

IN THE FAIR WORK COMMISSION

Matter No:
AM2020/103

AWARD FLEXIBILITY – HOSPITALITY AND RETAIL SECTORS

Party:
AUSTRALIAN HOTELS ASSOCIATION

SUBMISSIONS AND PROPOSALS

1. These submissions and proposals are put on behalf of the Australian Hotels Association (**AHA**) in response to the statement of the Fair Work Commission (**Commission**) issued on 21 December 2020¹, which invites proposals for additional award flexibility measures in relation to *Hospitality Industry (General) Award 2020* (**Hospitality Award**)

2. The AHA submits four proposals in relation to the Hospitality Award with the intention simplifying various provisions and adding flexibility to the Hospitality Award:
 - A. Consolidation of Junior Employee Classifications Rates;
 - B. Simplification of hours of work arrangements;
 - C. Simplification of late night/early morning penalties; and
 - D. Introduction of loaded rates.

¹ [2020] FWC 6931

AM2020/103 Award Flexibility – Hospitality and Retail Sectors

A. CONSOLIDATION OF JUNIOR EMPLOYEE CLASSIFICATIONS

Proposal

3. To consolidate the junior employee rates classifications into one stream and simplify the range of pay points that can apply to junior employees within the Hospitality Award.

Background and Rationale

4. The Hospitality Award provides for two categories of Junior Employees – Junior Office Employees² (which are junior employees classified within the administration stream) and Junior Employees (Other than Junior Office Employees)³, and permits an employer to pay an employee a percentage of the adult wage rate, which increases in line with the employee's age.
5. The percentages applicable to Junior Employees (Other than Junior Office Employees) and Junior Office Employees are different, with the Junior Office Employees entitled to a higher percentage. The rationale for the higher percentage for Junior Office Employees is not known and does not align with the junior employee percentages in the *Clerks (Private Sector Award) 2020* (Clerks Award).
6. A table comparing the junior employee rate percentages between the Hospitality Award and the Clerks Award is set out at Annexure A.
7. The two categories of junior employees in the Hospitality Award results in 980 different rates of pay out of a total of 1760 rates of pay in Schedule B of the Hospitality Award.

Hospitality Award Variation

8. The AHA proposes one set of Junior Employee Rates based on the percentages at clause 18.4 (a) of the Hospitality Award.

² See clause 18.4 (b) of the Hospitality Award;

³ See clause 18.4 (a) of the Hospitality Award;

9. The effect of this variation will reduce the hourly rates of pay in Schedule B of the Hospitality Award from 1760 to 1280 and simplify the junior rate provisions for employers and employees.

10. The AHA acknowledges the junior rate percentages in clause 18.4 (a) are lower than the percentages in clause 18.4 (b) and therefore to ensure no employee is worse off under this proposal, a transitional provision retaining an existing Junior Office Employees rate of pay until their next birthday is appropriate.

11. A draft proposed variation is set out in Annexure B to these submissions.

B. SIMPLIFICATION OF HOURS OF WORK ARRANGEMENTS

Proposal

12. To simplify the hours of work arrangements by providing greater flexibility for the rostering of the average of 38 ordinary hours per week for full-time employees.

Background and Rationale

13. Clause 15.1 (b) of the Hospitality Award provides eight different options for the rostering of an average of 38 ordinary hours per week. In addition to that, clause 15.1 (c) provides further rules and parameters to which the hours or work arrangements are subject, including minimum and maximum shift lengths.

14. Of the eight options, four of the options specify precise days and shift lengths⁴, three options provide for an average of a defined period⁵, while a final option permits “*any combination of the ways set out in clauses 15.1(b) (i) to (vii)*”⁶.

⁴ See clauses 15.1 (b) (i)-(iv) of the Hospitality Award;

⁵ See clauses 15.1 (b) (v)-(vii) of the Hospitality Award;

⁶ Clause 15.1 (b) (viii) of the Hospitality Award;

15. This raises the issue of the relevance of clause 15.1 (c) (other than the minimum shift length) to an employee who is rostered on the basis of 38 hours per week, if their shift length must be one of the options in clause 15.1 (b) (i)-(iv) or a combination of those options.

