



IN THE FAIR WORK COMMISSION

4 Yearly Review of Modern Awards - Group 4 Awards
Broadcasting, Recorded Entertainment and Cinemas Award 2010
AM2014/259

20 April 2018

Dear Associate,

8% SALARY LOADING FOR CINEMA EMPLOYEES

MEAA acknowledge the Full Bench's decision [2018] FWCFB 1548 dated 21 March 2018, which stated, inter alia, that:

[247] The previous Full Bench did not indicate whether the 8% allowance was payable for all purposes, nor did it indicate whether the allowance was cumulative or compounding, but the intention does not appear to have been to create an all-purpose allowance. Interested parties have agreed to the deletion of the words "This loading is payable for all purposes" appearing in clause 13.4 of the exposure draft and to delete the definition in clause 2 of the exposure draft. We will adopt the parties' agreed position.

[248] We think there is merit in seeking further clarification about how the 8% loading is calculated. Interested parties are to provide submissions on this point by 19 April 2018 ...

1. MEAA now respond to the Commission's invitation to provide clarification.
2. *Relevant History*

Until recently, the majority (approximately 80 to 90 per cent) of cinema workers were covered by enterprise-based employment agreements. These covered the cinema sector's major employers, including Village, Greater Union, Birch Carroll and Coyle, and Hoyts:

 - a. *Village Roadshow Agreement – AG2006/2654 – nominal expiry date 23 January 2009*
 - b. *Greater Union – AG2005/5417 – nominal expiry date 17 August 2008*
 - c. *Birch Carroll and Coyle – AG2005/4130 – nominal expiry date 19 December 2011*
 - d. *Hoyts Employment Agreement – AG2001/2943 – nominal expiry date 5 July 2004*
3. Each of these agreements has well-passed its nominal expiry date. Since the Broadcasting and Recorded Entertainment Award 2010 (now the Broadcasting and Recorded Entertainment and Cinema Award 2010 – 'BRECA') came into force, MEAA has focused its efforts on ensuring that the modern award represents an appropriate set of minimum standards for the cinema sector as a whole.
4. Notwithstanding MEAA's focus on the modern award, we note for clarity that the formerly dominant enterprise-based agreements:

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- did not expressly refer to an 8% penalty averaging component in wage-related clauses;
 - did not provide general¹ penalty payment arrangements, other than for work performed between 1.00a.m. and 8.00a.m and to compensate employees for work performed on public holidays - generally by paying double-time
 - Saturdays and Sundays were treated as ordinary hours worked, save for a relatively small group of Theatre Managers under the Entertainment and Broadcasting Industry – Theatre Managers – Cinema – Award 1998 (AP780630CRV)
5. Due to the nominal expiry of the enterprise-based agreements and the general improvements to BRECA minimum wages through National Minimum Wage Orders, MEAA believe (but are not certain) that the BRECA rates are now used by all cinema employers and that these rates include the 8% penalty averaging component, regardless of the day of the week in which work is performed - see our comment at paragraphs 32 to 25 of this submission.
 6. MEAA would welcome further information from the cinema employers and their representatives concerning the rates they now pay employees and whether current conditions of employment are those set out in the enterprise-based agreements and/or the BRECA.
 7. *8% Penalty Payment*
MEAA agree that the 8% penalty averaging component was determined through an Order by Commissioner McDonald in April 1997 and was maintained in the Entertainment and Broadcasting Industry – Cinema Award – 1998 until 2009.
 8. MEAA concur with statements at paragraphs 16 and 20 of the employers' submission dated 17 April 2018.
 16. *The Cinema Award 1998, at clause 16.1, under Wage rates, includes penalty averaging per week which, for each classification, provides an additional 8% calculated on the "base rate" for the relevant classification.*
 20. *The result of the award simplification proceeding C No. 34203 of 1998 was the Order by Commissioner Larkin making the Entertainment and Broadcasting Industry – Cinema award –1998. The Cinema Award 1998 contained properly fixed minimum rates including, at clause 16.1, a penalty averaging provision of 8% of each award base rate.*
 9. MEAA also concur with the observation in paragraph 23 of the employers' submission:
 23. *Based on the best information available, it seems that no precise formula was developed and used to determine the percentage to be applied to base rates instead of Sunday penalty payments and as*

¹ As opposed to other industries

compensation for reduced public holiday penalties. Rather, the percentage appears to have been arrived at by mutual agreement between union and employer representatives during the Commission proceedings which resulted in the making of the Cinema Award 1998 and the insertion of the reference, at clause 16.1 of that Award of a "penalty averaging" provision of 8%.

