



BACKGROUND PAPER

Fair Work Act 2009

s.156 - 4 yearly review of modern awards

4 yearly review of modern awards—*Ports, Harbours and enclosed Water Vessels Award 2010*

(AM2014/241)

MELBOURNE, 6 JUNE 2018

Note: This is a background document only and does not purport to be a comprehensive discussion of the issues involved. It has been prepared by the Commission research area and does not represent the view of the Commission on any issue.

Background

- [1] The purpose of this paper is to address the issues raised in the most recent exposure draft of the *Ports, Harbours and Enclosed Water Vessels Award 2010* (Ports Award) relating to the relevant rate to be paid to a shiftworker working on a weekend.
- [2] This issue of rates for weekend work in the Ports Award was first raised by the [Fair Work Ombudsman \(FWO\)](#) in the following terms:

“Clause 18.2 states that ordinary hours can be worked Monday to Friday. However, clauses 20.1(b) and 20.3 refer to ordinary hours worked on a Saturday and Sunday. It may be unclear under what circumstances an employee can work ordinary hours on a Saturday or Sunday.”¹
- [3] In the [exposure draft dated 7 November 2016](#) parties were asked to respond to the following question related to the issue raised by FWO:

“...whether the span of ordinary hours in clause 7.2 should also be defined to clarify under what circumstances an employee can work 'ordinary hours' on a weekend.”²
- [4] The [Maritime Union of Australia \(MUA\)](#), [Business SA](#), [Maritime Industry Australia Ltd. \(MIAL\)](#) and [The Australian Workers' Union \(AWU\)](#) made initial submissions on this question. Submissions in reply were received from [AWU](#) with further submissions from the [MUA](#) and [MIAL](#), and later submissions from the [Australian Maritime Officers' Union \(AMOU\)](#) and [The Australian Institute of Marine and Power Engineers \(AIMPE\)](#). These submissions are summarised later in this background paper.
- [5] The revised summary of submissions was published on 30 May 2016 and it identified this issue as item 23. The revised summary was discussed at the conference of 6 and 7 June 2016 convened to deal with the technical and drafting issues which have been

identified in relation to Group 3 exposure drafts. The purpose of the conference was to:

- confirm published summaries of submissions are accurate and reflect the position of the parties
- identify any submissions or variations which are now agreed or withdrawn;
- identify whether any matters raised in submissions are of a substantive nature and require consideration by a specially constituted Full Bench (in relation to matters where this has not previously occurred).³

[6] The discussion on 6 June confirmed that item 23 was contested.⁴

[7] A conference was convened for 30 June to deal with technical and drafting issues in the maritime related awards. The conference was cancelled at the request of the MUA and with agreement of AIMPE, MIAL, AMMA and AMOU and was relisted for 4 August 2016 to ‘discuss the outstanding issues in relation to the review of the above maritime awards.’⁵ This conference discussed all remaining items in the summary of submissions for the Ports Award, including the overtime and weekend work issue.

[8] A revised exposure draft incorporating the agreed position from the August conference on these clauses was published on 7 November 2016.

Ports, Harbours and Enclosed Water Vessels Award 2010

[9] The current award⁶ states that ordinary hours may be worked in the following manner:

18.2 Span of hours

Ordinary hours may be worked between 6.00 am and 6.00 pm for up to eight hours per day, Monday to Friday inclusive.

[10] The overtime clause in the current award makes it clear that all time worked outside these ordinary hours is overtime and any work between midnight on Friday and midnight on Sunday is overtime with the rates set out below:

20. Overtime and penalty rate

20.1 Employees will be entitled to be paid:

- (a) a loading of 50% of the ordinary hourly base rate of pay for the first three hours, and 100% of the ordinary hourly base rate of pay thereafter for any time worked outside of ordinary hours on a Monday to Friday, except for public holidays;
- (b) a loading of 50% of the ordinary hourly base rate of pay for all ordinary hours and overtime worked between midnight Friday and midnight Saturday; and
- (c) a minimum of four hours if recalled to work overtime after leaving the employer’s premises.

...

20.3 Sunday work

An employee will be paid a loading of 100% of the ordinary hourly base rate of pay for any hours, ordinary and overtime, worked on a Sunday.

[11] The shift work clause (extracted below) is silent on ordinary hours of work for shift workers and on the interaction between shift allowance and overtime rates. It appears that clause 18—Hours of Work applies to shift workers as well as day workers. Currently, a shiftworker working shiftwork on a weekend is entitled to be paid for all ordinary or overtime hours at the overtime rate (per Overtime clauses 20.1(b) and 20.3).

