DECISION

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

4 yearly review of modern awards – Award stage – Group 1
(AM2014/64 and others)

JUSTICE ROSS, PRESIDENT
VICE PRESIDENT HATCHER
SENIOR DEPUTY PRESIDENT HAMBERGER
DEPUTY PRESIDENT BULL
COMMISSIONER BISSETT MELBOURNE, 9 JUNE 2017

4 yearly review of modern awards – award stage – Group 1 technical and drafting issues – Manufacturing and Associated Industries and Occupations Award 2010 – Professional Diving Industry (Industrial) Award 2010.

1. Introduction

[1] The Fair Work Commission (the Commission) is currently reviewing all modern awards as required under s.156 of the *Fair Work Act 2009* (the Act). On 23 October 2015 the Full Bench issued a decision with respect to Group 1C, 1D and 1E awards (the *October 2015 decision*).[1] This decision deals with a number of technical and drafting issues arising from the exposure draft based on the *Manufacturing and Associated Industries and Occupations Award 2010* (the Manufacturing Award) and the *Professional Diving Industry (Industrial) Award 2010* (the Industrial Diving Award). The decision also provides an update on the status of the technical and drafting issues in the other awards allocated to Group 1 as listed in Attachment A.

2. The Manufacturing Award

[2] In the *October 2015 decision*, with respect to the Manufacturing Award, the Full Bench said:

> '[109] There are a number of other outstanding substantive amendments proposed to this award. These relate to the timing of payment on termination and the payment of training costs when training is undertaken in connection with a training contract. The parties are asked to confirm the outstanding issues within 21 days of the date of this decision. These matters will be referred to Commissioner Bissett for further conference and hearing, if necessary, and report to the Full Bench.'

[3] A conference of the parties in relation to their feedback on the Manufacturing Award exposure draft (Exposure Draft), as invited in the *October 2015 decision*, was conducted on 1 February 2016. A statement was issued on 25 February 2016 (the *February 2016 statement*) by Commissioner Bissett to the parties indicating how various matters arising from that

decision would be progressed. Subsequent to that statement further conferences on specific maters have occurred and written submissions received from interested parties.

[4] This decision deals with feedback provided on the Exposure Draft of the Manufacturing Award released in conjunction with the *October 2015 decision* except for those matters being dealt with separately as indicated in the *February 2016 statement*.

Note: the exposure draft that will be published as a result of this decision will include vehicle manufacturing provisions from the *Vehicle Manufacturing, Repair, Services and Retail Award 2010.* This has resulted in some renumbering of clauses. Where clause references have been renumbered in the revised exposure draft the new reference will be included in the decision below in brackets.

Time and wages record

[5] The AMWU propose that references to 'time and wages record' be replaced with 'pay record' to better reflect the wording in the *Fair Work Regulations 2009* (which uses the term "Records – Pay"). This, it says, would also better reflect the note at clause 24 of the Exposure Draft.

[6] We see no reason to make the change as proposed. The term 'time and wages record' is used across all awards. Its meaning is understood and no confusion arises from its continued use.

Clauses 13.2(d) Ordinary hours of work – day workers

[7] The AMWU has proposed that clause 13.2(d) be amended to refer to the consultation provisions in relation to changes to rosters or hours of work contained in clause 40.2 of the Exposure Draft such that the clause would read:

> **13.2(d)** The ordinary hours of work are to be worked continuously, except for meal breaks, at the discretion of the employer, <u>in accordance with clause 40.2</u>, between 6.00 am and 6.00 pm…

[8] The AMWU says that the insertion of the underlined words would make the award clear to read and easier to understand. It submits that this would make the award consistent with the *October 2015 decision* and confirm that the employer's right to change an employee's regular rostered hours is subject to the consultation requirements.

[9] Ai Group opposes the change. It says that the clause is not directed solely at the employer's ability to change ordinary hours of work although it permits this 'by stating that ordinary hours are to be worked at the discretion of the employer'.[2] It says, the clause has broader work to do and that the insertion of a reference to clause 40.2 where it does not necessarily apply to the entire clause is both confusing and unnecessary.

[10] The interaction between the consultation provisions contained in clause 40.2 of the Exposure Draft and clauses that relate to the setting of hours of work was considered in the *Consultation Clause Test Case*[3] where the Full Bench found:

> '[46] We now turn to the relationship between the obligation to consult required by the relevant term and other provisions within a modern award.
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> [47] A number of parties contended that the obligation to consult set out in the relevant term should be read subject to other provisions of the modern award such that the other provisions displaced the obligation to consult. An example serves to illustrate the proposition. If a modern award contained a provision which allowed an employer to vary an employee's regular roster on the giving of a specified period of notice (say 7 days) then the obligation to consult imposed by the relevant term would not apply.
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> [48] We are not persuaded that the relevant term was intended to operate in the manner contended. As mentioned earlier, s.145A is not a source of power in that it does not confer a right on an employer to change an employee's regular roster or ordinary hours of work. The source of such a power must be found elsewhere - either in the contract of employment or in an industrial instrument, such as a modern award. It is significant that s.145A was enacted against the background of existing provisions in modern awards which provide employers with the right to change an employee's regular roster or ordinary hours of work. It is also significant that s.145A does not state that the obligation to consult is subject to any other provisions in a modern award.
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> [49] If the proposition advanced were accepted it would, to a significant extent, effectively render s.145A nugatory. The obligation to consult would have no operation in circumstances where the modern award entitled an employer to change an employee's regular roster or ordinary hours of work. We are not persuaded that such a proposition is consistent with the terms of s.145A or its legislative purpose.
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> [50] Section 145A is intended to impose a new, additional obligation to consult employees in circumstances where their employer proposes to change their regular roster or ordinary hours of work. There is no conflict between the imposition of such an obligation and existing modern award provisions permitting the variation of a regular roster or ordinary hours of work on the giving of a specified period of notice or pursuant to a facilitative provision. There is no impediment to the employer complying with both provisions. The employer may still implement the proposed change on the giving of the requisite notice, but will now be required to consult the employees affected before implementing such a change. As we have mentioned such consultation must provide the affected employees with a genuine opportunity to attempt to persuade the employer to adopt a different course of action. For these reasons the relevant term will make it clear that it is to be read in conjunction with other award provisions concerning the scheduling of work and notice provisions.'

[11] We are satisfied that the inclusion of a reference to clause 40.2 (renumbered 41.2) in a clause which otherwise suggests the employer retains the sole discretion to alter hours of work will avoid confusion. However, we do not consider the change proposed by AMWU achieves what it sets out to do.

[12] We have decided to amend clause 13.2(d) by adding an additional sentence to the end of the clause that reads 'Any change to rosters or hours of work is subject to the consultative provisions in clause 41.2.'

13.3(b) Ordinary hours of work – continuous shiftwork

[13] For the same reasons given for clause 13.2(d), the AMWU propose that clause 13.3(b) be amended to read:

> **13.3(b)** Subject to clause 13.3(d) , the ordinary hours of continuous shiftworkers are, at the discretion of the employer, in accordance with Clause 40.2, to average 38 hours per week inclusive of meal breaks and must not exceed 152 hours in 28 consecutive days.

[14] For the same reasons given in relation to clause 13.2(d) Ai Group oppose the change.

[15] For the same reasons as given above, we shall vary the clause by adding 'Any change to rosters or hours of work is subject to the consultative provisions in clause 41.2.' to the end of the clause.

Clause 13.5(a) – Methods of arranging ordinary working hours

[16] For the same reasons given above the AMWU seek to vary clause 13.5(a) so that it reads:

> **13.5(a)** Subject to the employer's right in accordance with Clause 40.2 to fix the daily hours of work for day workers from time to time within the spread of hours referred to in clause 13.2(d) and the employer's right in accordance with Clause 40.2 to fix the commencing and finishing time of shifts from time to time, the arrangement of ordinary working hours must be by agreement between the employer and the majority of employees in the enterprise or part of the enterprise concerned. This does not preclude the employer reaching agreement with individual employees about how their working hours are to be arranged.

[17] Ai Group oppose the change. They say that the wording proposed by AMWU is cumbersome and appears to suggest that clause 40.2 is a source of power. For this reason it says the insertion is misleading.

[18] We agree that the wording proposed is cumbersome and may lead to some confusion. We think the additional sentence we have proposed for the clauses above will ensure there is no confusion with respect to the requirement to consult. We will therefore add to the end of clause 13.5(a) (renumbered 13.7(a)) the sentence:

> 'Any change to rosters or hours of work is subject to the consultative provisions in clause 41.2.'