Hospitality Award Variation

16. The AHA submits that this provision could be simplified by removing clauses 15.1(b) (i) – (iv) and (viii) of the Hospitality Award, and inserting a general provision for 38 hours per week.

17. Under this proposal, the rostering of 38 ordinary hours per week would remain subject to the minimum and maximum shifts and other parameters set out in clause 15.1 (c) and provide employers with greater flexibility to roster employees without the constraint of predetermined shift lengths.

18. A draft proposed variation is set out in Annexure C to these submissions.

C. SIMPLIFICATION OF LATE NIGHT/EARLY MORNING PENALTIES PAYMENTS

Proposal

19. To simplify the payment rules of late night and early morning penalties and provide consistency across the modern award system.

Background and Rationale

20. Clause 29.2 of the Hospitality Award provides for an additional amount of \$2.27 to be paid for work performed between the hours of 7:00pm and 12:00am Monday to Friday or \$3.41 to be paid for work performed between the hours of 12:00am and 7:00am Monday to Friday.

21. The entitlement is to be expressed as the relevant amount to be paid on a “*per hour or part of an hour*” basis.

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22. While it is our view that the additional payment has traditionally been on a per unit basis for time worked during relevant period, it is our experience there is confusion by users of Hospitality Award as to whether the payment is applied on a per unit basis or a pro rata basis.
23. The issue of whether this category of payments are to be paid on a per unit basis or a pro rata basis arose during the review of the *Registered and Licensed Clubs Award 2010 (Clubs Award)* as part of the 4 yearly review of modern awards.
24. The matter was ultimately resolved by agreement between United Voice and Clubs Australia Industrial on the basis that the late night/early morning penalties can be paid on a pro rata basis⁷.
25. While the wording contained in the Clubs Award clause included the additional words “*for such time worked*”, the AHA submits these additional payments in the Clubs Award and the Hospitality Award are the same amounts and compensate employees for work performed between same time and day periods, and that these highly similarly worded provisions should be interpreted and applied in the same way, which is consistent with the modern awards objective to provide an easy to understand and stable modern award system⁸ and consistent with the observation of a Full Bench of the Commission in the review of annualised wage arrangements⁹.

Hospitality Award Variation

26. The AHA proposes that the Hospitality Award to be amended so that the late night/early morning penalties can be paid on a pro rata basis consistent with the approach in the Clubs Award, which in our view, will simplify payroll administration.
27. A draft proposed variation is set out in Annexure D to these submissions.

⁷ See Report to the Full Bench (PR713492) at [21]-[22];

⁸ See s.134 (1) (g) of the *Fair Work Act 2009*;

⁹ *4 yearly review of modern awards – annualised wage arrangements* [2019] FWCFB 4368 at [35];

D. INTRODUCTION OF LOADED RATES

Proposal

28. To introduce a range of loaded rates (subject to parameters) to simplify the administration and understanding of entitlements and payroll for employers and employees.

Background and Rationale

29. In response to the Statement issued by the Commission¹⁰, the AHA proposes a range of loaded rates which provide for a minimum percentage to be applied to the minimum hourly rate which compensates employees for a defined range of hours and entitlements.

Hospitality Award Variation

30. The AHA proposes the introduction of six loaded rates:

- A. Monday to Friday 40 hours – 10% loading;
- B. Monday to Saturday 40 hours – 19% loading;
- C. Monday to Sunday 40 hours – 28% loading;
- D. Monday to Friday 45 hours – 20% loading;
- E. Monday to Saturday 45 hours – 25% loading; and
- F. Monday to Sunday 45 hours – 35% loading.

31. In each case, the loaded rate will compensate the employee for work performed between 7:00am – 12:00am Monday to Friday, Saturday (maximum of 10 hours) and Sunday (maximum of 10 hours), overtime up to the relevant 40 or 45 hour range, split shift allowance, weekly tool allowance and contain a buffer of \$10 per week. Worked performed on public holidays or in excess of daily/weekly limits is paid at the applicable award overtime or public holiday rate.

¹⁰ [2020] FWC 6931

32. The details for each loaded rate is set out in Annexures E to J to these submissions.

EXEMPTION RATE PROVISIONS

33. The AHA is not proposing any additional exemption rate provisions to be introduced into the Hospitality Award. However, we remain open to considering any proposals by other parties or provisions proposed by the Commission.