10. The BREC Award now provides at clause 14.12:

14.12 All cinema workers will receive an 8% penalty averaging component instead of Sunday penalty payments and reduced public holiday penalties.

11. The BREC Award also provides, at clause 26.3:

26.3 Special provision for employees in cinemas

- (a) Clause 26.2 will not apply to employees in cinemas.*
- (b) If a weekly employee is required to work on a day to be observed as a public holiday, then, in addition to receiving the normal rate of pay for working ordinary hours, employees will be paid at the rate of single time additional for the hours worked.*
- (c) Casual employees will be entitled to receive double the full-time permanent hourly rate for work on a public holiday.*
- (d) A weekly employee whose rostered time off falls on a public holiday will be allowed an additional day off at a time to be agreed upon by the employer and the employee or the employee will be paid an additional day's pay instead within seven days of the holiday.*

12. It can be seen from our emphases in clause 26.3 that double time payments under clause 26.3(b) apply to weekly employees required to work on a public holiday; casual employees receive double the full-time rate for work on public holidays under 26.3(c); and 26.3(d) provides weekly employees with an additional day off or payment in lieu of time off when rostered time off coincides with a public holiday.

13. We note that 'weekly employees' does not appear to be defined in the BREC Award in either clause 3 - *Definitions and Interpretation*, clause 10 - *Types of Employment*, clause 14 - *Classifications and Minimum Wages*, or in Part 9 – *Cinemas*.

14. MEAA query the extent to which the arrangements in BREC clause 26.3 now apply to the modern cinema workforce. In this respect, we submit that the cinema industry has steadily moved away from pre-existing levels of permanent and stable employment (including part-time permanent) over the past ten years.

15. Cinema employment is increasingly casualised and dominated by junior employees. Cinema employee data provided to the Commission on 31 March 2015 – **attachment A** – revealed that the cinema industry employed 6422 persons at March 2015. Of this total number:

- Adult employees represented 45.5% of the cinema workforce. 74.5% of adult employees were casual employees;

- Junior employees represented 54.5% of the cinema workforce. 80.5% of these employees were casual employees; and
 - 89.1% of cinema employees are engaged as Cinema Worker (CW) 1, CW 2 and CW 3 – the three lowest paid positions.²
16. MEAA believe that the 8% penalty payment sits at considerable odds with penalty payment levels determined by the *Fair Work Commission* for work performed on weekends and public holidays, including adjustments made as a result of the Full Bench's decision in 2017 FWCFB 3001 – the *Penalty Rates Case*.
17. It is questionable whether cinema workers are fairly compensated for performing weekend work relative to employees in like industries, whose employment is regulated by the *Fast Food Award*, the *General Retail Award* or the *Hospitality Award*.
18. *Fast Food Award*
In the *Fast Food Award* [MA000003], the penalty payment provisions are:

25.5 Penalty rates

(a) Evening work Monday to Friday

- (i) A loading of **10%** will apply for ordinary hours of work within the span of hours between 10.00 pm and midnight, and for casual employees this loading will apply in addition to their **25%** casual loading.
- (ii) A loading of **15%** will apply for ordinary hours of work between midnight and 6.00 am, and for casual employees this loading will apply in addition to their **25%** casual loading.

(b) Saturday work

- (i) A **25%** loading will apply for all hours of work on a Saturday for full-time and part-time employees.
- (ii) A **50%** loading will apply for all hours of work on a Saturday for casual employees, inclusive of the casual loading.

(c) Sunday work– Level 1 employees

(i) From 1 July 2017 to 30 June 2018

A **45%** loading will apply for all hours of work on a Sunday for full-time and part-time Level 1 employees. A **70%** loading will apply for all hours of work on a Sunday for casual Level 1 employees (inclusive of the casual loading).

