DECISION

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

4 yearly review of modern awards – Award stage – Group 3

(AM2014/223 and others)

JUSTICE ROSS, PRESIDENT
SENIOR DEPUTY PRESIDENT HAMBERGER
DEPUTY PRESIDENT CLANCY
COMMISSIONER JOHNS MELBOURNE, 30 OCTOBER 2017

4 yearly review of modern awards – award stage – exposure drafts – technical and drafting issues – Group 3 awards.

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ABBREVIATIONS

ABI	Australian Business Industrial and New South Wales Business Chamber (jointly ABI)
Act	*Fair Work Act 2009* (Cth)
AFEI	Australian Federation of Employers and Industries
AHEIA	Australian Higher Education Industrial Association
Ai Group	Australian Industry Group
AIS	Association of Independent Schools
AMWU	Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union known as the Australian Manufacturing Workers' Union
ASMC	Australian Sugar Milling Council
ASSA	Australian Swim Schools Association Ltd
ASU	Australian Municipal, Administrative, Clerical and Services Union
AWU	The Australian Workers' Union
Business SA	South Australian Employers' Chamber of Commerce and Industry Inc trading as Business SA
COAG	Council of Australian Governments
Commission	Fair Work Commission
December 2014 decision	Full Bench decision re exposure drafts in Group 1A and 1B – General drafting – alleged inconsistencies with NES – 23 December 2014 [2014] FWCFB 9412
FA	Fitness Australia
FWO	Fair Work Ombudsman
GA	Gymnastics Australia
Go8	Group of Eight Universities
IEU	Independent Education Union of Australia
July 2015 decision	Full Bench decision re exposure drafts in Group 1A and 1B – drafting and technical issues – ordinary hourly rate of pay – 13 July 2015 [2015] FWCFB 4658
July 2017 decision	Full Bench decision – Award stage – exposure drafts – Group 3 Awards – 6 July 2017 [2017] FWCFB 3433
NES	National Employment Standards
NFF	National Farmers' Federation
NTEU	National Tertiary Education Industry Union
NUW	National Union of Workers
Review	4 yearly review of modern awards under s.156 of the *Fair Work Act 2009*

September 2015 decision	Full Bench decision re exposure drafts in Group 1A and 1B – drafting and technical issues – Absorption clause – casual loading – 30 September 2015 [2015] FWCFB 6656
SAWIA	South Australian Wine Industry Association
the Clerks Award	*Clerks – Private Sector Award 2010*
the Dredging Award	*Dredging Industry Award 2010*
the Post-Secondary Award	*Educational Services (Post-Secondary Education) Award 2010*
the General Staff Award	*Educational Services (Schools) General Staff Award 2010*
the Fitness Award	*Fitness Industry Award 2010*
the Gardening Award	*Gardening and Landscaping Services Award 2010*
the Horticulture Award	*Horticulture Award 2010*
the Legal Services Award	*Legal Services Award 2010*
the Nursery Award	*Nursery Award 2010*
the Pastoral Award	*Pastoral Award 2010*
the Silviculture Award	*Silviculture Award 2010*
the Sporting Organisations Award	*Sporting Organisations Award 2010*
the Sugar Award	*Sugar Industry Award 2010*
the Wine Industry Award	*Wine Industry Award 2010*
UV	United Voice
VOH	Voice of Horticulture

1. Introduction

[1] Section 156 of the *Fair Work Act 2009* (the Act) requires the Fair Work Commission (the Commission) to review all modern awards every four years (the Review). In the Award stage of the Review the 122 modern awards have been divided into 4 groups. This decision deals with the technical and drafting issues arising out of the awards in Group 3. The 33 awards allocated to Group 3 are listed at Attachment A to this decision. This decision should be read in conjunction with the decision issued on 6 July 2017 (the *July 2017 decision*) which dealt with 19 of the awards in Group 3. This decision deals with the remaining awards within Group 3.

