DECISION

Fair Work Act 2009
s.156 - 4 yearly review of modern awards

4 yearly review of modern awards
(AM2019/17)

JUSTICE ROSS, PRESIDENT
DEPUTY PRESIDENT CLANCY
COMMISSIONER BISSETT

MELBOURNE, 24 DECEMBER 2019

4 yearly review of modern awards – finalisation of Exposure Drafts and variation determinations – Tranche 2.

1. Background

[1] A decision issued on 2 September 2019[1] (*the September 2019 Decision*) outlined the process for finalising the Exposure Drafts produced in the 4 yearly review of modern awards (the Review) and the consequent variation of each modern award. This Full Bench (AM2019/17) has been constituted to oversee this process and for that purpose we have divided modern awards into 3 tranches. The awards in each tranche were set out at Attachment B to the *September 2019 Decision*.

[2] This Decision deals with the 41[2] awards in Tranche 2:

- *Aboriginal Community Controlled Health Services Award*
- *Airline Operations—Ground Staff Award*
- *Air Pilots Award*
- *Airport Employees Award*
- *Alpine Resorts Award*
- *Architects Award*
- *Asphalt Industry Award*
- *Cleaning Services Award*

[1] [2019] FWCFB 6077

[2] *Aircraft Cabin Crew Award 2010* and *Live Performance Award 2010* moved to Tranche 3 (pursuant to paragraph [2] of decision [2019] FWCFB 6861).

- *Clerks—Private Sector Award*
- *Commercial Sales Award*
- *Concrete Products Award*
- *Contract Call Centres Award*
- *Educational Services (Schools) General Staff Award*
- *Educational Services (Post-Secondary Education) Award*
- *Dry Cleaning and Laundry Industry Award*
- *Gas Industry Award*
- *Higher Education Industry—Academic Staff—Award*
- *Higher Education Industry—General Staff—Award*
- *Hospitality Industry (General) Award*
- *Hydrocarbons Field Geologists Award*
- *Labour Market Assistance Industry Award*
- *Local Government Industry Award*
- *Mannequins and Models Award*
- *Manufacturing and Associated Industries and Occupations Award*
- *Maritime Offshore Oil and Gas Award*
- *Meat Industry Award*
- *Pastoral Award*
- *Passenger Vehicle Transportation Award*
- *Pharmaceutical Industry Award*
- *Poultry Processing Award*
- *Professional Diving Industry (Industrial) Award*
- *Professional Diving Industry (Recreational) Award*
- *Rail Industry Award*
- *Restaurant Industry Award*
- *Road Transport (Long Distance Operations) Award*
- *Road Transport and Distribution Award*
- *Stevedoring Industry Award*
- *Storage Services and Wholesale Award*
- *Transport (Cash in Transit) Award*
- *Vehicle Manufacturing, Repair, Services and Retail Award*
- *Waste Management Award*

[3] On 14 October 2019 Exposure Drafts were published for each of these awards with amendments made in tracked changes to show the changes made since the Exposure Draft was last published. Draft variation determinations in respect of each award were also published.

[4] In a decision issued on 14 October 2019[3] (the *14 October 2019 decision)* we expressed the *provisional* view that the variation of the modern awards in Tranche 2 in accordance with the draft variation determinations was, in respect of each of these awards, necessary to achieve the modern awards objective. Interested parties were invited to comment on the *provisional* view in accordance with the timetable below:

[3] [2019] FWCFB 6861

Date	Event
14 October 2019	Publish final Exposure Drafts and draft variation determinations
27 November 2019	Parties to file submissions on final Exposure Drafts and draft variation determinations
9 December 2019	Parties to file submissions in reply
17 and 18 December 2019[4]	Full Bench Hearing

[5] Submissions have been filed by:

- Association of Consulting Architects Australia (ACAA) on 27 November 2019
- Association of Independent Schools (AIS) on 27 November 2019
- Australian Business Industrial (ABI) on 27 November 2019 and 9 December 2019
- Australian Hotels Association (AHA) on 27 November 2019 and 9 December 2019
- Australian Industry Group (Ai Group) on 27 November 2019 and 9 December 2019
- Australian Manufacturing Workers' Union (AMWU) on 27 November 2019, 27 November 2019 and 9 December 2019
- Australian Workers' Union (AWU) on 27 November 2019 and 9 December 2019
- Construction, Forestry, Maritime, Mining and Energy Union – Manufacturing Division on 6 November 2019
- Federation of Parents and Citizens Associations of NSW on 5 December 2019
- Group of 8 Universities (Go8) on 27 November 2019
- Independent Education Union of Australia (IEU) on 5 December 2019 and 9 December 2019
- Local Government Associations (LGA) on 27 November 2019
- Motor Trades Organisations (MTO) on 27 November 2019 and 9 December 2019
- National Farmers' Federation (NFF) on 27 November 2019
- National Road Transport Association (NatRoad) on 18 November 2019, 3 December 2019 (Road Transport and Distribution Award) and 3 December 2019 (Road Transport (Long Distance Operations) Award)
- Rail, Tram and Bus Union Australia (RTBU) on 27 November 2019
- Transport Workers Union (TWU) in relation to the following awards:
    - Passenger Vehicle Transportation Award on 21 November 2019
    - Airline Operations – Ground Staff Award on 21 November 2019
    - Road Transport (Long Distance Operations) Award on 21 November 2019
    - Waste Management Award on 21 November 2019
    - Transport (Cash in Transit) Award on 21 November 2019
    - Road Transport and Distribution Award on 21 November 2019
- Qantas on 26 November 2019
- Community and Public Sector Union (CPSU) on 9 December 2019
- United Workers' Union (UWU) on 9 December 2019

[4] The Transport Awards were heard on 17 December 2019, all other awards in Tranche 2 were heard on 18 December 2019.

[6] A Statement issued on 11 December 2019[5] (*December 2019 Statement*) summarised the submissions made and expressed a number of *provisional* views in respect of some of the points advanced. The issues raised in respect of the Tranche 2 awards were the subject of hearings at on Tuesday 17 December 2019 and Wednesday 18 December 2019.[6]

2. General issues

2.1 The Tranche 1 changes

[7] During the finalisation of Exposure Drafts in Tranche 1, we issued 2 decisions – one on 24 October 2019[7] (*the 24 October Decision*) and the other on 25 November 2019[8] *(the 25 November Decision*) – in which we determined that the following common drafting amendments would be made to all awards in Tranche 1:

- The removal of any contested overtime for casuals rates from the rates of pay Schedules (see [12] – [18] of the *24 October Decision*).

- Casual conversion clauses in the 28 awards that had such clauses prior to the Casual and Part-time Decision[9] will not be redrafted during the review and the Exposure Drafts will be amended to re-insert the current award term[10].

- The deletion of the 'note' in the Schedules of Rates (see [21] – [23] of the *24 October Decision*).

- The year in the title of the award will be amended to 2020.

- In awards where the coverage clause refers to other modern awards, the year in the title of those awards will be amended to either 2010 or 2020 as appropriate.

- The reference to the summary of hourly rates of pay schedule in the minimum rates clause will be converted from an information box to a Note. The reference to 'penalties' in this note will be corrected to 'penalty rates'.

- The reference to the Miscellaneous Award 20XX will be amended to Miscellaneous Award 2010. This will be varied to the Miscellaneous Award 2020 when the review of the Miscellaneous Award is finalised.

- Some formatting changes will be made to the summary of hourly rates of pay schedules to facilitate subsequent variation determinations following an Annual Wage Review. The content of these schedules will not be changed.

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[5] [2019] FWCFB 8398

[6] Notice of listing, 18 December 2019

[7] [2019] FWCFB 7173

[8] [2019] FWCFB 7854

[9] [2017] FWCFB 3541

[10] See [2019] FWCFB 7062

[8] In the *December 2019 Statement* we confirmed that each of these amendments would also be made to the Tranche 2 awards. In addition to those amendments, four general issues were raised in the submissions.

2.2 Operative Date

[9] Ai Group submit that a period of not less than 3 months should be allowed to lapse between the issue of final determinations varying each award and the variations becoming operative.[11] In the *24 October decision* we confirmed that the following approach would be taken:

> 1. The Full Bench will issue a decision dealing with the issues arising in respect of the Tranche 1 Exposure Drafts and associated draft variation determinations.
>
> 2. Variation determinations for the Tranche 1 awards will be published no later than 25 November 2019 and will commence operation on 4 February 2020.
>
> 3. If a Tranche 1 award is the subject of another variation determination between the publication of the variation determination arising from this decision (25 November 2019) and when those variation determinations commence operation (on 4 February 2020) a conference will be convened to provide all parties interested in the affected award with an opportunity to be heard in relation to the appropriate course of action.

[10] In the *December 2019 Statement* we expressed the *provisional* view that the Tranche 2 awards would follow the same process. Final variation determinations would be issued no later than 14 February 2020 and the variation determinations would commence operation on 6 April 2020.

[11] At the hearing on 18 December 2019 Ai Group submitted that the variation determinations should commence operation on 4 May 2020 rather than 6 April 2020, to provide interested parties with some additional time to review the determination. Other parties expressed the view that the uncontentious variation determinations should operate from an earlier date (i.e. earlier than 4 May 2020).

[12] We have decided that all final variation determinations will be issued no later than 14 February 2020. In respect of the uncontentious awards (set out at [27]) the variation determinations will commence operation on 13 April 2020. The remaining variation determinations will commence operation on 4 May 2020.

2.3 Overtime for casuals

[13] ABI notes that multiple Tranche 2 Exposure Drafts contain summary tables setting out overtime rates of pay for causal employees in the Schedule of Hourly Rates of Pay and that the calculation of some of these rates is currently in dispute as part of the 'Overtime for Casuals' matter.[12]

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[11] Ai Group submission, 27 November 2019 at [3].

[12] ABI submission, 27 November 2019 at [7].

[14] ABI submits that, consistent with the approach taken with the first tranche of Exposure Drafts,[13] the Commission should publish the updated Exposure Drafts without any schedules containing overtime rates for casuals. [14] These schedules can be reinserted into the Tranche 2 awards, if appropriate, after the relevant Full Bench hands down its decision. We agree and will adopt the approach proposed.

2.3 Expression of Numbers

[15] ABI notes that one of the recent amendments to the Exposure Drafts has been to write numbers as figures instead of words.[15] This reflects the recommendations in paragraph 8.8 of the guidelines for plain language drafting of modern awards. [16]

[16] ABI submits that the 'voluntary employee contributions' clause in many of the Exposure Drafts has been overlooked in this regard[17]. For consistency, ABI submits that the terms "three month's written notice" should be expressed as "3 month's written notice".[18]

[17] In the December 2019 Statement we posed the following question to ABI: Is the Commission's capacity to vary the 'voluntary employee contributions' clause in modern awards in the context of the 4 yearly review constrained by s 156(2)(c) (see the definition of 'default fund term' in s 149(2))?

[18] ABI submitted that the relevant clause was not a 'default fund term' as defined and on that basis s 156(2)(c) did not constrain the Commission from dealing with the matter and, further, such an amendment would not constitute a 'variation' as it did not vary the rights and obligations arising under the clause. In response to an indication by the Commission that we were minded to take a cautious approach to the issue ABI did not press the point. Accordingly we need say nothing more about this issue and will not make the change proposed.

2.4 Coverage for Group Training Organisations

[19] ABI notes that many of the Exposure Drafts contain coverage clauses relating to group training organisations. ABI submits that consequential changes made to these clauses has highlighted a potential anomaly.[19] ABI provides the *Pharmaceutical Industry Award 2010* as an example:

> 'This award covers employers which provide group training services for trainees engaged in the pharmaceutical industry **and/or parts of that industry**.' (emphasis added).[20]

[20] ABI submits that it is unclear what is meant by "and/or parts of that industry" as any trainee engaged in a part of the pharmaceutical industry, must also, by definition, be engaged

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[13] [2019] FWCFB 7173 at [17]

[14] ABI submission, 27 November 2019 at [8].

[15] ABI submission, 27 November 2019 at [9].

[16] Plain language guidelines, 20 June 2017 at [8.8].

[17] ABI submission, 27 November 2019 at [11]

[18] ABI submission, 27 November 2019 at [12].

[19] ABI submission, 27 November 2019 at [13]-[14].

[20] ABI submission, 27 November 2019 at [15].

in the pharmaceutical industry as a whole.[21] The use of the words "and/or", suggests that an employee may be engaged in a part of the pharmaceutical industry, but not the pharmaceutical industry. ABI further notes that the words "and/or parts of that industry" do not appear in clause 4.1, the general coverage clause, or clause 4.4, the on-hire coverage clause. ABI submits that similar clauses apply to other Exposure Drafts.[22]

[21] ABI questions whether different coverage provisions should apply to group training organisations that do not apply to other employers. [23] It also submits that the use of "and/or" is also inconsistent with paragraph 5.10 of the guidelines for plain language drafting of modern awards. [24] ABI proposed that the words 'and/or parts of that industry' be deleted.

[22] At the hearing on 18 December 2019 some parties submitted that they were not aware of the current wording creating any difficulties and expressed concern that there may be unintended consequences flowing from the proposed change. In light of the expressed concerns ABI did not press its proposal.

3. Correcting minor errors

[23] The *December 2019 Statement* noted that a number of the submissions received had identified minor typographical errors and omissions in the exposure drafts and draft variation determinations. The minor errors proposed to be corrected were set out at [20] of the *December 2019 Statement.*

[24] At the hearing on 18 December 2019 Ai Group withdrew aspects of its submissions directed at correcting minor errors in respect of the *Airline Operations – Ground Staff Award* and the *Cleaning Services Award.* Further, the Local Government Associations sent an email drawing attention to some errors in the table in schedule C.1.1 of the *Local Government Industry Award*.

[25] The final list of minor typographical errors or omissions is as follows:

- *Airline Operations—Ground Staff Award*[25]
- *Alpine Resorts Award*[26]
- *Asphalt Industry Award*[27]

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[21] ABI submission, 27 November 2019 at [16].

[22] ABI submission, 27 November 2019 at [17]-[19].

[23] ABI submission, 27 November 2019 at [20].

[24] ABI submission, 27 November 2019 at [21].

[25] Ai Group submission, 27 November 2019 at [7], the reference in clause 7.4(a) to clause 19 should be amended to clause 19.2; at [11], a space should be added between '(b)' and 'continuous';

[26] AWU submission 27 November 2019 at [6], in clause 21.3(e)(ii) the numeral "8" should be inserted where the word "eight" has been deleted in the first dot point.

[27] Ai Group submission, 27 November 2019 at [19], the reference in clause 7.2 to clause 16 should be amended to clause 16.1; at [20], the reference in clause 11.4(a)(i) to clause 15.1 should be amended to clause 15; at [21] the full stop should be deleted after '8' and '9' in the daylight savings example, these will instead be amended '7.5', '8.5' and '9.5' as appropriate; at [22], in clause 14.2 the words 'seven and a half' have been struck out and not replaced, '7.5' should be inserted; at [23], in clause 20.1(a) the reference to 'clause 20.1' should be replaced with 'clause 20'; at [24] in clause 20.2(b)(iv) the reference to clause 20.2(b) should be amended to clause 202(b)(iv); at [25], in clause 20.5(a) the words 'employees' and 'of pay' after '200%' should be deleted. ABI submission, 27 November 2019 at [48], the example box

- *Cleaning Services Award*[28]
- *Clerks—Private Sector Award*[29]
- *Commercial Sales Award*[30]
- *Concrete Products Award*[31]
- *Contract Call Centres Award*[32]
- *Dry Cleaning Award*[33]
- *Educational Services (Schools) General Staff Award*[34]
- *Gas Industry Award*[35]
- *Labour Market Assistance Industry Award*[36]
- *Local Government Industry Award*[37]
- *Manufacturing and Associated Industries and Occupations Award*[38]

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under clause 13.6 includes the numbers '7 ½' and '8 ½'. These should be amended to '7.5' and '8.5'; at [49], in the second row of the table in clause B.2.1, the number '5 and a half' appears - this should be amended to '5.5'. AWU submission 27 November 2019 at [6], the numeral '7.5' in clause 14.2(a) has not been added.

[28] Ai Group submission, 27 November 2019 at [29] the note at the top of Schedule B has been retained in error and should be deleted.

[29] Ai Group submission, 27 November 2019 at [31], the reference to 'clause 10.3 in clause 11.5(k)(ii) should be amended to 'clause 10.2'. ABI's 27 November 2019 at [26]-[27], the words 'as it existed prior to that variation' should be added at the end of clause 1.3 for clarity and consistency with other awards.

[30] Ai Group submission, 27 November 2019.

[31] Ai Group submission, 27 November 2019 at [37], the reference in clause 7.2 to clause 17 should be amended to clause 17.1; at [38] the reference to clause 11.3(c) in clause 11.3(b) should be amended to 11.3(b); at [40], in clause 13.1(b) the reference to 'clause 13.1' should be amended to .clause 13'. AWU submission 27 November 2019 at [14], in clause 21.7: The word "rate" is missing at the end of the sentence.

[32] Ai Group submission, 27 November at [42], the various references to "2010" may require updating; at [43], the reference to "clause 10.3" should be replaced with "clause 10.4", consistent with clause 26.1(a) in the current award; at [44], the separate numbering of the provision under the heading 'Rates not cumulative' in clause 20.10 is not necessary and should be deleted; at [45], 'penalties' should be replaced with 'penalty rates' in clause 20.10. . CPSU submission in reply, 9 December 2019 at [3] agrees various references to "2010" be updated; at [3] agrees reference to clause 10.3 be replaced with clause 10.4; at [3] agrees "Rates not cumulative" should be deleted; at [3] agrees "penalties" should be replaced in clause 20.10.

[33] CFMMEU (Manufacturing) submission 6 November 2019 at [6] the cross reference in clause 11.8(i) should refer to clause 34, not clause 33; at [8]-[9]: the note appears twice in clause 20 and should only appear once.

[34] Ai Group submission, 27 November 2019 at [33]-[34], a backwards slash has been included in error in the daily laundry allowance in clause C.2.1.

[35] Ai Group submission, 27 November at [50], the cross reference in clause 13.1(c) to 'clause 8—Types of employment' should be replaced with 'clause 10—Part-time employees"; at para 53, the end of clause 20.8(g) [*sic.*] should be amended by adding "s" at the end of "week" and a full stop; at para 54, a space should be inserted after "Definitions" in clause C.1.1.

[36] Ai Group submission, 27 November 2019 at [50]-[51], at clause 21.6(a) and clause D.10.1, there is a space missing between '4' and 'hours'. Also see ABI submission 27 November 2019 at [50] and [51].

[37] Local Government Associations submission, 27 November 2019 at [6], the words 'and clause 22.3' should be added at the end of clause 13.1(i); at [7], in clause 17.2(b), the word 'clause' should be inserted before '17.2(a)'; at [8], the word 'service' should be amended to 'services' in clauses 19.2(f), 21.7(a) and 22.2(a); at [9], in clause 19.3(a)(ii) the word 'be' should be inserted between 'will' and 'paid'; at [10.1], in clause 19.4(a)(i) the word 'normal' should be inserted before 'starting' where is first appears in the clause; at [10.2] clause 19.4(a)(ii) should be deleted as the term is already defined in clause 2, the subsequent subclauses should then be renumbered and the cross-references within the clause amended accordingly; at [11], in clause 20.3(c) the word 'subclauses' should be amended to 'clauses at [12], in NOTE 1 to clause 23.7, a space should be inserted between 'clause 23.7(d) and 'may result'; at [13], in the table at C.1.1, a close parenthesis should be inserted after 3 references to '19.2(c)(iii)'; at [32] – [36], in Schedule C.1.1 the adverse working conditions allowance for level 1, 2 and 3 are paid hourly, the reference in the table to 'per week' should be amended to read 'per hour.' The sleepover allowance is also paid hourly and the reference in the table to 'per week' should be amended to read 'per hour.'

- *Meat Industry Award*[39]
- *Pastoral Award*[40]
- *Pharmaceutical Industry Award*[41]
- *Poultry Processing Award*[42]
- *Road Transport and Distribution Award*[43]
- *Storage Services and Wholesale Award*[44]

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[38] AMWU submission, 27 November 2019 at 25 and 26, the AMWU submit that clause 33.12 be deleted as it no longer exists, which will result in the renumbering of the subsequent clauses; Clause 33.12 has been retained in error and should be deleted and subsequent clauses renumbered. AWU submission 27 November 2019 at [19], the cross-reference to clause 32.2(i) should be clause 32.2(j). Ai Group submission, 27 November at [57], the words in 'leading boiler attendant or fireperson—first class', 'leading boiler attendant or fireperson—second class' and 'ship repairs' in clause 2 should be in bold; at [58], the number "(c)" in clause 2 should be deleted before the definition of 'radio industry'; at [59], the date in both dot points in clause 4.8(a)(xi) and in clause 4.8(a)(xiii) should be the date when the award is varied to reflect the terms of the exposure draft; at [60], two commas should be inserted in clause 12.8(c) as follows: "the requirements of the relevant State/Territory apprenticeship authority and any requirements of the relevant industry committee, which is currently the Manufacturing and Engineering Industry Reference Committee, with respect to …; at [64], "three3 hours" appears twice as a typographical error in clause C.1.1; at para 67. an apostrophe should be placed after 'employees' in the title of clause C.2 at [74] and [77], the following words in the headings for column 4 in clauses D.1.3 and D.2.1 should be deleted because columns 5 deal with the period for payment: 'per hour unless otherwise stated.' During the course of the hearing on 18 December 2019 ABI drew the Commission's attention to the fact that the 'footer' on the exposure draft refers to an incorrect award code (MA15), it should be MA10.

[39] ABI submission, 27 November 2019 at.[52], there is a typographical error in the word 'predictable' in 21.6(a). Ai Group submission, 27 November 2019 at [82], the reference in clause 7.4 to clause 23.1(b)(ii) should be deleted, only clause 23.1(b)(i) contemplates facilitation by majority agreement, at 83, the reference in clause 23.5 to clause 32 should instead be a reference to clause 33; at [88] the reference in clause 23.5 to clause 32 should be a reference to clause 33.

[40] ABI submission, 27 November 2019 at [46], in the table at clause 7.2, the second column in row next to clause 50.9(d)(iv)) includes both 'rates' and 'wages' in error; delete the word 'wages', at [47], in clause 49.5(b)(i) [] the reference to '5 thousand' should be replaced with '5000'. AWU submission 27 November 2019 at [23] the cross reference in clause 24.3 should be to clause 44; at [24], the cross-reference in clause 37.1(b)(ii) should be to clause 37.1(a) not clause 30.1(a).