Clause 29.2(a) – Rates for shiftworkers

[19] The AMWU seeks to alter the clause so that it reads:

> **Rostered shift** means any shift of which the employee concerned, in accordance with clause 40.2 has had at least 48 hours' notice.

[20] Ai Group oppose the change because the clause does not relate to any change to an employee's roster or hours of work.

[21] We do not agree that any change is necessary to clause 29.2(a). It is a definitional clause and does not go to how the hours of work are arranged or altered. No purpose is achieved by the change sought by the AMWU. No change will be made to the clause.

Clause 16.1(a) – Adult employee minimum wages

[22] Ai Group has raised concerns with respect to the proposed wording above the table at clause 16.1(a).

[23] Ai Group, apart from raising some drafting issues, argues that the previous wording created the obligation on an employer to pay minimum wages and that does not stop an employer paying more than the minimum wages.

[24] We are not convinced that the wording of the clause should revert to earlier drafts. We have however adopted some changes to the clause proposed by Ai Group. The words 'per week' will be deleted as these are inconsistent with the wording in the table and the words 'in which the employee is working' will be deleted so as not to create confusion with respect to the provisions that relate to higher duties.

[25] The clause shall now read:

> **(a)** An adult employee, other than one specified in clause 16.1(d), within a level specified in the following table will be paid not less than the rate assigned to the appropriate classification, as defined in Schedule B—Classification Structure and Definitions:

Clause 16.1(b) – Adult employee minimum wages

[26] The *October 2015 decision* inserted a new clause 16.1(b) and indicated that 'the remaining paragraphs [be] re-numbered accordingly.' The Exposure Draft has deleted the previous clause 16.1(b). This was not the intention. It will be re-inserted as 16.1(c) and the clause re-numbered accordingly.

Clause 30.1(e) – Definition of overtime

[27] The green text box will be deleted from clause 30.1(e) (renumbered 31.1(e). It is not relevant to the clause.

Clause 30.11 – Rest period after overtime

[28] A green text box will be inserted after clause 30.11(b) (renumbered 31.13(b)) to indicate that the exclusion of casual employees from the provision is being considered by the Casual Employment Full Bench.

Clause 6.4(b) – Casual loading and Schedule H – Definitions – casual ordinary hourly rate

[29] The AMWU has proposed some substantial changes to both clause 6.4(b) and the definition of casual ordinary hours in Schedule H. Ai Group says that no change should be made to the clause or definition as expressed in the exposure draft.

[30] In reviewing the provisions of clause 6.4 it seems that it has not been drafted to reflect the *September 2015 decision*[4] with respect to the calculation of casual loading.

[31] In the *September 2015 decision* the Full Bench said:

'[84] However, in the case of modern awards containing any allowance characterised as all purpose in nature, the exposure draft has provided that a casual employee must be paid the *ordinary* hourly rate and in addition a loading of 25% of the *ordinary* hourly rate. Because the ordinary hourly rate (as distinct from the minimum hourly rate) includes any all purpose allowance, the consequence of this is that the 25% loading is payable on any such all purpose allowance. This distinction between the minimum hourly rate and the ordinary hourly rate was explained in the *July 2015 decision* as follows (footnotes omitted):

> "**(ii) Definitions of all purpose and ordinary hourly rate of pay**
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> [35] A definition of 'all purpose' has been inserted in all exposure drafts containing such payments along the following lines:
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> > 'all purposes means the payment will be 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 leave.'
>
> [36] The identification of a particular allowance or loading as being for all purposes in the exposure drafts is intended to reflect the existing position in each of the current modern awards. …
>
> [47] We are not persuaded to depart from established practice in relation to the operation of all purpose payments and how they interact with an employee's rate of pay. Definitions of 'all purpose' and 'ordinary hourly rate of pay' will be inserted into all affected awards based on the wording in paragraphs [35] and [91]. Any issues as to whether a particular payment is payable for all purposes, and, in particular, whether an allowance should be added to a minimum rate before calculating a penalty or loading, will be dealt with on an award-by-award basis. Ultimately the resolution of these issues will turn on the construction of the relevant award and the context in which it was made."

[85] However in respect of the calculation of the casual loading vis-a-vis all purpose allowances, the Commission went on to say in the *July 2015 decision*:

> "[69] Some employer parties (e.g. Ai Group pp.12–13 re Cotton Ginning Award 2010 and more generally, pp.17–18) have submitted that where the current modern award states that the loading is calculated on "1/38th of the weekly award wage" or "1/38th of the minimum weekly rate", the casual loading should not be calculated based on the ordinary hourly rate that is they do not consider the all purpose allowance should be added to the minimum rate before the 25% is calculated. They submit that the casual loading is 25% of the minimum rate and added to the minimum hourly rate, then the all purpose allowance is added after that.
>
> [70] In our view it is desirable that there be a consistent rule relating to the calculation of a casual loading which should apply across all awards. Our provisional view is that the position of certain employer parties outlined above at paragraph [69] is the preferred option that should be adopted across all awards. That is, the casual loading will not be calculated based on the ordinary

> hourly rate. The casual loading will be calculated as 25% of the minimum rate, with any all purpose allowance being added after that."
>
> [86] Parties were given an opportunity to make further written submissions in relation to whether the casual loading should be applied to any all purpose allowances. The submissions of union parties were consistently in opposition to the general rule as proposed in the *July decision*. The submissions of employer parties generally supported the establishment of a consistent principle, but differed in their degree of support for the provisional decision identified in paragraph [70] of the *July 2015 decision*.'

[32] After considering the submissions of various parties the Full Bench reached three conclusions. Firstly that:

> '[93] Having considered these submissions, we are satisfied that it is likely that the adoption of the provisional decision would, in respect of a number of awards which contain allowances which are currently expressly described as being all purpose in nature or which are stated to form part of the ordinary hourly rate, result in reductions in the hourly rates of pay for casual employees. Consistent with the submissions advanced by ABI, we accept that those reductions, which may be in the order of one half of one per cent of the current rate, would not be regarded as insignificant by those employees on award minimum rates who would be directly affected by the proposed approach. It is not necessary for current purposes to attempt to exhaustively identify the number of awards affected, but it appears to be only a minority of awards.'

[33] Second, the Full Bench said:

> '[102] We accept the submission that the provisional decision is inconsistent with the general approach adopted in the *2008 decision*, namely that the casual loading should be applied to the ordinary time rate. Although what constituted the ordinary time rate was not the subject of express consideration in the *2008 decision*, we consider it to be well understood that an allowance which is described as all purpose in nature is one that necessarily forms part of the ordinary time rate. That being the case, any departure from that approach proposed by the provisional decision must be justified by cogent reasons.'

[34] Third, the Full Bench said:

> '[110] The general approach will remain as expressed in the exposure drafts, namely that the casual loading will be expressed as 25% of the ordinary hourly rate in the case of awards which contain any all purpose allowances, and will be expressed as 25% of the minimum hourly rate in awards which do not contain any such allowances.'

[35] It seems to us that the submissions of Ai Group[5] on the wording of clause 6.4(b) in the exposure draft issued following the *October 2015 decision* do no more than seek to re-agitate matters raised by it and considered in the *July 2015 decision* and ultimately resolved in the *September 2015 decision.*

[36] The wording in the exposure draft for the Manufacturing Award published as a consequence of the *October 2015 decision* does not reflect the *September 2015 decision.* This must be addressed.

[37] The change of wording proposed by the AMWU may be an attempt to overcome the identified drafting error. However, that change is, in our view, circular and does not clarify the clause. Further, the proposed definition of casual ordinary hourly rate is confusing.

[38] We have decided to maintain the standard wording generally used in exposure drafts. The following words will be inserted into clause 6.4(b):

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

[39] We see no reason to change the definition of casual ordinary hourly rate in Schedule H of the exposure draft.

Schedule B – Summary of Wage Rates

[40] We have made a number of amendments to Schedule B – Summary of Wage Rates (renumbered Schedule C) in line with suggestions from the parties. A revised Schedule C is at Attachment B to this decision. Note that the cross references in that attachment are to the exposure draft as amended by this decision and the rates have not been adjusted for the 2016–17 Annual Wage Review.

Applicable hourly rate

[41] In the *October 2015 decision* we identified an anomaly in how some penalties were paid given the definition of ordinary hourly rate. We identified the potential problems and proposed a method of resolving the anomalies. We then said:

> '[106] The parties are asked to consider the proposed changes including if there are clauses incorrectly identified as requiring the change or not identified that do require the amendment. Any submissions should be made in accordance with the directions in Part 4—Next Steps.'

