rate of remuneration for remote response work</u></p> <ul style="list-style-type: none"> • Minimum rate of pay unless applicable penalty rates to apply to remote work performed: <ul style="list-style-type: none"> ▪ Outside 6am – 8pm ▪ In excess of 38 hours per week/76 hours per fortnight ▪ In excess of 10 hours per day ▪ On Saturdays, Sundays, Public Holidays 	On-call	6am – 10pm	Minimum 15 minutes	On-call	10pm – 6am	Minimum payment to be determined	Not on-call		Minimum 1 hour’s pay
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	Topic	AiG second proposal	Joint Proposal
4.	The rounding proposal	Anytime worked continuously beyond the minimum payment period outlined above will be rounded either up or down to the nearest 15 minutes and paid accordingly. ¹¹	Any time worked continuously beyond the minimum payment period will be rounded up to the nearest 15 minutes
5.	Multiple instances of remote work	<p>On-Call</p> <p>If an employee undertakes remote work on separate instances during a period in which they are on call, or otherwise during 24 consecutive hours, the remuneration that the employee is entitled to be paid may be applied in satisfaction of the minimum payment required.</p> <p>Not on-call</p> <p>If an employee performs separate instances of remote work when not on-call, or otherwise during a period of 24 consecutive hours, the employee will not be entitled to multiple minimum payments but will be entitled to the greatest minimum payment applicable under clause X.3 (minimum payment for remote work when not on-call)</p> <p>AiG's proposal includes an example: if an employee who is not on-call undertakes remote work from 9:00pm to 9:10pm and then from 1:00am to 1:10am they will receive a minimum payment of 45 minutes.</p>	Where multiple instances of remote work are performed on any day, separate minimum payments will be triggered for each instance of remote work performed, save that where multiple instances of remote work are performed within the applicable minimum payment period, only one minimum payment period is triggered.
6.	Remote Work involving staff meetings/training	AiG's proposal does not deal specifically with minimum payments for meetings and training undertaken remotely. AiG submits that such work would attract the same remuneration as all other remote work. ¹²	Work involving participation in meetings or staff training remotely should attract minimum payment of one hour's pay

⁹ Australian Industry Group submissions dated 30 August 2021 at paragraph 98.

¹⁰ Australian Industry Group submissions dated 30 August 2021 at paragraph 99.

¹¹ Australian Industry Group submissions dated 30 August 2021 at paragraph 132.

¹² Australian Industry Group submissions dated 14 September 2021 at paragraph 29.

	Topic	AiG second proposal	Joint Proposal
7.	Recording of time	<p>Recording of time worked and communication requirements</p> <p>(a) An employee who performs remote response work must either:</p> <ul style="list-style-type: none"> (i) Maintain and provide to their employer a timesheet 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. (j) Comply with any reasonable requirement by their employer relating to the use of an electronic system for recording the time spent undertaking remote response work and the nature of the work undertaken <p>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.¹³</p>	<p>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.</p>
8.	Transitional Arrangements	<p>The monetary obligations imposed on employers by this clause may be absorbed into over award payments made to an employee who was employed prior to the inclusion of this clause in the award on [insert commencement date of award variations].</p>	N/A

¹³ Australian Industry Group submissions dated 30 August 2021 at paragraph 135.

	Topic	AiG second proposal	Joint Proposal
9.	Remote work that will not attract minimum payments	<p>If an employee performs remote response work constituting the performance of the following activities, clauses X.2, X.3, X.4 and 10.5 will not apply:</p> <p>(a) Responding to any form of electronic communication in circumstances where it is not required that such a response be provided outside of the employee’s ordinary working hours.</p> <p>(b) Responding to a text message, telephone call or email in circumstances where this takes (or should reasonably take) less than 5 minutes.</p> <p>(c) Responding to a text message, telephone call or email in circumstances where this takes (or should reasonably take) less than 10 minutes where this is essential to the health or safety of a client and is required as a consequence of the employee not undertaking, or not properly undertaking, a task that they were required to perform whilst at work (e.g. calls to clarify whether a client has been given medication in circumstances where handover notes have not been properly completed by the employee).</p>	N/A