[41] ABI submission, 27 November 2019 at [22]-[25], there is a formatting discrepancy with subclause 21.5. The entirety of of subclause 21.5 is indented into a single paragraph identified as 21.5(a). There are no further paragraphs in the subclause (i.e. there is no paragraph 21.5(b) or above). This is inconsistent with the ordinary modern award formatting; Ai Group submission, 27 November 2019 at 94 the reference in clause 2 to clause 15.1 should be replaced with "clause 15.1(a)". Clause 15 deals with the minimum rates payable to, for example, juniors and trainees. Consistent with the current clause 3.1 of the award, however, the standard rate is the weekly wage payable to adult employees as prescribed by clause 15.1(a); at [100], the reference in clause C.1 to clause 15.1 should be replaced with "clause 15.1(a)" to ensure consistency with our suggested amendments to the definition of "standard rate" in clause 2.

[42] Ai Group submission, 27 November 2019 at [102]-[104] and [107]-[109], Ai Group submit that within clause 2 definitions, the definition of standard rate making reference to clause 15 should be replaced with clause 15.1 as clause 15 deals with minimum rates payable to employees, including juniors and trainees, whereas the standard rate payable to adult employees is prescribed by clause 15.1; the reference made to clause 15 in the definition of standard rate at clause 2, should be replaced with clause 15.1; at clause 7.2 facilitative provisions, the reference to clause 21.5 should be replaced with clause 21.5(b) as subclause (b) is the only facilitative clause; at clause 7.2 facilitative provisions, the reference made to clause 21.7 be deleted as it is not a facilitative clause; at clause 21.5(e) annual close down, the reference made to clause 21.10 appears to be an error and therefore should be replaced with clause 21.5; at clause C.1.1 wage-related allowances, the reference to clause 15 should be replaced with clause 15.1 to ensure consistency with the amendment to the definition of 'standard rate' in clause 2; at clause C.1.1 wage-related allowances, the 's' before 17.2 be deleted.

[43] Ai Group submission, 27 November 2019 at [110], Ai Group submit that at clause 19.5(d)(ii) the housing allowance states in error that the allowance is $3.10, and the allowance should be amended to $3.15 as reflected in table D.2.1

[44] Ai Group submission, 27 November 2019 at [119], [121]-[122] and [126], Ai Group submit that at clause 7.3(a)(vi) facilitation by majority employment, the semicolon and "and" should be deleted and replaced with a full stop; at clause 20.3(f) hours of work, the reference to clause 20.3(c) appears to be made in error and should be replaced with "clause 20.3(d)"; Ai Group further submit that at clause 20.3(f), the terminology used in should be amended from "shift penalties" to "shift penalty rates" which is consistent with the changes made in clause 20.4; at clause C.1.1 wage-related allowances, the reference to clause 17.2(a) be replaced with "clause 17.2(a)(i)" for clarity.

- *Transport (Cash in Transit) Award*[45]
- *Vehicle Manufacturing, Repair, Services and Retail Award*[46]
- *Waste Management Award*[47]

[26] Any party who wished to contest the variation of these Exposure Drafts (and the related variation determinations) to address the minor errors identified was invited to make a submission at the hearings on 17 and 18 December 2019. At those hearings no party opposed the correction of the identified errors. We will amend the variation determinations accordingly.

4. The uncontentious awards

[27] In the December 2019 Statement we noted that subject to the correction of minor errors and the resolution of the general issues it appeared that there were no award specific issues in relation to the following awards:

- *Aboriginal Community Controlled Health Services Award*
- *Airport Employees Award*
- *Clerks – Private Sector Award*
- *Educational Services (Post-Secondary Education) Award*
- *Higher Education Industry—Academic Staff—Award*
- *Hydrocarbons Field Geologists Award*
- *Mannequins and Models Award*
- *Maritime Offshore Oil and Gas Award*
- *Passenger Vehicle Transportation Award*
- *Professional Diving Industry (Industrial) Award*
- *Professional Diving Industry (Recreational) Award*
- *Rail Industry Award*
- *Restaurant Industry Award*
- *Stevedoring Industry Award*

[28] At the hearing on 18 December 2019 no party identified any award specific issues in relation to the above awards.

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[45] Ai Group submission, 27 November 2019 at [128]-[129] insert 'also' in the definition of ordinary hourly rate; at [130] amend clause 15.1(e) to express the penalty/loading as a rate; at [131] replace 'allowances' with 'rates' in the preamble to clause 21.8.

[46] MTO submission, 27 November 2019 at 1, the words 'automotive parts interpreter – specialist' should be in bold in line with other definitions in clause 2; Ai Group submission, 27 November 2019 at [141], in clause 7.2 the reference to 'clause 11.6' should be amended to 'clause 11.6(g)'; at para 142, clause 11.6(j) has been listed under clause 7.2 and clause 7.4, it should just be listed under clause 7.4; at para 134, in the table at clause 11.4(a) the words 'of overtime' should be inserted in the final two rows to clarify that the rate applies to overtime; at para 144, in clause 11.4(c) the reference to 'clause 11.4' should be amended to 'clause 11.4(a)'; at para 145, in clause 11.4(c) the reference to 'clause 16.6(b)' should be to 'clause 16.6(c)'

[47] Ai Group submission, 27 November 2019 at [163], in clause 11.9(c) insert '11.9(b)' after clause at the end the provision; at [164], the final paragraphs of clause 11.9 should be renumbered clause 11.9(h); at [165] replace 'of' with 'or' in clause 16.2(a); at [166] in clause 22.6(a) the reference to clause 22.5(a) should be replaced with a reference to clause 22.5; at [167] in clause 22.7(d) the reference to clause 22.7(a); at [168] clause 27.5(d)(iii) to be renumbered clause 27.5(c) and clauses 27.5(e) and (f) renumbered clauses 27.5(f) and (g) respectively; at [171] in the second sentence of clause B.2.2(a) 'movement' has been misspelt.

5. The Transport Group of Awards

[29] The submissions filed in respect of these awards are as follows:

- Australian Business Industrial & the NSW Business Chamber (ABI) submission on 27 November 2019
- Australian Industry Group (Ai Group) submission on 27 November 2019 and 9 December 2019
- Australian Manufacturing Workers' Union (AMWU) submission on 27 November 2019
- Australian Workers' Union (AWU) submission on 27 November 2019 and 9 December 2019
- National Road Transport Association (NatRoad) in relation to the following awards:
  - Road Transport and Distribution Award on 14 October 2019, 18 November 2019 and 3 December 2019
  - Road Transport (Long Distance Operations) Award on 3 December 2019
- Transport Workers Union (TWU) in relation to the following awards:
  - Passenger Vehicle Transportation Award on 21 November 2019
  - Road Transport (Long Distance Operations) Award on 21 November 2019
  - Waste Management Award on 21 November 2019
  - Transport (Cash in Transit) Award on 21 November 2019
  - Road Transport and Distribution Award on 21 November 2019

[30] No award specific issues were raised in relation to the *Passenger Vehicle Transportation award 2010.*

5.1 *Road Transport (Long Distance Operations) Award*

[31] There are two issues in relation to this award.

(i) *Clause 4.2*

[32] Clause 4.2 contains the definitions that are relevant to the coverage of the Road Transport (Long Distance Operations) Award (Long Distance Operations Award). ABI submits that the introductory wording of clause 4.2 should be more clearly expressed.[48]

[33] The introductory wording to clause 4.2 is as follows:

> 'In this award, the following applies to the private **transport industry engaged in long distances operations**:'

[48] ABI submission, 27 November 2019 at paras. 38-39.

[34] ABI submits that the definitions apply to the Long Distance Operations Award generally rather than applying to the "private transport industry engaged in long distance operations". ABI submits that the introductory wording to clause 4.2 should be replaced with the words "In this award:" such that the clause reads:[49]

> 'In this award:
>
> (a) private transport industry means the transportation by road of all materials whether in a raw or manufactured state, or of livestock, throughout Australia;
>
> (b) long distance operation means any interstate operation, or any return journey where the distance travelled exceeds 500 kilometres and the operation involves a vehicle moving livestock or materials whether in a raw or manufactured state from a principal point of commencement to a principal point of destination. An area within a radius of 32 kilometres from the GPO of a capital city will be deemed to be the capital city;
>
> (c) interstate operation means an operation involving a vehicle moving livestock or materials whether in a raw or manufactured state from a principal point of commencement in one State or Territory to a principal point of destination in another State or Territory. Provided that to be an interstate operation the distance involved must exceed 200 kilometres, for any single journey. An area within a radius of 32 kilometres from the GPO of a capital city will be deemed to be the capital city.'

[35] No party opposed the proposed amendment. We agree with ABI and will amend the draft variation determination accordingly.

(ii) *Clause 25.3(b) Payment for work on a public holiday*

[36] The TWU contends that clause 25.3(b) conflicts with clauses 10.8 and 11.4 and proposes that the issue should be resolved by replacing the reference to 4 hours in clause 25.3(b) with a reference to 8 hours.

[37] Clause 25.3(b) states:

> (b) An employee must be paid for a minimum of ~~four~~4 hours' work.

[38] Clauses 10.8 and clause 11.4 provide for minimum payments that generally apply where a casual or part-time employee is engaged to work. This equates to either an 8 hour or 500km minimum payment:

> 10.8 A part-time employee who is paid by the cents per kilometre method of clause 16.4 must receive a minimum payment per day for 500 km. Where the employee is engaged according to the hourly driving rate method the minimum payment per day must be ~~eight~~8 hours' pay.
>
> …
>
> 11.4 Minimum payment and engagement

[49] ABI submission, 27 November 2019 at para. 39.

(a) A casual employee who is paid by the cents per kilometre method of clause 16.4 must receive a minimum payment per engagement for 500 km.

(b) Where the employee is engaged according to the hourly driving rate method the minimum engagement must be ~~eight~~8 hours.

[39] The TWU submits:

> 'Full time employees could not undertake a long distance operation, as defined in the Award, within a four hours period … [and] that clause 25.3(b) should be amended by deleting '4 hours' and replacing it with '8 hours' to overcome the conflict.'[50]

[40] In reply, Ai Group submits that the TWU proposal should not be adopted and it would introduce a new entitlement for casual and part-time employees.

[41] We note at the outset that the 4 hour minimum engagement period in clause 25.3(b) of the exposure draft (clause 26.4 of the current award) was inserted by the Part-time and Casual Employment Full Bench (see PR599012). The same determination also inserted the part time clause which the TWU submits conflicts with the minimum engagement on a public holiday term. The TWU was a participant in those proceedings but did not, at that time, raise the issue it now raises.

[42] Clause 25.3 deals with the specific issue of payment for full-time and part-time employees who work on a public holiday and it provides as follows:

25.3 Payment for work on a public holiday—full-time and part-time employees

(a) For all time worked by a full-time or part-time employee on a public holiday, payment must be made at the following rates:

(i) on Good Friday and the Christmas Day holiday—30% of the applicable minimum weekly rate specified in clause 16.1(a) plus payment for the work performed in accordance with the designated method of payment specified in clause 16—Minimum rates.

(ii) on any other holiday—20% of the applicable minimum weekly rate specified in clause 16.1(a), plus payment for the work performed in accordance with the designated method of payment specified in clause 16—Minimum rates.

(b) An employee must be paid for a minimum of ~~four~~4 hours' work.

[43] Under the provision full time and part time employees are entitled to a payment for either 20% or 30% (depending on the public holiday) of the relevant weekly wage plus payment for work performed, plus payment for a minimum of 4 hours work.

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[50] TWU submission Road Transport (Long Distance Operations) Award 21 November 2019 at [4] – [5]

[44] Clause 25.4 deals with the specific issue of payment for time worked by a casual employee on a public holiday and provides as follows:

> 25.4 Payment for work on a public holiday—casual employees
>
> For all time worked by a casual employee on a public holiday, payment must be made at the following rates:
>
> (a) on Good Friday and the Christmas Day holiday—30% of the applicable minimum weekly rate specified in clause 16.1(a) plus payment for the work performed in accordance with the designated method of payment specified in clause 16—Minimum rates.
>
> (b) on any other holiday—20% of the applicable minimum weekly rate specified in clause 16.1(a) plus payment for the work performed in accordance with the designated method of payment specified in clause 16—Minimum rates.

[45] Clause 25.4 requires payment for public holiday work at 20% or 30% (depending on the public holiday) of the relevant weekly wage plus payment for work performed. The clause does not contain a requirement for a minimum amount of work to be performed on such days; though we note that clause 11.4(b) specifies a minimum engagement of 8 hours for casuals engaged accordingly to the hourly driving rate method.

[46] As a matter of construction we would observe that clauses 25.3 and 25.4 regulate the payment for work performed on a public holiday and these specific provisions should be read to the exclusion of the general provisions contained in clauses 10.8 and 11.4, which apply on other days. The TWU accepts this is so and did not challenge Ai Group's submission that it necessarily follows that the TWU accepts that this is the correct interpretation of the current award.

[47] For the reasons set out above we are not persuaded to replace the reference to 4 hours in clause 25.3(b) with a reference to 8 hours in the context of proceedings which are directed at the finalisation of exposure drafts and the conversion of these documents into variation determinations. The issue raised by the TWU can be the subject of an application to vary the award, after the award has been varied as a result of these proceedings.

5.2 *Road Transport and Distribution Award*

[48] During the hearing on 9 October 2019[51] an issue arose in relation to the Exposure Draft for this award. The issue concerns clause 12.2 – Minimum wage rates – oil distribution workers and whether the divisor for the calculation of hourly wage rates for oil distribution workers is 35 or 38.

[49] The submissions of the interested parties in response to this issue are summarised in a Background Document dealing with this issue.

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[51] Transcript of Proceedings, 9 October 2019, see PN474 – PN484

[50] Clause 23.2 of the current award provides that the ordinary hours for oil distribution workers 'will be 35 per week or 70 per two week period.' Clause 15.2 of the current award deals with minimum wages and states:

> 15.2 Minimum wage rates
>
> The minimum wage rates of pay for a full-time adult employee are set out below:

Transport worker grade	**Minimum weekly rate $**	**Minimum hourly rate $**
1	784.60	20.62
2	804.30	21.17
3	814.20	21.43
4	829.20	21.82
5	839.60	22.09
6	849.20	22.35
7	861.60	22.67
8	886.60	23.33
9	901.50	23.72
10	923.80	24.31

[51] The hourly rates in clause 15.2 appear to have been derived by dividing the weekly wage rate by 38.

[52] In the current exposure draft the minimum hourly rates for oil distribution workers are set out in clause 17.2 as follows:

> 17.2 Minimum ~~wage~~ rates – oil distribution workers
>
> An employer must pay adult employees the following minimum wages for ordinary hours worked by the employee:

Employee classification	**Minimum weekly rate (full-time employee) $**	**Minimum hourly rate~~1~~ $**
Transport Worker Grade 1	784.60	22.42
Transport Worker Grade 2	804.30	22.98
Transport Worker Grade 3	814.20	23.26
Transport Worker Grade 4	829.20	23.69
Transport Worker Grade 5	839.60	23.99
Transport Worker Grade 6	849.20	24.26
Transport Worker Grade 7	861.60	24.62
Transport Worker Grade 8	886.60	25.33
Transport Worker Grade 9	901.50	25.75
Transport Worker Grade 10	923.80	26.39

[53] The hourly rates in clause 17.2 are derived by dividing the weekly wage rate by 35.

[54] As we have mentioned, the appropriate divisor for calculating the hourly rates for oil distribution workers is the issue in contention.

[55] NatRoad contends that the correct divisor for oil distribution workers is 38, not 35 and submits that clause 23 does not establish that the 35 hour week translates to a divisor of 35 in respect of minimum wages, and that it is silent on this matter. NatRoad also refers to clause 15.2 of the award and submits that this clause is clear in its prescription of the minimum wage rates as it states "*The minimum wage rates of pay for a full-time adult employee are set out below.*" NatRoad submits that there is no qualification to this statement. There is no cross-reference to clause 23 or a separate reference to oil distribution workers and the manner of the calculation of their wages.

[56] NatRoad refers to, and relies upon, the relevant *Award Modernisation* Full Bench decision,[52] and in particular to paragraphs 176 and 177:

> '[176] We acknowledge the fact that the rates in the Transport Workers (Oil Distribution) Award 2001 and the Transport Workers (L.P. Gas Industry) Award 2005 are higher than rates in the other pre-reform transport awards. We have considered the history of adjustment of the rates in those awards. It appears that each award had, in the past, operated as a paid rates award and it is not apparent that when the awards were simplified the rates were converted to minimum rates. In any event the majority of rates in other pre-reform transport awards and NAPSAs weigh heavily in favour of them being reflected in the rates in the RT&D Modern Award. We need say little about the TWU suggestion that we introduce an 11% industry allowance in the oil distribution and LP gas sectors. The union did not raise this proposal in submissions filed in accordance with the published timetable. When it was raised late in the consultation process little was said to justify it. Such an allowance would normally apply to all employees in the sector and for all purposes and before we would consider the introduction of such an allowance employers would need to first be alerted to the fact it was being sought and then an opportunity, on the days set aside for Full Bench consultations, to make submissions about it. We have decided that no such provision should be in the RT&D Modern Award. The rates for these two sectors can be considered further in the context of transitional provisions.
>
> [177] We next turn to the hours clause in the RT&D Modern Award and in particular cl.23 which provides for ordinary hours of work for oil distribution workers. The exposure draft clause reflected the existing regime of hours being 35 per week or 70 per fortnight. We are aware that these hours have operated within these sectors of the transport industry for many decades. We considered whether, in the context of this modern award, the ordinary hours for this sector of the industry should be less than those for the remaining sectors. In this respect we acknowledge the submissions of the Oil Industry Industrial Committee as to why two different hours clauses may not be appropriate. On balance however we have decided it is appropriate to retain the two minimum ordinary hours clauses. As a consequence of doing so we have inserted into the facilitative provisions and the provisions of cl.23 additional flexibilities contained in existing awards. We should indicate that it is not our intention that these minimum hours of work should extend any further than they have traditionally applied. It may be that, at an appropriate time, consideration needs to be given to variations to the award to ensure these constraints are reflected in it.' (Emphasis added)

[57] NatRoad relies on the underlined sentence in the above extract and submits that this sentence clearly indicates that minimum wages for oil distribution workers were to be

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[52] [2009] AIRCFB 345

reflective of 'the majority of rates' in other pre-reform awards and NAPSAs. They contend that the AIRCFB has separated its consideration of minimum rates in [176] of its decision from the ordinary hours of work issue that is then addressed in [177] of the decision. NatRoad submit that the current award reflects this distinction and it should not now be interpreted so that these issues are conflated.[53]

[58] NatRoad contend that the *Award Modernisation* Full Bench considered the pre-modern awards and that its consideration led to a separation of the issue of minimum wages from ordinary hours of work. NatRoad submit that this accords with the omission from the award of any clear statement of a linkage between the ordinary hours of work of oil distribution workers and the minimum rates of pay as appeared in the federal pre-modern award, the *Transport Workers (Oil Distribution) Award 2001* as follows:

> 'Ordinary-time rate means for an employee (other than a casual employee) 1/35th of the wage rate prescribed in clause 16 - Classifications and wage rates, of this award for the classification in which the employee is employed.'[54]

[59] The TWU supports a divisor of 35 and submits that this is the appropriate outcome having regard to the modern awards objectives, the history of industrial conditions for employees engaged in the oil distribution sector of the road transport industry and the plain meaning of the provisions of the award.

[60] The TWU notes that clause 14.2 of the Exposure Draft clearly states that the ordinary hours of work for oil distribution workers is either 35 hours per week or 70 hours per two week period. They submit that that other provisions, such as clauses 14.5 and 14.6 refer to oil distribution workers being engaged on the basis of 5 days or 7 hours per day, consistent with the conclusion that the industry has historically operated on the basis that oil distribution workers were engaged for 35 hours per week.[55]

[61] The TWU also refers to [177] of the *Award Modernisation* Full Bench decision in respect of the hours clause for oil distribution workers, noting that the pre-reform regime was 35 hours per week or 70 hours per two week period and place emphasis on the following sentence '*...we have decided it is appropriate to retain the two minimum ordinary hours clauses*'.[56]

[62] TWU further submit that the appropriate divisor when determining the hourly rate for those pre-reform awards was 1/35 of the minimum weekly rate and that this is also a relevant distinction.[57] They submit that this applied to the following instruments: *Transport Industry – Petroleum & C., Distribution (State) Award* at clause 28, and *Transport Workers (Oil Distribution) Award 2001* at clause 13.2.2 pertaining to casual employees.[58]

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[53] NatRoad submission dated 18 November 2019 at para [8]

[54] NatRoad submission dated 18 November 2019 at para [9]

[55] TWU submission dated 21 November 2019 at para [37]

[56] TWU submission dated 21 November 2019 at para [43]

[57] TWU submission dated 21 November 2019 at para [44]

[58] TWU submission dated 21 November 2019 at para [44]

[63] In response to the TWU's submission regarding the Full Bench retaining two clauses about ordinary hours, NatRoad contend that the Full Bench made no separate determination about two separate minimum wage rates, as was open to it.[59]

[64] NatRoad also submits that any determination of this matter that reversed what NatRoad argues is the status quo could then be instituted prospectively. They submit that to proceed otherwise might provide retrospective effect to the TWU position and therefore create regulatory risk as shown by the FWO submission.[60]

[65] We begin our consideration of this issue by commenting on two aspects of NatRoad's submission.

[66] The first concerns the decision of the *Award Modernisation* Full Bench. In our view that decision, and the passages upon which NatRoad relies, is of little assistance in the determination of the issue in contention.

[67] The *Award Modernisation* Full Bench make no express reference to the divisor issue and according to Mr Ryan (representing ARTIO) who was involved in those proceedings, the divisor issue was neither addressed in submissions nor raised by the Full Bench.

[68] The second aspect of NatRoad's submission upon which we wish to comment concerns the statement made in NatRoad's reply submission of 3 December 2019 (at [23]):

> 'An argument in the alternative which we proffer without prejudice is that this matter could be deferred with the status quo replicated (i.e. not include separate tables for oil distribution workers) at least until the TWU brings on evidence and proper merit arguments as was earlier foreshadowed. Any determination of this matter that reversed what NatRoad argues is the status quo could then be instituted prospectively. To proceed otherwise might provide retrospective effect to the TWU position and therefore create regulatory risk about a matter that has been in doubt, as shown inter alia via the FWO submission referred to in paragraph 17 of this submission.'

[69] We wish to make it clear that we are dealing with the issue in dispute as a matter of merit; we are not expressing a view on the proper construction of the current award. In such circumstances we fail to see how any decision we make could be said to 'provide retrospective effect to the TWU position', as contended by NatRoad.

[70] We have concluded that, as a matter of merit, the divisor should be 35. The weekly ordinary hours of oil distribution workers are 35 and we see no persuasive reason for not adopting that as the divisor. Indeed to adopt a divisor of 38 would have the effect of denying oil distribution workers one of the benefits of a 35 hour week.