[42] We identified 11 clauses in the Exposure Draft affected by this anomaly.

[43] Following extensive discussions the parties have put forward agreed variations to nine (9) of the identified clauses to overcome the identified issues. The parties have reached agreement on wording that negates the need to introduce any new term or definition into the Exposure Draft.

[44] We accept the proposed variations to wording of the clauses in the Exposure Draft as underlined and set out below:

14.1(b) - Unpaid meal breaks	**(b)** by agreement between an employer and an individual employee or the majority of employees in an enterprise or part of an enterprise concerned, an employee or employees may be required to work in excess of five hours but not more than six hours without a meal break. Employees will be paid for the sixth hour at the rate applying immediately prior to the end of the fifth hour.
14.5(a) – Working through meal breaks	**(a)** Subject to clause 14.1, an employee must work during meal breaks at the rate of pay applying to the employee immediately prior to the scheduled meal break whenever instructed to do so for the purpose of making good any breakdown of plant or for routine maintenance of plant which can only be done while the plant is idle.
14.5(b) – Working through meal breaks	**(b)** Except as otherwise provided in clause 14—Breaks and except where any alternative arrangement is entered into by agreement between the employer and the employee concerned, employees must be paid as follows for all work done during meal hours and thereafter until a meal break is taken: (i) Except in the circumstances referred to in clauses 14.5(b)(ii), (iii) and (iv): 150% of the ordinary hourly rate; (ii) Where the unpaid meal break is during ordinary time on a Saturday or a Sunday: 200% of the ordinary hourly rate; (iii) Where the unpaid meal break is during ordinary time on a shift on which the employee is entitled to a 15 per cent loading: 165% of the ordinary hourly rate; (iv) Where the unpaid meal break is during ordinary time on a shift on which the employee is entitled to a 30% loading: 180% of the ordinary hourly rate of pay.
15.4 – Ship trials	The parties have agreed to retain the current Manufacturing Award wording (clause 39.4).
23 – Extra rates not cumulative	The extra rates in this award, except rates prescribed in clause 27.3—Special rates and rates for work on public holidays, are not cumulative so as to exceed the maximum of double the ordinary hourly rate.

27.4(e) – Travelling time	**(i)** The rate of pay for travelling time on Monday to Saturday is the ordinary hourly rate of pay and on Sundays and public holidays is **150%** of the ordinary hourly rate.
31.12(b) – Rest break during overtime on Saturday, Sunday or public holiday	**(b)** Where a day worker is required to work overtime on a Saturday, Sunday or public holiday or on a rostered day off, the first rest break must be paid at the ordinary hourly rate.
31.12(c) – Rest break before overtime after ordinary hours	**(c)** Where overtime is to be worked immediately after the completion of ordinary hours on a day or shift and the period of overtime is to be more than one and a half hours, an employee, before starting the overtime, is entitled to a rest break of 20 minutes to be paid at the rate of pay applying to the employee immediately prior to the scheduled meal break.
31.15 – Standing by	Subject to any custom prevailing at an enterprise, where an employee is required regularly to hold themselves in readiness to work after ordinary hours, the employee must be paid standing by time at the employee's ordinary hourly rate for the time they are standing by.
Note that the cross references in this table are to the exposure draft as amended by this decision.	

[45] Clause 39.3 – Transfer to lower paid duties (renumbered clause 40.3) will be retained in the form it was in prior to the *October 2015 decision*. We note that the parties have reserved their positions on this clause and will raise those in the process of making submissions with respect to the clause as part of the plain language re-drafting of standard clauses in AM2016/15.

[46] The only provision that remains in dispute is clauses 34.5(a)(i) – Rostered day off falling on a public holiday.

[47] The current provision in the Manufacturing Award, the exposure draft prior to the *October 2015 decision* and the Exposure Draft are:

Manufacturing Award	**Exposure draft prior to *October 2015 decision***	**Exposure Draft following the *October 2015 decision.***
44.3 Rostered day off falling on public holiday **(a)** Except as provided for in clauses 44.3(b) and (c) and except where the rostered day off falls on a Saturday or a Sunday, where a full-time employee's ordinary hours of work are structured to include a day off and such day off falls on a public holiday, the employee is entitled, at the discretion of the employer, to either: **(i)** 7.6 hours of pay at the ordinary time rate; or…	**34.5 Rostered day off falling on public holiday** **(a)** Except as provided for in clauses 34.5(b) and (c) and except where the rostered day off falls on a Saturday or a Sunday, where a full-time employee's ordinary hours of work are structured to include a day off and such day off falls on a public holiday, the employee is entitled, at the discretion of the employer, to either: **(i)** 7.6 hours of pay at the ordinary time rate; or…	**34.5 Rostered day off falling on public holiday** **(a)** Except as provided for in clauses 34.5(b) and (c) and except where the rostered day off falls on a Saturday or a Sunday, where a full-time employee's ordinary hours of work are structured to include a day off and such day off falls on a public holiday, the employee is entitled, at the discretion of the employer, to either: **(i)** 7.6 hours of pay at the applicable rate of pay; or…

[48] The Manufacturing Award provides for payment for a rostered day off falling on a public holiday to be paid at the 'ordinary time rate'. This was replicated in the exposure draft prior to the *October 2015 decision* although 'ordinary time rate' was not defined. The general anomaly identified in the *October 2015 decision* was proposed to be rectified by requiring payment at the 'applicable hourly rate' which was defined as the 'ordinary hourly rate plus penalties and relevant loadings' and this was reflected in the Exposure Draft following the *October 2015 decision.*

[49] The disagreement between the parties as to what the appropriate wording of clause 34.5(a)(i) of the Exposure Draft should be goes to the question of what was intended in the Manufacturing Award with respect to the rate to paid in circumstances where the employer, at its discretion, determined to pay 7.6 hours of pay. Submissions from the parties have therefore gone to matters of interpretation of the Manufacturing Award clause. The resolution of this will determine the appropriate wording for the Exposure Draft.

[50] Both Ai Group and the AMWU properly outline the principles relevant to the interpretation of an award or agreement. We do not repeat them here.

[51] Ai Group says that the appropriate wording for clause 34.5(a)(i) of the Exposure Draft is:

> **(i)** 7.6 hours of pay at the ordinary hourly rate; or…

[52] In their submission of 28 October 2016 Ai Group provide an extensive history of the clause.

[53] An application by consent was made to the Australian Conciliation and Arbitration Commission to vary the *Metal Trades Award* in 1974[6] to insert a clause in relation to seven day shift workers that said:

> **15(k) Seven Day Shift Workers**
>
> A seven day or continuous shift worker, that is a shift worker who is rostered to work regularly on Sundays and holidays, when his rostered day off falls on a public holiday prescribed by this clause shall at the discretion of the employer, be paid for that day at the ordinary rate or have an additional day added to his annual leave. This sub-clause shall not apply when the holiday on which he is rostered off falls on a Saturday or Sunday. [Underlining added]

[54] This provision was replicated in the *Metal Trades Award, 1971* reprinted on 22 January 1975[7] although the clause number was amended to clause 22(k) and its application extended.

[55] In the same award the provisions in relation to afternoon and night shift allowances stated that:

> a shift worker whilst on afternoon or night shift shall be paid for such a shift 15 per cent more than his ordinary rate.[8]

[56] Other penalty rates in clause 19(g) referred to the penalty being paid 'in addition to' the ordinary rate.

[57] Ai Group says that it is clear, when the clauses are considered together, that the 'ordinary rate' in clause 15(k) did not include shift penalties and that this conclusion is supported by clauses in relation to penalties.

[58] In 1981, in response to the introduction of the 38 hour week, clause 22(k) of the *Metal Industry Award 1971*[9] was deleted and replaced. It relevantly read:

> **22(k) Rostered Day Off Falling on Public Holiday**
>
> (i) An employee who works continuous work and who by the circumstances of the arrangement of his ordinary hours of work is entitled to a rostered day off which falls on a public holiday prescribed by this clause shall, at the discretion of the employer, be paid for that day prior to 15 March 1982, seven hours 36 minutes at ordinary rates or have an additional day added to his annual leave. This provision shall not apply when the holiday on which he is rostered off falls on a Saturday or Sunday.

[59] The shiftwork provisions of the award at that time provided for payment for an afternoon or night shift of '15 per cent more' than the ordinary rate.