[2] In addition to the *July 2017 decision*, this decision should be read in conjunction with earlier decisions and statements concerning the Review, and in particular the decisions of 23 December 2014 (the *December 2014 decision*), 13 July 2015 (the *July 2015 decision*) and 30 September 2015 (the *September 2015 decision*), in which the Commission dealt with a number of general drafting and technical issues common to multiple exposure drafts.

[3] The *December 2014 decision*, along with an additional decision issued in May 2015[1], dealt with alleged inconsistencies with the National Employment Standards (NES). Further decisions in relation to award flexibility (AM2014/300), annual leave (AM2014/47) and transitional provisions in relation to accident pay (AM2014/190) also have application to this group of awards.

2. Review of Group 3 awards

[4] Conferences were held on 30 March 2015 to identify the issues to be raised by interested parties during the review of each of the Group 3 awards. The Commission subsequently published summaries of proposed variations.

[5] The Fair Work Ombudsman (FWO) raised a number of issues identified through interactions with employers and employees covered by Group 3 awards. While the FWO did not participate in any proceedings during the Award stage, these issues were drawn to the attention of the parties through notes in the exposure drafts and they were included in the 'summaries of submissions' published on the Award Review webpage.

[6] The Commission published exposure drafts for the Group 3 awards in two tranches, between December 2015 and January 2016, together with comparison documents showing the changes made to the structure and language in the award. Interested parties were given an opportunity to make written submissions on the exposure drafts and to reply to the submissions of others. At the request of the parties, further conferences were held to deal with a range of award-specific matters.

[7] Mentions were held on 6 and 7 June 2016 to deal with the technical and drafting issues identified in relation to the Group 3 exposure drafts. The purpose of the mentions was to:

- confirm that the published summaries of submissions were accurate and reflected the positions of the parties;

- identify any submissions or variations that were agreed or withdrawn; and

- identify any matters of a substantive nature that had not yet been referred to a specially constituted Full Bench.

[8] After the mentions, further conferences were conducted by individual members in respect of particular Group 3 awards. As noted above, the *July 2017 decision* dealt with of 19 of the awards in Group 3 and this decision deals with the remaining awards in Group 3, that is:

- *Dredging Industry Award 2010;*
- *Educational Services (Post-Secondary Education) Award 2010;*
- *Educational Services (Schools) General Staff Award 2010;*
- *Horticulture Award 2010;*
- *Sugar Industry Award 2010;*
- *Clerks Private Sector Award 2010;*
- *Fitness Industry Award 2010;*
- *Gardening and Landscaping Services Award 2010;*
- *Legal Services Award 2010;*
- *Nursery Award 2010;*
- *Pastoral Award 2010;*
- *Silviculture Award 2010;*
- *Sporting Organisations Award 2010; and*
- *Wine Industry Award 2010.*

[9] We now turn to the particular awards.

2.1 Clerks Private Sector Award 2010

[10] As confirmed in the Statement issued on 15 July 2016,[2] the *Clerks—Private Sector Award 2010*[3] (Clerks Award) will be the subject of the plain language review process. In consultations with the parties it was agreed that the outstanding technical and drafting issues would be dealt with prior to the plain language redrafting.[4]

[11] Written submissions on the 13 outstanding technical issues were due by 8 September 2016 and submissions in reply by 27 September 2016. A revised exposure draft was published by the Commission on 11 October 2016 with a plain language re-drafted exposure draft to be published for comment.

[12] Following further written submissions and consultations a Statement was issued on 4 November 2016[5] setting out the items that had been resolved and noting that the outstanding issues would be dealt with as part of the plain language re-drafting process.

[13] An initial plain language exposure draft was published on 3 February 2017 along with a comparison document detailing the changes between the previous exposure draft and the plain language re-draft. Subsequently there have been further written submissions and a number of revised exposure drafts published. The plain language draft was considered at a conference on 15 September 2017.[6]

[14] There are currently no matters for this Full Bench to determine in relation to the Clerks Award. The Full Bench constituted to deal with the plain language redrafting of modern awards will continue to deal with the Clerks Award.