[71] We also note that a 35 hour divisor sits conformably with the rostered days off provisions for oil distribution workers. Clause 14.6(a) of the exposure draft provides for a payment of 7 hours pay (or 7 hours extra annual leave) where an oil distribution employees' rostered day off falls on a public holiday. If a 38 divisor is adopted then such employees

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[59] NatRoad submission dated 3 December 2019 at para [20]

[60] NatRoad submission dated 3 December 2019 at para [23]

would receive less than one days' pay in these circumstances. Such an outcome seems incongruous.

[72] The variation determination will reflect a 35 divisor for oil distribution employees.

[73] The TWU raise five other issues in respect of this award.

(i) *Clause 11.6 Conversion of casual employment*

[74] The TWU refers to the *provisional* view of the Full Bench expressed at [2019] FWCFB 6894 at [81] in respect of the drafting of the term and supports the inclusion of a casual conversion clause in the Exposure Draft pending the resolution of issues associated with the drafting of the term.

[75] Consistent with the views expressed in [2019] FWCFB 6898 at [81] the draft variation determination will be amended to include the casual conversion clause in the current award. No party opposed this course.

(ii) *Clause 17.2 – Minimum rates – oil distribution workers*

[76] The TWU submits that tables C.4.3 and C.4.4 should be amended to include overtime provisions, as prescribed in clause 11.5.

[77] It does not seem to be contested that under this award casual employees are to be paid for all overtime worked at overtime rates. The employer parties sought an opportunity to comment on any amended tables.

[78] The TWU has filed amended C.4.3 and C.4.4 tables and these have been published on the AMOD website. Any interested party may comment on the TWU's proposed tables, by **4pm 17 January 2020**. All comments are to be sent to amod@fwc.gov.au.

(iii) *Clauses 11.5 and 23.1(b) – anomaly*

[79] The TWU submits that the interaction of clauses 11.5 and 23.1(b) of the exposure draft gives rise to an anomaly whereby casual employees who work overtime on a Sunday receive less than if they work ordinary hours on a Sunday.

[80] The issue raised does not arise from the translation of the current award terms into the exposure draft; the same issue arises under the current award (see clause 12.5(d) and 28.1(b)). We do not think it appropriate to deal with this issue in proceedings directed at the finalisation of exposure drafts and the conversion of these documents into variation determinations. The issue raised by the TWU can be the subject of an application to vary the award, after the award has been varied as a result of these proceedings.

(iv) *Schedule C2 – Full-time and part-time employees – ordinary and penalty rates*

[81] The TWU submits that the percentages in clause 23.2(a) and the footnote should be reflected in tables C.2.1, C.2.3 and C.2.5.

[82] There did not appear to be any opposition to the TWU's proposal – though the employer representatives sought an opportunity to comment on any variation to Schedule C2.

[83] The TWU has filed a document reflecting its proposed amendments to Schedule C2 which has been published on the AMOD website. Any interested party may comment on the TWU's proposal, by **4pm 17 January 2020**. All comments are to be sent to amod@fwc.gov.au.

(v) *Schedule C – Tables C.4.1, C.4.2, C.4.3, C.4.4, C.4.5 and C.4.6*

[84] The TWU submits that these tables should be amended to include provisions for the payment of overtime to casuals with the appropriate rates payable to casuals when working overtime on a Saturday or Sunday.

[85] As mentioned earlier, it does not seem to be contested that under this award casual employees are to be paid for all overtime worked at overtime rates. The employer parties sought an opportunity to comment on any amended tables.

[86] The TWU has filed amended C.4.1, C.4.2, C.4.3, C.4.4, C.4.5 and C.4.6 tables and these have been published on the AMOD website. Any interested party may comment on the TWU's proposed tables, by **4pm 17 January 2020**. All comments are to be sent to amod@fwc.gov.au.

5.3 *Transport (Cash in Transit) Award*

[87] In addition to some minor corrections Ai Group raise two issues.

(i) *Clause 21.8 Shift work rates – shiftworkers – afternoon shift*

[88] The table at clause 21.8 in the Exposure Draft, prescribes the rate payable for ordinary hours worked during an "afternoon shift (where continues for fewer than 5 consecutive afternoons)":

21.8 Shiftwork ~~allowances~~rates – shiftworkers

Shiftworkers must be paid the following shift allowances for all ordinary hours of shift worked during the following periods:

Shift	**Shift**	**Casual shift**
	% of ordinary hourly rate	
Afternoon shift		
Rotating afternoon shift	115	140
Permanently working afternoon shift	117.5	142.5
Afternoon shift (where continues for fewer than ~~five~~5 consecutive afternoons		
-first ~~three~~3 hours	150	175
-after ~~three~~3 hours	200	225
Night shift		
Rotating night shift	120	145
Permanently working night shift	130	155

Night shift (where continues for fewer than ~~five~~5 consecutive nights)		
-first ~~three~~3 hours	150	175
-after ~~three~~3 hours	200	225
Permanently working alternate night and afternoon shift:		
-when on afternoon shift	117.5	142.5
-when on night shift	130	155

[89] Clause 25.9(c) of the current award is the equivalent provision:

> '(c) Shiftworkers who work on an afternoon or night shift which does not continue for at least five consecutive afternoons or nights will be paid at the rate of time and a half for the first three hours and double time after that for each shift.'[61]

[90] Ai Group submit that the award clause, as opposed to the Exposure Draft, makes clear that the rate is payable where the *shift* does not continue for at least five consecutive afternoons and thus the entitlement to the higher rate is not contingent upon whether the employee works on the afternoon shift for at least five consecutive shifts.[62]

[91] To avoid ambiguity, Ai Group propose the following amendment to the description of the relevant afternoon shift in the Exposure Draft (noting the underlined):

> Afternoon shift (where the shift continues for fewer than 5 consecutive afternoons)[63]

[92] A similar amendment is proposed for clause 21.9:

> Night shift (where the shift continues for fewer than 5 consecutive nights)[64]

[93] No party opposed the proposed amendment. We agree with Ai Group and will amend the draft variation determination accordingly.

(ii) *Schedule A.1.2 Summary of hourly rates – ordinary hourly rate*

[94] With respect to schedule A.1.2 summary of hourly rates – ordinary hourly rate, Ai Group submits that the final sentence wrongly suggests that all applicable all-purpose allowances need to be added to the rates in the tables and contradicts schedule A.1.1 and the footnotes to the tables.[65]

[95] As such, Ai Group propose the final sentence be amended to (noting the underlined):

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[61] Ai Group submission, 27 November 2019 at [133].

[62] Ai Group submission, 27 November 2019 at [134].

[63] Ai Group submission, 27 November 2019 at [135]-[136].

[64] Ai Group submission, 27 November 2019 at [137].

[65] Ai Group submission, 27 November 2019 at [138].

> … Consistent with clause A.1.1, any additional all purpose allowances need to be added to the rates in the table where they are applicable.[66]

[96] No party opposed the proposed amendment. We agree with Ai Group and will amend the variation determination accordingly.

5.4 *Waste Management Award*

(i) *Schedule A.2.3 Full time and part time employees: Overtime*

[97] Parties were asked to advise whether the following text should be added to footnote 1 in schedule A.2.3:

> 'Payment for work on public holidays is in addition to any amount payable in respect of the weekly wage (see clause 27.5(b)).'

[98] No party supported the inclusion of the proposed text in footnote 1. We have decided not to include the proposed text in footnote 1.

(ii) *Clause 22.2 Annual leave*

[99] Clause 22.2 provides:

> 22.2 During a period of annual leave an employee will receive a loading calculated on the wage rate prescribed in clause 15—Minimum rates of this award. Annual leave loading payment is payable on leave accrued and taken but it is not payable on leave paid out on termination.
>
> The loading is as follows:
>
> (a) Day work
>
> Employees who would have worked on day work only had they not been on leave—**17.5%** or the relevant weekend penalty rates, whichever is the greater but not both.
>
> (b) Shiftwork
>
> Employees who would have worked on shiftwork had they not been on leave—a loading of **17.5%** or the shift loading (including relevant weekend penalty rates) whichever is the greater but not both.
>
> NOTE: Where an employee is receiving over-award payments such that the employee's base rate of pay is higher than the rate specified under this award, the employee is entitled to receive the higher rate while on a period of paid annual leave (see sections 16 and 90 of the Act).

[66] Ai Group submission, 27 November 2019 at [139].

[100] At the hearing on 17 December 2019 it was generally agreed that the second sentence in clause 22.2 be deleted. We agree and will delete the following sentence from clause 22.2 in the draft variation determination:

> 'Annual leave loading payment is payable on leave accrued and taken but is not payable on leave paid out on termination.'

6. All other Tranche 2 Awards – award specific issues

6.1 *Airline Operations—Ground Staff Award*

[101] Ai Group, the AMWU, AWU, TWU and Qantas submit that the tables in Schedule B that deal with overtime for shiftworkers incorrectly state that non-continuous shiftworkers receive time and a half for work performed on a Sunday[67]; the affected tables are B.2.4, B.3.4, B.4.4 and B.5.4.[68]

[102] It is common ground that the correct rate for work performed on a Sunday is double time for non-continuous shiftworkers, in accordance with clause 32.1(a)(ii) of the current Award. This subclause was recently inserted by the Full Bench in AM2018/15 as a result of resolving the substantive issues within the Award.[69]

[103] The Exposure Draft currently provides within each of the tables, under 'Shiftworkers (except continuous shiftworkers') the rates for the first two hours and after two hours for 'Monday to Sunday'. The AMWU and AWU propose that 'Monday to Sunday' be amended to 'Monday to Saturday' and a new column providing a rate of 200% for all hours worked on a Sunday to identify the correct rates.[70]

[104] Ai Group proposes to amend the tables at clauses B.2.4, B.3.4, B.4.4 and B.5.4 by:

- deleting the two columns under the heading 'Shiftworkers (except continuous shiftworkers); and
- amending the heading 'Day workers' to read 'Day workers and shiftworkers (except continuous shiftworkers).[71]

[105] Clause 24.1(a)(i) and (ii) of the draft variation determination provides payment for overtime, as follows:

> (i) for a continuous shiftworker the rate for working overtime is **200%** of the ordinary hourly rate; and
>
> (ii) for shiftworkers working on Sunday, the rate for working overtime is **200%** of the ordinary hourly rate.

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[67] AMWU submission, 27 November 2019 at [6].

[68] AMWU submission, 27 November 2019 at [6] and [9], Qantas submission, 26 November 2019 at 6.

[69] AMWU submission, 27 November 2019 at [7]; 4 Yearly Review of Modern Awards – Airline Operations Ground Staff Award 2010 [2019] FWCFB 5619 at [111]; PR712352.

[70] AMWU submission, 27 November 2019 at [9].

[71] Ai Group submission 27 November 2019 at [12]-[16]

[106] The variation has not been reflected in the rates of pay Schedules. The draft variation determination will be amended to reflect the terms of clause 24.1(a)(i) and (ii), as proposed by the parties and a new column inserted providing for 200% for all hours worked on a Sunday as proposed by the AMWU and AWU.

[107] A marked-up version of the changes we proposed to make to the tables at B.2.4, B.3.4, B4.4 and B.5.4 was set out at Attachment A to the *December 2019 Statement*. At the hearing on 18 December 2019 no party opposed the amendment of the draft determination in accordance with Attachment A. We will amend the variation determination accordingly.

[108] The AMWU also submit that the tables in Schedule B do not include overtime rates for casuals.[72] The AMWU continues to rely on their position that a table of overtime rates for casuals should be inserted into the relevant Schedule B tables,[73] however the AMWU notes that this matter may be dealt with by the Full Bench in AM2017/51.[74] Consistent with our general approach, the award will be varied by the Full Bench in AM2017/51. After the award has been varied the variation determination will be amended.

[109] Ai Group raises three other issues.

(i) *Schedule C.1.1*

[110] Ai Group submits that the clause numbers in Schedule C.1.1 should be amended to improve clarity, as follows:

- Disability allowance – excessive fumes, noise and dust etc: 20.3(b)(i)(A)
- Disability allowance – noise and dust to a limited degree: 20.3(b)(i)(B)

[111] The AMWU and AWU agree. We agree and will make the amendment suggested by Ai Group.

(ii) *Clause 10.3(a) Part time shiftworkers*

[112] Ai Group submits that the word 'on' should be inserted before 'guaranteed'.

[113] In reply, the AMWU submits that the word 'on' should be inserted before the word 'the', rather than before the word 'guaranteed', so that the clause reads:

> 'At the time of engagement or appointment of an employee as a shiftworker, the employer and the part time employee will agree in writing on the guaranteed minimum number of ordinary hours to be worked in a week.'

[114] The AWU and Ai Group agree with the AMWU's proposal. We will amend clause 10.3(a) in the draft variation determination accordingly.

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[72] AMWU submission, 27 November 2019 at [11].

[73] AMWU submission, 27 November 2019 at [12]; Transcript of proceedings 6 December 2016 at PN192

[74] AMWU submission, 27 November 2019 at [14].

(iii) *Clause 17.7(b) Shift penalty rates – weekends and public holidays*

[115] Ai Group submits that the word 'premiums' should be replaced with 'rates and allowances' in order to reflect the terminology adopted in clauses 17.3 to 17.6.

[116] In reply the AMWU submits that the proposed change is not necessary and that the current equivalent clause refers to 'shift premiums'. The AWU agrees with the AMWU.

[117] In the *December 2019 Statement,* consistent with the approach taken in the Tranche 1 matters, we expressed the *provisional* view that Ai Group's proposed amendment be adopted and the draft variation determination amended accordingly. At the hearing on 18 December 2019 no party opposed our *provisional* view. We confirm our *provisional* view and will amend the draft variation determination accordingly.

[118] The Qantas Group raise four additional issues.

(i) *Clause 4.2 Airline Operations industry definition* – Qantas reiterates its understanding that although the definition of airline operations industry has been amended, the amendments are not intended to alter the existing coverage of the award in any way.

We confirm that Qantas' understanding is correct. The amendments to the definition of airline operations are not intended to alter the coverage of the award in any way.

(ii) *Clause 18.7 Higher duties* – Qantas queries whether this clause is appropriately placed within the award.

The higher duties clause in this award is placed towards the end of clause 18, Minimum rates. The AMWU notes that this is consistent with the approach taken in other modern awards (see clause 20.2 of the draft variation determination in respect of the *Manufacturing and Associated Industries and Occupation Award).* We do not propose to adopt a different approach in respect of this award and we do not propose to vary the location of clause 18.7.

(iii) *Clause 24.1(c) Payment for working overtime* – Qantas submits that clause 24.1(c) deals with taking time off instead of payment for overtime and submits that it can be deleted given the overlap with clause 24.6. Ai Group raises the same point. The AMWU and AWU agree.

We agree with Qantas (and Ai Group) and will delete clause 24.1(c) (and renumber clause 24.1(d)) in the draft variation determination.

(iv) *Schedule B.5.3 Full time and part time store persons and logistics shiftworkers* - Qantas submits that the rates in Schedule B.5.3 'appear to be incorrect' and that the rates for 150%, 200% and 250% of the ordinary hourly rate (which is based on the minimum hourly rate) should reflect those in B.5.1. Ai Group and the AMWU submit that the rates in this table are incorrect and require recalculation. For example, 150% of the minimum hourly rates applying to

> Level 1 should be $31.08 and 200% of the minimum hourly rate applying to Level 1 should be $41.44. The AMWU and AWU agree.
>
> We agree with Qantas and Ai Group and will amend the rates accordingly.

6.2. *Air Pilots Award*

[119] Qantas raises three issues in respect of the draft variation determinations.

(i) *Table of facilitative provisions (clause 7.4)*

[120] Qantas submits that clause 14.1(b) and clause 20.3(b)(iii) should be added as additional cross-references in the table of facilitative provisions at clause 7.4.[75] The clauses are set out below:

> **14. Transfers**
>
> **14.1 Permanent**
>
> …
>
> (b) The pilot and the employer may mutually agree in a specific case that a shorter period of time represents adequate notice.
>
> **20.3 Expense-related allowances**
>
> **(b) Provision of transport and travel**
>
> (iii) Where an employer requires a pilot to layover the employer will provide accommodation and travel at no cost to the pilot. The accommodation and travel will be confirmed prior to departure from home base, or in aerial application operations, at the earliest practicable time or as otherwise agreed between the pilot and employer.

[121] We agree with Qantas and the two clauses set out above will be added to the table of facilitative provisions in clause 7.4; the draft variation determination will be amended accordingly.

(ii) *Schedule B.3.1*

[122] Qantas further submit that the words 'per tour of duty' in Schedule B.3.1 should be amended to revert to the wording in previous versions of the Exposure Draft which were 'for the tour of duty'. We agree and will make the change proposed.[76]

(iii) *Schedule F.3.2*

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[75] Qantas submission, 26 November 2019 at [3].

[76] Qantas submission, 26 November 2019 at [4].

[123] Qantas raise a question about the table in Schedule F.3.2(b) which includes a row for 'daily travel allowance' and submit that they are unsure what this allowance applies to and indicated that they would confer with the other parties before the hearing. At the hearing on 18 December 2019 Qantas advised that they had discussed the issue with the AFAP and it was agreed that the words 'daily travel allowance' in Schedule F.3.2(b) be replaced with 'daily travelling allowance.' We agree and will amend the draft variation determination accordingly.

[124] We note that there are a number of substantive issues currently referred to another Full Bench (AM2018/14). Clause 13 (Training – Classification) and Schedule B (Classification, Minimum Salaries and Additions to Salaries Regional Airlines) will be the subject of further submissions in those proceedings.

6.3 *Alpine Resorts Award*

[125] The AWU submits that the words "no more than 38 hours per week" in clauses 10.1(b) and 15.3 should be amended to "less than 38 hours per week". AWU submits that if the variation is not made, a part-time employee can arguably work an average of 38 ordinary hours per week. It is submitted that this change is consistent with what was substantively agreed between the AWU and the Australian Ski Areas Association earlier in the award review.

[126] Clauses 10.1(b) and 15.3 provide:

> **10.1 A part-time employee:**
>
> (b) is engaged to work an average of at least 8 and no more than 38 hours per week over a work cycle of 4 weeks;
>
> **15.3** The ordinary hours of part-time employees will average at least 8 and no more than 38 hours per week over a maximum work cycle of 4 weeks.

[127] In the *December 2019 Statement* we expressed the *provisional* view that the draft variation determination be amended, as proposed by the AWU. At the hearing on 18 December 2019 there was no opposition to our *provisional* view and the AWU indicated that the Australian Ski Areas Association supported the proposed change.[77] We confirm our *provisional* view and will amend the draft determination accordingly.

6.4 *Architects Award*

[128] The ACAA submit that a further amendment should be made to the table at clause 13.1 as follows:[78]

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[77] Subsequently confirmed by email

[78] ACAA submission, 27 November 2019 at page 1

Classification	Minimum annual rate (full-time employee)	Minimum weekly rate (full-time employee)	Minimum hourly rate (full-time and part-time employee)

[129] We agree with the addition of (full time employee) under the heading 'Minimum annual rate' and will amend the draft variation determination accordingly.

[130] In the December 2019 Statement we expressed the *provisional* view that the other proposed change be rejected. The minimum hourly rate column applies to full-time, part-time and casual employees (see clause 10). At the hearing on 18 December 2019 the ACAA did not contest our *provisional* view but proposed that a reference to casual employees also be inserted in the heading dealing with the minimum hourly rate. We agree and will amend the draft variation determination accordingly.

[131] The balance of the submissions made by the ACAA relate to the issues before the substantive issues full bench (AM2018/16). That Full Bench issued a decision in this matter on 12 September 2019 which attached a draft determination.[79] Interested parties then had the opportunity to file submissions. We do not propose to deal with those issues as part of the process of finalising the Exposure Drafts. The Exposure Draft will be updated when the AM2018/6 Full Bench issues a final variation determination.

6.5 *Asphalt Industry Award*

[132] The AWU raises three issues.

(i) *Clause 19.2*

[133] The AWU submits that an additional row should be added to the table at clause 19.2 for overtime work on a public holiday with a 250% rate and a four-hour minimum engagement. The proposed change is said to reflect the entitlement in clause 28.3 of the current award.

[134] The table at clause 19.2 deals with overtime rates for employees other than shiftworkers and states:

19.2 Overtime rates for employees other than shiftworkers

Where an employee works overtime the employer must pay to the employee the overtime rates as follows:

For overtime worked on	Overtime rate % of ordinary hourly rate or casual ordinary hourly rate	Minimum payment

[79] [2019] FWCFB 6138

For overtime worked on	Overtime rate % of ordinary hourly rate or casual ordinary hourly rate	Minimum payment
Monday to Friday—first 2 hours	150	–
Monday to Friday—after 2 hours	200	–
Saturday—first 2 hours	150	4 hours
Saturday—after 2 hours	200	4 hours
Sunday all day	200	4 hours

See Schedule A – Summary of Hourly Rates of Pay for a summary of hourly rates of pay including overtime and penalties.

See clause 20.5 for overtime rates for shiftworkers.

[135] In reply, Ai Group does not oppose the insertion of an additional row dealing with public holiday rates but submits that the reference to a 4 hour minimum payment would constitute a substantive change,:

> 'Clause 28.3 of the award requires a 4 hour minimum for any work performed on a public holiday, regardless of whether it constitutes ordinary hours or overtime. Moreover, an employee is not entitled to a 4 hour minimum payment in respect of ordinary hours and an additional 4 hour minimum payment in respect of overtime worked on a public holiday, in circumstances where an employee works both ordinary hours and overtime on a public holiday.
>
> Accordingly, we suggest that in the "minimum payment" column, the following words are inserted: "see clause 26.3". Clause 26.3 provides the minimum payment period in the same terms as the current clause 28.3.'[80]

[136] At the hearing on 18 December 2019 the AWU agreed to Ai Group's proposal that in the 'minimum payment' column of clause 19.2 the words 'see clause 26.3' be inserted to line up with the addition of the public holiday provision proposed by the AWU. We agree and will amend the draft variation determination accordingly.

(ii) *Payment for work on a public holiday*

[137] The AWU submits that the 'Payment for work on a public holiday' clauses in the current award and the Exposure Draft are not consistent. Clause 28.3 of the current award states:

> '**Payment for work on a public holiday**
>
> If an employee works on any of the public holidays arising from this clause or any day substituted for such public holidays the employee will be paid at the rate of double

[80] Ai Group reply submission, 9 December 2019 at [13]-[15]

> time and one half of their ordinary rate of pay, with a minimum payment of four hours at such rate.'

[138] Clause 26.2 of the Exposure Draft states:

> '**Payment for working public holidays**
>
> Where a full-time or part-time employee works ordinary hours on a public holiday the employee will be paid 250% of the ordinary hourly rate for all time worked on the public holiday. A casual employee who works on a public holiday will be paid 250% of the casual ordinary hourly rate.'

