

23 August 2021

Our Ref: 20140517

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Associate to the Hon. Justice IJK Ross
President
Fair Work Commission
11 Exhibition Street
Melbourne VIC 3000

Dear Associate

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

We refer to the above matter and to the Statement issued by the Commission on 9 August 2021.

We note that one of the issues that remains outstanding in this matter, and which is due to be determined at a hearing listed for 1 September 2021, is the issue of 'remote response' work.

Recently, a number of interested parties have had productive discussions in relation to the development of a clause to deal with remote response work.

Agreement among certain interested parties

With one exception (which is addressed below), those discussions have now resulted in an agreement as to the content of a 'remote work' clause, as well as to consequential amendments to existing clauses 20.9 and 28.4 of the Award.

An agreement has been reached between the following interested parties:

1. The Australian Services Union;
2. The Health Services Union;
3. The United Workers Union;
4. Australian Business Industrial;
5. The NSW Business Chamber Ltd (trading as Business NSW);
6. Aged & Community Services Australia;
7. Leading Age Services Australia; and
8. National Disability Services.

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The terms of the agreement

Enclosed with this letter is a Draft Determination that contains the substance of the agreement between the abovenamed parties.

The parties have been unable to reach agreement on one discrete element of the clause, being the minimum payment period that should apply where an employee who is on-call performs remote work (as defined) between 10pm and 6am. Otherwise, the abovenamed parties agree on the content of the Draft Determination.

In the circumstances, the abovenamed parties:

- support the making of a 'remote work' clause in the form set out in the **enclosed** Draft Determination; and
- respectfully request that they be permitted an opportunity to make submissions on the non-agreed element of the clause, after which they request that the Commission determine that matter.

The proposed 'remote work' clause

The abovenamed parties consider that the 'remote work' clause that has been developed and agreed (with one exception) provides a fair and appropriate regime for the regulation of remote work.

The abovenamed parties consider that the clause that has been developed:

- is consistent with the observations made by the Full Bench in the Decision of 4 May 2021 at [721]-[722]; and
- adequately resolves the Full Bench's concerns around complexity in terms of the rate of pay that would apply (see [737]-[738] of the Decision).

The abovenamed parties consider that, subject to the resolution of the non-agreed element of the clause, the proposed 'remote work' clause as set out in the enclosed Draft Determination will provide a fair and relevant minimum safety net of terms and conditions for employees when performing remote work.

Leave to file Draft Determination

The abovenamed parties respectfully seek leave to file the enclosed Draft Determination.

We acknowledge that the Statement of 9 August 2021 required parties to exchange any further proposals in respect of remote response, and to file those proposals with the Commission by 17 August 2021. While the parties did circulate earlier iterations of this proposal, unfortunately it was not practicable to file the proposal with the Commission by 17 August 2021 as without prejudice discussions were ongoing at that time and no agreed position had been reached. We apologise for the inconvenience associated with that fact, but respectfully submit that leave should now be granted for this proposal to be accepted for filing on the basis that it materially narrows the issues in dispute between most interested parties in the matter.

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Next steps

Each of the abovenamed parties intend to separately make further written submissions in support of the enclosed Draft Determination in accordance with the Directions contained in the Statement of 9 August 2021. Each of the abovenamed parties is in a position to do so in accordance with the current directions.

However, we acknowledge that other parties who are not a party to this agreement may seek some additional time to consider their position having regard to this development.

For our part, the abovenamed parties would be happy to attend a further Conference to discuss the agreed clause, if it assists the other parties and the Commission.

If you have any questions, please contact Kyle Scott on (02) 4989 1010.

Yours sincerely



Kyle Scott

Director

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DRAFT DETERMINATION

Fair Work Act 2009

s.156 - 4 yearly review of modern awards

4 YEARLY REVIEW OF MODERN AWARDS – SOCIAL, COMMUNITY, HOME CARE AND DISABILITY SERVICES INDUSTRY AWARD 2010 (AM2018/26)

XXXX
XXXX
XXXX

XXXX, XX XXXX 2021

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

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

1. By inserting a new clause 25.10 as follows:

25.10 Remote work

- (a) This clause applies where an employee is required by their employer to perform remote work.
- (b) For the purpose of this clause, **remote work** means the performance of work by an employee at the direction of, or with the authorisation of, their employer that is:
 - (i) not part of their 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.
- (c) **Minimum payments for remote work**
 - (i) Where an employee performs remote work they will be paid for the time spent performing remote work, with the following minimum payments applying:
 - A. where the employee is on call between 6.00am and 10.00pm – a minimum payment of 15 minutes' pay;

- B. where the employee is on call between 10.00pm and 6.00am – a minimum payment of [to be determined];
 - C. where the employee is not on call - a minimum payment of one hour's pay;
 - D. where the remote work involves participating in staff meetings or staff training remotely - a minimum payment of one hour's pay.
- (ii) Any time worked continuously beyond the minimum payment period outlined above will be rounded up to the nearest 15 minutes and paid accordingly.
 - (iii) Where multiple instances of remote work are performed on any day, separate minimum payments will be triggered for each instance of remote work performed, save that where multiple instances of remote work are performed within the applicable minimum payment period, only one minimum payment period is triggered.

(d) Rates of pay for remote work

- (i) Remote work will be paid at the minimum hourly rate unless one of the following exceptions applies:
 - A. Where remote work is performed outside the span of 6am-8pm, it will be paid at the rate of 150% for the first two hours and 200% thereafter or, in the case of casual employees, at 175% for the first two hours and 225% thereafter;
 - B. Where the remote work results in an employee working in excess of 38 hours per week or 76 hours per fortnight, it will be paid at the applicable overtime rate prescribed in clause 28.1;
 - C. Where the remote work results in an employee working in excess of 10 hours per day, it will be paid at the rate of 150% for the first two hours and 200% thereafter;
 - D. Where remote work is performed on Saturdays, it will be paid at the rate of 150% or, in the case of casual employees, 175%;
 - E. Where remote work is performed on Sundays, it will be paid at the rate of 200% or, in the case of casual employees, 225%;
 - F. Where remote work is performed on public holidays, it will be paid at the rate of 250% or, in the case of casual employees, 275%.
- (ii) The rates of pay in clause 25.10(d)(i) above are in substitution for and not cumulative upon the rates prescribed in clauses 26, 28, 29, and 34.

(e) Other requirements

An employee who performs remote work must maintain and provide to their employer a time sheet or other record acceptable to the employer specifying the time at which they commenced and concluded performing any remote work and a description of the work that was undertaken. Such records must be provided

to the employer within a reasonable period of time after the remote work is performed.

(f) Miscellaneous provisions

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

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

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

20.9 On call allowance

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

- (a) \$20.63 for any 24 hour period or part thereof during the period from the time of finishing ordinary duty on Monday to the time of finishing ordinary duty on Friday; or
- (b) \$40.84 in respect of any other 24 hour period or part thereof on a Saturday, Sunday, or public holiday.

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

28.4 Recall to work

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

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

[Insert the Seal of the Fair Work Commission]

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