[60] Ai Group says that, during Award Simplification, wording of the clause was agreed between Ai Group and the Metal Trades Federation of Union (MTFU).[10] The relevant part of the clause read:

> **7.5.4 Rostered Day Off Falling on Public Holiday**
>
> 7.5.4(a) Except as provided for in 7.5.4(b), where a full-time employee's ordinary hours of work are structured to include a day off and such day off falls on a public holiday, the employee is entitled to, at the discretion of the employer, either:

- 7 hours and 36 minutes pay at ordinary rates; or
- 7 hours 36 minutes added to his or her annual leave; or
- a substitute day off on an alternative week day.

This shall not apply where the rostered day off falls on a Saturday or a Sunday.

[61] Provisions in relation to payments for shiftworkers continued to be expressed in terms of a percentage loading 'in addition to his or her ordinary rate'.

[62] In the 2008–2009 Award Modernisation process the clause to be included in the modern award was agreed between the parties.

[63] Given this historical context, in particular the clear intention that 'ordinary rate' did not include shift and other penalties, Ai Group says that it is evident that the payment for an RDO falling on a public holiday was always intended to be at the ordinary rate of pay, not including any shift loadings or penalties.

[64] Of the AMWU submissions, Ai Group says that there was never intended to be any equivalence of the three alternative methods of compensation available under the clause and that, even on the AMWU's proposal, there would still be no equivalence. Further, Ai Group says that reliance of the AMWU on the *Public Holiday Decision*[11] and the *Public Holiday Non Standard Workers Decision*[12] is mischievous as the outcomes of those decisions were never reflected in the Metals Award or the Manufacturing Award.

[65] Ai Group says that its proposal is also consistent with the provisions of the NES (s.116 of the FW Act) that provide for payment at the base rate of pay for an employee who is absent from work on a day or part day that is a public holiday and that base rate of pay is defined in s.16 of the FW Act to exclude loadings and penalties (amongst other matters).

[66] The AMWU submits that clause 34.5(a)(i) should provide for:

> **(i)** 7.6 hours pay at the employee's rate for working ordinary hours including applicable shift or weekend allowances.

[67] The AMWU, with whom the CEPU agrees, says that the clause does not apply in circumstances where an employee has accrued additional time towards a rostered day off but where an employee's regular roster results in them being rostered off on a Monday to Friday. It says that the clause is intended to ensure that such employees do not forfeit the benefit of the public holiday.

[68] The clause gives the employer the option to decide which of the three alternatives apply:

> (i) 7.6 hours pay
> (ii) 7.6 hours of extra annual leave
> (iii) a substitute day off on an alternative weekday.

[69] The AMWU says that, if option (ii) is selected, the employee would be paid 17.5% leave loading or shift loading for that day off.

[70] If option (iii) is selected by the employer the employee would be entitled to the shift loading otherwise payable.

[71] If the 7.6 hours pay is made at the ordinary hourly rate the AMWU says that it would be at a rate not including the shift loading whilst the other two would be at a rate including the loading.

[72] Relying on the decision in *Kucks v CSR* that the 'meanings which avoid inconvenience or injustice may reasonably be strained for'[13] the AMWU submits that 'ordinary time rate' must be taken to include relevant shift penalties and loadings.

[73] The AMWU says that submissions of Ai Group must be rejected on the grounds that, as has been evident in resolving the 'applicable hourly rate' issue, the meaning of the term 'ordinary time rate' varies on a clause by clause basis and the immediate context of the words is the most relevant consideration. Further, the AMWU says that reliance on the NES is misleading as the provisions of s.116 of the FW Act apply to *standard* workers and the workers affected by this clause are *non-standard* workers.

[74] Further, the AMWU says that its interpretation should be favoured as it is consistent with the decisions of the Commission in the Public Holiday cases.

[75] We have carefully considered the submissions of all parties in relation to this clause. We accept that clause 34.5(a) only applies to non-standard workers (clause 34.5(b), (c) and (d) apply to employees who have accrued additional time towards an RDO).

[76] Whilst the 'equivalence' argument advanced by the AMWU has some merit, the history of the clause clearly indicates that the rate paid should not include any shift loadings. When first proposed the clause was one that applied to shiftworkers. The relevant shiftwork provisions indicated that that the ordinary rate for a shiftworker did not include the shift penalty or loading of 15% (or higher). The 'ordinary rate' required to be paid for a rostered day off that fell on a public holiday was clearly not intended to include payment of any shift loadings or penalties the employee was otherwise entitled to receive.

[77] We do not consider it necessary to consider the application of the NES in such circumstances or the application or otherwise of the public holiday test cases. If those decisions were applicable the Metal Trades Award would have been appropriately varied and their application within the context of that award considered.

[78] Clause 34.5(a) (renumbered clause 35.5(a)(i)) of the Exposure Draft will therefore be amended to read:

> **35.5 Rostered day off falling on public holiday**
>
> **(a)** Except as provided for in clauses 35.5(b) and (c) and except where the rostered day off falls on a Saturday or a Sunday, where a full-time employee's ordinary hours of work are structured to include a day off and such day off falls on a public holiday, the employee is entitled, at the discretion of the employer, to either:
>
> **(i)** 7.6 hours of pay at the ordinary hourly rate; or

(ii) 7.6 hours of extra annual leave; or

(iii) a substitute day off on an alternative weekday

Agreed changes

[79] The changes listed in Attachment B are not disputed between the parties or are drafting errors identified in the Exposure Draft. The changes will be adopted and reflected in an amended Exposure Draft. Note that the clause numbering refers to the Exposure Draft issued in conjunction with the *October 2015 decision.* Further changes will be made in the consequent Exposure Draft to reflect any numbering issues arising from this decision not otherwise addressed.

3. *Professional Diving (Industrial) Award 2010*

[80] In the *October 2015 decision,*[14] we identified an issue in relation to the hours provisions in the *Professional Diving (Industrial) Award 2010* (the Industrial Diving Award). The Industrial Diving Award contains terms and conditions for both "Offshore" and "Inshore" divers.[15] At clause 10 reference is made to the categories of employment and the hours of work:

10 Types of employment

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

(a) full-time employees; or

(b) casual employees.

10.2 Full-time employees

(a) Inshore divers must be employed by the week.

(b) For offshore divers, employment for the first four weeks will be on a weekly basis and thereafter will be on a calendar month basis.

(c) A full-time employee is an employee who is engaged to work an average of 38 ordinary hours per week.

(d) Where employment is of less than four weeks' duration, employees will be paid casual rates.

10.3 Casual employees

(a) A casual employee is one engaged and paid as such.

(b) A casual employee will be paid an hourly rate with a minimum payment of eight hours, except as provided for in clause 10.3(e).

(c) A casual employee will be paid per hour 1/38th of the relevant minimum wage in clause 13—Classifications and minimum wages, plus a loading of 25%.

> **(d)** The casual loading is paid instead of annual leave, personal/carer's leave, notice of termination, redundancy benefits and the other entitlements of full-time or part-time employment provided for in this award. The loading constitutes part of the casual employee's all purpose rate.
>
> **(e)** Where casual employees are required to attend for work at the usual starting time and are not required to start work, they must be paid four hours' pay plus fares and travelling time in accordance with clause 15.6.
>
> **(f)** Casual employment is to be terminated by four hours' notice on either side, or by the payment or forfeiture of four hours' wages as the case may be.
>
> (Our underline)

[81] As is apparent, full-time employees are engaged to work an average of 38 ordinary hours per week and casual employees are paid 1/38th of the relevant minimum wage plus a loading of 25%. However clause 21—**Hours of Work and Related Matters** of the award provides as follows:

> **21 Ordinary hours of work**
>
> **21.1 Inshore divers**
>
> **(a)** The ordinary hours of work will not exceed 6 hours and 36 minutes per day which may be worked between 6.00 am and 6.00 pm Monday to Friday.
>
> **(b)** Work undertaken prior to the spread of hours provided by clause 21.1(a) for which overtime rates are payable will be deemed for the purposes of this clause to be part of the ordinary hours of work.
>
> **(c)** The spread of hours provided by clause 21.1(a) may be altered by up to one hour by mutual agreement between the employer and employees.
>
> **(d)** Where employees are not employed on diving operations as such during the full 6 hours and 36 minutes in any one day, the employer will have the right to use their services on other work for any time remaining.
>
> **21.2 Offshore divers**
>
> With the exception of employees engaged in operations rendering them subject to greater than atmospheric pressure, the average daily hours of work will be no greater than 12 hours. Starting and finishing times will be in accordance with a nominated regularly recurrent roster schedule.
>
> (Our underline)

[82] As can be seen from clause 21 the ordinary hours for inshore divers are not to exceed 6 hours and 36 minutes per day (33 hours per week) between the hours of 6.00 am and 6.00 pm Monday to Friday. Further, clause 24.1 of the award provides that inshore divers are paid overtime for hours worked "in addition to their ordinary hours" which in clause 21.1 are defined as 6 hours and 36 minutes on Monday to Friday. Offshore divers have no prescribed ordinary hours of work but cannot work longer than 12 hours per day. Offshore divers normally work an equal time roster of 12 hours a day, 7 days a week.