(i) From 1 July 2018 to 30 June 2019

² Cinema employees can be appointed to Cinema Worker 1, 2, 3, 4, 5 and 6 classifications.

A 35% loading will apply for all hours of work on a Sunday for full-time and part-time Level 1 employees. A 60% loading will apply for all hours of work on a Sunday for casual Level 1 employees (inclusive of the casual loading).

(iii) From 1 July 2019

(i) A 25% loading will apply for all hours of work on a Sunday for full-time and part-time Level 1 employees. A 50% loading will apply for all hours of work on a Sunday for casual Level 1 employees (inclusive of the casual loading).

(d) Sunday work – Level 2 and 3 employees

A 50% loading will apply for all hours of work on a Sunday for full-time and part-time Level 2 or 3 employees. A 75% loading will apply for all hours of work on a Sunday for casual Level 2 or 3 employees (inclusive of the casual loading).

19. Public holidays are compensated in the *Fast Food Award* in the following manner:

30. Public holidays

30.1 *Public holidays are provided for in the NES.*

30.2 *An employer and a majority of employees may agree to substitute another day for a public holiday. If an employee works on either the public holiday or the substitute day public holiday penalties apply. If both days are worked, the public holiday penalties must be paid on one day chosen by the employee.*

30.3 *Work on a public holiday must be compensated by payment at the rate of 225% (250% for casual employees, inclusive of the casual loading).*

20. *General Retail Award*

In the **General Retail Award 2010** [MA000004], the penalty payment provisions are:

29.4 Penalty payments

(a) Evening work Monday to Friday

A penalty payment of an additional 25% will apply for ordinary hours worked after 6.00 pm. This does not apply to casuals.

(b) Saturday work

A penalty payment of an additional 25% will apply for ordinary hours worked on a Saturday for full-time and part-time employees.

A casual employee must be paid an additional 10% for work performed on a Saturday between 7.00 am and 6.00 pm.

(c) Sunday work

(i) From 1 July 2017 to 30 June 2018

A penalty payment of an additional 95% loading will apply for all hours worked by a full-time or part-time employee on a Sunday. A penalty payment of an additional 95% loading will apply for all hours worked by a casual employee on a Sunday (inclusive of the casual loading).

(ii) From 1 July 2018 to 30 June 2019

A penalty payment of an additional 80% loading will apply for all hours worked by a full-time or part-time employee on a Sunday. A penalty payment of an additional 85% loading will apply for all hours worked by a casual employee on a Sunday (inclusive of the casual loading).

(iii) From 1 July 2019 to 30 June 2020

A penalty payment of an additional 65% loading will apply for all hours worked by a full-time or part-time employee on a Sunday. A penalty payment of an additional 75% loading will apply for all hours worked by a casual employee on a Sunday (inclusive of the casual loading).

(iv) From 1 July 2020

A penalty payment of an additional 50% loading will apply for all hours worked by a full-time or part-time employee on a Sunday. A penalty payment of an additional 75% loading will apply for all hours worked by a casual employee on a Sunday (inclusive of the casual loading).

(d) Public holidays

(i) Work on a public holiday must be compensated by payment of an additional 125% for all hours worked by a full-time or part-time employee. A penalty payment of an additional 150% will apply for all hours worked by a casual employee (inclusive of the casual loading).

(ii) Provided that by mutual agreement of the employee and the employer, the employee (other than a casual) may be compensated for a particular public holiday by either:

(A) An equivalent day or equivalent time off instead without loss of pay. The time off must be taken within four weeks of the public holiday occurring, or it shall be paid out; or

(A) An additional day or equivalent time as annual leave.

(iii) The employee and employer are entitled to a fresh choice of payment or time off by agreement on each occasion work is performed on a public holiday.

(iii) If no agreement can be reached on the method of compensation, the default arrangement shall be as per clause 29.4(d)(i).

21. The *General Retail Award* provides the following with regard to public holidays:

34. Public holidays

34.1 Public holidays are provided for in the NES.

34.2 An employer and a majority of employees may agree to substitute another day for a public holiday. If either the public holiday or the substitute day is worked, public holiday penalties must be paid. If both days are worked, one day at the election of the employee must be **paid at public holiday rates**.