[139] The AWU submits that clause 28.3 in the current award does not confine the 250% penalty rate to ordinary hours on public holidays – it applies equally to overtime[81] and on that basis that a public holiday column should be added to the table at shedule A.2.2 with a penalty rate of 250%.[82]

[140] In reply, Ai Group submit that it is not clear whether the AWU is proposing a change to clause 26.2 but note that the change it has proposed to clause 19.2 would address its concern. Ai Group also notes that an alternate way of addressing this issue would be to simply delete the words 'ordinary hours' from clause 26.2, in lieu of making any change to clause 19.2.[83]

[141] During the course of the hearing on 18 December 2019 the AWU and Ai Group agreed to a resolution of this issue by amending clause 11.4(a)(i) and (ii) to delete 'minimum hourly rate' and insert 'ordinary hourly rate.'[84] We agree and will amend the draft variation determination accordingly.

(iii) *Clauses A.2.3 and A.3.3*

[142] The AWU submits that a Sunday penalty rate column has been omitted from the table at clauses A.2.3 and A.3.3 and that the correct penalty rate is 200%.[85]

[143] In reply, Ai Group does not oppose the changes to A.2.3 and A.3.3.[86]ABI agrees with the submissions of Ai Group and the AWU.

[144] We will make the changes to A.2.3 and A.3.3 proposed by the AWU and amend the draft variation determination.

6.6 *Cleaning Services Award*

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[81] AWU submission 27 November 2019 at [9]

[82] AWU submission 27 November 2019 at [10]

[83] Ai Group reply submission, 9 December 2019 at [16]-[17]

[84] The AWU subsequently filed a note setting out the position agreed to by the AWU and Ai Group

[85] AWU submission 27 November 2019 at [11]

[86] Ai Group reply submission, 9 December 2019 at [18]

[145] In addition to correcting minor errors Ai Group raises an issue with the definition of 'minimum hourly rate' in clause 2.[87]

[146] Ai Group submit that the words 'for a full-time employee' should be removed from the definition of minimum hourly rate.[88] The definition is as follows:

> **minimum hourly rate** means the minimum hourly rate for a full-time employee specified in column 3, in accordance with the employee classification specified in column 1, of Table 2—Minimum rates.

[147] Ai Group submits that the purpose of the words 'for a full time employee' is unclear and they are potentially confusing, in particular:

- it is unclear whether they have the effect of limiting the application of the term to full time employees, which would be an unintended outcome of the definition. The term 'minimum hourly rate' is used throughout the Exposure Draft in respect of entitlements for full time, part time and casual employees;
- Table 2 at clause 15 does not refer to or confine the entitlement to the hourly rate there prescribed to full time employees.

[148] In reply the UWU opposes the deletion of the words 'for a full time employee' and submits:

> 'Whilst Table 2 at clause 15 includes hourly rates, those hourly rates are not applicable to part-time or casual employees. Part time employees are entitled to a 15% allowance in accordance with clause 10.2 and casual employees are entitled to a loading of 25% in accordance with clause 11.3. Deleting the words 'for a full time employee' in the definition of the minimum hourly rate may mislead employers and employees as to the correct payment for part time and casual employees.'[89]

[149] Contrary to the UWU's submissions, we see no difficulty with the deletion of the words 'for a full-time employee' as the rates for part time and casual employees under this award are plainly based on the minimum hourly rate. We will amend the draft variation determination as proposed by Ai Group.

[150] During the course of the hearing on 18 December 2019 the UWU submitted that this award is 'replete with … confusion'.[90] The appropriate means of addressing perceived deficiencies in a modern award is by making an application to vary the award. We note that over the course of the Review, since 2014, United Voice, one of the predecessor organisations of the UWU, made no substantive claims to vary this award. If UWU contends that the award is not meeting the modern awards objective it is open to it to file an application under s 158.

6.7 *Commercial Sales Award*

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[87] We note that Ai Group withdrew its earlier submission proposing an amendment to clause 4.5(d)

[88] Ai Group submission, 27 November 2019 at [27]

[89] UWU submission 9 December 2019 at [3]

[90] Transcript of Proceedings, 18 December 2019 at PN160

[151] Ai Group submit that the terms 'minimum hourly rate' and 'applicable minimum hourly rate set out in clause 15–Classifications and minimum rates' have been used inconsistently and therefore have the potential to cause confusion.

[152] In reply, ABI submits (contrary to Ai Group) that the use of both 'minimum hourly rate' and 'applicable minimum hourly rate' is not confusing but did not oppose the references to 'minimum – hourly rate' identified by Ai Group being varied to 'applicable minimum hourly rate', for the sake of consistency.

[153] In the *December 2019 Statement* we expressed the *provisional* view that no amendment is necessary. At the hearing on 18 December 2018 no party challenged our *provisional* view and Ai Group did not press its submission.

6.8 *Concrete Products Award*

[154] The Commission posed the following question at clause 11.3 of the tracked Exposure Draft published on 14 October 2019:

> 'Parties are asked to confirm whether the cross reference in clause 11.3(b) to clause 11.3(c) is correct'

[155] The AWU submits that the cross-reference in clause 11.3(b) to clause 11.3(c) is incorrect and that it should be amended to 'clause 11.3(b).[91] Ai Group agrees. We will amend the draft variation determination accordingly.

[156] The AWU raises three additional points.

> (i) *Clause 21.9(b)(iii) Sundays and public holidays – shiftworkers on other than continuous shift*

[157] The AWU submits that the 'Shiftworkers on other than continuous work' subclauses at clause 21.9(b)(iii) of the Exposure Draft and the corresponding clause of the current award are inconsistent.

[158] Clause 25.9(c) of the current award is drafted as follows:

> 'Where shifts commence between 11.00 pm and midnight on a Sunday or a public holiday, the time worked before midnight will not entitle the employee to the Sunday or public holiday rate, provided that the time worked by an employee on a shift commencing before midnight on the day preceding a Sunday or public holiday and extending into a Sunday or public holiday will be regarded as time worked on such Sunday or public holiday.'

[159] Clause 21.9(b)(iii) of the Exposure Draft is under the heading 'Shiftworkers on other than continuous work' as follows:

> 'Where shifts commence between 11.00 pm and midnight on a Sunday or a public holiday, the time worked before midnight will not entitle the employee to the Sunday or public holiday rate, provided that the time worked by an employee on a shift commencing before midnight on

[91] AWU submission 27 November 2019 at [12].

the day preceding a Sunday or public holiday and extending into a Sunday or public holiday will be regarded as time worked on such Sunday or public holiday.'

[160] The AWU submits the provision in the current award applies equally to continuous and non-continuous work and to maintain this outcome, clause 21.9(b)(iii) of the Exposure Draft should be renumbered as clause 21.9(c) and a consequential change made to the next clause.[92]

[161] Ai Group agrees with the AWU. We will amend the draft variation determination accordingly.

(ii) *Schedule B.3.2*

[162] The AWU submits the heading in the table in schedule B.3.2 be amended as follows: (added words underlined):

'Monday to Sunday and public holidays'.[93]

[163] Ai Group agrees with the AWU. We will amend the draft variation determination accordingly.

(iii) *Schedule B.3.3*

[164] The AWU submits that a 'Public holiday' column should be added to the table in schedule B.3.3 with a rate of 200%.[94]

[165] Ai Group does not oppose the AWU's submission and notes that the rates should be the same as those set out in the column currently furthest to the right; the AWU agrees with the latter point. We agree and will amend the draft variation determination accordingly.

6.9 *Contract Call Centres Award*

[166] In addition to some minor errors Ai Group raises an issue in relation to clauses B.1.1 and B.2.1.

[167] Schedule B.1.1 states:

[92] AWU submission 27 November 2019 at [14].

[93] AWU submission 27 November 2019 at [15].

[94] AWU submission 27 November 2019 at [16].

B.1.1 Full–time and part–time adult employees—all employees—ordinary and penalty rates

	Ordinary hours	Monday to Friday	Saturday	Sunday		Public holiday[1]
		Outside spread of ordinary hours		7 am—7 pm	12 am—7 am & 7 pm—12 am	
	% of minimum hourly rate					
	100%	125%	125%	150%	175%	250%
	$	$	$	$	$	$
Customer Contact Trainee	20.82	26.03	26.03	31.23	36.44	52.05
Clerical and Administration Officer Level 1	20.82	26.03	26.03	31.23	36.44	52.05
Customer Contact Officer Level 1	21.54	26.93	26.93	32.31	37.70	53.85
Clerical and Administration Officer Level 2	21.54	26.93	26.93	32.31	37.70	53.85
Customer Contact Officer Level 2	22.70	28.38	28.38	34.05	39.73	56.75
Clerical and Administration Officer Level 3	22.70	28.38	28.38	34.05	39.73	56.75
Principal Customer Contact Specialist	24.14	30.18	30.18	36.21	42.25	60.35
Customer Contact Team Leader	24.77	30.96	30.96	37.16	43.35	61.93
Clerical and Administration Officer Level 4	24.77	30.96	30.96	37.16	43.35	61.93
Principal Customer Contact Leader	26.55	33.19	33.19	39.83	46.46	66.38
Clerical and Administration Officer Level 5	26.55	33.19	33.19	39.83	46.46	66.38
Contract Call Centre Industry Technical Associate	28.70	35.88	35.88	43.05	50.23	71.75

[1] Does not apply to designated shiftworkers performing work during afternoon and night shifts.

[168] Ai Group submits that the heading of the second column ("Ordinary hours") in the tables in clauses B.1.1 and B.2.1 be replaced with "Monday to Friday, Within spread of ordinary hours" [95] on the basis that this more accurately reflects the circumstances in which the rate prescribed is payable and better distinguishes those rates from the rates that appear in the following column.

[169] At the hearing on 18 December 2019 the CPSU did not oppose the changes proposed by Ai Group.

[170] We agree with both suggested changes and will amend the draft variation determination accordingly.

6.10 *Dry Cleaning and Laundry Industry Award*

[171] The CFMMEU – Manufacturing Division submits that it may be clearer if all the shiftwork rates for ordinary hours in clauses C.1.2 and C.1.3 are combined into a single table. It notes that this approach has been taken for casual shiftwork rates in Schedule C.3.5 and C.3.6.[96]

[172] We agree with the CFMMEU – Manufacturing Division and in the *December 2019 Statement* we expressed the *provisional* view that tables C.1.2 and C.1.3 be combined as set out below:

C.1.2 Full-time and part-time shiftworkers—ordinary and penalty rates

	Ordinary hours	Morning, afternoon or night shift	Permanent night shift	Saturday – ordinary hours worked before midday	Saturday – ordinary hours worked after midday	Public holiday	Non-successive morning, afternoon or night shift – dry cleaning[1]	
							First 3 hours	After 3 hours
	% of minimum hourly rate							
	100%	115%	130%	125%	150%	250%	150%	200%
	$	$	$	$	$	$	$	$
Dry cleaning employee Level 1	19.49	22.41	25.34	24.36	29.24	48.73	29.24	38.98
Dry cleaning employee Level 2	20.06	23.07	26.08	25.08	30.09	50.15	30.09	40.12
Dry cleaning employee Level 3	20.34	23.39	26.44	25.43	30.51	50.85	30.51	40.68
Dry cleaning employee	21.54	24.77	28.00	26.93	32.31	53.85	32.31	43.08

[95] Ai Group submission, 27 November at [46]-[47].

[96] AWU submission 27 November 2019 at [17].

	Ordinary hours	Morning, afternoon or night shift	Permanent night shift	Saturday – ordinary hours worked before midday	Saturday – ordinary hours worked after midday	Public holiday	Non-successive morning, afternoon or night shift – dry cleaning[1]	
							First 3 hours	After 3 hours
	% of minimum hourly rate							
	100%	115%	130%	125%	150%	250%	150%	200%
	$	$	$	$	$	$	$	$
Level 4								
Dry cleaning employee Level 5	22.70	26.11	29.51	28.38	34.05	56.75	34.05	45.40

[1] **Non successive morning, afternoon or night shift – dry cleaning** means an employee in a dry cleaning workplace who works on any morning, afternoon or night shift which does not continue for a period of 3 successive mornings, afternoons or nights (see clause 25.6)

[173] At the hearing on 18 December 2019 there was no opposition to our *provisional* view. We confirm that view and will combine table C.1.2 and C.1.3 as set out above. The insertion of this table will require consequential numbering within C.1. The draft variation determination will be amended accordingly.

6.11 *Educational Services (Schools) General Staff Award*

[174] In the *14 October 2019 decision* [97] we set out an issue that had been raised by ISV as follows:

> [151] Independent Schools Victoria (ISV) makes a submission in relation to the definition of a 'night shift' in clause 15. In short, ISV is of the view that the multiple spreads of ordinary hours in clause 9.5 of the Award and definition of a 'night shift', in clause 15.1(c) as finishing at 6am, irrespective of the starting time of the relevant spread of ordinary hours, has created a situation where an overnight shift cannot be defined as a night shift in some circumstances.
>
> [152] ISV proposes a variation to clause 15.1(c) as follows:
>
> '(c)' night shift is a shift which is not a day shift and which finishes after midnight and at or before the commencement of the relevant spread of ordinary hours identified in clause 9.5, which may be varied by clause 9.6.'
>
> [153] The IEU has not yet responded to ISV's submission; the Commission will write to the IEU inviting them to do so. If the proposal is contested it will be referred to a separate, substantive issues, Full Bench.

[175] On 5 December 2019, the IEU responded to the ISV's submission. The IEU supported the ISV submission and undertook to provide a draft determination giving effect to the changes by 9 December 2019.[98]

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[97] [2019] FWCFB 6935

[176] A draft determination was filed by the IEU on 12 December 2019. The draft determination states, relevantly:

> '1. By replacing clause 22.1(c) with the following clause:
>
> > '**(c) night shift** is a shift which is not a day shift and which finishes after midnight and at or before the commencement of the relevant spread of ordinary hours identified in clause 14.5.'[99]

[177] At the hearing on 18 December 2019 there was no opposition to varying the draft variation determination to incorporate the change proposed in the IEU's draft determination. We will amend the draft variation determination accordingly.

[178] During the hearing on 18 December 2019 the IEU drew our attention to the fact that the exposure draft and draft variation determination had not incorporated a series of amendments made to the award by a Full Bench of the Commission on 21 December 2015. These amendments are set out in PR575283.

[179] We advised the parties that we will issue a revised exposure draft and draft variation determination in January 2020. Interested parties will have an opportunity to comment on the revised documents and we will issue a Statement setting out the process for finalising the variation determination in respect of this award.

[180] In light of the amendments to be made to the exposure draft and draft variation determination, the Associations of Independent Schools (the Associations) withdrew their claims in respect of the formula in clause 12.2 and the unpaid meal break provisions. Further, at a conference before Deputy President Clancy on 18 December 2019 the parties agreed to some amendments to the example at the end of clause 12 and ABI withdrew its other proposed amendments to clause 12.2. The agreed variations to the example at the end of clause 12 are as follows:

> Brad works 38 hours per week during term weeks and is classified at Level 3.1. The annual rate of pay for a full-time employee working 52.18 weeks of the school year is $45,031.
>
> Brad is required to take leave without pay during non-term weeks.
>
> As there are 39.4 term weeks in the school year, Brad is required to work 39.4 term weeks.
>
> The formula in clause ~~7.2(b)~~12.2(b) is:
>
> $$A = C \times \frac{\text{(working weeks + 4 weeks annual leave)}}{52.18}$$

---

[98] IEU submission, 5 December 2019

[99] The cross references in the original draft determination were amended during the course of the hearing on 18 December 2019, see Transcript 18 December 2019 at [389]

Calculating the adjusted annual salary:

Step 1: (working weeks + 4 weeks annual leave) = 39.4 + 4 = 43.4

Step 2: 43.4 / 52.18 = 0.8317

Step 3: $45,031 x 0.8317 = $37,452

Adjusted annual salary = $37,452

[181] There are two outstanding issues in respect of this award.

(i) *Clause 21.3 Reasonable additional hours for part time employees*

[182] In relation to clause 21.3 Reasonable additional hours for part-time employees, the Associations agree that clause 21.3 of the Exposure Draft is consistent with clause 22.4 of the current award[100] but submit that clause 22.4 of the current award could be more explicit when it comes to the maximum ordinary hours that can be worked in a week.[101]

[183] Clause 21.3 of the Exposure Draft currently provides:

21.3 Reasonable additional hours – part-time employees

(a) An employer may require a part-time employee to work reasonable additional hours in accordance with clause 21.3.

(b) The employee will be paid for all additional hours at the applicable casual hourly rate for all hours worked that:

(i) fall within the applicable daily spread of hours in clause 14.5;
(ii) do not result in the employee working more than 8 hours on that day; and
(iii) do not result in an employee whose hours are averaged, to work more than the allowed maximum weekly ordinary hours during the averaging period.

(c) The employee will be paid for all additional hours at the applicable overtime rate in clause 21—Overtime for all hours worked that:

(i) are outside the applicable daily spread of hours in clause 14.5; and
(ii) result in the employee working more than 8 hours on that day, or
(iii) result in an employee whose hours are averaged, to work more than the allowed maximum weekly ordinary hours during the averaging period.

(d) Where additional hours are worked on a day the employee is already attending for work, the minimum casual engagement of 2 hours will not apply.

(e) Additional hours worked by a part-time employee in accordance with clause 21.3 do not accrue leave entitlements under this award or the NES.

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[100] Associations of Independent Schools submission, 27 November 2019 at [19].

[101] Associations of Independent Schools submission, 27 November 2019 at [20].

[184] The Associations submit that in the interests of assisting employers and employees to interpret the provision surrounding reasonable additional hours, clause 21.3(b)(iii) of the Exposure Draft be replaced with:

> **cl.21.3(b)**
>
> **(iii)** do not result in an employee:
>
> • working more than the allowed maximum weekly ordinary hours;
>
> • working more than the allowed maximum weekly ordinary hours during the averaging period, where the employee's hours are averaged.[102]

[185] The IEU agrees with the Associations proposal to vary clause 21.3.

[186] In the *December 2019 Statement* we expressed the *provisional* view that the proposed amendment be made. However, as we indicated to the parties during the course of the hearing on 18 December 2019, we have given the matter further thought and have formed the view that the expression 'the allowed maximum weekly ordinary hours' in the proposed amendment should be replaced by '38 hours per week', to provide greater clarity. Clause 21.3(b) will now read:

> '(iii) do not result in an employee:
>
> - working more than 38 ordinary hours per week; or
> - working more than an average of 38 ordinary hours per week during the averaging period in which the employee's hours are averaged.'

[187] Interested parties may comment on the proposed variation to clause 21.3(b) in the course of responding to the revised exposure drafts and draft variation determination.

(ii) *Schedule C.2.1 Expense related allowances*

[188] ABI submits that the words "an amount of up to" in schedule C.2.1 should be deleted.[103]

[189] The uniform/protective clothing allowance and laundry allowances payable under clause 19.3(c) are subject to a weekly maximum of $6.00 and $1.50 respectively. The summary table in scheduleC.2.1 describes the weekly cap for the uniform/protective clothing allowance as:

> 'Uniform/protective clothing allowance—paid with laundry allowance—Maximum per week—an amount of up to [$6.00 per week].'

[190] Similarly, the laundry allowance (when paid in addition to the uniform/protective clothing allowance) is described as:

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[102] Associations of Independent Schools submission, 27 November 2019 at [22].

[103] ABI submission, 27 November 2019 at [28]-[32].

> 'Laundry allowance—additional to uniform/ protective clothing allowance—Maximum per week—an amount of up to [$1.50 per week].'

[191] ABI submits that the allowance cap can accurately be expressed as either a "maximum per week" or "an amount of up to", but it cannot be both. The words "an amount of up to" should be removed in rows containing the maximum weekly laundry and Uniform/protective clothing allowances.[104]

[192] ABI also submits that the words "an amount of up to" is erroneous where it appears in schedule C.2.1 in the row that provides a daily laundry allowance where the cost of the uniform is reimbursed by the employer. ABI submits that the allowance is fixed at a rate of $0.30 per day.[105]

[193] In reply, the IEU agrees with ABI's submission and its proposed wording. In the December 2019 Statement we expressed the *provisional* view that the amendments proposed by ABI be adopted. At the hearing on 18 December 2019 no party opposed our *provisional* view. We confirm our *provisional* view and will amend the draft variation determination as proposed by ABI.

[194] In a submission received on 5 December 2019, the Federation of Parents and Citizens Associations of NSW (Federation) seek to vary the coverage clause of the award.

[195] The Federation submits that the following amendments should:

> 4.1 This industry award covers employers and Parents and Citizens Association employers in the school education industry throughout Australia and their employees employed in the classifications contained in Schedule A—Classifications to the exclusion of any other modern award.

[196] It is also proposed that a definition of Parents and Citizens Association employer should then be inserted as follows:

> **'Parents and citizens association employer** means an incorporated or not incorporated, not-for-profit, school-based organisation consisting of parents, teachers and interested parties, established under the requisite State Education Act, for the purpose of supporting a school for the benefit of the school's students.'

[197] In reply, the IEU submits that the Federation seek a significant variation to the award and 'if the Commission is minded to deal with this issue it should, as a matter of fairness, be referred to a separate Full Bench and a hearing programmed for directions'.[106]

[198] ABI also notes that the change in coverage proposed 'would be substantive and fall outside of the intended scope of the technical and drafting review of Exposure Drafts.'[107]

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[104] ABI submission, 27 November 2019 at [31].

[105] ABI submission, 27 November 2019 at [35].

[106] IEU reply submission 9 December 2019 at [10]

[107] ABI reply submission 9 December 2019 at [19]

[199] The Federation seek a significant variation to the award and (as noted by the IEU) it does so more than 2 years after the Commission issued directions requiring any party seeking a substantive change to file proposals and more than 12 months after the last of those proposals was dealt with by the Commission.

[200] We do not propose to deal with Federation's proposal as part of these Tranche 2 proceedings. The proposal will be referred to a separate Full Bench and the matter will be programmed for a hearing in due course.

6.12 *Gas Industry Award*

[201] In addition to some minor errors Ai Group raises an issue with respect to schedule C.1.1 Wage-related allowances – Availability duty. Ai Group suggests that after '$224.25', the Commission insert '(or part thereof)' to properly reflect the bracketed element of clause 17.3(a) of the Exposure Draft. The AWU agrees.

[202] We note that the availability allowance in clause 17.3(a) is '$224.25 per week (or per day on a pro rata basis where an employee is required for less than a week)'. We agree with Ai Group and will amend C.1.1 in the draft variation determination as proposed by Ai Group.

