



STATEMENT AND DIRECTIONS

Fair Work Act 2009

s.156 - 4 yearly review of modern awards

4 yearly review of modern awards—Penalty rates (AM2014/305)

JUSTICE ROSS, PRESIDENT
VICE PRESIDENT CATANZARITI
DEPUTY PRESIDENT ASBURY
COMMISSIONER HAMPTON
COMMISSIONER LEE

MELBOURNE, 8 SEPTEMBER 2016

4 yearly review of modern awards – penalty rates

[1] This Statement deals with two issues relating to the Penalty Rates case. The first concerns an aspect of the evidence led by Ai Group in support of its claim to vary certain penalty rates in the Fast Food Industry Award 2010.

[2] On 3 August 2016, [Directions](#) were issued in relation to the survey evidence attached as ‘PAD2’ to the affidavit of Patricia Ann Deasy. In particular, Ai Group was directed to provide a breakdown of the survey results based on classification level. If no such breakdown existed then Ai Group was asked to suggest an alternative measure which may provide a proxy for classification level. This information was sought so that the Full Bench could consider whether employee preferences varied depending on their classification.

[3] In response to the Directions Ai Group filed an affidavit of Patricia Deasy, affirmed on 19 August 2016 (the [Deasy Affidavit](#)), and [submissions](#) dated 19 August 2016.

[4] Ai Group’s submission states that as no question in the survey required respondents to specify or record their classification it is not possible to provide a breakdown of results based on classification level. Ai Group goes on to submit that the age or employee status of the survey respondents may provide a proxy for classification level. The Deasy Affidavit provides a further breakdown of certain results from the survey based on employment status and age (the ‘Additional Breakdown’). The results from the survey which the Additional Breakdown was performed on were:

- (i) days of the week usually worked (tables 101 to 102 of Exhibit PAD-1 to the Deasy Affidavit);
- (ii) preferred day to work on weekend (tables 103 to 108 of Exhibit PAD-1 to the Deasy Affidavit);
- (iii) whether employees would work more hours on a Saturday if offered (tables 109 to 114 of Exhibit PAD-1 to the Deasy Affidavit);

- (iv) whether employees would work more hours on a Sunday if offered (tables 115 to 120 of Exhibit PAD-1 to the Deasy Affidavit);
- (v) reasons why Saturday work is preferred to Sunday work (tables 121 to 126 of Exhibit PAD-1 to the Deasy Affidavit);
- (vi) reasons why Sunday work is preferred to Saturday work (tables 127 to 132 of Exhibit PAD-1 to the Deasy Affidavit);
- (vii) reasons why employees make themselves available to work weekday evenings, including past 9pm (tables 133 to 138 of Exhibit PAD-1 to the Deasy Affidavit).

[5] Ai Group submits that the results from the survey demonstrate that:

- (i) the majority of employees in all age brackets stated their preferred day to work on a weekend was both Saturday and Sunday (tables 103 and 105 of Exhibit PAD-1 to the Deasy Affidavit);
- (ii) the majority of employees who were permanent part time or casual or who did not know their employment status stated that their preferred day to work on a weekend was both Saturday and Sunday (table 107 of Exhibit PAD-1 to the Deasy Affidavit);
- (iii) the majority of employees stated they would work more hours on a Saturday if offered, regardless of their age (although the difference between employees who stated they would work more hours on a Saturday as opposed to those who would not was much smaller for employees who were aged over 30 years) (tables 109 and 111 of Exhibit PAD-1 to the Deasy Affidavit);
- (iv) the majority of employees who identified themselves as being either permanent part time or casual, or as being unsure of their employment status, stated that they would work more hours on a Saturday if offered (table 113 of Exhibit PAD-1 to the Deasy Affidavit);
- (v) the majority of employees (apart from employees who are over 30 years of age) stated that they would work more hours on a Sunday if offered (tables 115 and 117 of Exhibit PAD-1 to the Deasy Affidavit);
- (vi) the majority of employees who identified themselves as being either permanent part time or casual, or as being unsure of their employment status, stated that they would work more hours on a Sunday if offered (table 119 of Exhibit PAD-1 to the Deasy Affidavit);
- (vii) the most common reason given across all age groups (other than employees aged 16 and 17 years) for a preference to work Saturday rather than Sunday was spending time with family on Sundays. The most common reason given by 16 and 17 year olds for a preference to work Saturday rather than Sunday was study commitments on Sundays (table 121 of Exhibit PAD-1 to the Deasy Affidavit);