For the Australian Hotels Association

27 January 2021

ANNEXURE A
Comparison of Junior Rate Percentages

Age	Hospitality Junior Employees (other than office)	Hospitality Junior Office Employees	Clerks Junior Employees
15 years of age & under	50%	45%	45%
16 years of age	50%	55%	50%
17 years of age	60%	65%	60%
18 years of age	70%	75%	70%
19 years of age	85%	90%	80%
20 years of age	100%	100%	90%
21 years of age	100%	100%	100%

ANNEXURE B

Draft Proposed Variation – Clause 18.4*

18.4 Junior rates

NOTE: Junior employee is defined in clause [2—Definitions](#).

(a) Junior employees ~~(other than junior office employees)~~

An employer must pay a junior employee, ~~who is not a junior office employee,~~ aged as specified in column 1 of [Table 5—Junior employees ~~\(other than junior office employees\)~~](#) the minimum percentage specified in column 2 of the minimum rate that would otherwise be applicable under [Table 3—Minimum rates](#).

Table 5—Junior employees ~~(other than junior office employees)~~

Column 1	Column 2
Age	% of minimum rate
16 years of age and under	50%
17 years of age	60%
18 years of age	70%
19 years of age	85%
20 years of age	100%

(b) Pre ~~[insert date]~~ Junior office employees

A junior office employee, who was employed immediately before ~~[insert date]~~, is entitled to continue to be paid as specified in column 1 of [Table 6—Junior office employees](#) the minimum percentage specified in column 2 of the minimum rate that would otherwise be applicable under [Table 3—Minimum rates](#) until their next birthday after ~~[insert date]~~.

Table 6—Junior office employees

Column 1	Column 2
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Age	% of minimum rate
15 years of age and under	45%
16 years of age	55%
17 years of age	65%
18 years of age	75%
19 years of age	90%
20 years of age	100%

*Consequential amendments to Schedule B will be required.

ANNEXURE C

Draft Proposed Variation – Clause 15.1 (b)

15. Ordinary hours of work and rostering arrangements

15.1 Full-time employees

(a) The employer and a full-time employee must agree on the arrangement for working the average of 38 ordinary hours per week required for full-time employment.

(b) The average of 38 hours per week is to be worked in one of the following ways:

~~(i) a 19 day month, of 8 hours per day;~~

~~(ii) 4 days of 8 hours and one day of 6 hours;~~

~~(iii) 4 days of 9.5 hours per day;~~

~~(iv) 5 days of 7 hours and 36 minutes per day;~~

~~(i) 38 hours each week with a minimum of 2 days off each weekly period;~~

(ii) 76 hours over a 2 week period with a minimum of 4 days off each 2 week period;

~~(iii) 152 hours each 4 week period with a minimum of 8 days off each 4 week period;~~

~~(vi) 160 hours each 4 week period with a minimum of 8 days off each 4 week period plus an accrued day off;-~~

~~(viii) any combination of the ways set out in clauses 15.1(b)(i) to 15.1(b)(vii).~~

ANNEXURE D

Draft Proposed Variation – Clause 29.2 (b)

29.2 An employer must pay an employee as follows for hours worked by the employee during a period, or on a day, specified in column 1 of [Table 14—Penalty rates](#):

(a) for a full-time or part-time employee, at the percentage specified in column 2 of that Table of the ordinary hourly rate of the employee under [Table 3—Minimum rates](#) plus the additional amount specified in that column for hours worked between 7.00 pm and 7.00 am on a Monday to Friday; or

(b) for a casual employee, at the percentage specified in column 3 of that Table of the ordinary hourly rate of the employee under [Table 3—Minimum rates](#) plus the additional amount specified in that column for hours worked between 7.00 pm and 7.00 am on a Monday to Friday.