[203] We also note that clause 14.1 Meal Breaks is the subject of separate proceedings in AM2018/10 (see [2019] FWCFB 4559). Once the other Full Bench issues its determination varying the award interested parties will be given an opportunity to comment on the terms in which that change is reflected in the Exposure Draft and draft variation determination.

6.13 *Higher Education Industry—General Staff—Award*

[204] The Go8 rely on their submissions filed in the Overtime for Casuals matter,[108] in relation to clause 12 and 22 and the rates of pay for casual staff in Schedule B and recognise their submissions will be considered by that Full Bench.[109]

[205] As noted by the Go8 the pre-existing casual conversion clauses will not be redrafted.[110]

6.14 *Hospitality Industry (General) Award*

[206] There are two issues in respect of this award.

(i) *Clause 29.3(a)*

[207] Clause 29.3 of the Exposure Draft currently states:

(a) Clause 29.3 applies where more than one penalty rate would be payable for hours worked at a particular time. The employer must pay the employee the highest of any penalty rates applicable.

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[108] Group of Eight Universities submission, 28 October 2019 filed in the Overtime for Casuals matter

[109] Group of Eight Universities submission, 27 November 2019 at [4].

[110] Group of Eight Universities submission, 27 November 2019 at [5].

(b) However, any penalty payable under clause 16 – Breaks is payable in addition to the penalty rate payable in accordance with clause 29.3(a).

[208] ABI submit that that the last sentence of clause 29.3(a) is not clear and should be re-drafted to more clearly articulate how the applicable penalty rate is to be determined.[111] ABI propose that the entirety of clause 29.3 be re-drafted as follows:

'(a) Clause 29.3 applies where more than one penalty rate would be payable for hours worked at a particular time.

(b) Subject to clause 29.3(c), where more than one penalty rate would be payable for hours worked at a particular time, the employer must pay the employee the highest applicable penalty rate, but no other applicable penalty rate is payable.

(c) However, any penalty payable under clause 16—Breaks is payable in addition to the penalty rate payable in accordance with clause 29.3(b).'[112]

[209] At the hearing on 18 December 2019 the AHA proposed the following to replace clause 29.3:

(a) Clause 29.3 applies where more than one penalty rate would be payable for hours worked at a particular time.

(b) Subject to clause 29.3(c), where more than one penalty rate would be payable for hours worked at a particular time, the employer must pay the employee the highest applicable penalty rate, but no other applicable penalty rate is payable.

(c) ~~However, any~~ Where applicable, the penalty payable under clause 16 – Breaks is payable in addition to the penalty rate payable in accordance with clause 29.3(b).

[210] ABI agree to the AHA's proposal and the UWU did not oppose the proposed variation.

[211] We agree with the AHA's proposed variation to clause 29.3 and will amend the draft variation determination accordingly.

(ii) *Clause 16.2*

[212] On 27 November 2019, the AHA made an application[113] to vary clause 16.2 to clarify the meal break entitlements. The AHA seeks to delete the heading of column 1 in Table 2 in clause 16.2 of the Exposure Draft and the following inserted in its place: "Column 1 Ordinary hours worked per shift". The basis for the variation is to provide clarity and remove ambiguity as to the interaction between the break entitlements set out in clause 16.2 and the additional

[111] ABI submission, 27 November 2019 at [40].

[112] ABI submission, 27 November 2019 at [41].

[113] AHA application, 27 November 2019

break entitlements set out in clause 16.7. The AHA submit that a similar amendment was accepted by a Full Bench in the *Restaurant Industry Award 2010* (see [2019] FWCFB 7035).

[213] Clause 16 of the Exposure Draft states:

> **16. Breaks**
>
> 16.1 Clause 16 deals with meal breaks and rest breaks and gives an employee an entitlement to them in specified circumstances.
>
> 16.2 **Frequency of breaks** – An employee who works the number of hours in any one shift specified in column 1 of Table 2 – Entitlements to meal and rest break(s) is entitled to a break or breaks as specified in column 2.
>
> **Table 2 – Entitlement to meal and rest break(s)**

Column 1 Hours worked per shift	Column 2 Breaks
More than 5 hours and up to 6	Elective unpaid meal break of up to 30 minutes in accordance with clause 16.4—Request for unpaid meal break.
More than 6 hours and up to 8	An unpaid meal break of no less than 30 minutes (to be taken after the first 2 hours of work and within the first 6 hours of work).
More than 8 hours and up to 10	An unpaid meal break of no less than 30 minutes (to be taken after the first 2 hours of work and within the first 6 hours of work). One 20 minute paid rest break (may be taken as two 10 minute paid rest breaks).
More than 10 hours	An unpaid meal break of no less than 30 minutes (to be taken after the first 2 hours of work and within the first 6 hours of work). Two 20 minute paid rest breaks.

> 16.3 When the employer rosters an employee's breaks, they must make all reasonable efforts to ensure that breaks are spread evenly across the employee's shift.
>
> 16.4 **Request for unpaid meal break**
>
> (a) An employee working a shift of more than 5 and up to 6 hours who elects to take an unpaid meal break must request the break in writing no later than the start of their shift. The employer must not unreasonably refuse the employee's request.
>
> (b) A request under ~~paragraph (a)~~clause 16.4(a) applies to all shifts of more than 5 hours worked by that employee unless otherwise agreed between the employee and the employer.
>
> (c) The arrangement may be reviewed at any time.
>
> 16.5 **Employer to pay higher rate if break not allowed**
>
> If, during an employee's shift of more than 6 hours, the employer does not allow the employee to take an unpaid meal break, then the employer must pay the employee at the rate that applies under clause 16.6:
>
> (a) from 6 hours after the employee started work on that shift;
>
> (b) until either the employee is given a break or the shift ends.

16.6 If an employee is not allowed to take an unpaid meal break in accordance with clause 16.2 during a shift of more than 6 hours, the employer must pay the employee 50% of the employee's ordinary hourly rate extra from the end of 6 hours after starting work until either the employee is allowed to take the break or the shift ends.

EXAMPLE Mary is a full-time employee whose ordinary hourly rate is $20.00 an hour. She is working an 8 hour shift. Under Table 2—Entitlements to meal and rest break(s), she is entitled to "an unpaid meal break of no less than 30 minutes (to be taken after the first 2 hours of work and within the first 6 hours of work)". If she has been working for 6 hours and has not been allowed a break, then she becomes entitled to be paid the higher rate under clauses 16.5 and 16.6.

If the shift is a normal mid-week shift on which Mary is paid her ordinary hourly rate of $20.00, then from when she has worked 6 hours until she is allowed to take a break or her shift ends, the employer is to pay her:

(a) her ordinary hourly rate of $20.00;

(b) plus 50% of her ordinary hourly rate, which is $10.00.

So Mary is to be paid $30.00 an hour after she has worked for 6 hours until she is allowed to take a break or the shift ends.

If the shift is a Sunday shift on which Mary is paid 160% of her ordinary hourly rate of $20.00, then from when she has worked 6 hours until she is allowed to take a break or her shift ends, the employer is to pay her:

(a) her Sunday shift rate of $32.00 (being 160% of her ordinary hourly rate of $20.00);

(b) plus 50% of her ordinary hourly rate, which is $10.00.

So Mary is to be paid $42.00 an hour after she has worked for 6 hours until she is allowed to take a break or the shift ends.

16.7 Additional rest break

An employer must give an employee an additional paid rest break of 20 minutes if the employer requires the employee to work more than:

(a) 5 continuous hours after an unpaid meal break; or

(b) 2 hours' overtime after the employee finishes their rostered hours.

[214] The UWU submits that the AHA's application should be dealt with separately from the Tranche 2 process.

[215] We do not propose to deal with the AHA application as part of the Tranche 2 process. The changes proposed by the AHA are not technical and drafting matters but are substantive. The AHA's proposals will be referred to a separate Full Bench and the matter will be programmed for a hearing in due course.

6.15 *Labour Market Assistance Industry Award*

[216] The National Employment Standards (NES) provide for a range of paid leave and holiday entitlements, including paid annual leave (s.87), personal/carer's leave (s.96) and public holidays (s.116). Except in prescribed circumstances, the cashing out of annual leave (s.93) and personal/carer's leave (s.100) is prohibited.

[217] Section 55(1) of the Act relevantly provides that a modern award 'must not exclude' the NES or any provision thereof. Section 136(1)(c) provides that a modern award may only include terms that are permitted by s.55, and s.136(2)(b) prohibits terms that contravene s.55. Section 56 provides a term of a modern award has no effect to the extent that it contravenes s.55.

[218] There appears to be an NES inconsistency issue in relation to clause 10.3(d) of this award. Clause 10.3(d) states:

> 'By mutual agreement between the employer and employee, a part-time employee may be paid a loading of 25% on their hourly rate and not have an entitlement to annual leave, personal/carers' leave or payment for public holidays. Such agreement will not alter the employee's status as part-time employee.'

[219] Commissioner McKinnon recently referred to an agreement clause in the same terms as clause 10.3(d) of the award in the course of dealing with an application to approve the *Epic Employment Service Inc Enterprise Agreement 2018*:

> '[3] In *Canavan Building Pty Ltd* a Full Bench of the Commission held that if an enterprise agreement term has the effect that employees do not receive some or all of a benefit provided by the Standards [NES], the term excludes the Standards [NES] in a way that is contrary to section 55.
>
> [4] Clause 10.4(b) of the Agreement provides for the payment of a 25% loading in lieu of an entitlement to paid leave and public holidays for part-time employees as follows:
>
> > 'By mutual agreement between the Employer and Employee, a part-time employee may be paid a loading of 25% on their hourly rate and not have an entitlement to paid leave or payment for public holidays except for their accrued long service leave. Such agreement will not alter the employee's status as a part-time employee.''
>
> [5] The term reflects an equivalent term in clause 10.3(d) of the Labour Market Assistance Industry Award 2010 …
>
> [6] The effect of clause 10.4(b) of the Agreement is that part-time employees can elect to forgo their entitlement to paid leave and paid public holidays in return for a loaded hourly rate of pay. The value of the loading is more than the value of the leave and holiday entitlements it is intended to displace. As it results in some or all of the benefit provided by the Standards [NES] not being provided to relevant employees, clause 10.4 excludes each of the Standards [NES] identified in paragraph [2] at least in part.'[114]

[220] In *Canavan Building Pty Ltd*[115] the Full Bench concluded that the expression 'paid annual leave' as used in Division 6 of Part 2-2 of the Act means annual leave with pay, in the sense that the pay is provided together with the leave. In broad terms, the Agreement provided for annual leave to be paid as a loading upon or incorporated into the hourly rate of pay, so that annual leave would be notionally paid for in advance as a component of the payment

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[114] *Epic Employment Service Inc. T/A Epic Assist* [2019] FWC 8142. The Agreement was subsequently approved by Commissioner McKinnon with a written undertaking that the employer undertakes that clause 10.4(b) will have no effect and will not be applied as a term of the Agreement: [2019] FWCA 8307.

[115] [2014] FWCFB 3202

made for work performed. The Full Bench concluded that the Agreement was contrary to s.55(1) in two interrelated respects:

> (i) it excluded the entitlement to 'paid annual leave' in s.87(1); and
>
> (ii) it excluded the requirement for payment in respect of annual leave in s.90(1).

[221] The Full Bench also considered that the scheme of 'pre-payment' of annual leave in the Agreement constituted cashing out of annual leave in a manner inconsistent with s.93 of the Act.

[222] In the December 2019 Statement we expressed the *provisional* view that clause 10.3(d) of the award is inconsistent with s.55 of the Act and that the clause should be deleted from the award. At the hearing on 18 December 2019 no party opposed our *provisional* view. We confirm our *provisional* view. We will amend the award to delete clause 10.3(d) and will delete the equivalent provision (clause 10.3) in the draft variation determination.

6.16 *Local Government Industry Award*

[223] In addition to correcting some minor errors and omissions the Local Government Associations raises four issues.

(i) *Public holiday clauses 14.1(d) and 28*

[224] The LGA submit that all provisions relating to public holidays should be contained in one clause. Clause 14 deals with rostering arrangements, and clause 14.1(d) currently states:

> (d) If an accrued rostered day off falls on a public holiday as prescribed in the NES, the next working day will be substituted. Another day may be substituted by written agreement.

[225] The remaining public holiday provisions are in clause 28. The LGA submit that clause 14.1(d) should be deleted and re-inserted as a new clause 28.7.

[226] We agree with the LGA's submission and will amend the draft variation determination accordingly.

(ii) *On-call allowance – Clause 19.2(e)*

[227] The LGA submit that the on-call allowance provisions have been separated in the restructure of the Exposure Draft and that this has made the provisions more difficult to navigate. In the Exposure Draft published on 14 October 2019, the following provision was moved to clause 19.2–wage related allowances:

> **(e) On-call allowance**
>
> An employee who is on-call in accordance with clause 21.6 will be paid an on-call allowance as follows:
>
> (i) Monday to Friday, inclusive—$22.70 per day;

(ii) Saturday—$34.05 per day; or

(iii) Sunday or a public holiday—$45.40 per day.

[228] Clause 21.6 contains the balance of the 'on-call' provisions:

(a) An employee directed by the employer to be available for duty outside of the employee's ordinary working hours will be on-call. An employee on-call must be able to be contacted and immediately respond to a request to attend work.

(b) An employee who is on-call may be paid an on-call allowance in accordance with clause 19.2(e).

(c) Call out

(i) An employee who is on-call and in receipt of an on-call allowance will be paid at the appropriate overtime rate in clause 21 for time required to attend work.

(ii) Actual time worked will be deemed to apply from the time the employee leaves home.

Remote response

(i) An employee who is in receipt of an on-call allowance and available to immediately:

• respond to phone calls or messages;

• provide advice ('phone fixes');

• arrange call out/rosters of other employees; and

• remotely monitor and/or address issues by remote telephone and/or computer access, will be paid the applicable overtime rate in clause 21 for the time actually taken in dealing with each particular matter.

[229] The LGA propose that clause 19.2(e) should be moved to clause 21.6(b) and that 19.2(e) should be as follows:

'An employee who is on-call allowance will be paid an on-call allowance in accordance with 21.6.'

[230] This clause was moved during the restructure to ensure that all allowances appear together in the award. We are not persuaded to move the allowance to clause 21.6(b). We note that clause 21.6(b) directs attention to the on call allowance in clause 19.2(c).

(iii) *Schedule B – Summary of hourly rates of pay*

[231] The LGA submit that the current drafting of the tables in B.1.1 and B.2.1 refers to clause 22.2 to communicate that not all work areas are paid the same weekend penalty rates. The LGA submit that the award has a unique and complex hours clause (at clause 13 of the Exposure Draft) that reflects the wide range of services provided by local governments and their unique operational environments. They submit that the current drafting of the Exposure

Draft has the potential to mislead employees and employers about the correct rate of pay for different groups of employees at different times.

[232] In the Exposure Draft published on 14 October 2019, schedule B.1 contains two tables:

B.1.1 Full-time and part-time adult employees—ordinary and penalty rates

	Ordinary hours	**Work outside span of ordinary hours**	**Saturday[1]**	**Sunday[1]**	**Public holiday**
	% of minimum hourly rate				
	100%	**120%**	**150%**	**175%**	**250%**

B.1.2 Full-time and part-time adult employees—overtime rates

	Monday to Saturday – first 2 hours	**Monday to Saturday – after 2 hours**	**Sunday**	**Public holiday**
	% of minimum hourly rate			
	150%	**200%**	**200%**	**250%**

[1] See clause 22.2

[233] LGA propose the following amendments to the tables:

B.1 Full-time and part-time adult employees

B.1.1 Full-time and part-time adult employees – ordinary and penalty rates for employees working ordinary hours of work from Monday to Friday as provided in clause 13.1(d) and 13.1(h).

	Ordinary hours	**Work outside span of ordinary hours**	**Public holiday**
% of minimum hourly rate			
	100%	**120%**	**250%**

B.1.2 Full-time and part-time adult employees – ordinary and penalty rates for employees working ordinary hours of work from Monday to Sunday as provided in clause 13.1(e), 13.1(f) and 13.1(g), excluding employees engaged in community services and recreation centres.

	Ordinary hours	Work outside span of ordinary hours	Saturday	Sunday	Public holiday
% of minimum hourly rate					
	100%	120%	150%	175%	250%

B.1.3 Full-time and part-time adult employees – ordinary and penalty rates for employees engaged in community services and recreation centres.

	Ordinary hours	Work outside span of ordinary hours	Saturday before 5am or after 10pm	Sunday before 5am or after 10pm	Public holiday
% of minimum hourly rate					
	100%	120%	150%	175%	250%

B.1.4 Full-time and part-time adult employees – overtime rates

	Monday to Saturday 12pm – first 2 hours	Monday to Saturday – after 2 hours	After 12pm Saturday, and Sunday	Public holiday
	150%	200%	200%	250%

[234] LGA make a similar submission in relation to Schedule B.2 which relates to the rates for casual employees and note that these issues are currently before the Full Bench in AM2017/51–Overtime for casuals.

[235] The proposed amendments referring to the three major groups of employees with different ordinary hours and weekend penalty rates, are intended to provide more obvious direction to those reading the Schedule B tables as to the correct rate of pay at the time of the performance of the work.

[236] The LGA also note the Commission is currently considering, as a common issue, overtime for casuals (AM2017/51) and that they have made submissions with respect to this, most recently on 28 October 2019, and are waiting for the decision of the Full Bench.

[237] In the amendments proposed to clauses B.2.1, B.2.2 and B.2.3 set out above the LGA have set out the casual penalty and overtime rates to reflect their submissions in the overtime for casuals matter. Consistent with the position we have taken in respect of all other awards, the schedules will not be varied to deal with overtime for casuals until the Part time and Casuals Full Bench has dealt with the matters before it and issued a variation determination in respect of this award.

[238] We agree with the LGA's proposal and will amend the draft variation determination accordingly. Adoption of the proposed headings for the Schedule B tables, will require consequential amendments to populate the hourly rates of pay.

(iv) *Schedule C–Summary of monetary allowances*

[239] The wage-related allowances table in C.1.1 of Schedule C do not refer to clause 10.2(c) which provides that part-time employees receive pay and conditions on a pro rata basis, and may mislead employers to paying for example, the total weekly allowance to a part-time employee when this is ordinarily adjusted on a pro rata basis.

[240] In support of its submission, the LGA refers to the Fair Work Ombudsman Pay Guide for the LGIA published on 27 June 2019 (**FWO Pay Guide**) which contains a table of allowances that clearly stipulates calculations for the first aid and leading hand allowances as an hourly rate, as well as a maximum weekly rate.

[241] The FWO Pay Guide expresses the allowance rates as follows:

- First aid allowance: $0.42 per hour, up to a maximum of $15.89 per week;
- Leading hand allowance – Level 3 or 4 classification supervising 1-5 employees: $0.66 per hour, up to a maximum of $24.97 per week;
- Leading hand allowance – Level 3 or 4 classification supervising 6-15 employees: $0.90 per hour, up to a maximum of $34.05 per week; and
- Leading hand allowance – Level 3, 4 or 5 classification supervising more than 15 employees: $1.14 per hour, up to a maximum of $43.13 per week.

[242] The LGA submits that a new clause C.1.2 be inserted for clarity as follows:

> 'The leading hand allowance in clause 19.2(a) and first aid allowance in clause 19.2(b) will be paid to part-time and casual employees on a pro rata basis.'

[243] We agree with the LGA's proposal and will amend the draft variation determination accordingly.

6.17 *Manufacturing and Associated Industries and Occupations Award*

[244] The AMWU raises two issues.

(i) *Clause 11.2*

[245] Clause 11.2 states:

> **11.2 Casual loading**
>
> (a) For working ordinary time, a casual employee must be paid:
>
> (i) the ordinary hourly rate for the work being performed; plus
>
> (ii) a loading of **25%** of the ordinary hourly rate.
>
> (b) The casual loading constitutes part of the casual employee's all-purpose rate.

(c) The resulting rate is the **casual ordinary hourly rate**.

(d) The **25%** casual loading in clause 11.2 does not apply to vehicle manufacturing employees in the technical field covered by clause 4.8(a)(ix). The casual loading for these employees is prescribed in clause 46 in Part 9 – Vehicle manufacturing employees of this award.

[246] The AMWU raises a concern with the way clause 11.2 is expressed and organised in the context of the way references to the calculation of penalties and loadings in other parts of the Exposure Draft have been changed from "time and a half" and "double time" to percentages of the ordinary hourly rate.[116]

[247] Specifically, the AMWU's concern is because the Exposure Draft introduces a new concept of casual ordinary hourly rate' and provides that overtime and other penalties are to be calculated as a percentage of the 'ordinary hourly rate', 'may have the effect of causing employers to mistakenly interpret the new award as meaning that the relevant overtime and penalties are calculated on the 'ordinary hourly rate' and not the 'casual ordinary hourly rate'.[117]

[248] The AMWU does not cavil with having separate definitions of 'ordinary hourly rate' and 'casual ordinary hourly rate'; indeed it argues that it is necessary to have separate definitions as the 'concepts have specific and distinct work to do for casuals'.[118] The AMWU goes on to submit:

> 'The confusion arises because of the way overtime and penalty rates are expressed. For example, clause 31.1 states:
>
> (a) Weekend work
> Where agreement is reached in accordance with clause 17.2(c):
> (i) The rate to be paid to a day worker for ordinary time worked between midnight on Friday and midnight on Saturday will be **150% of the ordinary hourly rate.**
> (ii) The rate to be paid to a day worker for ordinary time worked between midnight on Saturday and midnight on Sunday will be **200% of the ordinary hourly rate.**
> As it can be seen from the above example there is no distinction in the relevant clause as to how the calculation is conducted between casual and non-casual employees. For the discerning employer, any confusion about the calculation of penalty rates for employers will ultimately be clarified by clause C.3.1 which provides:
>
> > "The casual ordinary hourly rate applies for all purposes and is used to calculate penalties and overtime".[119]
>
> however, the AMWU contends that there is merit in making the award simpler and easier to understand by clarifying the distinct way of calculating penalties for casual and non-casual employees in the body of the award.'

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[116] AMWU submission, 27 November 2019 at [17].

[117] AMWU submission 27 November 2019 at [18]

[118] Ibid at [19]

[119] *Exposure Draft – Manufacturing and Associated Industries and Occupations Award 20XX* republished 14 October 2019 Clause C.3.1.

[249] In a previous submission the AMWU proposed that all relevant references to the calculation of penalties or loadings throughout the Exposure Draft be changed to X% of the ordinary hourly rate to X% of the ordinary hourly rate/casual ordinary hourly rate.