- (viii) the most common reason given across all employment types for a preference to work Saturday rather than Sunday was spending time with family on Sundays (table 125 of Exhibit PAD-1 to the Deasy Affidavit);
- (ix) the most common reason given by employees aged 15 years and less for a preference for Sunday work over Saturday work was sporting commitments on Saturday. For employees aged 16 to 24 years the most common reason for preferring Sunday work rather than Saturday work was that more of their friends were available to socialise on Saturday than on Sunday. The most common reason given by employees aged 25 years and over for preferring Sunday work over Saturday work was spending time with family on Saturdays (table 127 of Exhibit PAD-1 to the Deasy Affidavit);
- (x) the most common reason given by permanent full time employees for preferring Sunday work to Saturday work was spending time with family on Saturday. The most common reason given by permanent part time and casual employees for preferring Sunday work to Saturday work was that more of their friends were available to socialise with on Saturday than Sunday. The most common reason for preferring Sunday work to Saturday work given by employees who did not know their employment type, was sporting commitments on Saturday (table 131 of Exhibit PAD-1 to the Deasy Affidavit); and
- (xi) across all age groups and all employment types, the most common response given by employees as to why they made themselves available to work week day evenings including past 9pm, was that they wanted to maximise the times they are available to work, to get more shifts (tables 131 and 137 of Exhibit PAD-1 to the Deasy Affidavit).

[6] The SDA filed a [submission](#) in reply to the submissions filed by Ai Group. At paragraph 5 of that submission the SDA states:

‘The Ai Group has not articulated a cogent basis for why age and employment status may provide a proxy for classification levels. The SDA submits that, in the context of the survey, neither age nor employment status are a reasonable or reliable proxy for the classification level of employees’.

[7] The argument advanced in support of this submission is set out at paragraphs 6 – 17 of the SDA’s submission.

[8] On the material presently before us our provisional view is that there is some force in the SDA’s submission that no cogent basis has yet been articulated for why age and employment status may provide a proxy for classification levels.

[9] We note that paragraph 4 of Ai Group’s submission relies on parts of the Limbrey First Affidavit ([Exhibit AIG3](#) at paragraphs 25, 30, 31, 33-36 and 186-185: the ‘Limbrey evidence’) in support of the proposition that age and employment status may provide a proxy for classification levels. The Limbrey evidence is that at 19 May 2015, 98 911 employees employed in McDonald’s restaurants were employed in the following classifications under the *McDonald’s Australia Enterprise Agreement 2013*:

Level 2 Crew Member	91 107
Level 3 Shift Supervisor	3 239
Level 4 Shift or Trainee Manager	4 565

[10] Further, as at 19 May 2015 the employment status of these 98 911 employees was:

Casuals	75 948
Part time	16 108
Full time	6 855

[11] The data at paragraphs 33-36 of the Limbrey evidence shows that the majority of casual employees (58,007; 76%) were aged 14-18 years whereas a majority of part time (10,069; 63%) and full time employees (6,397; 93%) were aged 19 years and older.

[12] At paragraph 184 of the Limbrey evidence it is said that ‘casual Crew Members and most part time Crew Members can be classified as non-career employees’.

[13] While the Limbrey evidence may show an association between employment status and age, it does not appear to provide any insight into the age and employment status of the employees employed at Levels 2, 3 and 4. Further, the Limbrey evidence provides no data in respect of the Hungry Jack’s employees.

[14] We would be assisted by evidence which sets out (for McDonald’s and Hungry Jack’s employees):

- the number of employees by classification level;
- the characteristics of employees by classification level, that is their age and employment status (for example, provide a breakdown of the 4565 Level 4 McDonald’s employees by their age and the number employed on a casual, part time and full time basis);
- what types of employees are regarded (by McDonalds and Hungry Jacks) as career employees, and why;
- why age and employment status may be regarded as a proxy for classification levels.

[15] As to the Deasy Affidavit and the Additional Breakdown, this material appears to show that employee preferences to work some or more hours on either a Saturday or a Sunday vary depending on the age and employment status of the employee. For example, a majority of full time employees would *not* work some or more hours on a Sunday if they were offered those hours whereas a majority of casual employees *would* work the additional Sunday hours. We would be assisted by a further affidavit from Ms Deasy clearly setting out the extent of the variation in employee preferences to work some or more hours on either a Saturday or a Sunday, by the age and employment status of the employee.

[16] The Directions issued on 3 August 2016 did not specifically provide Ai Group with the opportunity to reply to any submissions filed in response to material it filed. We propose to provide such an opportunity. The following Directions are issued in relation to the provision of evidence of the type referred to in paragraphs [14] and [15] above:

1. Ai Group is to file the evidence sought, in affidavit form, with the Fair Work Commission at amod@fwc.gov.au by 4pm Friday 23 September 2016. Material

provided will be published to the Commission's [Penalty Rates page](#) and subscribers notified. Subscribers to the Penalty Rates case subscription service will receive email alerts as material is posted to the website.

2. The matter will be listed for further hearing at **10am on Wednesday 28 September 2016** in Melbourne. Any requests for video links should be made to chambers.ross.j@fwc.gov.au by 21 September 2016.
3. The deponent(s) of the affidavit(s) setting out the evidence referred to at paragraphs [14] and [15] are to attend the hearing on 28 September 2016 to deal with any questions from the Full Bench and may be cross-examined by any interested party.