22. *Hospitality Award*

The penalty payment provisions in the *Hospitality Industry (General Award) 2010 [MA000009]*, state:

32.1 An employee performing work on the following days will be paid the following percentage of the minimum wage rate in clause 20—Minimum wages for the relevant classification:

	Full-time and part-time employees %	Casual employees (inclusive of 25% loading) %
Monday to Friday	100	125
Saturday	125	150
Sunday 1 July 2017 –30 June 2018	170	175
1 July 2018 –30 June 2019	160	175
From 1 July 2019	150	175
Public holiday	225	250

32.2 Public holidays

- (a) An employee other than a casual working on a public holiday will be paid for a minimum of four hours' work. A casual employee working on a public holiday will be paid for a minimum of two hours' work.*
- (b) Employees (other than casuals) who work on a prescribed holiday may, by agreement, perform such work at their applicable ordinary hourly rate plus 25% additional loading rather than the penalty rate prescribed in clause 32.1, provided that equivalent paid time is added to the employee's annual leave or one day instead of such public holiday will be allowed to the employee during the week in which such holiday falls. Provided that such holiday may be allowed to the employee within 28 days of such holiday falling due.*
- (c) An employee other than a casual working on Christmas Day when it falls on a weekend, and is not prescribed as a public holiday under the NES will be paid an additional loading of 25% of their applicable ordinary hourly rate for the hours worked on that day and will also be entitled to the benefit of a substitute day.*

32.3 Other penalty

Employees will be entitled to the following additional penalty for work performed at the following times:

- (a) Monday–Friday—7.00 pm to midnight: 10% of the standard hourly rate per hour or any part of an hour for such time worked within the said hours;*
- (b) Monday–Friday—midnight to 7.00 am: 15% of the standard hourly rate per hour or any part of an hour for such time worked within the said hours.*

32.4 Penalty rates not cumulative

Except as provided in clause 31—Breaks, where time worked is required to be paid for at more than the ordinary rate such time will not be subject to more than one penalty, but will be subject to that penalty which is to the employee's greatest advantage.

23. The Hospitality Award provides the following for public holidays:

37. Public holidays

37.1 National Employment Standards

(a) Public holidays are provided for in the NES

By agreement between the employer and the majority of employees in the relevant enterprise or section of the enterprise, an alternative day may be taken as the public holiday instead of any of the days prescribed in s.115 of the Act.

(b) Additional arrangements for full-time employees:

(i) A full-time employee whose rostered day off falls on a public holiday must, subject to clause 32.2, either:

- *be paid an extra day's pay; or*
- *be provided with an alternative day off within 28 days; or*
- *receive an additional day's annual leave.*

(ii) A full-time employee who works on a public holiday which is subject to substitution as provided for by the NES will be entitled to the benefit of the substitute day.

(c) Arrangements for part-time employees

Part-time employees are entitled to public holidays prescribed in s.115 of the Act without loss of pay if those public holidays fall on days on which hours of work are rostered under clause 12.5. Part-time employees who work on a public holiday must be paid in accordance with clause 32.

24. MEAA has not extracted the minimum wages provisions from the above modern awards; however, our examination of current³ minimum wages in each of the three awards indicates:

- a. *Fast Food Award: Level 1 employee - \$763.20 p/week or \$20.08 p/hour*
- b. *General Retail Award: Retail Employee Level 1 - \$763.20 p/week or \$20.08 p/ hour*
- c. *Hospitality Award: Level 1 Food and Beverage Attendant - \$714.90 p/week or \$18.81 per hour*

25. *Cinema Employees*

The minimum wage for a Cinema Worker 1 is \$18.81 per hour. With the 8% penalty averaging component, this becomes \$20.31 per hour. At face value, it does appear that cinema employees are less than adequately compensated for work performed in evenings, weekends and to an extent, on public holidays.

26. MEAA accept that this view requires further testing through the generation of comparative tables of earnings between fast food, retail, hospitality and cinema employees.

27. It is however the case that the preponderance of cinema earnings – and therefore attendance at work by cinema employees – occurs on Friday, Saturday and Sunday each week. Saturday is uniformly the highest earning day for cinemas (not including public holidays), followed by Friday and Sunday. We **attach** a recent 28-day box office earnings summary for the top ten gross earning films spanning 14 March to April 11, 2018 in support of this contention – **Attachment B**.