[250] The AMWU concedes that its earlier proposed approach may be cumbersome and submits that the same affect could be achieved by a more minimalist approach, by amending clause 11.2 as follows (proposed changes marked up using strike through and underline):

> **11.2 Casual loading**
>
> (a) For working ordinary time, a casual employee must be paid:
>
> (i) the ordinary hourly rate for the work being performed; plus
> (ii) a loading of 25% of the ordinary hourly rate.
>
> (a) The casual loading constitutes part of the casual employee's all purpose rate.
>
> (b) The resulting rate is the casual ordinary hourly rate.
>
> (c) Where this award refers to a penalty rate or shift loading as being calculated as a percentage of the ordinary hourly rate, that reference will (for a casual employee) instead be taken to be a reference to the casual ordinary hourly rate.
>
> (e) ~~(d)~~ The 25% casual loading in this clause 11.2 does not apply to vehicle manufacturing employees in the technical field covered by clause 4.8(a)(ix). The casual loading for these employees is prescribed in clause 46 in Part 9— Vehicle manufacturing employees of this award.[120]

[251] The AMWU contends that amending the Exposure Draft in the way proposed will ensure that the new award is simple and easy to understand. The AMWU further considers that the proposed changes should not be controversial considering the Group 1 Full Bench has already confirmed that in respect of the Manufacturing Award, penalties compound on the casual loading and the relevant employer groups have confirmed they agree that that the casual loading compounds in the Manufacturing Award as part of the *AM2017/51 Overtime for Casuals* proceedings.[121]

[252] In reply, ABI acknowledges the apparent difficulty with the definition of 'ordinary hourly rates' and agree that this needs to be resolved.[122]

[253] In reply, Ai Group submits that the changes proposed by the AMWU are unnecessary and submits:

> 'The issue raised by the AMWU is adequately dealt with in clause 11.2(b) of the exposure draft. In addition, the hourly rates payable to casual employees when working shifts and overtime are set out in Schedule C.'[123]

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[120] AMWU submission, 27 November 2019 at [23].

[121] Correspondence from Australian Business Lawyers and Advisors to Fair Work Commission dated 10 October 2019

[122] ABI reply submission, 9 December 2019 at [44]

[123] Ai Group reply submission 9 December 2019 at [31]

[254] At the hearing on 18 December 2019 Ai Group sought leave to file a short supplementary submission in respect of this issue.

[255] In a further submission filed on 23 December 2019 Ai Group submits that the amendment to clause 11.2(d) proposed by the AMWU 'is problematic in circumstances where a particular entitlement uses the expression 'ordinary hourly rate' but the entitlement does not apply to a casual employee, eg clause 31.12(d) and (e) – the 10 hour break provision'. Ai Group does not object to the following modified wording for paragraph (d):

> (d) Where this award refers to a penalty rate or shift loading as being calculated as a percentage of the ordinary hourly rate, that reference will (for a casual employee) instead be taken to be a reference to the casual ordinary hourly rate if the entitlement is applicable to a casual employee.

[256] It is our *provisional* view that the modified wording proposed by Ai Group be adopted. Interested parties will have an opportunity to comment on this proposal when the revised exposure draft and draft variation determination are published in January 2020.

(ii) *Schedule C – C.1.1 Table of Rates*

[257] The AMWU notes that the reference made to "Full-time and part time employees other than afternoon and night shift workers" within Schedule C – C.1.1 Table of Rates, appears "superfluous" as the existing heading, located five rows above, captures those employees.[124] Further, the AMWU notes that there is no existing percentage figure corresponding to "Overtime on a public holiday" and proposes that 250% be inserted into that column, consistent with the cross-reference and in accordance with clause 31.7(a).[125] The AWU make a similar point.[126]

[258] Clause 31.7(a) states:

> (a) A day worker required to work overtime on a public holiday must be paid **250%** of the ordinary hourly rate until the employee is relieved from duty with a minimum payment of 3 hours.

[259] The table at schedule C.1.1 states:

Working hours	**% of ordinary hourly rate/minimum casual ordinary hourly rate**
Employees other than afternoon and night shift workers	
Ordinary hours	100%
Ordinary hours on a Saturday (clauses 17.2(f)(i) and 32.1(a)(i))	150%

[124] AMWU submission, 27 November 2019 at [27].

[125] AMWU submission, 27 November 2019 at [28]; Clause 31.7(a) of the Exposure Draft republished on 14 October 2019, it provides that a day worker performing work on a public holiday must be paid 250% of the ordinary hourly rate.

[126] AWU submission 27 November 2019 at [20].

Working hours	**% of ordinary hourly rate/minimum casual ordinary hourly rate**
Ordinary hours on a Sunday (clauses 17.2(f)(ii) and 32.1(a)(ii))	200%
Work on a public holiday (clauses 17.2(g) and 32.1(b))	250%
Full-time and part-time employees other than afternoon and night shift workers	
Overtime on a public holiday (clause 31.7(a))	
Overtime – first 3 hours per day Monday to Saturday (clause 31.2(a))	150%
Overtime –after 3 hours per day Monday to Saturday (clause 31.2(b))	200%
Overtime on a Sunday (clause 31.6)	200%
Shiftworkers other than those engaged in vehicle manufacturing covered by clause 4.8(a)(ix)	
Shiftworker – afternoon and night shift (clause 32.2(d))	115%
Shiftworker – permanent night shift (clause 32.2(f)(iii))	130%
Employed on continuous shift work – on a shift other than a rostered shift (clause 32.2(g)(ii))	200%
Employed on other than continuous shift work – Work on shift other than rostered shift - first three3 hours (clause 32.2(g)(ii))	150%
Employed on other than continuous shift work – Work on shift other than rostered shift - after three3 hours (clause 32.2(g)(ii))	200%
Shiftworker – ordinary hours on a Saturday (clause 32.2(i)(i))	150%
Shiftworker – ordinary hours on a Sunday (clause 32.2(j)(ii))	200%
Continuous shiftworker – ordinary hours on a public holiday (clause 32.2(j)(i))	200%
Afternoon or night shift – non-successive shifts – first 3 hours (clause 32.2(e))	150%
Afternoon or night shift – non-successive shifts – after 3 hours (clause 32.2(e))	200%
Other than continuous shiftworker – ordinary hours on public holiday (clause 31.7(c))	250%
Full-time and part-time shiftworkers other than those engaged in vehicle manufacturing covered by clause 4.8(a)(ix)	

Working hours	**% of ordinary hourly rate/minimum casual ordinary hourly rate**
Continuous shiftworker – overtime on a public holiday (clause 31.7(b))	200%
Continuous shiftworker – overtime (clause 31.4)	200%
Other than continuous shiftworker – overtime – first 3 hours Monday to Saturday (clause 31.2(a))	150%
Other than continuous shiftworker – overtime – after 3 hours Monday to Saturday (clause 31.2(a))	200%
Other than continuous shiftworker – overtime – Sunday (clause 31.6)	200%
Other than continuous shiftworker – overtime on a public holiday (clause 31.7(c))	250%
Shiftworkers engaged in vehicle manufacturing covered by clause 4.8(a)(ix)	
Night shift only	130%
Alternating night and afternoon shifts	118%
Alternating day and night shifts—rate for the night shift	112.5%
Afternoon shift only	118%
Alternating day and afternoon shifts—rate for the afternoon shift	112.5%
Alternating day, afternoon and night shifts—rate for the afternoon and night shift	112.5%
Continuous afternoon or night shift	112.5%
Saturday	125%

[260] In reply, Ai Group agrees with the submission made by the AMWU[127] and the parties have agreed that the sub-heading '**Full-time and part-time employees other than afternoon and night shift workers**' in the table at schedule C.1.1 be deleted. We agree and will amend the table in the draft variation determination.

[261] ABI raises two issues.

(i) *Clause 4.4*

[262] ABI submits that the phrase "This award covers any employer which supplies labour on an on-hire basis in the manufacturing and associated industries and occupations industry (or industries)" in clause 4.4 of the award is unclear.[128] It proposes to replace that phrase with the following wording:

[127] Ai Group reply submission 9 December 2019 at [33]

[128] ABI submission, 27 November 2019 at [42].

> 'This award covers any employer which supplies labour on an on-hire basis in the manufacturing and associated industries.' [129]

[263] At the hearing on 18 December 2019 it was generally agreed that the words 'industry (or industries)' in clause 4.4 (as set out above) should be deleted. We agree and will amend the draft variation determination accordingly.

(ii) *Table C.3.2(a)*

[264] ABI submits that explanation of what the '100%' casual rate is in the table in schedule C.3.2(a) is unclear. [130] Specifically, ABI submits that the text stating that the casual rates are 'based on' 25% casual loading is not clear. ABI proposes varying these words to provide that casual rates are inclusive of 25% casual loading. They submit that this would decrease the likelihood that a reader of the award may interpret this table as requiring an additional 25% casual loading to be applied to the '100%' rate. [131]

[265] At the hearing on 18 December 2019 it was generally agreed that the issue raised by ABI be addressed by amending the tables in C.3.2(a) and C.3.2(b) to delete the expression 'based on the casual loading' and to insert 'inclusive of the casual loading.' We agree and will amend the draft variation determination accordingly.

[266] Ai Group raises 10 discrete issues.

(i) *Clause 31.3 Unrelieved shiftwork on rostered day off*

[267] Ai Group submits that there is some inconsistency between the 'Unrelieved shiftwork on rostered day off' clauses in the Exposure Draft at clause 31.3(b) and the corresponding clause of the current award (clause 40.2(e)). Clause 40.2(e) of the award applies only to shiftworkers, and to avoid any ambiguity, Ai Group proposes that the following minor amendment should be made to clause 31.3(c):

> 'If ~~an employee~~ a shiftworker is required to work on their rostered day off because of the absence of a relieving employee, the unrelieved shiftworker must be paid 200% of the ordinary hourly rate for all hours worked on their rostered day off.' [132]

[268] At the hearing on 18 December 2019 there was general agreement to Ai Group's proposed amendment. We agree and will amend the draft variation determination accordingly.

(ii) *Table C.1.1 Table of rates – casual minimum hourly rate*

[269] The table at schedule C.1.1 is set out above (see [154]).

[270] Ai Group contends that the expression 'minimum casual ordinary hourly rate' in the heading in the table at C.1.1 is likely to confuse readers of the award, given its similarity to

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[129] ABI submission, 27 November 2019 at [43].

[130] ABI submission, 27 November 2019 at [44].

[131] ABI submission, 27 November 2019 at [45].

[132] Ai Group submission, 27 November 2019 at [61].

the expression 'casual ordinary hourly rate' which is a defined term in the award and has a different meaning. The expression 'casual minimum hourly rate' is a more appropriate term. This term is defined in schedule C.3.1.[133]

[271] Ai Group submits that a similar amendment should be made to the heading of the second column in the table in schedule C.1.2.[134]

[272] In reply, the AMWU agrees that the term 'minimum casual ordinary hourly rate' is liable to confuse users but rather than changing the column to 'casual minimum hourly rate' the AMWU proposes it be changed to 'casual ordinary hourly rate', because the relevant penalties in the table at C.1.1 are calculated on the ordinary hourly rate (which for a casual is the casual ordinary hourly rate).

[273] In reply, the AWU does not agree with the proposition that the heading requires amendment and submits:

> 'The expression 'casual minimum hourly rate' is **not** more appropriate as it does not accurately reflect the entitlements in the award. Penalties and overtime in the award are calculated on the casual ordinary hourly rate, not on the 'casual minimum hourly rate.''[135]

[274] In a further submission filed on 23 December 2019 Ai Group submits that there are two problems with what the AMWU has proposed:

- Not all of the entitlements in table C.1.1 apply to casuals, eg clause 31.12(d) and (e) – the 10 hour break provision; and
- Not all of the entitlements in table C.1.1 are calculated on the 'ordinary hourly rate' or the 'casual ordinary hourly rate'. For example, the following entitlements for vehicle manufacturing employees are calculated on the 'minimum hourly rate' and the 'casual minimum hourly rate':

Night shift only (clause 54.1(b)(ii))	130%
Alternating night and afternoon shifts (clause 54.1(b)(ii))	118%
Alternating day and night shifts—rate for the night shift (clause 54.1(b)(ii)	112.5%
Afternoon shift only (clause 54.1(b)(ii)	118%
Alternating day and afternoon shifts—rate for the afternoon shift (clause 54.1(b)(ii))	112.5%
Alternating day, afternoon and night shifts—rate for the afternoon and night shift (clause 54.1(b)(ii))	112.5%
Continuous afternoon or night shift (clause 54.1(b)(iv)	112.5%

[133] Ai Group submission, 27 November 2019 at [63].

[134] Ai Group submission, 27 November 2019 at [66]

[135] AWU reply submission, 9 December 2019 at [40]

Saturday (clause 54.1(b)(v))	125%

[275] Ai Group submits that an appropriate heading for the second column of table C.1.1 would be:

> **% of ordinary hourly rate/casual ordinary hourly rate/minimum hourly rate/casual minimum hourly rate**

[276] It is our *provisional* view that the heading for the second column of table C.1.1. be amended as proposed by Ai Group. Interested parties will have an opportunity to comment on this proposal when the revised exposure draft and draft variation determinations are published in January 2020.

(iii) *Table C.1.1 Table of Rates – additional clause references*

[277] Ai Group submits that the following clause references should be added to the table in schedule C.1.1: [136]

Shiftworkers engaged in vehicle manufacturing covered by clause 4.8(a)(ix)	
Night shift only (clause 54.1(b)(ii))	130%
Alternating night and afternoon shifts (clause 54.1(b)(ii))	118%
Alternating day and night shifts—rate for the night shift (clause 54.1(b)(ii))	112.5%
Afternoon shift only (clause 54.1(b)(ii))	118%
Alternating day and afternoon shifts—rate for the afternoon shift (clause 54.1(b)(ii))	112.5%
Alternating day, afternoon and night shifts—rate for the afternoon and night shift (clause 54.1(b)(ii))	112.5%
Continuous afternoon or night shift (clause 54.1(b)(iv))	112.5%
Saturday (clause 54.1(b)(v))	125%

[278] The AMWU agrees with Ai Group.

[279] We will amend the table of rates as proposed by Ai Group.

(iv) *Schedule C.2 Full time and part time employees' hourly rates – footnote*

[280] Ai Group submits that the following amendment should be made to footnote 1 in clauses C.2 and C.3.2(a) on the basis that these rates are only relevant to vehicle

[136] Ai Group submission, 27 November 2019 at [65].

manufacturing employees covered by clause 4.8(a)(ix), not all vehicle manufacturing employees covered by the Award: [137]

> 'Rates in bold are for Vehicle Manufacturing employees covered by clause 4.8(a)(ix) only'

[281] This submission is repeated with respect to schedule C.3.2(a).

[282] In reply, the AMWU notes that the cross reference proposed by Ai Group 'appears to be incorrect'. Ai Group refers to clause 4.8(a)(ix), however that clause does not deal with vehicle manufacturing at all, rather it is an ancillary part of the traditional manufacturing award coverage. Clauses 4.8(a)(xi) and (xii) deal with vehicle manufacturing. The AWU makes a similar submission.

[283] The AMWU notes that this raises a broader issue with the Exposure Draft and 'many/all of the references to 4.8(a)(ix) may need to be reconsidered'.

[284] At the hearing on 18 December 2019 Ai Group submitted that the correct cross reference was 4.8(a)(xi); all other parties agreed. We will amend footnote 1 in schedule C.2 andC.3.2(a) as proposed by Ai Group save that the cross reference will be to clause 4.8(a)(xi). We will amend the draft variation determination accordingly.

[285] We note that clause 4.8(a)(ix) is referred to in the following clauses in the Exposure Draft:

- Clause 11.2(d)
- Clause 17.3(a)
- Clause 17.4(a)
- Clause 17.5(b)(i)
- Clause 18.1(c)
- Clause 18.2(a)
- Clause 18.3
- Clause 20.5(b)
- Clause 20.5(c)(i)
- Clause 20.5(d)
- Clause 20.5(d)(i)
- Clause 25.1
- Clause 25.2
- Clause 29.1(c)(i)
- Clause 29.1(d)(i)
- Clause 29.2(c)(i)
- Clause 29.3(k)(ii)
- Clause 29.3(w)(i)
- Clause 29.5(d)
- Clause 31.3(a)
- Clause 31.4
- Clause 31.8(a)
- Clause 31.11(a)

[137] Ai Group submission, 27 November 2019 at [68]-[69].

- Clause 31.12(a)
- Clause 31.13(a)
- Clause 32.2(a)
- Clause 45
- Schedule A.2
- Schedule B.1
- Schedule C.1.1

[286] We will amend the cross references in each of these clauses in the draft variation determination to clause 4.8(a)(xi).

(v) *Schedule C.3.2(b) Casual rates based on 17.5% casual loading for certain vehicle manufacturing employees in the technical field*

[287] Ai Group submits that the heading in schedule C.3.2(b) needs to be clarified for this table to avoid confusion because only a very small cohort of employees are entitled to a 17.5% loading. The heading should be: [138]

'**Casual rates – based on a 17.5% casual loading for certain vehicle manufacturing employees in the technical field covered by clause 4.8(a)(ix) - ~~, in accordance with~~ See clause 11.2(d) and clause 46.1.**'

[288] Ai Group also submits that the words '+17.5%' in the second column in the table in C.3.2(b) should be deleted to avoid confusion. The 17.5% casual loading is referred to in the heading row above and is incorporated within the definition of 'casual minimum hourly rate'.[139]

[289] Subject to the cross reference being corrected to clause 4.8(a)(xi) all parties agree to Ai Group's proposed change. We also agree and will make the amendment proposed by Ai Group, but deleting the reference to clause 4.8(a)(ix) and inserting clause 4.8(a)(xi).

(vi) *Schedule D.1.2 Wage related allowances*

[290] Ai Group submits that the preamble in schedule D.1.2 should be amended as follows: [140]

'See clause 29 – Allowances and special rates for ~~full~~ details of wage-related allowances payable under this award. In addition, clause 52 deals with certain additional or alternative wage-rated allowances for vehicle manufacturing employees covered by clause 4.8(a)(ix) of the award.'

[291] Subject to the cross reference being corrected to clause 4.8(a)(xi) all parties agree to Ai Group's proposed change. We also agree and will make the amendment proposed by Ai Group, but deleting the reference to clause 4.8(a)(ix) and inserting clause 4.8(a)(xi).

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[138] Ai Group submission, 27 November 2019 at [70].

[139] Ai Group submission, 27 November 2019 at [71].

[140] Ai Group submission, 27 November 2019 at [72].

(vii) *Schedule D.1.3 Wage related allowances – Special rates*

[292] Ai Group submits that the preamble in schedule D.1.3 should be amended as follows: [141]

> 'See clause 29 – Allowances and special rates for ~~full~~ details of wage-related allowances – special rates payable under this award. In addition, clause 52 deals with certain additional or alternative wage-rated allowances – special rates for vehicle manufacturing employees covered by clause 4.8(a)(ix) of the award.'

[293] Subject to the cross reference being corrected to clause 4.8(a)(xi) all parties agree to Ai Group's proposed change. We also agree and will make the amendment proposed by Ai Group, but deleting the reference to clause 4.8(a)(ix) and inserting clause 4.8(a)(xi).

[294] Ai Group submits that the words 'per hour unless otherwise stated' should be deleted from the heading for column 4 because column 5 deals with the period of payment. The AMWU and AWU are not opposed to this proposal. We agree and will make the proposed change.

[295] Ai Group also submits that the following wage-related allowances – special rates are missing from the table in schedule D.1.3: [142]

Allowances	**Clause**	**$**	**Payable**
Glass or slag wool (Vehicle Manufacturing Employees covered by clause 4.8(a)(ix))	52.5	0.84	per hour
Handling garbage (Vehicle Manufacturing Employees covered by clause 4.8(a)(ix))	52.6	0.65	per hour
Boiler house employees (Vehicle Manufacturing Employees covered by clause 4.8(a)(ix))	52.7	0.65	per hour
Fork-lift or cranes allowance (Vehicle Manufacturing Employees covered by clause 4.8(a)(ix))	52.8	2.50	per day

[296] Subject to the cross reference being corrected to clause 4.8(a)(xi) all parties agree to Ai Group's proposed change. We also agree and will make the amendment proposed by Ai Group, but deleting the reference to clause 4.8(a)(ix) and inserting clause 4.8(a)(xi).

(viii) *Schedule D.2.1 Expense related allowances*

[297] Ai Group submits that the preamble in schedule D.2.1 should be amended as follows: [143]

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[141] Ai Group submission, 27 November 2019 at [73].

[142] Ai Group submission, 27 November 2019 at [75].

[143] Ai Group submission, 27 November at [76].

'See clause 29 – Allowances and special rates for ~~full~~ details of expense-related allowances payable under this award. In addition, clause 52.1 and clause 55.4 deal with certain alternative expense-rated allowances for vehicle manufacturing employees covered by clause 4.8(a)(ix) of the award.'

[298] Subject to the cross reference being corrected to clause 4.8(a)(xi) all parties agree to Ai Group's proposed change. We also agree and will make the amendment proposed by Ai Group, but deleting the reference to clause 4.8(a)(ix) and inserting clause 4.8(a)(xi).

[299] Ai Group submits that the words 'per hour unless otherwise stated' should be deleted from the heading of column 4 because column 5 deals with the period of payment.

[300] In reply the AMWU states that it 'does not follow this submission. Those words 'per hour unless otherwise stated' do not appear in the table at D.2.1.'[144] Similarly, the AWU notes that the words Ai Group suggests should be deleted do not appear in this table.

[301] At the hearing on 18 December 2019 Ai Group clarified its position and stated that the proposed change is to be made to schedule D.1.3.

[302] It is our *provisional* view that the words 'per hour unless otherwise stated' in the heading of column 4 in schedule D.1.3 be deleted. Interested parties will have an opportunity to comment on this amendment when the revised exposure draft and draft variation determination are published in January 2020.

(ix) *Schedule D.2.1 Expense related allowances – tool allowance*

[303] Ai Group submits that the following amendments need to be made to the tool allowance in the table at schedule D.2.1 because the table currently states that apprentices are entitled to a $15.29 per week tool allowance which is not correct:[145]

Allowances	Clause	$	Payable
Tool allowance – tradespersons ~~and apprentices~~[12]	29.1(c)	15.29	Per week

[304] In reply the AMWU submits that 'it is not quite correct to say that apprentices are not entitled to a tool allowance of $15.29. They are entitled to a percentage of the $15.29 amount.'[146] The AMWU submits that this issue should be resolved by amending the table as follows:

Allowance	Clause	$	Payable
Tool allowances – tradespersons and apprentices[1]	29.1(c)	15.29[2]	Per week

1. These allowances apply for all purposes of the award.

[144] AMWU reply submission, 9 December 2019 at [53]

[145] Ai Group submission, 27 November at [78].

[146] AMWU reply submission, 9 December 2019 at [61]

2. Tool allowance for apprentices is calculated as a percentage of this amount. See clause 29.1(c)(v) for calculating the tool allowance for apprentices.