[17] The second issue we wish to deal with concerns the status of the various claims before the Full Bench. It appears that some of the claims are no longer being pressed. For example, the written closing submissions filed on behalf of ACCI, NSWBC and ABI, dated 2 February 2016, state at paragraph 3.1:

‘The Hair and Beauty Australia Industry Association, ABI and NSWBC initially also sought to vary penalty rates in relation to *Hair and Beauty Industry Award 2010*. However, as evidence specific to the *Hair and Beauty Industry Award 2010* was not tendered as part of the hearing of the proceedings, ABI and NSWBC consider it more prudent for penalty rates in the *Hair and Beauty Industry Award 2010* to be reviewed on a subsequent occasion.’

[18] A draft summary of the claims before the Full Bench has been prepared by staff of the Fair Work Commission and is set out at Attachment A to this Statement. Any corrections or amendments to that draft summary are to be filed with the Fair Work Commission at amod@fwc.gov.au by **4pm Friday 23 September 2016**.

[19] Any questions in relation to the Directions set out at paragraph [16] above (or any application to vary those Directions) should be sent to chambers.ross.j@fwc.gov.au.

PRESIDENT

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ATTACHMENT A — Proposed Variations

[Attachment A1—Hospitality Industry \(General\) Award 2010 \[MA000009\]](#)

[Attachment A2—Restaurant Industry Award 2010 \[MA000119\]](#)

[Attachment A3—Registered and Licensed Clubs Award 2010 \[MA000058\]](#)

[Attachment A4—General Retail Industry Award 2010 \[MA000004\]](#)

[Attachment A5—Fast Food Industry Award 2010 \[MA000003\]](#)

[Attachment A6—Hair and Beauty Industry Award 2010 \[MA000005\]](#)

[Attachment A7—Pharmacy Industry Award 2010 \[MA000012\]](#)

NOTE 1: In the attached document red text that is struck-through is existing text that the relevant party seeks to have removed from the award. Red text that is underlined is new text that the relevant party seeks to have inserted into the award. Black text is existing text that the relevant party doesn't seek to change (and is included in the document to provide context).

NOTE 2: A joint application by the Australian Federation of Employers and Industries and the Australian Amusement, Leisure and Recreation Association Inc. to vary penalty rates in the *Amusement, Events and Recreation Award 2010* was [withdrawn by correspondence dated 26 June 2015](#).

NOTE 3: A joint application by the Australian Federation of Employer and Industries and the Drycleaning Institute of Australia to vary penalty rates in the *Dry Cleaning and Laundry Industry Award 2010* was [withdrawn by correspondence dated 12 August 2015](#).

Claims by Australian Hotels Association and Accommodation Association of Australia

3. Definitions and interpretation

3.1 In this award, unless the contrary intention appears:

...

additional holiday means for the purposes of entitlements or benefits arising under this award, any day or part day falling within the scope of s.115(b) of the Act.

If, under (or in accordance with a procedure under) a law of a State or Territory, a day or part day is substituted for a day or part day that would otherwise be an additional holiday because of the definition above, then the substitute day or part-day is the additional holiday.

holiday means any day or part day defined as an additional holiday or a public holiday under this award.

public holiday means, for the purposes of entitlements or benefits arising under this Award, each of these days:

- (i) 1 January (New Year’s Day);
- (ii) 26 January (Australia Day);
- (iii) Good Friday;
- (iv) Easter Monday;
- (v) 25 April (Anzac Day);
- (vi) The Queen’s birthday holiday (on the day on which it is celebrated in a State or Territory or a region of a State or Territory);
- (vii) 25 December (Christmas Day);
- (viii) 26 December (Boxing Day).

If, under (or in accordance with a procedure under) a law of a State or Territory, a day is substituted for a day that would otherwise be a public holiday because of the definition above, then the substitute day is the public holiday.

...

32. Penalty rates Additional remuneration

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

	Monday to Friday	Saturday	Sunday	Public holiday	<u>Additional holiday</u>
	%	%	%	%	<u>%</u>
Full-time and	100	125	175 <u>150</u>	250 <u>225</u>	250 <u>200</u>

	Monday to Friday	Saturday	Sunday	Public holiday	<u>Additional holiday</u>
	%	%	%	%	<u>%</u>
part-time					
Casual (inclusive of the 25% casual loading)	125	150	175 <u>150</u>	275 <u>175</u>	<u>125</u>

32.2 **Public holidays-Holidays**

- (a) An employee other than a casual working on a **public** holiday will be paid for a minimum of four hours' work. A casual employee working on a **public** holiday will be paid for a minimum of two hours' work.

29.1.1 Employees (other than casual employees) who work on a ~~prescribed~~ holiday may, by agreement, perform such work at their applicable ordinary hourly rate plus ~~50%~~ 25% additional loading rather than the ~~penalty rate~~ additional remuneration prescribed in clause 32.1, provided that equivalent paid time is added to the employee's annual leave or one day instead of such **public** holiday will be allowed to the employee during the week in which such holiday falls. Provided that such holiday may be allowed to the employee within 28 days of such holiday falling due.