Table 14—Penalty rates

Column 1 Time of ordinary hours worked	Column 2 Full-time and part-time employees	Column 3 Casual employees
	% of ordinary hourly rate	% of ordinary hourly rate (inclusive of casual loading)
Monday to Friday – 7.00 am to 7.00 pm	100%	125%
Monday to Friday – 7.00 pm to midnight	100% plus \$2.27 per hour or part of an hour for such time worked.	125% plus \$2.27 per hour or part of an hour for such time worked.
Monday to Friday— midnight to 7.00 am	100% plus \$3.41 per hour or part of an hour for such time worked.	125% plus \$3.41 per hour or part of an hour for such time worked.
Saturday	125%	150%
Sunday	150%	175%
Public holiday	225%	250%

NOTE 1: [Schedule B—Summary of Hourly Rates of Pay](#) sets out the hourly penalty rate for all employee classifications, including junior employees and apprentices.

NOTE 2: The additional amount specified for hours worked between 7.00 pm and 7.00 am on a Monday to Friday will be paid on a pro-rata basis for a part hour.

**Consequential amendments to Schedule C will be required.

ANNEXURE E

Proposed Loaded Rate – Monday to Friday 40 Hours –10%

1. It is proposed that a loaded rate of 10% compensate an employee as follows:
 - a. 40 hours between 7:00am and 12:00am Monday to Friday, comprising 38 ordinary hours and 2 hours of overtime;
 - b. 15 x late night penalty payments;
 - c. 5 x split shift allowances;
 - d. Weekly tool allowance;
 - e. A buffer of \$10.00 per week.

2. The following calculations are based on a level 4 employee with a minimum hourly rate of \$22.70.

<u>Monday to Friday</u>			
Base Rate		\$ 22.70	
<u>Entitlement</u>	<u>No.</u>	<u>Amount</u>	<u>Total</u>
M-F Rate	38	\$ 22.70	\$ 862.60
12-7am	0	\$ 3.41	\$ -
7pm-12am	15	\$ 2.27	\$ 34.05
Saturday		\$ 28.38	\$ -
Sunday		\$ 34.05	\$ -
OT1	2	\$ 34.05	\$ 68.10
OT2	0	\$ 45.40	\$ -
Tool Allowance	1	\$ 8.49	\$ 8.49
Split Shift	5	\$ 2.85	\$ 14.25
Buffer	1	\$ 10.00	\$ 10.00
Total Weekly Hours	40		\$ 997.49
Average Hourly Rate	\$ 24.94		
% above base	10%		
LOADED RATE	\$ 24.97		

3. The arrangement to be entered into by agreement and can be terminated on appropriate notice.

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4. Work performed on public holidays is paid at the applicable public holiday rate.
 5. Work performed in excess of 40 hours or daily maximums is paid at the applicable overtime rate.
 6. Annual leave loading will apply to annual leave.
 7. Consistent with the annualised wage arrangement provisions, the base rate of pay for purposes of the National Employment Standards is the minimum rate of pay set out in clause 18.

ANNEXURE F

Proposed Loaded Rate – Monday to Saturday 40 Hours – 19%

1. It is proposed that a loaded rate of 19% compensate an employee as follows:
 - a. 40 hours between Monday to Saturday, comprising 38 ordinary hours and 2 hours of overtime;
 - b. Monday to Friday work is subject to being performed between 7:00am and 12:00am;
 - c. Saturday work is subject to a maximum of 10 hours.
 - d. 12 x late night penalty payments;
 - e. 5 x split shift allowances;
 - f. Weekly tool allowance;
 - g. A buffer of \$10.00 per week.

2. The following calculations are based on a level 4 employee with a minimum hourly rate of \$22.70.

Monday to Saturday			
Base Rate		\$ 22.70	
Entitlement	No.	Amount	Total
M-F Rate	28	\$ 22.70	\$ 635.60
12-7am	0	\$ 3.41	\$ -
7pm-12am	12	\$ 2.27	\$ 27.24
Saturday	10	\$ 28.38	\$ 283.80
Sunday	0	\$ 34.05	\$ -
OT1	0	\$ 34.05	\$ -
OT2	2	\$ 45.40	\$ 90.80
Tool Allowance	1	\$ 8.49	\$ 8.49
Split Shift	5	\$ 2.85	\$ 14.25
Buffer	1	\$ 10.00	\$ 10.00
Total Weekly Hours	40		\$ 1,070.18
Average Hourly Rate		\$ 26.75	
% above base		18%	
LOADED RATE		\$ 27.01	

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3. The arrangement to be entered into by agreement and can be terminated on appropriate notice.
 4. Work performed on public holidays is paid at the applicable public holiday rate.
 5. Work performed in excess of 40 hours or daily maximums is paid at the applicable overtime rate.
 6. Annual leave loading will apply to annual leave.
 7. Consistent with the annualised wage arrangement provisions, the base rate of pay for purposes of the National Employment Standards is the minimum rate of pay set out in clause 18.