[83] There is an obvious tension between a prescribed 38 hour week for full-time employees and the terms of clauses 21.1(a) and 24.1 which effectively prescribe 33 ordinary hours per week for inshore divers.

[84] In the *October 2015 decision* we said that while historically the ordinary hours for inshore divers has been 33 hours per week, and the ordinary hours for offshore divers set at 38, no party could point to the reason for the distinction. [16] On that basis the parties were provided with a further opportunity to provide submissions on whether the distinction should be removed, with the NES standard of 38 hours per week being inserted into the Industrial Diving Award.

[85] The Commission convened a conference on 4 January 2016 in Sydney with a video link to Perth. Interested parties were asked to consider the terms of a number of previous industrial instruments and those of a specific modern award:

a. *The Professional Divers Association of Australasia v Aquarius Underwater Services and others* (Print C0901);

b. *The Professional Divers (Interim) Award* (Print C0945) at page 11;

c. *The Professional Divers Award* (Print C0964) at page 17; and

d. *The Building and Construction General On-site Award 2010* at cl.19.3(a)(ii).

[86] Notice of the conference was provided to all named respondents to the pre-reform award, the *Professional Divers' – Maritime Union of Australia Award 2002*.[17] Representatives from The Maritime Union of Australia (MUA), The Australian Workers' Union (AWU), the Australian Mines and Metals Association (AMMA) and Fremantle Commercial Diving attended the conference. After the conference a number of parties forwarded additional correspondence to the Commission elaborating further on their arguments.

Submissions of parties

[87] The MUA and AWU (the Unions) submit that the Industrial Diving Award contains an error by not accurately reflecting that inshore divers have historically worked a 33 hour week. The reference to ordinary hours of 6 hours and 36 minutes per day is said to be correct but the reference to a 38 hour week should only apply to offshore divers.

[88] The Unions submit that support for their position can be demonstrated by viewing the history of the relevant provisions. The predecessor award, the *Professional Divers' – Maritime Union of Australia Award 2002* referred to a 6 hour 36 minute ordinary working day for inshore divers with casual employees receiving 1/33 of the weekly rate plus a 20% loading. The reference to 1/33 of the weekly rate for inshore casual divers was not contained in the Industrial Diving Award, which the MUA states was an error, although it did not attract any attention until the current award review process commenced.

[89] In correspondence dated 4 February 2016, the MUA advised they were unable to shed light on the genesis of the 33 hour week for inshore divers. They submit that employers should be required to put a full merit argument on moving from a 33 hour week to a 38 hour week similar to the case run in the matter arising from the 4 yearly review of the *Stevedoring*

Industry Award 2010[18] where employers unsuccessfully sought to move from a 35 hour week to a 38 hour week.

[90] The Unions submit that the award's history clearly shows that inshore divers have always worked a 33 hour week and that this history is important in this context.

[91] AMMA submits there is no merit in maintaining a 33 hour week for inshore divers, although they cannot identify the reason for the distinction in working hours between offshore and inshore divers. They state that it is difficult to establish the precise reason for the creation of the restriction of ordinary hours to 33 per week for inshore divers, which can be traced back at least to the 1970s.

[92] In correspondence of 27 January 2016, AMMA attached a statement from a Mr Simon Guthrie Director – The Diving Co NSW Pty Ltd. Mr Guthrie states that he has been a commercial diver since 1972 and that he worked in the Bass Strait in the early 1980s. During this time he became active in the union as a site delegate and as an organiser in NSW. The union at that time was The Professional Divers Association of Australasia (PDAA) Mr Guthrie states that carpenter/divers employed by the NSW Maritime Services Board at Goat Island in Sydney Harbour worked a 6 hour 36 minute day. This came about because the 'pump handlers' whose job was to manually turn the air pumps for the divers, worked these hours. From this historical connection 6.6 hours remained as the basis for the calculation of the time that divers work per day.

[93] Interested parties were invited to comment on AMMA's submissions (to which Mr Guthrie's statement was attached). The MUA replied, on 4 February 2016, noting AMMA's submissions and stating that 'Our research has been unable to shed further light on the genesis of the 33 hour week in the inshore diving area prior to the awards identified in the 23 November 2015 Notice of Listing'. The MUA did not object to Mr Guthrie's statement (attached to AMMA's submissions), nor did it contest the proposition in the AMMA submission that Mr Guthrie's statement lent support to the proposition that the introduction of the 33 hour week was 'related to the arduous operation of pump equipment, which has long been superseded by current equipment used by professional divers'.

[94] We note that pump handlers are no longer employed and inshore divers now rely on air tanks to perform their tasks.[19]

[95] AMMA submitted that there is no requirement to have a merits argument before the Commission as the Industrial Divers Award states that 38 hours per week are the hours of all full-time divers and that the reference to the ordinary hours for inshore divers being 6 hours and 36 minutes per day should read 7.6 hours per day.[20] AMMA provided a detailed history of the award and its predecessor federal instrument, the *Professional Divers Award 1974*.[21]

[96] Fremantle Commercial Diving (FCD) state that their contracts like others in the industry are based on the Industrial Divers Award referring to a 38 hour week and that to revert to a 33 hour week will be a cost impost of 13.15 per cent as the hourly rate will increase. It also submits that no inshore diver works a 6 hour 36 minute day, with most days being 10 hours or more due to the extensive safety precautions that need to be put in place each day.

[97] FCD submit that their current contracts are based on a casual employee being paid 1/38th of the minimum weekly rate in accordance with clause 10.3(c) of the award and that any change to that calculation would see their costs increase by up to 13.15%.

[98] FCD contend that there is no justification for inshore divers having a 33 hour week. The historical rationale for the 6 hours and 36 minute working day was the limitations of the gas supply equipment but this is no longer relevant as such equipment is longer used in the industry.[22]

[99] Further, the FCD noted that the MUA draft award provided to the Commission during the award modernisation process provided for a 38 hour week not a 33 hour week.[23]

[100] Gray Diving Services Pty Ltd submit that a 33 hour week will have an adverse impact on an employer's ability to secure work and their ability to employ casuals.

[101] Indianic Group Pty Ltd submit that they are paying overtime for hours worked in excess of 6 hours and 36 minutes which makes it 'very hard to be competitive' particularly in a time when there is little work available.[24]

Conclusion

[102] All parties acknowledge the inconsistencies evident in the Industrial Diving Award. The Unions submit that there is no basis for disturbing the 33 hour standard set in the pre reform *Professional Divers – Maritime Union of Australia Award 2002*. The various employer submissions contend, in essence, that there is no rational basis for a distinction to be drawn between the ordinary hours of work of inshore and offshore divers and that the ordinary hours for inshore divers should be set at 38 hours per week.

[103] The distinction between inshore and offshore divers' hours appears to date back to the early 1970s when inshore divers were first included in an award that had previously only provided for offshore divers.[25] In these early awards, the offshore divers were generally referred to as 'oil drilling divers' while inshore divers were referred to as 'other divers'. In a 1973 decision of Commissioner Portus[26] it was suggested that non-oil drilling divers (inshore) worked on a part-time basis on a daily rate; whereas offshore divers were employed full-time. The *Professional Divers Award 1974*[27] made by the Commissioner provided that the ordinary working hours for inshore divers shall not exceed 6 hours 36 minutes Monday to Friday.

[104] The contention advanced by the unions that an error has occurred in the drafting of the Industrial Diving Award must be viewed against the fact that the MUA filed a draft of the proposed Diving Industry Award during the award modernisation process which combined professional (offshore/inshore) and recreational diving under one award. The hours clause referred to in the proposed award provided for a 38 hour week. The proposed award made no reference to inshore divers working 6 hours and 36 minutes per day nor that the casual inshore diving hourly rate divisor should be 33.