- (c) An employee other than a casual working on Christmas Day when it falls on a weekend, and is not ~~prescribed as~~ a public holiday ~~under the NES~~ as defined in this award will be paid an additional loading of 50% of their applicable ordinary hourly rate for the hours worked on that day and will also be entitled to the benefit of a substitute day.

32.3 **Other ~~penalty~~ additional remuneration**

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

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

32.4 **~~Penalty rates~~ Additional remuneration not cumulative**

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

...

37. ~~Public holidays~~ Holidays

~~37.1 National Employment Standards~~

(a) ~~Public holidays are provided for in the NES~~ Substitution by Agreement

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

(b) Additional arrangements for full-time employees:

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

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

For the purposes of this subclause a "day" is equal to the length of time of the rostered day off that falls on the holiday.

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

(c) Arrangements for part-time employees

Part-time employees are entitled to ~~public holidays prescribed in s.115 of the Act~~ holidays as defined in clause 3 without loss of pay if those ~~public~~ holidays fall on days agreed under clauses 12.3 and 12.4. Part-time employees who work on a ~~public~~ holiday must be paid in accordance with clause 32.

(d) Part Day Additional Holidays

(i) Where a full-time employee is usually rostered to work ordinary hours on a part day additional holiday, but as a result of having a rostered day off (RDO) provided under this award, does not work, the employee will be taken to be on an additional holiday for such hours and paid their ordinary rate of pay for those hours.

(ii) A full-time employee not rostered to work on a part-day additional holiday, other than an employee who has exercised their right to refuse to work in accordance with the NES, will not be entitled to another day off, another day's pay or another day of annual leave as a result of the part-day additional holiday.

[NOTE 1: The application to vary the part-day public holiday provisions has been referred to a separately constituted Full Bench ([AM2014/301](#)).]

[NOTE 2: Pending the outcome of its application to amend the coverage of the Hospitality Award 2010 regarding catering businesses, Restaurant and Catering Industrial may seek to amend the public holiday penalty rate for full-time and part-time employees per its [outline of submissions of 1 December 2014](#).]

Attachment A2—Proposed Variations—Restaurant Industry Award 2010 [MA000119]

Claims by Restaurant & Catering Industrial

34. Penalty rates

34.1 Penalty rates for work on weekends and public holidays

An employee working ordinary time hours on the following days will be paid the following percentage of the minimum wage in clause 20—Minimum wages for the relevant classification:

Type of employment	Monday to Friday	Saturday	Sunday	Public holidays
	%	%	%	%
Full-time and part-time	100	125	150 125	250 150
Casual Introductory Level, Level 1, Level 2 (inclusive of 25% casual loading)	125	150	150	250 150
Casual Level 3 to Level 6 (inclusive of casual 25% loading)	125	150	175	250

~~34.1A—Special condition regarding existing employees~~

~~No existing employee classified as Level 3 or above shall be moved down to pay grade Levels 1 or 2 or be discriminated against in the allocation of work as a result of the variation of clause 34.1 by the Full Bench of the Fair Work Commission in proceedings number C2013/6610.~~

~~34.2—Additional payment for work done between the hours of 10.00 pm to 7.00 am on Monday to Friday~~

~~(a)—An employee, including a casual, who is required to work any of their ordinary hours between the hours of 10.00 pm and midnight Monday to Friday inclusive, or between midnight and 7.00 am Monday to Friday inclusive, must be paid an additional amount per hour calculated according to the following:~~

~~(i)—Between 10.00 pm and midnight~~

~~For each hour or part of an hour worked during such times—10% of the standard hourly rate per hour extra.~~

~~(ii)—Between midnight and 7.00 am~~

~~For each hour or part of an hour worked during such times—15% of the standard hourly rate per hour extra.~~

~~(b) For the purposes of this clause midnight will include midnight Sunday.~~

34.2 Additional payment for work done between the hours of midnight and 5.00 am Monday to Friday

(a) An employee, including a casual, who is required to work any of their ordinary hours between the hours between midnight and 5.00 am Monday to Friday inclusive, must be paid an additional shift allowance of 5% per hour worked.

(b) For the purposes of this clause midnight will include midnight Sunday.

34.3 Penalty rates not cumulative

Except as provided in clause 32—Breaks, where time worked is required to be paid at more than the ordinary rate such time will not be subject to more than one penalty, but will be subjected to that penalty which is to the employee's greatest advantage.

34.4 Additional provisions for work on public holidays

(a) An employee other than a casual working on a public holiday must be paid for a minimum of four hours' work.

(b) A casual employee working on a public holiday must be paid for a minimum of two hours' work.

~~(e) Employees who work on a prescribed holiday may, by agreement, perform such work at a rate of 150% of the relevant minimum wage in clause 20—Minimum wages, rather than the penalty rate prescribed in clause 34.1, provided that equivalent paid time is added to the employee's annual leave or one day instead of such public holiday will be allowed to the employee during the week in which such holiday falls. Provided further that such holiday may be allowed to the employee within 28 days of such holiday falling due.~~

(c) Employees who work on a prescribed holiday may, by agreement, perform such work at the ordinary hourly rates as set out in clause 20—Minimum wages, rather than the penalty rate prescribed in clause 34.1, provided that four hours annual leave is added to the employee's annual leave balance or four hours time off in lieu is provided within four weeks of the public holiday.