2.2 Dredging Industry Award 2010

[15] On 15 January 2016 the Commission published an initial exposure draft based on the *Dredging Industry Award 2010*[7] (Dredging Award) together with a comparison document showing the changes made to the structure and language in the award. Interested parties were provided with an opportunity to file written submissions and submissions in reply on the drafting and technical issues in the exposure draft.[8] Submissions were received from the MUA[9] and the AWU[10] and on 26 May 2016 the Commission published a summary of submissions.

[16] The Dredging Award was listed for mention on 6 June 2016 to:

(i) confirm that the published summary of submissions was accurate and reflected the parties' positions;

(ii) identify any submissions or variations agreed or withdrawn; and

(iii) identify whether any matters raised in submissions were of a substantive nature and required consideration by a specially constituted Full Bench.

[17] The Australian Institute of Marine and Power Engineers (AIMPE), the AWU, and the MUA appeared at the 6 June 2016 mention.[11]

[18] Following the 6 June 2016 mention, the Commission published a revised summary of submissions on 24 June 2016. A further conference in relation to the review of the Dredging Award was held in Sydney on 4 August 2016 (the August conference) to discuss the issues listed in the revised summary of submissions.[12] AIMPE, the AWU and the MUA appeared at that conference.

[19] On 7 November 2016 the Commission issued a Statement[13] that attached a report outlining the matters discussed at the August conference. That Statement included draft directions setting out the process for dealing with the outstanding technical and drafting matters for the Dredging Award. A revised exposure draft and a further revised summary of submissions, reflecting the agreed position of the parties following the August conference,[14] were published on 8 November 2016. Parties were given until 14 November 2016 to file any comments on the draft directions or on the attached reports. No comments were received and final directions were issued on 15 November 2016.

[20] On 21 November 2016 the MUA wrote to the Commission to withdraw claim 2. The outstanding items are the subject of the 15 November 2016 Directions requiring the filing of further material in December 2016. No further submissions were filed in respect of this award.

[21] Items 1, 3–4, 15–19 and 24 were agreed between the parties. Items 5 and 23 were referred to the Part-time and Casual Employment Full Bench, but were not pursued in those proceedings.

[22] As is apparent from the 7 November 2016 report, there are 13 issues that remain at least partially unresolved and require determination.

Item 6 – Hours of work – span of hours

[23] The AWU submits that the exposure draft and corresponding clause in the current award 'allows workers to agree to work any number more hours than 12 at the ordinary rate of pay, and without regard to the nature of the clause being about "day workers"'.[15]

[24] The exposure draft provision, which is based on the current Dredging award, is:

> **8.2 Span of hours—vessels fully operational**
>
> **(a) Day workers**
>
> Hours of duty for day workers will consist of:
>
> **(i)** 12 hours per day on each of seven days per week between 6.00 am and 6.00 pm; or
>
> **(ii)** other starting and finishing times as may be mutually agreed.

[25] The AWU submitted that three enterprise agreements in the industry currently contain provisions that limit the maximum number of hours to 14 hours followed by a 10 hour break.[16] The AWU submitted that a 14 hour day is standard in the dredging industry.

[26] The AWU suggested varying the clause as per the provisions in the *Manufacturing and Associated Industries and Occupations Award 2010*[17] (Manufacturing Award). The wording of clause 36.2(c) of the Manufacturing Award is set out below:

> **36.2 Ordinary hours of work—day workers**
>
> **(c)** The ordinary hours of work are to be worked continuously, except for meal breaks, at the discretion of the employer between 6.00 am and 6.00 pm. The spread of hours (6.00 am to 6.00 pm) may be altered by up to one hour at either end of the spread, by agreement between an employer and the majority of employees concerned or, in appropriate circumstances, between the employer and an individual employee.
>
> **(d)** Any work performed outside the spread of hours must be paid for at overtime rates. However, any work performed by an employee prior to the spread of hours which is continuous with ordinary hours for the purpose, for example, of getting the plant in a state of readiness for production work is to be regarded as part of the 38 ordinary hours of work.
>
> (emphasis added)

[27] The AWU proposed the following draft variation to the Dredging Award:

> **(x)** the spread of hours (6.00 am to 6.00 pm) may be altered by up to one hour at either end of the spread, by agreement between an employer and the majority of employees concerned and covered by this award, or, in appropriate circumstances, between the employer and an individual employee.
>
> **(x)** Any work performed outside the agreed spread of hours must be paid for at overtime rates in accordance with 13.1.