[105] AMMA also filed a draft award for offshore/inshore and recreational diving during the award modernisation process which stated that the working week for full-time employees was 38 hours but, proposed that there be a casual hourly divisor of 33 for inshore divers and also provided that the span of ordinary hours for inshore divers be 6 hours 36 minutes per day

Monday to Friday. It is apparent that the Commission when making the Industrial Diving Award was faced with a divergence of views on the proposed hours clause for divers.

[106] While no party could with any confidence state the origins of a 33 hour week for casual inshore divers, occupational health and safety reasons were discounted as being a factor.

[107] Whether the Full Bench when making the Industrial Diving Award made an error in respect of the hours for inshore divers cannot be ascertained with any degree of certainty. In publishing the 2010 exposure draft the Full Bench stated that it was largely reflective of the *Professional Divers' – Maritime Union of Australia Award 2002* and the draft modern award provided by the MUA without the reference to recreational diving.[28] The *Professional Diving Industry (Industrial) Award 2010* exposure draft was published on 25 September 2009 and parties were given an opportunity to make any further submissions. A number of parties chose to make further submissions, but no party identified the inshore diving hours as an issue.

[108] As it stands, the Industrial Divers Award provides for a 38 hour week for all divers with the ordinary hours for inshore divers not to exceed 6 hours 36 minutes per day Monday to Friday. This is an incongruous outcome that needs to be rectified by providing either a 38 or 33 hour week for inshore divers for all purposes of the award.

[109] Contrary to the MUA's submission of 31 December 2015, we are not persuaded that it is necessary to require an evidentiary case similar to that undertaken in *Stevedoring Industry Award 2010*[29].

[110] The circumstances in this case are clearly distinguishable from the *Stevedoring Industry Award 2010* decision. In that matter there was no evidence of inconsistency between the provisions of the modern award such as is evident in the matter before us, further, as the majority decision in that case makes clear:

> '… the evidence supports a finding that there are factors unique to this industry which are relevant when considering the level of penalty rates in this Award'.[30]

[111] In the present case there is no evidentiary justification for maintaining a distinction in ordinary hours of work as between inshore and offshore diving.

[112] It appears that the 33 hour week for 'inshore diving' was introduced some time ago – by consent – and that it has not been the subject of an arbitral determination.

[113] It is understood that divers work across the two sectors, and accordingly it is difficult to reconcile the distinction in hours for offshore divers and inshore divers. Further, we are not persuaded of the merits of retaining the current prescription of a 33 hour week for inshore divers. In our view the inconsistency between current award provisions should be resolved by prescribing a 38 hour week for inshore divers, which may be worked between 6.00am and 6.00pm Monday to Friday.

[114] Clause 21.1 of the Industrial Diving Award will be varied as follows:

21. Ordinary hours of work

21.1 Inshore divers

(a) The ordinary hours of work will not exceed ~~6 hours and 36 minutes per day~~ 38 hours per week which may be worked between 6.00 am and 6.00 pm Monday to Friday.

(b) Work undertaken prior to the spread of hours provided by clause 21.1(a) for which overtime rates are payable will be deemed for the purposes of this clause to be part of the ordinary hours of work.

(c) The spread of hours provided by clause 21.1(a) may be altered by up to one hour by mutual agreement between the employer and employees.

(d) Where employees are not employed on diving operations as such during ~~the full 6 hours and 36 minutes in any one day~~ their ordinary hours, the employer will have the right to use their services on other work for any time remaining.

4. Group 1A and 1B

[115] A decision in relation to the awards in Group 1A and 1B was issued on 23 December 2014[31] with additional decisions in relation to technical and drafting issues made on 13 July 2015[32] and 30 September 2015[33]. Revised exposure drafts were published in September 2016 incorporating agreed changes, adjustments to wages and allowances arising from the 2015–16 Annual Wage Review (including schedules of hourly rates) and decisions arising from the 4 yearly review of general application. Common issues decisions in relation to part-day public holidays and annual leave were also incorporated in exposure drafts for awards affected by subsequent variations.

[116] A number of submissions were received commenting on the revised exposure drafts and have been considered by the Commission. Where appropriate and consistent with previous decisions made as part of the Review, exposure drafts have been further updated in accordance with the agreed position of the parties. Since September 2016 further common issues have been determined that affect this tranche of awards. Determinations issued in recent months varying these awards in relation to award flexibility (time off instead of payment for overtime) and payment of wages have now been incorporated in the exposure drafts.

5. Group 1C, 1D and 1E

[117] A decision in relation to the awards in Group 1C, 1D and 1E was issued on 23 October 2015[34] and at paragraph [358] of that decision, the Full Bench directed parties to provide feedback on the revised exposure drafts by 20 November 2015.

[118] A number of submissions were received and have been considered by the Commission. Where appropriate and consistent with previous decisions made as part of the Review, exposure drafts have been updated in accordance with the agreed position of the parties. Throughout 2016 a number of common issues were determined that affect this tranche of awards. In order to reduce the workload of parties and the Commission, exposure drafts for

these awards have not been republished after each change. Determinations issued in recent months varying these awards in relation to annual leave, award flexibility (time off instead of payment for overtime) and payment of wages have now been incorporated in the exposure drafts. Additionally wages and allowances (including schedules of hourly rates) have been updated for the 2015–16 Annual Wage Review.

6. Next steps

6.1 Manufacturing Award

[119] The exposure draft based on the Manufacturing award will be republished shortly to reflect the outcome of this decision. Any errors identified in the revised exposure draft should be sent to amod@fwc.gov.au by 4.00 pm on **Friday 30 June 2017.**

[120] This decision resolves all outstanding technical and drafting issues in the Manufacturing award other than the changes arising from the decision to incorporate the manufacturing stream from the *Vehicle Manufacturing Repair, Services and Retail Award 2010* into this award. (A substantive claim to insert an electrical licence allowance in this award was determined in the decision issued on 3 March 2016[35].)

[121] If any party considers there are further outstanding technical and drafting issues in this award details of the outstanding issues should be forwarded to amod@fwc.gov.au by 4.00 pm on **Friday 30 June 2017**.

6.3 Industrial Diving Award

[122] A draft determination varying the Industrial Diving Award will be published shortly to reflect the changes in [114]. Any comments on the draft determination should be sent to amod@fwc.gov.au by 4.00 pm on **Friday 30 June 2017**.

6.2 Other Group 1 awards

[123] Revised exposure drafts for all awards in Group 1 (except the Manufacturing and Vehicle awards), along with updated summaries of submissions on the exposure drafts will be published for comment early next week.

[124] There appear to be a limited number of unresolved technical and drafting issues in this group of awards.

[125] Parties are directed to review the revised exposure drafts and the summaries of submissions and provide any comments in writing to amod@fwc.gov.au by 4.00 pm on **Friday 30 June 2017** outlining:

- any errors in the exposure drafts or summaries; and
- any outstanding issues in the summaries of submissions that they wish to press.

[126] Following receipt of any comments, further directions will be issued to deal with the outstanding issues.

[127] As the remaining issues are resolved during 2017 and following the adjustment to wages and allowances arising from the 2016–17 Annual Wage Review, exposure drafts will be amended and republished on the Commission's website. In accordance with the Statement issued on 27 March 2017 regarding the Plain language processes,[36] these exposure drafts will be further updated to incorporate the revised standard clauses.

[128] When all common and award-specific issues have been resolved, the awards will be republished for final comment. Following that final consultation process the current award will then be varied to substitute all clauses and schedules with the provisions in the exposure draft.

PRESIDENT

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[1] [2015] FWCFB 7236.

[2] Ai Group submission 7 December 2015 paragraph 86.

[3] [2013] FWCFB 10165.

[4] [2015] FWCFB 6656.

[5] Ai Group submission, 23 November 2015 at paras 34–70

[6] (1974) 155 CAR 603.

[7] (1975) 164 CAR 320.

[8] *Metal Trades Award* 1971, clause 19(g)(i).

[9] Print E9186

[10] Print P9311

[11] Print L4534

[12] Print L9178

[13] *Kucks v CSR Limited*

[14] [2015] FWCFB 7236 at [207]–[227]

[15] Offshore is diving from oil rigs, platforms vessels, Inshore is diving in coastal or inland waters e.g. jetties.

[16] [2015] FWCFB 7236 at [226]

[17] AP814932

[18] [2015] FWCFB 1729

[19] The Australian Standard for Occupational Diving (AS 2299.1:2015) specifies the type of equipment to be used as a breathing gas supply

[20] AMMA submission, 27 January 2016

[21] Print D6539; (1978) 203 CAR 386 [P010]

[22] FCD submission, 26 November 2015 at p.1

[23] FCD submission, 3 February 2016 at p.1

[24] Indianic Group submission, 9 December 2015. Note the submission incorrectly refers to overtime being payable after 6.2 hours. Clause 24.1 of the award provides that overtime is payable after 6 hours and 36 minutes.