(d) An employee other than a casual working on Christmas Day when it falls on a weekend and it is not a prescribed public holiday must be paid an additional loading of 50% of their ordinary time rate for the hours worked on that day ~~and will also be entitled to the benefit of a substitute day.~~

Claims by Australian Business Industrial and NSW Business Chamber

34. Penalty rates

34.1 Penalty rates for work on weekends and public holidays

An employee working ordinary time hours on the following days will be paid the following percentage of the minimum wage in clause 20—Minimum wages for the relevant classification:

Type of employment	Monday to Friday	Saturday	Sunday	Public holidays
	%	%	%	%
Full-time and part-time	100	125	150	250 <u>200</u>
Casual Introductory Level, Level 1, Level 2 (inclusive of 25% casual loading)	125	150	150	250 <u>125</u>
Casual Level 3 to Level 6 (inclusive of casual 25% loading)	125	150	175	250 <u>125</u>

34.1A Special condition regarding existing employees

No existing employee classified as Level 3 or above shall be moved down to pay grade Levels 1 or 2 or be discriminated against in the allocation of work as a result of the variation of clause 34.1 by the Full Bench of the Fair Work Commission in proceedings number C2013/6610.

34.2 Additional payment for work done between the hours of 10.00 pm to 7.00 am on Monday to Friday

- (a) An employee, including a casual, who is required to work any of their ordinary hours between the hours of 10.00 pm and between midnight and 5.00 am Monday to Friday inclusive, or between midnight and 7.00 am Monday to Friday inclusive, must be paid an additional shift allowance amount per hour calculated according to the following:
- (i) **Between 10.00 pm and midnight**
 - For each hour or part of an hour worked during such times—10% of the standard hourly rate per hour extra.
 - (ii) **Between midnight and 7.00 am**
 - For each hour or part of an hour worked during such times—15% of the standard hourly rate per hour extra.
- (b) For the purposes of this clause midnight will include midnight Sunday.

34.3 Penalty rates not cumulative

Except as provided in clause 32—Breaks, where time worked is required to be paid at more than the ordinary rate such time will not be subject to more than one penalty, but will be subjected to that penalty which is to the employee's greatest advantage.

34.4 Additional provisions for work on public holidays

- (a) An employee other than a casual working on a public holiday must be paid for a minimum of four hours' work.
- (b) A casual employee working on a public holiday must be paid for a minimum of two hours' work.
- (c) Employees (other than casual employees) who work on a prescribed holiday may, by agreement, perform such work at a rate of ~~150%~~ 100% of the relevant minimum wage in clause 20—Minimum wages, rather than the penalty rate prescribed in clause 34.1, provided that equivalent paid time is added to the employee's annual leave or one day instead of such public holiday will be allowed to the employee during the week in which such holiday falls. Provided further that such holiday may be allowed to the employee within 28 days of such holiday falling due.
- (d) An employee other than a casual working on Christmas Day when it falls on a weekend and it is not a prescribed public holiday must be paid an additional loading of 50% of their ordinary time rate for the hours worked on that day and will also be entitled to the benefit of a substitute day.

Attachment A3—Proposed Variations—Registered and Licensed Clubs Award 2010 [MA000058]

Claims by Clubs Australia Industrial

29. Penalty rates

29.1 An employee other than a maintenance and horticultural employee performing work on the following days will be paid the following percentage of the minimum wage rate in clause 17—Minimum wages for the relevant classification:

	Monday to Friday	Saturday	Sunday	Public holiday
	%	%	%	%
Full-time and part-time	100	150 <u>125</u>	175 <u>150</u>	250 <u>200</u>
Casual (inclusive of the 25% casual loading)	125	150	175 <u>150</u>	250 <u>200</u>

29.2 A maintenance and horticultural employee performing work on the following days will be paid the following percentage of the minimum wage rate in clause 17—Minimum wages for the relevant classification:

Monday to Friday and Saturday before 12 noon	Saturday after 12 noon	Sunday	Public holiday
100%	150% for the first 2 hours then 200%	200%	250%

29.3 Public holidays

- (a) An employee other than a casual working on a public holiday will be paid for a minimum of four hours' work.
- (b) Employees other than casuals or maintenance or horticultural employees who work on a prescribed public holiday may, by agreement, perform such work at ordinary rates ~~plus 50% additional loading~~, instead of the penalty rate prescribed in clause 29.1, provided that equivalent ~~paid~~ time is added to the employee's paid annual leave or ~~one day instead of such public holiday will be equivalent time off work is~~ allowed to the employee during the week in which such holiday falls. Provided that such holiday may be allowed to the employee within 28 days of such holiday falling due.
- (c) An employee other than a casual working on Christmas Day when ~~it such day~~ falls on a weekend, and is not prescribed as a public holiday as defined in this Award, will be paid an additional loading of 50% of their ~~ordinary time rate~~ applicable ordinary hourly rate for the hours worked on that day and will also be entitled to the benefit of a substitute day.