ANNEXURE G

Proposed Loaded Rate – Monday to Sunday 40 Hours – 28%

1. It is proposed that a loaded rate of 28% compensate an employee as follows:
 - a. 40 hours between Monday to Sunday, comprising 38 ordinary hours and 2 hours of overtime;
 - b. Monday to Friday work is subject to being performed between 7:00am and 12:00am;
 - c. Saturday and Sunday work is subject to a maximum of 10 hours each day.
 - d. 9 x late night penalty payments;
 - e. 5 x split shift allowances;
 - f. Weekly tool allowance;
 - g. A buffer of \$10.00 per week.

2. The following calculations are based on a level 4 employee with a minimum hourly rate of \$22.70.

Monday to Sunday			
Base Rate		\$ 22.70	
Entitlement	No.	Amount	Total
M-F Rate	18	\$ 22.70	\$ 408.60
12-7am	0	\$ 3.41	\$ -
7pm-12am	9	\$ 2.27	\$ 20.43
Saturday	10	\$ 28.38	\$ 283.80
Sunday	10	\$ 34.05	\$ 340.50
OT1	2	\$ 34.05	\$ 68.10
OT2	0	\$ 45.40	\$ -
Tool Allowance	1	\$ 8.49	\$ 8.49
Split Shift	5	\$ 2.85	\$ 14.25
Buffer	1	\$ 10.00	\$ 10.00
Total Weekly Hours	40		\$ 1,154.17
Average Hourly Rate	\$ 28.85		
% above base	127%		
LOADED RATE	\$ 29.06		

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3. The arrangement to be entered into by agreement and can be terminated on appropriate notice.
 4. Work performed on public holidays is paid at the applicable public holiday rate.
 5. Work performed in excess of 40 hours or daily maximums is paid at the applicable overtime rate.
 6. Annual leave loading will apply to annual leave.
 7. Consistent with the annualised wage arrangement provisions, the base rate of pay for purposes of the National Employment Standards is the minimum rate of pay set out in clause 18.

ANNEXURE H

Proposed Loaded Rate – Monday to Friday 45 Hours –20%

1. It is proposed that a loaded rate of 20% compensate an employee as follows:
 - a. 45 hours between 7:00am and 12:00am Monday to Friday, comprising 38 ordinary hours and 7 hours of overtime (2 x OT1.5 and 5 x OT2);
 - b. 15 x late night penalty payments;
 - c. 5 x split shift allowances;
 - d. Weekly tool allowance;
 - e. A buffer of \$10.00 per week.

2. The following calculations are based on a level 4 employee with a minimum hourly rate of \$22.70.

Monday to Friday 45 hours			
Base Rate		\$ 22.70	
Entitlement	No.	Amount	Total
M-F Rate	38	\$ 22.70	\$ 862.60
12-7am	0	\$ 3.41	\$ -
7pm-12am	15	\$ 2.27	\$ 34.05
Saturday		\$ 28.38	\$ -
Sunday		\$ 34.05	\$ -
OT1	2	\$ 34.05	\$ 68.10
OT2	5	\$ 45.40	\$ 227.00
Tool Allowance	1	\$ 8.49	\$ 8.49
Split Shift	5	\$ 2.85	\$ 14.25
Buffer	1	\$ 10.00	\$ 10.00
Total Weekly Hours	45		\$ 1,224.49
Average Hourly Rate		\$ 27.21	
% above base		120%	
LOADED RATE		\$ 27.24	

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3. The arrangement to be entered into by agreement and can be terminated on appropriate notice.
 4. Work performed on public holidays is paid at the applicable public holiday rate.
 5. Work performed in excess of 45 hours or daily maximums is paid at the applicable overtime rate.
 6. Annual leave loading will apply to annual leave.
 7. Consistent with the annualised wage arrangement provisions, the base rate of pay for purposes of the National Employment Standards is the minimum rate of pay set out in clause 18.