[25] In 1969 Commissioner Clarkson made the *Oil Drilling Divers Award*

[26] *The Professional Divers Association of Australasia v Aquarius Underwater Services and others* Print C0901, 23 May 1973

[27] Print C0964

[28] [2009] AIRCFB 865 at [51]

[29] [2015] FWCFB 1729

[30] [2015] FWCFB 1729 at [149].

[31] [2014] FWCFB 9412

[32] [2015] FWCFB 4658

[33] [2015] FWCFB 6656

[34] [2015] FWCFB 7236

[35] [2016] FWCFB 1294

[36] [2017] FWCFB 1638

Attachment A—List of Group 1A and 1B awards

Extract from Attachment A to Full Bench Decision of 17 March 2014 [2014] FWCFB 1788; subgroups as per Attachment A of Decision on 23 October 2015 [2015] FWCFB 7236.

Group 1A & 1B (11 awards)

Award code	Award title	Subgroup
MA000060	Aluminium Industry Award 2010	1B
MA000098	Ambulance and Patient Transport Industry Award 2010	1A
MA000054	Asphalt Industry Award 2010	1B
MA000055	Cement and Lime Award 2010 [1]	1B
MA000022	Cleaning Services Award 2010	1A
MA000056	Concrete Products Award 2010	1B
MA000024	Cotton Ginning Award 2010	1A
MA000057	Premixed Concrete Award 2010	1B
MA000037	Quarrying Award 2010 [1]	1B
MA000107	Salt Industry Award 2010	1B
MA000016	Security Services Industry Award 2010	1A

[1] The Full Bench proposes amalgamating these two awards – see [2014] FWCFB 9412 at [172]

Group 1C, 1D & 1E (19 awards)

Award code	Award title	Subgroup
MA000001	Black Coal Mining Industry Award 2010	1D
MA000061	Gas Industry Award 2010	1E
MA000062	Hydrocarbons Industry (Upstream) Award 2010	1E
MA000010	Manufacturing and Associated Industries and Occupations Award 2010	1C
MA000093	Marine Tourism and Charter Vessels Award 2010	1E
MA000086	Maritime Offshore Oil and Gas Award 2010	1E
MA000059	Meat Industry Award 2010	1C
MA000011	Mining Industry Award 2010	1D
MA000072	Oil Refining and Manufacturing Award 2010	1D
MA000069	Pharmaceutical Industry Award 2010	1C
MA000074	Poultry Processing Award 2010	1C
MA000108	Professional Diving Industry (Industrial) Award 2010	1E
MA000109	Professional Diving Industry (Recreational) Award 2010	1E
MA000015	Rail Industry Award 2010	1D
MA000053	Stevedoring Industry Award 2010	1D
MA000017	Textile, Clothing, Footwear and Associated Industries Award 2010	1C
MA000071	Timber Industry Award 2010	1C
MA000089	Vehicle Manufacturing, Repair, Services and Retail Award 2010	1C
MA000044	Wool Storage, Sampling and Testing Award 2010	1C

Attachment B—Agreed changes (see [79])

Clause	Change
5.3(a)	'14.1(a)' will be replaced with '14.1(b)'
5.4(a)	'13.3(b)' will be replaced with '13.3(d)'
5.4(a)	'13.4(a)' will be replaced with '13.5(c)'
5.4(c)	'13.3(b)' will be replaced with '13.3(d)'
5.4(c)	'13.4(a)' will be replaced with '13.5(c)'
6.3(i)(ii)	'clauses 0, 13.2(g) and 30.6' will be replaced with 'clauses 13.2(g), 29.1(b), 29.2(i)', 31.7
7.11(c)(i)	A full stop will be inserted between 'training' and 'Provided'
9.2(i)	A space will be inserted between '9.2(h)' and 'termination'
13.1(b)	'or clause 5.4 as relevant' added to the end of the clause
13.3(d)	Replace the word 'are' with 'is' in the third line
14.1(a)	The words 'a break for' will be deleted
14.5(b)	The word 'employees' will be deleted and substituted with 'an employee'
17.2	'0' in the first line will be replaced with '17.6'
27.1(c)(iv)	'Table A or B of' will be deleted
27.3(m)(ii)	The word 'such' will be inserted before 'a boiler' in the last line
29.2(i)(i)	'on a rostered shift' will be inserted into the first line after ' shiftworker'
29.2(i)(iv)	'clauses 29.2(i)(ii) and (iii)' will be deleted and replaced with 'clauses 29.2(i)(i), (ii) and (iii)'
29.2(i)(vi)	A space will be inserted between 'clause 29.2(i)' and 'are'
31.2(b)	The clause applies to all shiftworkers, not just other than continuous shiftworkers. It will be re-numbered as clause 30.3 and the remainder of the clause re-numbered accordingly.
31.3(a)	The first line of clause will be amended to read 'If an employee is ~~be~~ required to <u>continue</u> work on their rostered day off…'
35.2	'clauses 0, 13.2(g) and 30.6' will be replaced with 'clauses 13.2(g), 29.1(b), 29.2(i) and 31.7'.
39.2	The word 'from' will be inserted between 'withhold' and 'any'.
The numbering in this table reflects the numbering in the exposure draft that has been updated in accordance with this decision	

Schedule C—Summary of Wage Rates

NOTE: Employers who meet their obligations under this schedule are meeting their obligations under the award.

C.1 Table of Rates

C.1.1 The following table provides a summary of overtime and penalty rates that apply under the award. Penalty rates are payable for working shift work on a Saturday, on a Sunday, on Public Holidays and on other occasions specified at C.1.2. The hourly rates of pay applicable then set out in C.2 for full and part-time employees and in C.3 for casual employees.

Working hours	**% of ordinary hourly rate/casual ordinary hourly rate**
Day Workers	
Ordinary hours	100%
Ordinary hours on a Saturday (clauses 13.2(f)(i) and 29.1(a)(i))	150%
Ordinary hours on a Sunday (clauses 13.2(f)(ii) and 29.1(a)(ii))	200%
Ordinary hours on a public holiday (clauses 13.2(g) and 29.1(b))	250%
Overtime on a public holiday (clause 31.7(a))	
Overtime – first 3 hours per day Monday to Saturday (clause 31.2(a)(i))	150%
Overtime –after 3 hours per day Monday to Saturday (clause 30.2(a)(ii))	200%
Overtime on a Sunday (clause 31.6)	200%
Shiftworkers other than those engaged in vehicle manufacturing	
Shiftworker – afternoon and night shift (clause 29.2(c))	115%
Shiftworker – permanent night shift (clause 29.2(e)(iii))	130%
Employed on continuous shift work – on a shift other than a rostered shift (clause 29.2(f)(i))	200%
Employed on other than continuous shift work – Work on shift other than rostered shift - first three hours (clause 29.2(f)(ii))	150%
Employed on other than continuous shift work – Work on shift other than rostered shift - after three hours (clause 29.2(f)(ii))	200%
Shiftworker – ordinary hours on a Saturday (clause 29.2(h)(i))	150%
Shiftworker – ordinary hours on a Sunday (clause 29.2(i)(ii))	200%
Continuous shiftworker – ordinary hours on a public holiday (clause 29.2(i)(i))	200%
Continuous shiftworker – overtime on a public holiday (clause 31.7(b))	200%
Continuous shiftworker – overtime (clause 31.4)	200%
Afternoon or night shift – non-successive shifts – first 3 hours (clause 29.2(d))	150%
Afternoon or night shift – non-successive shifts – after 3 hours (clause 29.2(d))	200%
Other than continuous shiftworker – overtime - first 3 hours per shift Monday to Saturday (clause 31.2(a))	150%
Other than continuous shiftworker – overtime - after 3 hours per shift Monday to Saturday (clause 31.2(b))	200%
Other than continuous shiftworker – overtime - Sunday (clause 31.6)	200%
Other than continuous shiftworker – ordinary hours on public holiday (clause 29.2(i)(iii))	250%
Other than continuous shiftworker – overtime on public holiday (clause 30.7(c))	250%

Working hours	**% of ordinary hourly rate/casual ordinary hourly rate**
Shiftworkers engaged in vehicle manufacturing	
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%

C.1.2 Other Circumstances Attracting a Penalty Payment

Circumstances	**% of ~~minimum~~ ordinary hourly rate/~~minimum~~ casual ordinary hourly rate**
Working through meal break on a Saturday or Sunday (clause 14.5(b)(ii))	200%
Working through meal break on a shift where employees are entitled to a 15% loading (clause 14.5(b)(iii))	165%
Working through meal break on a shift where employees are entitled to a 30% loading (clause 14.5(b)(iv))	180%
Working through meal break in all other circumstances (clause 14.5(b)(i))	150%
Ship Trials (clause 15.4)	125% or 150%
Travelling time payment – Sunday or a public holiday (clause 27.4(e)(i))	150%
Unrelieved shiftworker for work on RDO (clause 31.3)	200%
Rest period after overtime (clause 31.13(c))	200%
Call back other than continuous shiftworker (clause 31.14(a)(i))	150% for first 3 hours 200% thereafter
Call back – continuous shiftworker (clause 31.14(a)(ii))	200%

C.2 Full-time and part-time adult employee hourly rates

C.2.1 Where an allowance is payable for all purposes in accordance with clause 27.1, this forms part of an employee's ordinary hourly rate and must be added to the ordinary hourly rate prior to calculating penalties, overtime and annual leave payments.