29.4 Late and early work penalty

Employees other than maintenance or horticultural employees will be entitled to the following additional penalty for work performed at the following times:

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

29.5 Penalty rates not cumulative

Except as provided in clause 24—Meal breaks, where time worked is required to be paid for at more than the ordinary rate such time will be not subject to more than one penalty, but will be subjected to that penalty which is to the employee's greatest advantage.

Claim by Australian Retailers Association, National Retail Association and Master Grocers Association

29 Overtime and penalties

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29.4 Penalty payments

(a) Evening work Monday to Friday

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

(b) Saturday work

A penalty payment of an additional 25% will apply for ordinary hours worked on a Saturday for full-time and part-time employees. A casual employee must be paid an additional 10% for work performed on a Saturday between 7.00 am and 6.00 pm.

(c) Sunday work

A penalty payment of an additional ~~100%~~ 50% loading will apply for all hours worked on a Sunday. This penalty payment also applies to casual employees instead of the casual loading in clause 13.2.

(d) Public holidays

- (i)** Work on a public holiday must be compensated by payment at the rate of an additional 150%.
- (ii)** Provided that by mutual agreement of the employee and the employer, the employee (other than a casual) may be compensated for a particular public holiday by either:
 - (A)** An equivalent day or equivalent time off instead without loss of pay. The time off must be taken within four weeks of the public holiday occurring, or it shall be paid out; or
 - (B)** An additional day or equivalent time as annual leave.
- (iii)** The employee and employer are entitled to a fresh choice of payment or time off by agreement on each occasion work is performed on a public holiday.
- (iv)** If no agreement can be reached on the method of compensation, the default arrangement shall be as per clause 29.4(d)(i).

30. Shiftwork

...

30.3 Rate of pay for shiftwork

- (a) Any shiftwork performed between midnight Sunday and midnight Friday will be paid at the rate of 130% (155% for casuals) of the ordinary time rate of pay.
- (b) Any shiftwork performed on a Saturday will be paid at the rate of 150% (175% for casuals) of the ordinary time rate of pay.
- (c) Any shiftwork performed on a Sunday will be paid at the rate of ~~200%~~ 175% (~~225%~~ 200% for casuals) of the ordinary time rate of pay.
- (d) Where an employee elects to work on a public holiday shift then the provisions set out in clause 29.4(d) will apply for all hours of the shift.
- (e) For the purposes of this clause, where a shift falls partly on a public holiday, the shift which commences on the public holiday will be regarded as the public holiday shift. Provided that if the employee elects not to work on a public holiday shift such employee will be entitled to be absent without loss of pay.
- (f) Provided that in any shop where it is mutually agreed between an employer and the majority of employees engaged under the provisions of this clause another shift may be substituted for the shift which commences on the holiday as the holiday shift and in such instance the provisions of clause 29.4(d) relating to such holiday will apply only to the day so substituted.

Claim by Australian Business Industrial and NSW Business Chamber

29 Overtime and penalties

...

29.4 Penalty payments

(a) Evening work Monday to Friday

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

(b) Saturday work

A penalty payment of an additional 25% will apply for ordinary hours worked on a Saturday for full-time and part-time employees. A casual employee must be paid an additional 10% for work performed on a Saturday between 7.00 am and 6.00 pm.

(c) Sunday work

A penalty payment of an additional ~~100%~~ 50% loading will apply for all hours worked on a Sunday. This penalty payment also applies to casual employees instead of the casual loading in clause 13.2.

(d) Public holidays

(i) Work on a public holiday (other than by a casual) must be compensated by payment at the rate of an additional ~~150%~~ 100%.

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

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

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

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

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

Claim by Australian Industry Group

25. Hours of work

...

25.5 Penalty rates

(a) Evening work Monday to Friday

- (i)** A loading of 10% will apply for ordinary hours of work within the span of hours between ~~9.00 pm~~ 10.00 pm and midnight, and for casual employees this loading will apply in addition to their 25% casual loading.
- (ii)** A loading of 15% will apply for ordinary hours of work after midnight, and for casual employees this loading will apply in addition to their 25% casual loading.

ii. Saturday work

A loading of 25% will apply for ordinary hours of work within the span of hours on a Saturday, and for casual employees an additional 25% on top of the casual rate.

iii. Sunday work

- (i)** A ~~50%~~ 25% loading will apply for all hours of work on a Sunday for full-time and part-time employees.
- (ii)** A ~~75%~~ 50% loading will apply for all hours of work on a Sunday for casual employees, inclusive of the casual loading.

Claim by Restaurant & Catering Industrial

25. Hours of work

...