[12] Clause 21 is set out as follows:

21. Shiftwork

21.1 The following shifts may be worked:

- (a) **afternoon shift** means any shift finishing after 6.00 pm and at or before midnight;
- (b) **continuous work** means work carried on with consecutive shifts of employees throughout the 24 hours of each of at least six consecutive days without interruption except during breakdowns or meal breaks or due to unavoidable causes beyond the control of the employer;
- (c) **night shift** means any shift finishing subsequent to midnight and at or before 8.00 am;
- (d) **permanent night shift** employee means an employee who:
 - (i) during a period of engagement on shift, works night shift only;
 - (ii) remains on night shift for a period longer than four consecutive weeks; or
 - (iii) works on a night shift which does not rotate or alternate with another shift or with day work so as to give them at least one third of their working time off night shift in each shift cycle during such engagement period or cycle.

21.2 Shiftwork rates

Type of shift	Percentage of the ordinary time rate
	%
Afternoon shift	115
Night shift	115
Permanent night shift	130

Draft clauses in the 18 July 2017 exposure draft of *Ports, Harbours and Enclosed Water Vessels Award 2010*

[13] The span of hours clause in the current exposure draft⁷ clause retains the wording from clause 18.2 of the current award:

7.2 Span of hours

Ordinary hours may be worked between 6.00 am and 6.00 pm for up to eight hours per day, Monday to Friday inclusive.

[14] The current exposure draft overtime clause was initially proposed in a table form in the MUA submission of 14 April 2016 to clarify when overtime rates were applicable, including for work on weekends. The words above the table in that submission (which were

incomplete) were further modified to incorporate suggested words from the AWU’s 18 April submission (page 5). The final version in the exposure draft of 7 November 2016 is:

12. Overtime and penalty rates

12.1 Entitlement to payment for overtime

Overtime is payable to employees for any time worked outside of ordinary hours on a Monday to Friday (except a public holiday).

12.2 Employees will be paid the following rates for ~~all~~ overtime worked Monday to Friday, work on a Saturday or on a Sunday, or work on a public holiday ~~or ordinary weekend work at the following rates:~~

		% of ordinary hourly rate
Overtime		
Monday to Friday	First three hours	150
	After three hours	200
Ordinary hours and overtime		
Saturday		150
Sunday		200
Public holiday		250

12.3 Minimum payment for recall to work overtime

An employee will be paid for a minimum of four hours if recalled to work overtime after leaving the employer’s premises.

[15] The current exposure draft Shiftwork clause is substantially unchanged but the definitions section was reformatted as follows:

13. Shiftwork

13.1 Shiftwork definitions:

- (a) **afternoon shift** means any shift finishing after 6.00 pm and at or before midnight;
- (b) **continuous work** means work carried out:
 - (i) on consecutive shifts of employees;
 - (ii) over 24 hours a day;
 - (iii) for at least six consecutive days; and
 - (iv) without interruption, except during breakdowns, meal breaks or due to unavoidable causes beyond the control of the employer;
- (c) **night shift** means any shift finishing after midnight and at or before 8.00 am;
- (d) **permanent night shift employee** means an employee who:
 - (i) during a period of engagement on shift, works night shift only;
 - (ii) remains on night shift for a period longer than four consecutive weeks; or
 - (iii) works on a night shift which does not rotate or alternate with another shift or with day work so as to give them at least one third of their

working time off night shift in each shift cycle during such engagement period or cycle.

13.2 Shiftwork rates

Type of shift	% of the ordinary hourly rate
Afternoon shift	115
Night shift	115
Permanent night shift	130

[16] The changes to the overtime clause in the exposure draft were intended to make it easier to work out when to pay overtime and at which rate.

Parties Submissions

[17] The parties are at odds vary about how the shift allowance and overtime rates apply to shiftworkers working on weekends. The interaction between ordinary hours and payment for afternoon and evening shift work Monday to Friday has been raised by parties.

[18] The AWU submission of 18 April 2016 makes it clear that:

‘In response to the question about weekend shift rates, our understanding is that the shift work rates set out at clause 13.2 are not cumulative on the weekend penalty rates. Shift work rates do not apply to work performed on weekends and public holidays’⁸

[19] This is confirmed in their submission on 5 May 2016.