C.2.2 The minimum rates in the table below do not contain any all purpose allowances prescribed in clause 27.1. Where an employee is entitled to an all purpose allowance as prescribed in clause 27.1 an employee's ordinary hourly rate is calculated according to C.2.1.

Classification	Hourly rate % of minimum hourly rate								
	100%	112.5%	115%	118%	125%	130%	150%	200%	250%
	$	$	$	$	$	$	$	$	$
C14 / V1	17.70	19.91	20.36	20.89	22.13	23.01	26.55	35.40	44.25
C13 / V2	18.21	20.49	20.94	21.49	22.76	23.67	27.32	36.42	45.53
C12 / V3	18.91	21.27	21.75	22.31	23.64	24.58	28.37	37.82	47.28
C11 / V4	19.56	22.01	22.49	23.08	24.45	25.43	29.34	39.12	48.90
C10 / V5	20.61	23.19	23.70	24.32	25.76	26.79	30.92	41.22	51.53
C9 / V6	21.26	23.92	24.45	25.09	26.58	27.64	31.89	42.52	53.15
C8 / V7	21.90	24.64	25.19	25.84	27.38	28.47	32.85	43.80	54.75
C7	22.49	25.37	25.86	26.61	28.19	29.24	33.74	44.98	56.23
V8	22.55	26.58	25.93	27.88	29.54	29.32	33.83	45.10	56.38
C6 / V9	23.63	27.14	27.17	28.46	30.15	30.72	35.45	47.26	59.08
C5 / V10	24.11	27.86	27.73	29.22	30.95	31.34	36.17	48.22	60.28
C4 / V11	24.76	29.32	28.47	30.75	32.58	32.19	37.14	49.52	61.90
C3 / V12	26.06	30.05	29.97	31.52	33.39	33.88	39.09	52.12	65.15
C2(a) / V13	26.71	31.35	30.72	32.89	34.84	34.72	40.07	53.42	66.78
C2(b) / V14	27.87	19.91	32.05	20.89	22.13	36.23	41.81	55.74	69.68
Driver classifications									
D1	19.36	22.30	22.26	23.39	24.78	25.17	29.04	38.72	48.40
D2	19.59	22.57	22.53	23.67	25.08	25.47	29.39	39.18	48.98
D3	19.83	22.84	22.80	23.95	25.38	25.78	29.75	39.66	49.58
D4	20.11	23.16	23.13	24.30	25.74	26.14	30.17	40.22	50.28

C.3 Casual adult employees

C.3.1 **Casual ordinary hourly rate** includes the casual loading which is payable for all purposes. Where an allowance is payable for all purposes in accordance with clause 27.1, this forms part of an employee's casual ordinary hourly rate and must be added to the applicable minimum hourly rate in C.2. prior to the application of the 25% or 17.5% casual loading to form the casual ordinary hourly rate. The casual ordinary hourly rate applies for all purposes and is used to calculate penalties and overtime.

C.3.2 The rates in the table below do not contain any all purpose allowances prescribed in clause 27.1. Where a casual employee is entitled to an all purpose allowance prescribed in clause 27.1 the employee's casual ordinary hourly rate is calculated according to C.3.1.

(a) Casual rates—based on 25% casual loading in accordance with clause 6.4(b)(i)

Classification	Hourly Rate % of casual minimum hourly rate (based on 25% casual loading in accordance with clause 6.4(b)(i))								
	100%	112.5%	115%	118%	125%	130%	150%	200%	250%
	$	$	$	$	$	$	$	$	$
C14 / V1	22.13	24.90	25.45	26.11	27.01	28.77	33.20	44.26	55.33
C13 / V2	22.76	25.61	26.17	26.86	27.80	29.59	34.14	45.52	56.90
C12 / V3	23.64	26.60	27.19	27.90	28.86	30.73	35.46	47.28	59.10
C11 / V4	24.45	27.51	28.12	28.85	27.66	31.79	36.68	48.90	61.13
C10 / V5	25.76	28.98	29.62	30.40	28.45	33.49	38.64	51.52	64.40
C9 / V6	26.58	29.90	30.57	31.36	29.55	34.55	39.87	53.16	66.45
C8 / V7	27.38	30.80	31.49	32.31	30.56	35.59	41.07	54.76	68.45
C7	28.11	31.71	32.33	33.26	32.20	36.54	42.17	56.22	70.28
V8	28.19	33.23	32.41	34.86	33.23	36.65	42.29	56.38	70.48
C6 / V9	29.54	33.92	33.97	35.58	34.23	38.40	44.31	59.08	73.85
C5 / V10	30.14	34.82	34.66	36.52	35.24	39.18	45.21	60.28	75.35
C4 / V11	30.95	36.65	35.59	38.44	36.93	40.24	46.43	61.90	77.38
C3 / V12	32.58	37.56	37.47	39.40	37.69	42.35	48.87	65.16	81.45
C2(a) / V13	33.39	24.90	38.40	41.11	38.69	43.41	50.09	66.78	83.48
C2(b) / V14	34.84	25.61	40.07	26.11	40.73	45.29	52.26	69.68	87.10
Driver classifications									
D1	24.78	27.88	27.83	29.24	29.24	32.21	61.95	49.56	61.95
D2	25.08	28.22	28.16	29.59	29.59	32.60	62.70	50.16	62.70
D3	25.38	28.55	28.51	29.95	29.95	32.99	63.45	50.76	63.45
D4	25.74	28.96	28.91	30.37	30.37	33.46	64.35	51.48	64.35

(a) Casual rates—based on 17.5% casual loading in accordance with clause 6.4(b)(iv)

Classification	Hourly Rate % of casual minimum hourly rate (based on 17.5% casual loading in accordance with clause 6.4(b)(iv))								
	100%	112.5%	115%	118%	125%	130%	150%	200%	250%
	$	$	$	$	$	$	$	$	$
C14 / V1	20.80	23.40	23.92	24.54	26.00	27.04	31.20	41.60	51.99
C13 / V2	21.40	24.07	24.61	25.25	26.75	27.82	32.10	42.79	53.49
C12 / V3	22.22	25.00	25.55	26.22	27.78	28.89	33.33	44.44	55.55
C11 / V4	22.98	25.86	26.43	27.12	28.73	29.88	34.47	45.97	57.46
C10 / V5	24.22	27.24	27.85	28.58	30.28	31.48	36.33	48.43	60.54
C9 / V6	24.98	28.10	28.73	29.48	31.23	32.47	37.47	49.96	62.45
C8 / V7	25.73	28.95	29.59	30.36	32.16	33.45	38.60	51.47	64.33
V8	26.50	29.81	30.48	32.76	33.13	34.45	39.74	52.99	66.24
C6 / V9	27.77	31.24	31.94	33.44	34.71	36.09	41.65	55.53	69.41
C5 / V10	28.34	31.88	32.59	34.33	35.43	36.84	42.51	56.68	70.85
C4 / V11	29.09	32.73	33.45	36.13	36.36	37.82	43.64	58.19	72.73
C3 / V12	30.62	34.45	35.21	37.03	38.28	39.81	45.93	61.24	76.55
C2(a) / V13	31.38	35.31	36.09	38.64	39.23	40.80	47.08	62.77	78.46
C2(b) / V14	32.75	36.84	37.66	24.54	40.94	42.57	49.12	65.49	81.87