[305] At the hearing on 18 December 2019 Ai Group agreed with the AMWU's proposal. We also agree and will amend the table in the draft variation determination as proposed by the AMWU.

(x) *Schedule D.2.1 Expense related allowances – missing allowances*

[306] Ai Group submits that the following expense-related allowances are missing from the table in schedule D.2.1, none of which apply for all-purposes of the award: [147]

Allowances	**Clause**	**$**	**Payable**
Tool allowance – tradespersons (Vehicle Manufacturing Employees covered by clause 4.8(a)(ix))	52.1(a)		Per week
Tool allowance apprentices (Vehicle Manufacturing Employees covered by clause 4.8(a)(ix))	52.1(b)		Per week
Level 1 of First Year		6.48	Per week
Level 2 or Second Year		8.38	Per week
Level 3 or Third Year		11.51	Per week
Level 4 of Fourth Year		11.51	Per week
Meal allowance (Vehicle Manufacturing Employees covered by clause 4.8(a)(ix))	55.4	14.34	Per meal

[307] Subject to the cross reference being corrected to clause 4.8(a)(xi) all parties agree to Ai Group's proposed change. We also agree and will make the amendment proposed by Ai Group, but deleting the reference to clause 4.8(a)(ix) and inserting clause 4.8(a)(xi).

[308] Given the number of amendments to be made to the exposure draft and draft variation determination we will issue revised drafts in January 2020 and a statement setting out the process for parties to comment on the revised drafts prior to the publication of a variation determination by 14 February 2020.

6.18 *Meat Industry Award*

[309] In addition to the correction of some minor errors, Ai Group raises three issues.

(i) *Clause 7.2(a)*

[310] Ai Group submits that the reference in clause 7.2(a) to clause 10.2 should be deleted as it is not a facilitative provision. Clause 10.2 simply requires that an employer and part-time employee reach agreement at the time of engagement on the employee's hours of work. It does not "allow agreement between the employer and employees on how specific award

[147] Ai Group submission, 27 November 2019 at [79].

provisions are to apply at the workplace or section or sections of it" (per clause 7.1).[148] We agree and we will vary clause 7.2(a) in the draft variation determination to delete the reference to clause 10.2.

(ii) *Clause 22.1(a) Entitlement to overtime and payment*

[311] Ai Group submits that there has been a substantive change to the 'Entitlement to overtime and payment' clause in the exposure draft as compared to the current award.[149]

[312] Clause 36.1(a) of the current award says as follows:

> 'All time worked outside ordinary working hours on any day as prescribed in clause 31—Hours of work (or in the case of a shiftworker, outside the hours rostered as ordinary shiftwork hours in accordance with clause 34—Rostering) will be deemed to be overtime and be paid for at time and a half for the first three hours and double time thereafter.'

[313] Accordingly, day workers are entitled to payment at overtime rates for time worked outside ordinary hours on any day as prescribed by clause 31. Clause 31 of the award has been reproduced at clauses 14.1 – 14.6 of the Exposure Draft. However, clause 14 of the Exposure Draft also includes:

- Clause 14.7 (Rostering); and
- Clause 14.8 (Make up time).

[314] Clause 22.1(a) of the Exposure Draft requires the payment of overtime rates to day workers for all work performed outside ordinary working hours on any day as prescribed in clause 14. This would include clauses 14.7 and 14.8. Ai Group submit that this is a substantive change to the award and particularly problematic in respect of clause 14.7. Ai Group further submits that, read together, clause 22.1(a) would appear to suggest that day workers are entitled to overtime rates for all time worked outside rostered hours which is not presently the case. Only shiftworkers are entitled to overtime rates by reference to the rostering clause (i.e. clause 14.7 in the Exposure Draft and clause 34 in the award).[150]

[315] Ai Group proposes that clause 22.1(a) be amended by replacing the reference to clause '14' with 'clauses 14.1 – 14.6'.[151]

[316] We agree but will retain the reference to clause 14.7 for shiftworkers, which appears in the brackets. We will amend the draft variation determination accordingly.

(iii) *Clause 25.3(b) Payment for annual leave*

[317] Clause 37.3(b) of the current award states:

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[148] Ai Group submission, 27 November 2019 at [81].

[149] Ai Group submission, 27 November 2019 at [84].

[150] Ai Group submission, 27 November 2019 at [86].

[151] Ai Group submission, 27 November at [87].

37.3 Payment for annual leave

(b) For the purpose of ascertaining ordinary time earnings in clause 37.3(a)(i), the following are not included:

(i) incentive-based payments (other than those coming within clause 24 – Payment by results);

(ii) bonuses;

(iii) loadings (other than the loading for a daily hire and part-time daily hire employee as set out in clause 14 – Daily hire);

(iv) monetary allowances;

(v) overtime;

(vi) penalty payments (other than ordinary hour penalty rates for employees provided for in this award and only if the employee is regularly rostered to work on weekends); and

(vii) any other separately identifiable amounts.

[318] Clause 25.3 of the Exposure Draft states:

25.3 Payment for annual leave

(a) Before the start of an employee's annual leave, the employer must pay the employee for the employee's ordinary hours of work:

(i) at the employee's ordinary time earnings for the hours the employee would have worked during the period; and

(ii) any annual leave loading payable under clause 25.5.

(b) For the purpose of ascertaining ordinary time earnings in clause 25.3(a)(i), the following are not included:

(i) incentive based payments (other than those coming within clause 18 – Payment by results);

(ii) bonuses;

(iii) loadings (other than the loading for daily hire and part-time daily hire employees as set out in clause 11.10);

(iv) monetary allowances;

(v) overtime;

(vi) penalty payments (other than ordinary hour penalty rates for employees provided for in this award and only if the employee is regularly rostered to work on weekends); and

(vii) any other separately identifiable amounts.

(c) In the event of an employee being engaged 4 weeks prior to the commencement of leave, or termination of employment, in 2 or more classifications entitling the employee to different rates of pay, the wages to be paid to the employees will be the average of the weekly wage rates for the classifications in which the employee was engaged.

NOTE: Where an employee is receiving over-award payments such that the employee's base rate of pay is higher than the rate specified under this award, the employee is entitled to receive the higher rate while on a period of paid annual leave (see sections 16 and 90 of the Act).

[319] Ai Group submits that pursuant to clause 37.3(b) of the award, shift allowances payable pursuant to clause 33.9 do not form part of an employee's ordinary time earnings, clause 37.3(b)(iv) excludes monetary allowances. The Exposure Draft does not prescribe shift allowances; it prescribes rates that are payable for shiftwork at clause 23.3. Ai Group submits that it appears that clause 25.3(b) does not exclude additional amounts payable to an employee for the performance of shifts. Accordingly, Ai Group contends that a new subclause under clause 25.3(b) should be inserted, excluding "shift rates". [152]

[320] We agree and will amend the draft variation determination accordingly.

(iv) *Schedule B.5 – Shiftworkers*

[321] ABI supports the inclusion of new columns into the tables for non-successive shifts in clauses B.5.1 and B.5.3, which refers the reader back to clause 23.3(d) (and 23.3(e) (for casuals). [153] ABI notes that if proposed amendment is made, then the words "including non-successive shifts" can be removed from the heading in Schedule B.5.2.[154] Similarly, Ai Group submits that the changes proposed by the Commission to schedule B.5 should be made. [155] We will make the changes proposed.

6.19 *Pastoral Award*

[322] In addition to the correction of some minor errors the AWU raises five issues in relation to this award.

(i) *Clause 11.7*

[323] Clause 11.7 of the Exposure Draft states:

11.7 Farm and livestock hand at shearing or crutching

(a) Subject to clause 11.7(b), during any time an employee engaged on a weekly basis under Part 6—Broadacre Farming and Livestock Operations is employed in shearing

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[152] Ai Group submission, 27 November 2019 at [89]-[91].

[153] ABI submission, 27 November 2019 at [53]'

[154] ABI submission, 27 November 2019 at [53]

[155] Ai Group submission, 27 November at [92].

or crutching operations of the principal employer, Part 9—Shearing Operations will not apply.

(b) Exception

(i) Clause ~~11.7(b)~~11.7(a) will not apply to any farm and livestock hand engaged by the week who:

- works in the employer's shearing shed; and
- who has been engaged by the employer during the period commencing one week before the actual shearing or crutching begins; and
- who is discharged during the week after the shearing or crutching actually ends.

(ii) In the circumstances set out in clause 11.7(b)(i), the employee will be paid station hand rates when performing work covered by Part 5 of this award and shearing rates when performing work covered by Part 8 of this award.

[324] The corresponding provision in the current award is at clause 10.6 (with clause 10 dealing more broadly with all categories of employment):

10.6 Farm and livestock hand at shearing or crutching

Notwithstanding anything else contained in this award, Part 7—Shearing Operations of the award will not apply to any employee engaged to work on a weekly basis under Part 4—Broadacre Farming and Livestock Operations during any time the employee is employed in shearing or crutching operations of the principal employer. Provided that this clause will not apply to any Farm and livestock hand engaged by the week who works in the employer's shearing shed and who has been engaged by the employer during the period commencing one week before the actual shearing or crutching begins and who is discharged during the week after the shearing or crutching actually ends. In such case, the employee will be paid station hand rates when performing work covered by Part 4 of this award and shearing rates when performing work covered by Part 7 of this award.

[325] The AWU submits that the inclusion of the 'Farm and livestock hand at shearing or crutching' clause (clause 11.7) within clause 11 may cause confusion because clause 11 is otherwise solely concerned with casual employees and this provision is directed at weekly employees.[156] The AWU proposes to remove the provision from clause 11.7 and insert it as a new clause 8.3 in the Exposure Draft, to avoid extensive renumbering throughout the rest of the Exposure Draft.[157]

[326] Clause 8 of the Exposure Draft would then read:

8. Types of employment

8.1 Employees under this award will be employed in one of the following categories:

(a) full-time;

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[156] AWU submission 27 November 2019 at [21].

[157] AWU submission 27 November 2019 at [21].

(b) part-time; or

(c) casual.

8.2 At the time of engagement an employee will inform each employee of the terms of their engagement and in particular whether they are to be full-time, part-time or casual.

8.3 **Farm and livestock hand at shearing or crutching**

(a) Subject to clause 8.3(b), during any time an employee engaged on a weekly basis Part 6—Broadacre Farming and Livestock Operations is employed in shearing or crutching operations of the principal employer, Part 9—Shearing Operations will not apply.

(b) Exception

(i) Clause ~~11.7(b)~~8.3(a) will not apply to any farm and livestock hand engaged by the week who:

- works in the employer's shearing shed; and
- who has been engaged by the employer during the period commencing one week before the actual shearing or crutching begins; and
- who is discharged during the week after the shearing or crutching actually ends.

(ii) In the circumstances set out in clause 8.3(b)(i), the employee will be paid station hand rates when performing work covered by Part 5 of this award and shearing rates when performing work covered by Part 8 of this award.

[327] At the hearing on 18 December 2019 the NFF supported the AWU's proposed variation.

[328] We agree with the AWU's proposed amendment and will amend the draft variation determination accordingly.

(ii) *Clause 19.2*

[329] Clause 19.2 of the Exposure Draft states:

19.2 Conversion to hourly entitlement

An employer may reach agreement with the majority of employees concerned to convert the annual leave entitlement in section 87 of the Act to an hourly entitlement for administrative ease (e.g. 152 hours for a full-time employee entitled to ~~four~~ 4 weeks' annual leave).

[330] The AWU also submits that the example located in brackets at the end of clause 19.2 should be deleted because it has the potential to undermine the NES for the reasons identified by a Full Bench of the Commission in RACV[158].[159] In reply ABI submitted that it does not

[158] *RACV Road Service Pty Ltd v Australian Municipal, Administrative, Clerical and Services Union* [2015] FWCFB 8554

[159] AWU submission 27 November 2019 at [22].

consider the removal of the example necessary as it merely identifies the hourly annual leave entitlements for a 38 hour per week employee.

[331] As discussed at the hearing on 18 December 2019, we will amend the example to clarify the source of the 152 hours, that is '4 weeks x 38 hours per week.'

(iii) *Clause 24*

[332] The AWU also submits that the cross-reference in clause 24.3 to clause 41 should be amended to clause 44. The AWU notes that the rates appear in clause 44 and clause 41 only refers the reader to clause 44.[160] We agree that the cross reference should be to clause 44 and will amend the draft variation determination accordingly.

(iv) *Clause 38*

[333] Clause 38 of the Exposure Draft states:

> **38. Continuous work hours – Ordinary hours and roster cycles for shiftworkers**
>
> 38.1 Application of clause ~~31~~38
>
> Clause ~~31~~38 applies to shiftworkers who work on continuous work as defined in clause 38.2.
>
> 38.2 Definition of continuous work
>
> **Continuous work** means work carried on with consecutive shifts for 24 hours on each day for at least 6 days in a row without interruption (other than for breakdowns, for meal breaks or due to unavoidable causes beyond the employer's control).
>
> 38.3 Maximum hours in certain periods
>
> (a) In any 28 day period, a shiftworker working a shift:
>
> (i) is not to work more than 152 ordinary hours; and
>
> (ii) is to average 38 ordinary hours a week, including crib time.
>
> (b) However, the employer and the majority of employees concerned may agree on a roster system that results in the weekly average of 38 ordinary hours being achieved over a period that is longer than 28 days, but no longer than 26 weeks.
>
> 38.4 Length of shifts
>
> (a) A shiftworker is to work a shift of up to 8 ordinary hours at the times the employer requires.
>
> (b) A shift may not be longer than 12 ordinary hours.

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[160] AWU submission 27 November 2019 at [23].

(c) If a shift is to be longer than 8 ordinary hours, then it is to be agreed by the employer and the majority of employees in the plant, or work section, or sections concerned.

38.5 Frequency of shifts

An employee must not be required to work more than one shift in any 24 hours, except at regular changeover of shifts.

38.6 Crib time for shiftworkers

A continuous hours shiftworker is allowed 20 minutes crib time on each shift, which is counted as time worked.

[334] The AWU submits that the reference to a "continuous hours shiftworker" in clause 38.6 should be amended to a "continuous work shiftworker" because "continuous work" is the term defined in clause 38.2.[161]

[335] We agree with the AWU's proposed amendment and will amend the draft variation determination accordingly.

(v) *Schedule B*

[336] The AWU notes that it has been agreed during the 'Overtime for Casuals' common issue proceedings that the 25% casual loading is paid on a cumulative basis for overtime hours under the current award. As a result, the AWU submits that the casual overtime rate tables can be inserted into the broadacre farming and livestock operations, pig breeding and raising and poultry farming sections of Schedule B.[162] Consistent with our general approach the award will be amended once the variation determination has been issued by the Part time and Casual Full Bench.

[337] The NFF raises five issues.

(i) *Clause 17.2*

[338] The table at clause 17.2 provides as follows:

17.2 Wage-related allowances

(a) All-purpose allowances

Allowances paid for **all purposes** are included in the rate of pay of an employee who is entitled to the allowance, when calculating any penalties or loadings or payment while they are on annual leave. The following allowances are paid for all purposes under this award:

(i) leading hand allowance (clause 17.2(b)); and

[161] AWU submission 27 November 2019 at [25].

[162] AWU submission 27 November 2019 at [26].

(ii) first aid allowance (clause 17.2(c)).

(b) Leading hands

(i) A leading hand in charge of two 2 or more people must be paid as follows:

In charge of	$ per week
2-6 employees	23.07
7-10 employees	26.88
11-20 employees	38.31
More than 20 employees	48.14

(ii) The allowance contained in clause 17.2(b)(i) will apply to part-time employees on a pro-rata basis.

[339] The NFF submit that the source for the figures in this table is unknown and that the Pastoral Award 2010 presently provides for the leading hand allowance to be a percentage of the relevant employee's salary. Clause 17.4 of the Pastoral Award currently provides:

17.4 All-purpose allowances

The following allowances apply for all purposes of this award:

(c) Leading hands

A leading hand in charge of two or more people must be paid as follows:

In charge of	**% of the standard rate**
2–6 employees	115% per week extra
7–10 employees	134% per week extra
11–20 employees	191% per week extra
More than 20 employees	240% per week extra

[340] The figures in the Exposure Draft are based on a percentage of the standard rate as set out in the current award. In the *December 2019 Statement* we expressed the *provisional* view that no amendment is necessary. At the hearing on 18 December 2019 the NFF did not contest our *provisional* view and withdrew its submission in respect of clause 17.2.

(ii) *Clause 37.2*

[341] Clause 37 of the Exposure Draft states:

37 Ordinary hours and roster cycles for non-shiftworkers

37.1 Maximum hours in certain periods

(a) An employee's ordinary hours of work will be up to 8 hours a day between 6.00 am and 6.00 pm Monday to Friday.

(b) However, the employee and the employer may agree:

(i) that the employee is to work up to 12 ordinary hours in a day; and

(ii) to change the span of hours as allowed under clause 30.1(a).

(c) The employer and the majority of employees at a workplace may agree about how the 38 hour week is implemented at that workplace.

(d) In any 4 week period, a piggery attendant is not to work more than 152 ordinary hours.

37.2 Minimum payment for one week

If an employee works less than 38 hours in one week in a 4 week period, then the employer must pay the employee for 38 hours work for that week.

[342] The Commission has previously expressed its decision in regard to the redraft of this clause as follows (noting that clause 37.2 of the 14 October 2019 Exposure Draft was previously numbered 30.2):

> '[45] The NFF also submitted that clause 30.2 of the exposure draft requires the employer to pay an 'employee' for a 38 hour week, regardless of the hours actually worked by the 'employee', whereas clause 35.1 of the current award only requires an employer to 'use its best endeavours' to pay the employee for 38 hours. The NFF submitted that the proposed clause may have significant consequences for part-time employees, where an employee takes unpaid leave or if an employee works more than 38 hours in one week but less than 38 in the next week, as provided by a 4 weekly averaging system.
>
> [46] The relevant part of clause 35.1 of the current award is italicised below:
>
> > '35.1 Ordinary hours for Piggery attendants will not exceed 152 in any four week period. If an employee works less than 38 hours in one week of any four week period then the employer will use its best endeavours to ensure that the employee is paid for 38 hours work during any such week…' (emphasis added)
>
> [47] The wording of clause 30.2 of the plain language re-draft has been amended because the current clause is vague and aspirational in nature and does not provide an enforceable entitlement to an employee or an obligation on an employer. In previous decisions, the Commission has declined to vary awards to insert provisions which may be characterised as 'aspirational' and which have little or no work to do. On this basis we have decided not to revert to the current award wording.
>
> [48] The NFF submitted that new clauses 31 – 34 are not necessary and are potentially risky because the current provisions are not a source of debate or dispute. The NFF submitted that given this, it is difficult to identify a strong rationale for introducing new provisions that may promote confusion and dispute or have other unintended consequences. The NFF submitted that the re-drafted clauses contain a number of differences to the current award provisions.'[163] (footnotes omitted)

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[163] [2018] FWCFB 6368 at [45] to [48]

[343] While the NFF accepts that the language is not ideal, it submits that the intent of the current clause is clear. It obliges a piggery employer to provide 38 hours for the employee every week, except where there is legitimately nothing for the employee to do. As such, the NFF submit that the clause has "work to do" and is more than purely aspirational.

[344] The NFF submit further that if in its current form the clause is purely aspirational then changing it to a clause which clearly has operative effect goes beyond the remit of the plain English redraft.

[345] The NFF's concern is that as redrafted, where the employer averages the work over 4 weeks, so that where the employee works only 36 hours in Week 1 — but, for example, 40 in Week 2 — the employer will still have to pay for 38 hours in Week 1. It could also affect part-time and possibly casual arrangements.

[346] In the *December 2019 Statement* we noted that it appears that the cross reference to clause 30.1(a) in clause 37.1(b)(ii) may be incorrect and we expressed the *provisional* view that the cross reference be amended to clause 37.1(a). At the hearing on 18 December 2019 no party opposed our *provisional* view. We confirm our *provisional* view and will amend the cross reference in the draft variation determination.

[347] In respect of the substantive issue raised by the NFF, this will be the subject of a conference on Wednesday 22 January 2020. We note that in correspondence dated 20 December 2019 the AWU proposed the deletion of clause 37.2. This proposal can be discussed at the conference. A notice of listing will be published in due course.

(iii) *Clause 50*

[348] The NFF submit that for consistency, the second column in the table at clause 50 should read "If not found employee" or the third column should read "~~If~~ Found employee".

[349] The relevant part of clause 50 states:

> **50. Minimum rates**
>
> 50.1 The Minimum rates for Shearers will be:

Minimum rates for shearing (by machine)	**Not found employee**[1] **$**	**If found employee $**
Flock sheep – wethers, ewes and lambs – rate per 100	318.62	286.27
Flock sheep – wethers, ewes and lambs – rate per day	238.04	205.69

> [1] These rates are calculated in accordance with clause A.1.

[350] The current Pastoral Award uses the terminology 'If found' and 'If not found' in clause 45.1. In the *December 2019 Statement* we expressed our *provisional* view that the second column of the table should be amended to include the word 'If' before the word 'not.'

[351] At the hearing on 18 December 2019 no party opposed our *provisional* view. We confirm our *provisional* view and will amend the draft variation determination accordingly.

(iv) *Clause 54.8*

[352] Clause 49.8 of the current award reads "subject to this award, the employer will be ready…". The Exposure Draft has deleted "subject to this award", a change which the NFF submits could affect the interpretation of the award:

> **49.8 Provision of sheep**
>
> (a) The total number of sheep to be shorn (or crutched) at the shearing (or crutching) will not be more than the maximum number agreed upon nor less than the minimum number agreed upon nor will the number of Shearers employed exceed the number agreed upon.
>
> (b) Subject to this award, the employer will be ready to commence shearing (or crutching) on the date appointed and will keep the Shearers (or Crutchers) fully supplied with sheep until the completion of the shearing (or crutching). But the employer will not be bound to furnish the agreed minimum number of sheep or to be so ready or to so keep the employee fully supplied if prevented by any cause unavoidable by them; provided, however, that the employer will inform the employee, as soon as is reasonably possible, whether, and to what extent, the employee will be or is likely to be so prevented.
>
> Provided also that when the employer is a contractor shearing or crutching sheep under contract with an owner or the owner's agent, the failure of the owner or agent to keep the contractor supplied with sheep for shearing (or crutching) will not be deemed to be a cause unavoidable by the contractor unless the owner or agent is prevented from supplying sheep because of any unavoidable cause.
> (Emphasis added)

[353] At the hearing on 18 December 2019, the NFF was asked to explain the provisions of the award that may have an impact on this clause and why the words 'subject to this award' are necessary. The NFF referred to three provisions, clauses 54.3, 54.4(b) and 54.4(c). We will amend clause 54.8 to add the following introductory words:

> 'Subject to clause 54.3 and clause 54.4(b) and (c)'

[354] In correspondence dated 20 December 2019 the AWU proposed that the introductory words to clause 49.8 read:

> 'subject to other conditions in the award concerning the provision of sheep'.