[20] The MUA’s position is similar:

‘The span of ordinary hours of work is set by clause 7.2. That clause is in these terms:

Ordinary hours may be worked between 6.00 am and 6.00 pm for up to eight hours per day, Monday to Friday inclusive.

This clause makes it clear that work on Saturday and Sunday falls outside the span of ordinary hours.’⁹

[21] Business SA’s position on shiftwork rates is that the current award does *not* permit shiftwork on weekends and submits that if clause 7.2 was amended to permit ordinary hours on weekend the appropriate rate would be 150% *plus* the shiftwork rate for shiftworkers working on weekends, as follows:

‘Clause 13.2 – Shiftwork Rates

The shiftwork rates are provided in clause 13.2. Afternoon shiftworkers are paid 115% of the ordinary hourly rate, night shift are also paid 115% and permanent night shift are paid 130%.

Parties are asked to make submissions on which rates apply to shift work on weekends. Issue of how the casual loading applies in relation to shiftwork and weekend penalties has been referred to AM2014/197.

The current Draft does not provide for shiftwork on weekends and therefore should not occur. Clause 7.2 limits ordinary hours of work to Monday to Friday, 6:00 am to 6:00 pm, with an 8 hour workday. Clause 13.2 applies shiftwork rates as a percentage of the ordinary hourly rate.

Should clause 7.2 be amended to extend ordinary hours to weekends, the appropriate rate to apply would be 150% of the ordinary hourly rate for the first 8 hours of work. With an afternoon, night or permanent night shift attracting an additional rate through clause 13.2.’¹⁰

- [22] MIAL’s submission of 5 August 2016¹¹ indicates they believed payment for Saturday work at 150% was an increase on the current award. They agreed that the reference to ‘ordinary hours’ adjacent to the table in clause 12.2 should be removed (as it was in the current exposure draft).
- [23] The AMOU submission of 13 December 2016 agreed with the MUA proposal for the overtime clause¹², as did AIMPE in their submission of 21 December 2016.

The 4 August 2016 conference

- [24] The issue of ordinary hours worked on weekends was discussed at the conference on 4 August 2016¹³ which dealt with the various maritime awards. After a brief discussion the MUA, the MOUA and the AWU agreed on the MUA wording for clause 12.2 —Overtime. However on being asked by the Commission “So your submission is that there should be no additional payment for working ordinary hours on a Saturday or a Sunday?”¹⁴ MIAL supported no change “beyond what currently exists”¹⁵ and the MUA agreed on having an opportunity to put more material.¹⁶

Are the issues resolved?

- [25] With the exception of Business SA and MIAL, the parties appear to agree that shift work on Saturdays and Sundays is paid at the overtime rate and is not inclusive of shift allowance. Both the current award and exposure draft seem to support this, though it requires a careful reading of the three relevant clauses to arrive at that position.
- [26] If this position were adopted it may be desirable to insert a new clause at 13.3 of the exposure draft, to clarify how the shiftwork rates interact with overtime, along the following lines:

“Shiftwork rates in clause 13.2 are not payable when working overtime. The relevant overtime rate is payable instead.”

- [27] As outlined in the March 2018 Group 3 Awards Decision ([\[2018\] FWCFB 1405](#)) at para [297] we propose to convene a conference of interested parties to discuss the matter further. The proposal outlined above at para [26] will be discussed at the conference which will be listed for **Thursday 21 June in Sydney at 11.00 am**. A notice of listing will be issued in due course.

¹ See FWO [Submission](#), 2 March 2015, item 31.

² [Exposure draft](#), 7 November 2016 at clause 12.2

³ [Notice of listing](#), 6-7 June 2016

⁴ [Transcript](#), 6 June 2016 at para [293].

⁵ [Notice of listing](#) for 4 August 2016, 11 July 2016

⁶ [MA000052](#).

⁷ [Exposure draft](#), 7 November 2016.

⁸ See AWU [Submission](#), 18 April 2016, para 17.

⁹ See MUA [Submission](#), 14 April 2016, para10.

¹⁰ See BusinessSA [Submission](#), 15 April 2016, para 12.2.10.

¹¹ See MIAL [Submission](#), 5 May 2016, page 2.

¹² See AMOU Submission, 13 December 2016. page 2.

¹³ [Transcript](#), 4 August 2016, at paras {459} to [494]

¹⁴ [Ibid](#), at para [487]

¹⁵ [Ibid](#), at para [488].

¹⁶ [Ibid](#), at para [492].