[28] It seems to us that the AWU's proposed variation does not address the identified issue with the existing clause, because it would not cap the number of hours on a single shift or provide for a subsequent rest period, it only allows the span of hours to be varied, but does not prescribe the maximum number of hours per day.

[29] In the absence of any submissions from other interested parties, the Commission has considered the provisions about ordinary hours of work in other modern awards and the relevant pre-modern instruments.

[30] In a number of 4 yearly review proceedings, interested parties have contended that the presence of certain provisions in enterprise agreements is a basis for adopting those provisions into the applicable modern award. Generally speaking, this contention has *not* been accepted. For example, the Full Bench that considered the substantive variations proposed to the *Graphic Arts, Printing and Publishing Award 2010*[18] noted that:

> **[59]** Although the AMWU sought by general submissions to justify the variations sought, its submissions primarily focused on an argument that the Award should be varied to reflect these conditions because these conditions were the pre-2009 standard for the metropolitan daily newspaper sector. In other words, the AMWU urged us to approach the matter in the same manner as the Full Bench in the *Award Modernisation Decision* approached the task of creating the Award in 2010 but having regard for the first time, to the standards in the metropolitan newspaper sector. We consider that if we adopt this approach then it is not the standards applying to the sector in general which must be considered but rather the standards as reflected in the pre-2009 industrial instruments which applied to the sector. The relevant industrial instruments in this context are the awards. Absent some broader merit based case, we do not consider that the enterprise agreements or over award arrangements which may have been in place in the sector to be relevant.[19] (emphasis added)

[31] As noted in the AWU's submission, the *Dredging Industry (AWU) Award 1998*, the *Marine Engineers (Non Propelled) Dredge Award 1998* and the *Maritime Industry Dredging Award 1998*[20] contained similar provisions regarding hours of duty being varied by agreement. The difference between the pre-modern instrument provisions and the modern award provision is that the "pre-reform awards allowed for the variation of the aggregate wage and leave entitlements to reflect the change in ordinary working hours".[21]

[32] A comparable clause in the *Coal Export Terminals Award 2010*[22] is:

> **16.2 Employees other than shiftworkers**

> **(a)** Employees, other than shiftworkers, may be required to work up to 10 ordinary hours per day, between the hours of 6.00 am and 6.00 pm Monday to Sunday. If the employer and a majority of affected employees agree, up to 12 ordinary hours per day may be worked.
>
> **(b)** All ordinary hours worked by an employee other than a shiftworker on the following days will be paid for at the following rates:

[33] We agree that the modern award has not replicated the requirement to remunerate additional hours of work undertaken subject to an agreement to vary the 'span of hours' provisions that appeared in the pre-reform instruments. We note that the AWU's proposed variation does not limit or vary the number of hours that may be worked in a single shift. This was also noted at the conference on 4 August 2016.[23] By varying the span of hours by one hour at each end, it expands the span of time when ordinary hours may be performed; it does not expand the number of ordinary hours that an employee may be required to work before overtime provisions are triggered. The only other protection is that clause 8 operates subject to clause 9.4–Maximum hours. Therefore, any remaining concerns about avoiding excessive hours may require further consideration and additional variations.

[34] Our provisional view is that the exposure draft span of hours clause should be varied as follows:

> **8.2 Span of hours—vessels fully operational**
>
> **(a) Day workers**
>
> **(i)** Hours of duty for day workers will consist of 12 hours per day on each of seven days per week between 6.00 am and 6.00 pm.
>
> **(ii)** The ordinary hours of work are to be worked continuously, except for meal breaks, at the discretion of the employer between 6.00 am and 6.00 pm. The spread of hours (6.00 am to 6.00 pm) may be altered by up to one hour at either end of the spread, by agreement between an employer and the majority of employees concerned or, in appropriate circumstances, between the employer and an individual employee.
>
> **(iii)** Any work performed outside the agreed spread of hours must be paid for at overtime rates in accordance with clause 13.1.