[355] This proposal will be discussed at the conference on 22 January 2020.

(v) *Clause 54.4(b)*

[356] At the hearing on 18 December 20196 the NFF raised a further issue, regarding clause 54.4(b) of the exposure draft, which states:

> (b) The employer need not pen sheep for shearing (or crutching) which in the honest opinion of the employee should not be shorn or crutched because they are too wet to be short (or crutched), without responsibility for any delay.

[357] The NFF submits that the word 'employee' should read 'employer.'

[358] At the hearing we indicated that on the face of it we thought the NFF was correct. As the issue was raised late we provided the AWU with a few days to indicate whether they opposed the amendment of clause 54.4(b) to delete 'employee' and insert 'employer.' There was no subsequent correspondence from the AWU.

[359] We note that clause 54.4 generally deals with employer requirements in respect of the condition of sheep, indeed the clause heading reads '**Conditions of sheep – employer requirements.**' Further, clause 54.4(c) states:

> (c) The employer may also withdraw sheep which have been penned for shearing (or crutching) when, in the employer's honest opinion, the wool is too wet for pressing, without responsibility for any delay.

[360] Plainly, the context supports the amendment proposed by the NFF.

[361] The amendment is also supported by the terms of various pre-modernisation instruments which informed the making of the current award, for example:

- Pastoral Industry Award 1998: clause 24.3.3(b) and (c);
- Pastoral Employees (State) Award (WA): clause 40 'Wet Sheep';
- Shearing Industry Award – State 2003 (QLD) clause 4.9(d); and
- Shearing Industry Award (Tas) clause 40(a) and (b).

[362] We agree with the NFF that the word 'employee' in clause 54.4(b) should be 'employer' and we will amend the draft variation determination accordingly.

6.20 *Pharmaceutical Industry Award*

[363] Ai Group raises three issues.

(i) *Clause 13.2 and 13.3*

[364] Ai Group refer to its submissions filed on 23 October 2019 in which it proposed various changes to clauses 13.2 and 13.3 of the Exposure Draft (at the time of the submission the relevant clauses appeared as 8.2 and 8.3, consistent with the last published version of the Exposure Draft) in response to an issue raised by the AWU during proceedings before the Full Bench on 9 October 2019.

[365] In its submissions dated 23 October 2019, Ai Group proposed to vary the clauses as follows:[164]

> **'8.2 Ordinary hours—day workers**

[164] Ai Group submission, 23 October 2019 at pp. 2-3.

(a) The ordinary hours of work for a full time day worker are an average of 38 hours per week but not exceeding 152 hours in 28 consecutive days.

(b) Ordinary hours are worked continuously, except for meal breaks and rest pauses, between 7.45 am and 5.15 pm, Monday to Friday.

(c) Where the employer and the majority of employees in the affected plant, work section or sections agree, the spread of hours may be altered by up to one hour at either end of the spread.

(d) The ordinary hours of work for a part-time employee will be in accordance with clause 10–Part-time employees.

(e) The ordinary hours of work for a casual day worker are an average of up to 38 hours per week but not exceeding 152 hours in 28 consecutive days.

8.3 Ordinary hours—shiftworkers

(a) The ordinary hours of work for a full-time shiftworkers are an average of 38 hours per week but not exceeding 152 hours in 28 consecutive days.

(b) Ordinary hours must not exceed eight hours in any one day.

(c) At the discretion of the employer, ordinary hours must be worked continuously on Monday to Friday, except for meal breaks.

(d) Except at changeover of shifts, an employee must not be required to work more than one shift in each 24 hours.

(e) The ordinary hours of work for a part-time employee will be in accordance with clause 10–Part-time employees.

(f) The ordinary hours of work for a casual shiftworker are an average of up to 38 hours per week but not exceeding 152 hours in 28 consecutive days.'

[366] Ai Group continues to rely on that submission and submit that the changes there proposed should be made.[165] ABI supports Ai Group's submission and the AWU agreed to the proposed changes.

[367] We agree and will vary the draft variation determination accordingly.

(ii) *Clauses 19.1 and 19.2 Overtime*

[368] Clauses 19.1 and 19.2 of the Exposure Draft state:

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[165] Ai Group submission, 27 November at [95].

19.1 Definition of overtime

(a) For a full-time or casual employee overtime is any time worked:

(i) outside the times of beginning and ending work in any one day;

(ii) within the times of beginning and ending work but in excess of 8 hours in any one day;

(iii) on a Saturday, Sunday, public holiday or rostered day off.

(b) For a part-time employee, overtime is any time worked in excess of the employee's hours as agreed in accordance with clauses 10.2 and 10.3.

19.2 Overtime rates

Where an employee works overtime the employer must pay to the employee the overtime rates as follows:

For overtime worked on:	**Overtime rate % of minimum hourly rate**	**Minimum payment**
	%	
Day workers		
Monday to Friday working overtime within the times of beginning and ending work but in excess of 8 hours in any one day:		
– first 2 hours	150	–
– after 2 hours	200	–
Shiftworkers		
Monday to Friday working overtime within the times of beginning and ending work but in excess of 8 hours in any one day:		
– first 3 hours	150	–
– after 3 hours	200	–
All employees		
Monday to Friday outside the times of beginning and ending work in any one day:		
– first 2 hours	150	–
– after 2 hours	200	–
Saturday – first 2 hours	150	3 hours
Saturday – after 2 hours	200	3 hours
Sunday all day	200	3 hours

For overtime worked on:	Overtime rate % of minimum hourly rate	Minimum payment
	%	
Rostered day off	250	–
Public holiday all day	250	

[369] Ai Group submits that there are a number of issues arising from clauses 19.1 and 19.2. Firstly, clause 19.1 defines all time worked in the circumstances described at clauses 19.1(a)(i) – (iii) as overtime. Ai group submits that it is not clear that this would necessarily be the case under the current award. By way of example, work performed on a public holiday could, in Ai Group's view, constitute ordinary hours under the current award. The award does not mandate that it be treated as overtime.[166]

[370] Additionally, by virtue of clause 19.1(a)(iii) any work performed on a rostered day off would be treated as overtime. Ai Group submits that this is inconsistent with clause 25.5 of the current award which provides that where time is worked by an employee on an RDO, the employee is entitled to be paid either 250% or given a day off at some future date. Ai Group submits that the most common RDO arrangement involves employees working 19 x 8 ordinary hour working days and then having the 20th working day off as an RDO. For example, an employee may work 8 ordinary hours, Monday to Friday, for three weeks, and 8 ordinary hours, Monday to Thursday, in the fourth week, with Friday deemed to be the RDO. If the employee works on the Friday of the fourth week, this would be overtime in some, but not all, circumstances, as follows:[167]

- If the employee is not given an alternative RDO, the time worked on the fourth Friday would be overtime;

- If the employee is given an alternative RDO at some future date (consistent with clause 25.5 in the current award), the time worked on the fourth Friday would not be overtime. Often employees wish to bank RDOs or take an RDO on an alternative date, by agreement with their employer

[371] Clause 19.2 requires the payment of the rates there described during overtime only. Ai Group submits it is potentially a substantive change to clause 25 of the award (or elements of clause 25) given that it is not expressly confined to the performance of overtime. [168]

[372] Clause 19.2 appears to require a minimum payment of 3 hours on a Saturday at 150% of the minimum hourly rate and another minimum 3 hour payment at 200% of the minimum hourly rate. Ai Group submits that this is substantively different to clause 25.2 of the award, which requires a three hour minimum payment in total on a Saturday. [169]

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[166] Ai Group submission, 27 November at [97].

[167] Ai Group submission, 27 November at [97].

[168] Ai Group submission, 27 November at [97].

[169] Ai Group submission, 27 November at [98].

[373] Clause 25 of the current award states:

25 Overtime and penalty rates

The following rates, based on 1/38th of the weekly wage rate, must be paid for all work done:

25.1 Outside the times of beginning and ending work in any one day—150% for the first two hours and 200% thereafter.

25.2 Within the times of beginning and ending work but in excess of eight hours in any one day—150% for the first two hours and 200% thereafter for a day worker and 150% for the first three hours and 200% thereafter for a shiftworker.

25.3 On Saturday—150% for the first two hours and 200% thereafter, with a minimum payment as for three hours' work.

25.4 On Sunday—200%, with a minimum payment as for three hours' work.

25.5 On a rostered day off—250% or a day off instead at some future date.

25.6 On a public holiday—250%.

25.7 Time off instead of payment for overtime

(a) An employee and employer may agree in writing to the employee taking time off instead of being paid for a particular amount of overtime that has been worked by the employee.

(b) Any amount of overtime that has been worked by an employee in a particular pay period and that is to be taken as time off instead of the employee being paid for it must be the subject of a separate agreement under clause 25.7.

(c) An agreement must state each of the following:

(i) the number of overtime hours to which it applies and when those hours were worked;

(ii) that the employer and employee agree that the employee may take time off instead of being paid for the overtime;

(iii) that, if the employee requests at any time, the employer must pay the employee, for overtime covered by the agreement but not taken as time off, at the overtime rate applicable to the overtime when worked;

(iv) that any payment mentioned in subparagraph (iii) must be made in the next pay period following the request.

Note: An example of the type of agreement required by this clause is set out at Schedule H. There is no requirement to use the form of agreement set out at Schedule H. An agreement under clause 25.7 can also be made by an exchange of emails between the employee and employer, or by other electronic means.

(d) The period of time off that an employee is entitled to take is the same as the number of overtime hours worked.

EXAMPLE: By making an agreement under clause 25.7 an employee who worked 2 overtime hours is entitled to 2 hours' time off.

(e) Time off must be taken:

(i) within the period of 6 months after the overtime is worked; and

(ii) at a time or times within that period of 6 months agreed by the employee and employer.

(f) If the employee requests at any time, to be paid for overtime covered by an agreement under clause 25.7 but not taken as time off, the employer must pay the employee for the overtime, in the next pay period following the request, at the overtime rate applicable to the overtime when worked.

(g) If time off for overtime that has been worked is not taken within the period of 6 months mentioned in paragraph (e), the employer must pay the employee for the overtime, in the next pay period following those 6 months, at the overtime rate applicable to the overtime when worked.

(h) The employer must keep a copy of any agreement under clause 25.7 as an employee record.

(i) An employer must not exert undue influence or undue pressure on an employee in relation to a decision by the employee to make, or not make, an agreement to take time off instead of payment for overtime.

(j) An employee may, under section 65 of the Act, request to take time off, at a time or times specified in the request or to be subsequently agreed by the employer and the employee, instead of being paid for overtime worked by the employee. If the employer agrees to the request then clause 25.7 will apply, including the requirement for separate written agreements under paragraph (b) for overtime that has been worked.

Note: If an employee makes a request under section 65 of the Act for a change in working arrangements, the employer may only refuse that request on reasonable business grounds (see section 65(5) of the Act).

(k) If, on the termination of the employee's employment, time off for overtime worked by the employee to which clause 25.7 applies has not been taken, the employer must pay the employee for the overtime at the overtime rate applicable to the overtime when worked.

Note: Under section 345(1) of the Act, a person must not knowingly or recklessly make a false or misleading representation about the workplace rights of another person under clause 25.7.

[374] In response to the issues outlined above, Ai Group proposes the following solutions:

'(a) Amending the heading of clause 19 to read: "Overtime and Penalty Rates".

(b) Deleting clause 19.1(a).

(c) Relocating clause 19.1(b) to a new clause 10.5.

(d) Deleting the heading to clause 19.2.

(e) Replacing the preamble to the table with the following. Where an employee performs work described in the table below, the employer must pay the employee the corresponding rate prescribed: …

(f) Deleting all references to "overtime" in the table at clause 19.2.

(g) Amending the table in respect of Saturday rates as follows:

Saturday ~~– first 2 hours~~ - first 2 hours - after 2 hours	 150 200	3 hours
~~Saturday – after 2 hours~~	~~200~~	~~3 hours~~'

[375] Ai Group suggests that if the changes above are made, the heading to clause 20 should be varied to read "Shiftwork penalty rates". [170]

[376] In reply, ABI agrees that under the current award work performed on a public holiday is not automatically considered overtime and in many cases would be ordinary hours. ABI notes:

- the heading of clause 25 in the current award is 'Overtime and penalty rates', yet the rates in the clause are all defined as overtime in clause 19.1 of the exposure draft; and
- neither the award nor the exposure draft contain a definition of 'rostered day off'. Whether the work performed on such a day would be ordinary hours or overtime would depend on how the employer has structured the ordinary hours of work.

[377] ABI submits that it may be appropriate to include a footnote in the tables at clauses B.2 and B.4, drawing attention to the fact that clause 19.3 allows for a future day off in lieu of payment at the 250% rate. As to clause 19.2 ABI agrees that the current drafting appears to suggest that a minimum payment of three hours applies for the first two hours worked on a Saturday, with a further minimum payment of three hours applying thereafter.

[378] ABI submits that clause 19.1 should be varied to address the issues raised – to clarify what is considered part of an employee's ordinary hours of work and what is overtime. ABI submits that Ai Group's proposed variations 'do not provide any clarity in relation to this [and] should not be adopted in their current form'.

[379] The AWU generally agrees with the issues identified by Ai Group but submits that the issues raised can be resolved in a manner that is more consistent with the current award, by:

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[170] Ai Group submission, 27 November at [99].

- amending clause 19.1(a)(iii) to read: 'on a Saturday, Sunday or an RDO (unless a day off will be taken instead at a future date)';
- amend the Saturday overtime rate table in clause 19.2 in the manner proposed by Ai Group (at [98](g)) to address the minimum engagement issue; and
- amend clause 26.2 to read:

> 'Where an employee works on a public holiday, they will be paid at 250% of the minimum weekly rate.'

[380] The issues raised by Ai Group; Ai Group's proposed solution and the AWU's proposal will be the subject of a conference in February 2020.

6.21 *Poultry Processing Award*

[381] Clause 26.1 of the current award states:

> **26.1 Payment for working overtime**
>
> Except as provided for in clauses 26.4 and 26.5, for all work done outside of ordinary hours, the overtime rate is 150% for the first three hours and 200% thereafter.

[382] Ai Group submit, with respect to clause 19.1 and the definition of overtime, that the clause potentially introduces the notion of an employee's ordinary hours, or the hours that an employee ordinarily works.[171]

[383] Clause 19.1 of the Exposure Draft defines overtime as

> "…any work done outside of the employee's ordinary hours provided by clause 13…"

[384] Ai Group submit that in accordance with clause 26.1 of the current award, overtime rates are payable "for all work done outside ordinary hours". As such, Ai Group propose that clause 19.1 of the Exposure Draft be amended to better reflect the current award as follows (noting the strikethrough):

> Overtime is any work done outside ~~of the employee's~~ ordinary hours <u>as</u> provided in clause 13 – Ordinary hours of work.[172]

[385] ABI supports Ai Group's submissions. No party opposed Ai Group's proposal.

[386] We agree with Ai Group and will amend the draft variation determination accordingly.

6.22 *Storage Services and Wholesale Award*

[387] Ai Group submits that the weekly and hourly rates for 'Wholesale employee level 4' are incorrect and they instead reflect the 'Storeworker grade 1 – on commencement' rates.[173]

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[171] Ai Group submission, 27 November 2019 at [105].

[172] Ai Group submission, 27 November 2019 at [106].

[388] Ai group submit that the reference in clause 21.2 to clause 21 should be replaced with "clauses 21 – 23".[174]

[389] Ai Group notes that the definitions at clause 21.2 of the Exposure Draft appear at clause 24.2 of the award and the definitions are expressed as applying to "this clause", being clause 24. [175]

[390] Ai Group also notes that the defined terms are used throughout clause 24 but most relevantly in clauses 24.5 and 24.6. Clauses 24.5 and 24.6 of the award have been redrafted at clauses 22 and 23 of the Exposure Draft which are separate from clause 21. Consequently, the reference made to "this clause" does not extend the definition of the relevant terms to clauses 22 and 23.[176]

[391] No party opposed Ai Group's proposal.

[392] We agree with Ai Group and will amend the draft variation determination accordingly.

6.23 *Vehicle Manufacturing, Repair, Services and Retail Award*

[393] The following submissions have been made in relation to the Vehicle Manufacturing Repair Services and Retail Award Exposure Draft and draft variation determination:

- ABI 27 November 2019 at [54] – [55]
- Ai Group 27 November 2019 at [140] – [161] and 9 December 2019 at [56]-[80]
- Motor Trades Organisations 27 November 2019 and 9 December 2019
- AMWU 27 November 2019

[394] The matters raised in the submissions were the subject of a conference before Commissioner Bissett at 12:30pm on Wednesday 18 December 2019. All outstanding issues were agreed at the conference, as set in Commissioner Bissett's Report. We will amend the draft variation determination to give effect to the agreement reached at the conference.

7. Conclusion

[395] As mentioned earlier, in the *14 October 2019 Decision* we expressed the *provisional* view that the variation of the 41 modern awards in Tranche 2 in accordance with the draft variation determinations was, in respect of each of the awards, necessary to achieve the modern awards objective. No submissions were made contesting our *provisional* view in respect of the following 14 awards:

- *Aboriginal Community Controlled Health Services Award*
- *Airport Employees Award*
- *Clerks – Private Sector Award*

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[173] Ai Group submission, 27 November 2019 at [120].

[174] Ai Group submission, 27 November 2019 at [123].

[175] Ai Group submission, 27 November 2019 at [124].

[176] Ai Group submission, 27 November 2019 at [124]-[125].

- *Educational Services (Post-Secondary Education) Award*
- *Higher Education Industry—Academic Staff—Award*
- *Hydrocarbons Field Geologists Award*
- *Mannequins and Models Award*
- *Maritime Offshore Oil and Gas Award*
- *Passenger Vehicle Transportation Award*
- *Professional Diving Industry (Industrial) Award*
- *Professional Diving Industry (Recreational) Award*
- *Rail Industry Award*
- *Restaurant Industry Award*
- *Stevedoring Industry Award*

[396] We confirm our *provisional* views and will issue the variation determinations in respect of each of these awards in the terms published on 14 October 2019, subject to any amendments necessary to give effect to our decision in respect of the general issues (see Section 2 above) and the correction of any minor typographical errors or omissions (see [25] above). These variation determinations will be published by no later than 14 February 2020 and will commence operation on 13 April 2020.

[397] In Sections 5 and 6 of this decision we dealt with more substantive award specific issues in respect of 27 of the Tranche 2 modern awards.

[398] In Section 5 decisions have been made in respect of the disputed issues in the Transport Group of Awards, that is:

- *Road Transport (Long Distance Operations) Award 2010*
- *Road Transport and Distribution Award 2010*
- *Transport (Cash in Transit) Award 2010*
- *Waste Management Award 2010*

[399] In Section 6 decisions have been made in respect of the disputed issues in the following Tranche 2 awards:

- *Airline Operations – Ground Staff Award 2010*
- *Air Pilots Award 2010*
- *Alpine Resorts Award 2010*
- *Architects Award 2010*
- *Asphalt Industry Award 2010*
- *Cleaning Services Award 2010*
- *Commercial Sales Award 2010*
- *Concrete Products Award 2010*
- *Contract Call Centres Award 2010*
- *Dry Cleaning and Laundry Industry Award 2010*
- *Educational Services (School) General Staff Award 2010*
- *Gas Industry Award 2010*
- *Higher Education Industry – General Staff Award 2010*
- *Hospitality Industry (General) Award 2010*
- *Labour Market Assistance Industry Award*
- *Local Government Award 2010*
- *Manufacturing and Associated Industries and Occupations Award 2010*

- *Meat Industry Award 2010*
- *Pastoral Award 2010*
- *Pharmaceutical Industry Award 2010*
- *Poultry Processing Award 2010*
- *Storage Services and Wholesale Award 2010*
- *Vehicle Manufacturing, Repair, Services and Retail Award 2010*

[400] The variation determinations published on 14 October 2019 in respect of the 27 modern awards at [398] and [399] above will be amended to correct any of the errors identified in [25] above; to remove any contested overtime for casuals and casual conversion terms or Schedules (see [13] – [14] above); and to make the variations we have determined in Sections 5 and 6 of this decision (the amended variation determinations). We confirm our *provisional* view that the variation of the modern awards in [398] – [499], in accordance with the amended variation determinations is, in respect of each of the awards, necessary to achieve the modern awards objective.

[401] We note that some outstanding issues in relation to the variation of the *Pastoral Award 2010* and the *Pharmaceutical Industry Award 2010* are the subject of conferences in January and February 2020.

[402] If any of the modern awards which we propose to vary is the subject of another variation determination between the publication of the variation determinations arising from this decision (on 14 February 2020) and when those variation determinations commence operation (on 4 May 2020), a conference will be convened to provide all parties interested in the affected award with an opportunity to be heard in relation to the appropriate course of action.

PRESIDENT

Appearances:

Mr B Ferguson and Ms R Bhatt of Australian Industry Group

Mr I MacDonald of the Australian Public Transport Industrial Association

Mr S Crawford of the Australian Workers' Union

Mr R Kingston of Australian Business Industrial and the New South Wales Business Chamber

Mr P Boncardo with Ms T Walton of the Transport Workers' Union

Mr R Calver of National Road Transport Association

Mr P Ryan of the Australian Road Transport Industrial Organisation

Mr R Kingston of Australian Business Industrial and the NSW Business Chamber

Mr I MacDonald of the Australian Public Transport Industrial Association

Mr P Ryan of the Australian Hotels Association

Ms K Srdanovic – Qantas

Ms A Ambihaipahar - Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia

Ms A Devasia – Australian Manufacturing Workers' Union

Mr K Barlow – the Community and Public Sector Union

Mr W Chesterman – Victoria Automobile Chamber of Commerce and the Motor Trades Association of NSW, QLD and WA

Mr A Odgers – Independent Education Union

Mr C Morey with Mr M Sheehan – Motor Trades Association of SA

Ms V Wiles – Construction, Forestry, Maritime, Mining and Energy Union – Manufacturing Division

Mr S Pill and Mr M Condello – Group of Eight Universities

Mr S Bull – United Workers' Union

Ms E Gilmore and Ms F Nethercote – Association of Independent Schools

Ms C Pugsley – Australian Higher Education Industrial Association

M Corrigan with Mr D Wagner – Association of Consulting Architects

Ms D Hunter – Local Government Associations

Mr B Rogers – National Farmers' Federation

Hearing details:
2019.
Sydney
17 and 18 December

Printed by authority of the Commonwealth Government Printer

<PR715419>