25.5 Penalty rates

~~(a) Evening work Monday to Friday~~

~~(iii) A loading of 10% will apply for ordinary hours of work within the span of hours between 9.00 pm and midnight, and for casual employees this loading will apply in addition to their 25% casual loading.~~

~~(iv) A loading of 15% will apply for ordinary hours of work after midnight, and for casual employees this loading will apply in addition to their 25% casual loading.~~

~~(b) Saturday work~~

~~A loading of 25% will apply for ordinary hours of work within the span of hours on a Saturday, and for casual employees an additional 25% on top of the casual rate.~~

~~(c) Sunday work~~

~~(i) A 50% loading will apply for all hours of work on a Sunday for full-time and part-time employees.~~

~~(ii) A 75% loading will apply for all hours of work on a Sunday for casual employees, inclusive of the casual loading.~~

(a) Penalty rates for work on weekends and public holidays

An employee working ordinary hours of work on the following days will be paid the following percentage of the minimum wage in clause 17—Minimum weekly wages for the relevant classification:

<u>Type of employment</u>	<u>Monday to Friday</u>	<u>Saturday</u>	<u>Sunday</u>	<u>Public holidays</u>
	<u>%</u>	<u>%</u>	<u>%</u>	<u>%</u>
<u>Full-time and part-time</u>	<u>100</u>	<u>125</u>	<u>125</u>	<u>150</u>
<u>Casual employees</u>	<u>125</u>	<u>150</u>	<u>150</u>	<u>150</u>

(b) Additional payment for work done between the hours of Midnight and 5.00 am Monday to Friday

An employee, including a casual, who is required to work any of their ordinary hours between the hours between midnight and 5.00 am Monday to Friday inclusive, must be paid an additional shift allowance of 5% per hour worked. For the purposes of this clause midnight will include midnight Sunday.

30. Public holidays

30.1 Public holidays are provided for in the NES.

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

~~**30.3** — Work on a public holiday must be compensated by payment at the rate of 250% (275% for casual employees).~~

30.3 Alternate compensation for work on public holiday

An employee other than a casual who works on a prescribed public holiday may, by agreement, perform such work at the ordinary rates rather than the penalty rate prescribed in clause 25.5, provided that four hours annual leave is added to the employee's annual leave balance or they are given four hours time off in lieu within four weeks of the public holiday occurring.

Claim by National Retail Association

25. Hours of work

...

25.5 Penalty rates

(a) Evening work Monday to Friday

- (i)** A loading of 10% will apply for ordinary hours of work within the span of hours between ~~9.00 pm~~ 10.00 pm and midnight, and for casual employees this loading will apply in addition to their 25% casual loading.
- (ii)** A loading of 15% will apply for ordinary hours of work after midnight, and for casual employees this loading will apply in addition to their 25% casual loading.

~~**(b) Saturday work**~~

~~A loading of 25% will apply for ordinary hours of work within the span of hours on a Saturday, and for casual employees an additional 25% on top of the casual rate.~~

~~**(c) Sunday work**~~

- ~~**(i)** A 50% loading will apply for all hours of work on a Sunday for full-time and part-time employees.~~
- ~~**(ii)** A 75% loading will apply for all hours of work on a Sunday for casual employees, inclusive of the casual loading.~~

(b) Weekend work

A loading of 25% will apply for ordinary hours of work within the span of hours on Saturday and Sunday, and for casual employees an additional 25% on top of the casual rate.

...

26. Overtime

The rate of overtime shall be time and a half for the first two hours on any one day and at the rate of double time thereafter, except on a Sunday which shall be paid for at the rate of double time and on a Public Holiday which shall be paid for at the rate of double time and a half. ~~Casual employees shall be paid 275% on a Public Holiday.~~

...

Public holidays

30.1 Public holidays are provided for in the NES.

- 30.2** An employer and a majority of employees may agree to substitute another day for a public holiday. If an employee works on either the public holiday or the substitute day public holiday penalties apply. If both days are worked, the public holiday penalties must be paid on one day chosen by the employee.
- 30.3** Work on a public holiday must be compensated by payment at the rate of ~~250%~~ 150% (~~275%~~ 175% for casual employees, inclusive of the casual loading).

**Attachment A6—Proposed Variations—Hair and Beauty Industry Award 2010
[MA000005]**

**Claim by Australian Business Industrial, NSW Business Chamber and Hair & Beauty
Australia Industry Association**

13. Casual employment

13.1 A casual employee is an employee engaged as such.

13.2 For all work between 7.00 am and 9.00 pm Monday to Friday, a casual will be paid both the hourly rate for a full-time employee and an additional 25% of the ordinary hourly rate.

13.3 For all work performed outside the hours in clause 28.2, ~~except Sundays~~, a casual employee will be paid the hourly ordinary rate for a full-time employee in this award plus 50%. ~~For Sundays, the additional loading will be 100%.~~

13.4 The following provisions of this award do not apply to casuals:

- Clause 14—Termination of employment;
- Clause 15—Redundancy;
- Clause 21.2—Meal allowances;
- Clause 21.4—Excess travelling costs;
- Clause 21.5—Travelling time reimbursement;
- Clause 21.8—Transport of employees' reimbursement;
- Clause 28—Hours of work;
- Clause 29—Notification of rosters; and
- Clause 31.2(a)—Overtime and penalty rates.