³ as at April 19, 2018

28. Of course, aligning cinema penalty payments with those in other sectors, such as the *Fast Food*, *General Retail* and *Hospitality Awards*, may not be without adverse consequences.
29. The key example of potential relative loss of earnings would be for cinema employees who perform work on Monday to Friday. It is also possible that the (declining) number of full-time and part-time employees in the cinema sector (which stood at approximately 20% of the total workforce in 2015) perform work on Monday to Friday and would therefore be denied the 8% penalty loading if an alternate scheme were introduced.
30. A counter to these risks is that the cinema employees adversely affected by the removal of the 8% penalty payment from Monday to Friday may perform work (possibly the majority of their work) when higher penalty payments applied. Additionally, penalties for evening work such as those in the General Retail Award may lead to higher earnings over the weekday in question.
31. MEAA submit that the only means of advancing its questions and concerns about the inherent equity of the 8% penalty averaging component – as compared to other modern awards – is for the employers to produce updated workforce information that includes data about when work is performed. To this end, MEAA would welcome the Commission’s ongoing interest in this matter.
32. *Amendment to Clause 13.4 of BRECA Exposure Draft*
Notwithstanding further consideration of the origins and adequacy of the 8% penalty averaging component, MEAA seek an amendment to proposed clause 13.4 in the current BRECA Exposure Draft.
33. The proposed clause now states:
- 13.4 All employees in cinemas will receive an 8% loading for all hours worked. This averaging component is payable instead of Sunday penalty payments and as compensation for reduced public holiday penalties.⁴*
34. While the proposed clause 13.4 is more clearly expressed than current clause 14.12, MEAA is concerned that the final clause should be expressed more clearly. This is due to MEAA’s receipt of anecdotal evidence that not all cinema employers apply the 8% penalty for work performed on *all* days of the week. In this respect, we acknowledge that cinema employer representatives concede that the penalty payment applies to the Award’s minimum rates irrespective of which day of the week work is performed.
35. MEAA therefore propose the following amendment to proposed clause 13.4:

⁴ The equivalent provision in the current BRECA is clause 14.12.

14.12 Employees in cinemas

All employees in cinemas will receive an 8% penalty averaging component instead of Sunday penalty payments and reduced public holiday penalties.

13.4 All employees in cinemas will receive an 8% loading for all hours worked regardless of the day(s) of the week on which work is performed. This averaging component is payable instead of Sunday penalty payments and as compensation for reduced public holiday penalties.

36. MEAA would be pleased to make further submissions with respect to the above matters at the Commission's convenience.

Yours sincerely,



Matthew Chesher
Director, Legal and Policy

INDUSTRY EMPLOYEE DATA

30th March 2015

TOTAL EMPLOYEES ACROSS INDUSTRY 6422			
ADULTS	2926 (45.5%)	JUNIORS	3496 (54.5%)
Full-Time	197 (6.7%)	Full-Time	4 (0.1%)
Part-Time	551 (18.8%)	Part-Time	679 (19.4%)
Casual	2178 (74.5%)	Casual	2815 (80.5%)

Overall employee numbers breakdown (6422)

Full-Time	201 (3.1%)
Part-Time	1230 (19.2%)
Casual	4993 (77.7%)

Classification	Adults	Juniors	%
CW1	69	218	4.5%
CW2	1619	2746	67.9%
CW3	628	447	16.7%
CW4	359	81	6.9%
CW5	156	1	2.5%
CW6	95	3	1.5%

Junior Age	#'s	%
16	670	19.1%
17	672	19.2%
18	726	20.7%
19	763	21.9%
20	665	19.1%

Junior Age	CW1	CW2	CW3	CW4	CW5	CW6
16	88	501	81	0	0	0
17	57	521	92	0	0	0
18	26	616	73	12	0	0
19	32	594	102	34	0	1
20	15	514	99	35	1	2
Total Numbers	218	2746	447	81	1	3
%	6.2%	78.5%	12.8%	2.38%	0.02%	0.1%