ANNEXURE I

Proposed Loaded Rate – Monday to Saturday 45 Hours – 25%

1. It is proposed that a loaded rate of 25% compensate an employee as follows:
 - a. 40 hours between Monday to Saturday, comprising 38 ordinary hours and 7 hours of overtime (2 x OT1.5 and 5 x OT2);
 - b. Monday to Friday work is subject to being performed between 7:00am and 12:00am;
 - c. Saturday work is subject to a maximum of 10 hours.
 - d. 12 x late night penalty payments;
 - e. 5 x split shift allowances;
 - f. Weekly tool allowance;
 - g. A buffer of \$10.00 per week.

2. The following calculations are based on a level 4 employee with a minimum hourly rate of \$22.70.

Monday to Saturday			
Base Rate		\$ 22.70	
Entitlement	No.	Amount	Total
M-F Rate	28	\$ 22.70	\$ 635.60
12-7am	0	\$ 3.41	\$ -
7pm-12am	12	\$ 2.27	\$ 27.24
Saturday	10	\$ 28.38	\$ 283.80
Sunday	0	\$ 34.05	\$ -
OT1	2	\$ 34.05	\$ 68.10
OT2	5	\$ 45.40	\$ 227.00
Tool Allowance	1	\$ 8.49	\$ 8.49
Split Shift	5	\$ 2.85	\$ 14.25
Buffer	1	\$ 10.00	\$ 10.00
Total Weekly Hours	45		\$ 1,274.48
Average Hourly Rate		\$ 28.32	
% above base		125%	
LOADED RATE		\$ 28.38	

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3. The arrangement to be entered into by agreement and can be terminated on appropriate notice.
 4. Work performed on public holidays is paid at the applicable public holiday rate.
 5. Work performed in excess of 45 hours or daily maximums is paid at the applicable overtime rate.
 6. Annual leave loading will apply to annual leave.
 7. Consistent with the annualised wage arrangement provisions, the base rate of pay for purposes of the National Employment Standards is the minimum rate of pay set out in clause 18.

ANNEXURE J

Proposed Loaded Rate – Monday to Sunday 45 Hours – 35%

1. It is proposed that a loaded rate of 35% compensate an employee as follows:
 - a. 45 hours between Monday to Sunday, comprising 38 ordinary hours and 2 hours of overtime (2 x OT1.5 and 5 x OT2);
 - b. Monday to Friday work is subject to being performed between 7:00am and 12:00am;
 - c. Saturday and Sunday work is subject to a maximum of 10 hours each day.
 - d. 9 x late night penalty payments;
 - e. 5 x split shift allowances;
 - f. Weekly tool allowance;
 - g. A buffer of \$10.00 per week.

2. The following calculations are based on a level 4 employee with a minimum hourly rate of \$22.70.

Monday to Sunday			
Base Rate		\$ 22.70	
Entitlement	No.	Amount	Total
M-F Rate	18	\$ 22.70	\$ 408.60
12-7am	0	\$ 3.41	\$ -
7pm-12am	9	\$ 2.27	\$ 20.43
Saturday	10	\$ 28.38	\$ 283.80
Sunday	10	\$ 34.05	\$ 340.50
OT1	2	\$ 34.05	\$ 68.10
OT2	5	\$ 45.40	\$ 227.00
Tool Allowance	1	\$ 8.49	\$ 8.49
Split Shift	5	\$ 2.85	\$ 14.25
Buffer	1	\$ 10.00	\$ 10.00
Total Weekly Hours	45		\$ 1,381.17
Average Hourly Rate		\$ 30.69	
% above base		135%	
LOADED RATE		\$ 30.65	

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3. The arrangement to be entered into by agreement and can be terminated on appropriate notice.
 4. Work performed on public holidays is paid at the applicable public holiday rate.
 5. Work performed in excess of 40 hours or daily maximums is paid at the applicable overtime rate.
 6. Annual leave loading will apply to annual leave.
 7. Consistent with the annualised wage arrangement provisions, the base rate of pay for purposes of the National Employment Standards is the minimum rate of pay set out in clause 18.