13.5 Casual employees will be paid at the termination of each engagement, but may agree to be paid weekly or fortnightly.

13.6 The minimum daily engagement of a casual is three hours.

...

31. Overtime and penalties

...

31.2 Overtime and penalty rates

(a) Overtime hours worked in excess of the ordinary number of hours of work prescribed in clause 28.2 are to be paid at time and a half for the first three hours and double time thereafter.

(b) Saturday work

A loading of 33% will apply for ordinary hours of work for full-time, part-time and casual employees within the span of hours on a Saturday.

(c) Sunday work

A ~~100%~~ 50% loading will apply for all hours of work for full-time; and part-time and casual employees on a Sunday.

(b) Employment on rostered day off

Where it is mutually agreed upon between the employer and the employee (such agreement to be evidenced in writing), an employee may be employed on their rostered day off at the rate of double time for all time worked with a minimum payment as for hour hours' work.

...

35. Public holidays

35.1 Public holidays are provided for in the NES.

~~35.2 An employer and a majority of employees may agree to substitute another day for a public holiday. Where an agreement to substitute a day is made the following applies:~~

- ~~• If both days worked — employee paid public holiday on day elected by employee;~~
- ~~• If only actual public holiday worked — public holiday penalty applies; or~~
- ~~• If only a substituted day worked — public holiday penalty applies.~~

~~35.3 Work on a public holiday must be compensated by payment at the rate of double time and a half for full-time, part-time and casual employees.~~

35.2 Work on a public holiday for full-time and part-time employees must be compensated by:

- (a) payment at the rate of double time; or

(b) the employee being paid at their ordinary rate for working on the public holiday and in addition receiving a paid day off to be taken at a mutually agreed time and paid at the employee's ordinary rate.

35.3 Work on a public holiday for casual employees must be compensated by payment at the casual employee's ordinary rate.

Claim by Pharmacy Guild of Australia

26.2 Overtime and penalty rates

(a) Overtime

Overtime means authorised additional hours performed at the direction of the employer:

- (i) Hours worked in excess of the ordinary number of hours of work prescribed in clauses 25.2 and 25.3 are to be paid at time and half for the first two hours and double time thereafter. Overtime worked on a Sunday is to be paid at the Sunday rate of double time, and overtime worked on a public holiday is to be paid at the public holiday rate of double time and half.
- (ii) The rates provided by clause 26.2(b) and (c) will not be cumulative on overtime rates.
- (iii) For casual employees the casual loading IS not payable on overtime.

~~**(b) Morning and Evening work Monday to Friday**~~

~~A loading of 50% (casuals 75%) will apply for hours worked before 8.00 am and a loading of 25% (casuals 50%) for hours between 7.00 pm to 9.00 pm. A loading of 50% will apply to hours worked from 9.00 pm to midnight (casuals 75%).~~

~~**(c) Saturday work**~~

~~A loading of 100% (casuals 125%) will apply for hours worked before 8.00 am, and a loading of 25% (casuals 50%) will apply for hours of work from 8.00 am to 6.00 pm on a Saturday. A loading of 50% (casuals 75%) will apply from 6.00 pm to 9.00 pm, and a loading of 75% (casuals 100%) for hours from 9.00 pm to midnight.~~

~~**(d) Sunday work**~~

~~A 100% (casuals 125%) loading will apply for all hours of work on a Sunday.~~

...

31 Public holidays

31.1 Public holidays are provided for in the NES.

31.2 An employer and the employee may by agreement substitute another day for a public holiday. Where there is no agreement the employer may substitute another day but not so as to give an employee less time off work than the employee would have had if the employee had received the public holiday.

~~**31.3** Work on a public holiday must be compensated by payment at the rate of 250% (casuals 275%) of the minimum rate.~~

...

[NOTE: The following clause X is a new clause proposed by the Pharmacy Guild of Australia.]

X. Additional remuneration

X.1 The employer will pay to an employee the following rates for all ordinary hours worked during the specified periods:

<u>Hours worked</u>	<u>Additional Remuneration Full-time and part-time employees</u>	<u>Additional Remuneration Casual employees (inclusive of casual loading)</u>
	<u>% of minimum hourly rate</u>	
<u>Monday to Friday</u>		
<u>Before 7.00 am</u>	<u>150</u>	<u>175</u>
<u>Between 9.00 and midnight</u>	<u>125</u>	<u>150</u>
<u>Saturday</u>		
<u>Before 7.00 am</u>	<u>200</u>	<u>200</u>
<u>Between 7.00 am & 9.00 pm</u>	<u>125</u>	<u>125</u>
<u>Between 9.00 pm and midnight</u>	<u>150</u>	<u>150</u>
<u>Sunday</u>		
<u>Before 7.00 am</u>	<u>200</u>	<u>200</u>
<u>Between 7.00 am and 9.00 pm</u>	<u>150</u>	<u>150</u>
<u>Between 9.00 pm and midnight</u>	<u>175</u>	<u>175</u>
<u>Public holiday</u>	<u>200</u>	<u>125</u>