Box office mojo

Last 28 days

Row	Date (click to view)	Day <input type="text"/>	Day #	Top 10 Gross	% Change YD / LW		Movies Tracked	#1 Movie	Gross
1	Mar. 14	Wed	73	\$11,494,054	-27.4%	+22.0%	54	Black Panther	\$3,843,374
2	Mar. 15	Thu	74	\$10,454,648	-9.0%	+10.1%	56	Black Panther	\$3,632,414
3	Mar. 16	Fri	75	\$38,908,010	+272.2%	+11.9%	55	Tomb Raider	\$8,984,365
4	Mar. 17	Sat	76	\$47,344,750	+21.7%	-11.3%	55	Black Panther	\$11,558,877
5	Mar. 18	Sun	77	\$32,558,002	-31.2%	-7.8%	56	Black Panther	\$7,609,433
6	Mar. 19	Mon	78	\$9,898,402	-69.6%	-16.1%	54	Black Panther	\$2,188,463
7	Mar. 20	Tue	79	\$13,806,700	+39.5%	-12.8%	55	Black Panther	\$2,834,515
8	Mar. 21	Wed	80	\$9,672,049	-29.9%	-15.9%	54	Black Panther	\$2,052,932
9	Mar. 22	Thu	81	\$9,626,408	-0.5%	-7.9%	54	Black Panther	\$2,155,108
10	Mar. 23	Fri	82	\$33,214,529	+245.0%	-14.6%	54	Pacific Rim 2	\$10,329,775
11	Mar. 24	Sat	83	\$44,760,594	+34.8%	-5.5%	54	Pacific Rim 2	\$10,571,865
12	Mar. 25	Sun	84	\$30,841,994	-31.1%	-5.3%	54	Pacific Rim 2	\$7,214,895
13	Mar. 26	Mon	85	\$10,675,452	-65.4%	+7.9%	52	Pacific Rim 2	\$2,165,925
14	Mar. 27	Tue	86	\$15,253,350	+42.9%	+10.5%	53	Pacific Rim 2	\$2,945,105
15	Mar. 28	Wed	87	\$10,460,796	-31.4%	+8.2%	54	Black Panther	\$1,742,732
16	Mar. 29	Thu	88	\$23,135,312	+121.2%	+140.3%	55	Ready Player One	\$11,946,275

17	Mar. 30	Fri	89	\$43,148,753	+86.5%	+29.9%	56	Ready Player One	\$15,004,052
18	Mar. 31	Sat	90	\$42,281,963	-2.0%	-5.5%	56	Ready Player One	\$15,601,179
19	Apr. 1	Sun	91	\$29,819,800	-29.5%	-3.3%	56	Ready Player One	\$11,158,819
20	Apr. 2	Mon	92	\$15,668,166	-47.5%	+46.8%	54	Ready Player One	\$5,241,464
21	Apr. 3	Tue	93	\$16,475,524	+5.2%	+8.0%	55	Ready Player One	\$5,392,511
22	Apr. 4	Wed	94	\$12,678,112	-23.0%	+21.2%	55	Ready Player One	\$4,002,387
23	Apr. 5	Thu	95	\$10,989,200	-13.3%	-52.5%	55	Ready Player One	\$3,513,838
24	Apr. 6	Fri	96	\$46,518,513	+323.3%	+7.8%	52	A Quiet Place	\$18,861,111
25	Apr. 7	Sat	97	\$58,479,314	+25.7%	+38.3%	52	A Quiet Place	\$19,086,510
26	Apr. 8	Sun	98	\$35,975,863	-38.5%	+20.6%	53	A Quiet Place	\$12,255,941
27	Apr. 9	Mon	99	\$10,621,133	-70.5%	-32.2%	40	A Quiet Place	\$4,170,622
28	Apr. 10	Tue	100	\$14,469,151	+36.2%	-12.2%	40	A Quiet Place	\$5,364,754
29	Apr. 11	Wed	101	\$11,170,390	-22.8%	-11.9%	39	A Quiet Place	\$3,664,805

<http://www.boxofficemojo.com/daily/?view=recent&yr=2018&sort=num1gross&order=DESC&p=.htm> (accessed 12 April 2018)