[35] Interested parties have until **4.00pm Friday, 24 November 2017** to provide any feedback on this provisional view. In the absence of any objection the variation will be made.

Items 7–11 – Breaks

[36] As noted in the Report, the exposure draft of 15 January 2016 included a question from the Commission about how clauses 9.2(c), 9.2(e) and 9.3 interact. The intention of the clauses was discussed at the conference on 4 August 2016.[24]

[37] In the revised exposure draft published on 8 November 2016, the Commission redrafted clauses 9.1, 9.2 and 9.3.

[38] In the absence of any further feedback from the interested parties, the redrafted clauses will now be adopted.

Item 12 – Weekly aggregated wage

[39] The FWO raised an issue about the use of the phrase 'weekly aggregated rate' in clause 14.3 of the Dredging Award and whether, in the absence of a definition, it was clear what entitlements had been aggregated.[25]

[40] In the initial exposure draft of the Dredging Award parties were asked to comment on whether the award should include a definition of 'aggregated rate'.[26] It was suggested in the exposure draft that a definition may clarify how the rate was calculated and improve transparency when the rates were adjusted following the Annual Wage Review.

[41] Following the conference on 30 March 2016 the MUA proposed that the source of clause 14.3 of the Dredging Award was clause 3 of Part C of *Maritime Industry Dredging Award 1998*.[27] They provided the following extract of clause 3.1.2 of the *Maritime Industry Dredging Award 1998:*

> 'The aggregate wages prescribed in this Part are minimum rates and have been fixed on the basis that, except where otherwise provided in the award, they take account of all aspects and conditions of employment both general and Particular and incorporate the dredging industry allowance.'

[42] The MUA provided a further submission proposing the introduction of a new definition into the award in the following terms

> '**Aggregate rate** means the minimum rate that has been fixed on the basis that, except where otherwise provided in the award, it takes account of all aspects and conditions of employment both general and particular and incorporates the dredging industry allowance.'[28]

[43] The AWU submitted that a definition of 'aggregated rate' should be inserted to clarify how the wage is calculated. AWU also queried why there were no shiftworker rates for 'Trailer master' and 'Chief engineer' classifications.[29]

[44] By correspondence dated 7 October 2016 the Commission asked the parties to confirm how the aggregated wages ought to be calculated.[30] The Commission attached a submission from the MUA from 2009 setting out how the rates were originally calculated in the pre-reform award. The Commission noted that the relationship between the minimum and aggregate rates has been altered due to flat dollar increases to the minimum rates. The Commission asked the parties to confirm whether the MUA's methodology is correct and, if so whether the modern award rates should be adjusted accordingly. The Commission attached a document setting out the current rates contained in the Dredging Award and the rates as they would be if adjusted using the MUA methodology.

[45] In reply to the Commission's correspondence the MUA confirmed that the MUA methodology set out by the Commission was correct and should be used to adjust the modern award rates.[31]

[46] Our *provisional* view is that the exposure draft will be varied to adopt the MUA's methodology. Interested parties have until **4.00pm Friday, 24 November 2017** to provide any feedback on this provisional view. In the absence of any objection the variation will be made.

Item 13 – Higher duties

[47] The AWU submitted that the "higher duties" rate is payable where an employee is required to perform the duties of a position at a higher classification level however there may be instances where only some duties are required to be performed. The AWU cited a number of pre-reform awards that entitled employees to the higher rate when "any duties carrying a higher rate" were performed.[32]

[48] Subsequently, the Commission undertook and published research about the 'higher duties' clause and its history.[33]

[49] Without re-producing significant excerpts from that research, we agree that AWU's concern may be resolved by inserting the word 'any' in place of the word 'the' as follows:

> **10.4 Higher duties**
>
> **(a)** An employee engaged to perform ~~the~~ any duties of a position at a higher classification level for more than two hours during any one day will be paid the rate applicable to that higher level for all work done on that day.
>
> **(b)** An employee engaged to perform ~~the~~ any duties of a position at a higher classification level for two hours or less during one day will be paid the higher rate for the actual time worked at that higher level.

[50] Clause 10.4 of the exposure draft will be varied accordingly.

Item 14 – Dual certificate allowance

[51] The AWU submitted that the dual certificate allowance in clause 11.2(b) of the exposure draft should be expressed as an hourly rate as well as a weekly rate.[34]

[52] The submission was considered at the Conference on 4 August 2016.[35] The allowance is an all purpose allowance and is therefore captured in the wage tables in Schedule A of the exposure draft.[36] No variation will be made to clause 11.2(b) the exposure draft.

Item 20 – Shiftwork penalties

[53] The AWU submitted that the wording of clause 13.3(a) of the exposure draft was confusing.[37] The AWU proposed amending the exposure draft clause and clarified its position at the conference on 4 August 2016:[38]

13.3 Shiftwork penalties

(a) A shiftwork loading of 30% of the ordinary hourly rate is payable to an employee working shiftwork and which shift commences at or after 6.00 pm. ~~on any Monday to Friday inclusive.~~

[54] The AWU noted that 'Shiftworkers', as defined in clause 8.2(b), include workers performing day shifts and night shifts. However, as it is currently drafted, clause 13.3(a) will not clearly apply to day workers.[39] The current drafting of the shiftworker penalties clause would mean that shiftworkers performing shiftwork on weekends would not be paid the shift loading.

[55] Under clause 20, ordinary hours may be performed on any day of the week for fully operational vessels and on Monday to Friday for vessels that are not fully operational. This does not assist in clarifying the intention of clause 13.3.

[56] In the absence of any submissions from other interested parties, we have considered the provisions in the current modern award and its predecessors.

[57] The current Dredging Award provides:

22.3 Shiftwork penalties

An employee working shiftwork and which shift commences at or after 6.00 pm on any Monday to Friday inclusive, will be paid a loading of 30% of the standard rate per hour. If a three shift per day system is worked the additional rate of 15% will be payable in respect of the afternoon and night shifts.

[58] Having regard to the other agreed changes, the current shift penalties clause provides the same entitlements as the exposure draft. The exposure draft has not created any ambiguity or uncertainty in that regard. As such, it is appropriate to consider the pre-reform award provisions.

[59] By way of example, the *Dredging Industry (AWU) Award 1998* provided the following:

3.2.2 Employees working shift work and which shift commences at or after 6.00 p.m. on any Monday to Friday inclusive, shall be paid for such work at the additional rate of 30% calculated on the ordinary rates. This subclause shall apply where two shifts per day are worked. If a three shift per day system is worked the additional rate of fifteen per cent shall be payable in respect of the afternoon and night shifts.

[60] Similar provisions could be found in the the *Marine Engineers (Non Propelled) Dredge Award 1998* and the *Maritime Industry Dredging Award 1998.* On that basis any variation to the exposure draft provisions would be a substantive variation, not a technical and drafting amendment.

[61] In the absence of a merit based argument, we are not satisfied that the variation proposed by the AWU is necessary or appropriate. Clause 13.3(a) of the exposure draft will not be varied.

Item 21– annual leave loading

[62] The AWU indicated that it would seek the insertion of an annual leave loading provision in clause 14 of the exposure draft.[40] The AWU submitted that 17.5% is a national standard in Australia and the Dredging Award is one of only three modern awards that do not include annual leave loading. The AWU made similar submissions about the *Book Industry Award 2010*[41] and *Alpine Resorts Award 2010*.[42]

[63] The AWU unsuccessfully sought an identical variation to the Dredging Award as part of the transitional review of modern awards in 2012.[43] The AWU made a number of submissions in support of that claim.

[64] At the Conference on 4 August 2017, the AWU indicated that it would rely on the material already submitted in support of the proposed variation.[44]

[65] In the transitional review of modern awards, the majority of the Annual Leave Full Bench decided not to make the variation sought by the AWU. The majority decision noted that the claim may be "more appropriate for consideration in the four year review".[45]

[66] The minority decision held that annual leave loading should be inserted into the modern awards that were the subject of the AWU's claim:[46]

> 'The absence of an entitlement to annual leave loading in these awards is unexplained and in my view unfair and unwarranted. The AWU could be criticised for not raising the matter more specifically during the award modernisation process. It has faced up to this and provided an explanation. But any failure on its part should not be a reason to deny its case now when merit is demonstrated. I consider that the AWU has established that the modern awards objective is furthered by the inclusion of an entitlement to annual leave loading in these awards and has made out a case on the merits for its inclusion into the three awards. Turning a blind eye to the intrinsic merit of the applications is not consistent with the obligation to conduct a review of the awards.'

[67] On that basis, we have considered the provisions of the three pre-reform awards mentioned previously in this decision as well as any consideration given to this issue during the award modernisation proceedings.[47]

[68] The three pre-reform awards are silent on annual leave and annual leave loading. During award modernisation, the parties' draft award and the Commission's exposure draft were based on the provisions contained in the three pre-reform awards, which are more or less identical. Annual leave was included in the modern award as per the NES but annual leave loading was not adopted.

[69] The AWU previously submitted that the omission of annul leave loading was an inadvertent error because most other modern awards contained annual leave loading provisions.[48] We do not agree. The inclusion of annual leave loading provisions in other

modern awards does not create an automatic basis for introducing the entitlement in the Dredging Award. Any such claim must be merit based. As noted previously, a relevant consideration is what the industry standard was prior to 2010.

[70] The AWU submissions previously noted that modern awards covering related industries include provisions about annual leave loading or provide a more generous leave accrual rate.[49] These include the *Port Authorities Award 2010*;[50] the *Seagoing Industry Award 2010*;[51] and the *Maritime Offshore Oil and Gas Award 2010*.[52]

[71] Clause 22 of the Port Authorities Award provides annual leave loading of 20% for shiftworkers and 17.5% for other workers. Clause 19 of the Maritime Offshore Oil and Gas Award and clause 20 of the Seagoing Award provide unique leave accrual calculations to compensate for the hours of work and requirement to be away from home for long periods of time.

[72] We understand that the nature of work and the disabilities associated with the Dredging Award are comparable to the other maritime sectors. The unique element of the Dredging industry is that it tends to be project work. There is no evidence before us about whether these types of employment arrangements mean employees are more or less likely to take annual leave or be paid out any accrued entitlements once the project is completed. These industry practices need to be considered properly when developing an annual leave loading provision or a unique annual leave accrual provision.

[73] The introduction of an annual leave loading provision would be a substantive variation to the Dredging Award and would introduce an entitlement that does not appear to have been a feature of past awards in respect of this sector.

[74] In terms of the modern awards objective, there is no evidence before us that the annual leave provisions in the Dredging Award are not meeting the modern awards objective. It could be argued that the loading would be additional remuneration for employees who work unsociable hours and shiftwork as per s. 134(da) of the Act. However it could equally be said that the introduction of annual leave loading would be an increased cost to employers which is a relevant consideration under s. 134(f) of the Act.

[75] We are not persuaded that there is sufficient material before us to determine the issue, and accordingly do not propose to make the change sought, at this time. If a party wishes to pursue the variation they can make a separate application to that effect. For now, we will not vary clause 14 of the exposure draft to include annual leave loading.

Item 22 – annual leave

[76] As part of the exposure draft process, the Commission asked interested parties to consider whether the definition of 'Shiftworker' in Schedule E applies for the purpose of the National Employment Standards.

[77] In response to that question, the MUA submitted that the work pattern in clause 8.2(b) should be used for the purpose of the NES.[53] The AWU agreed with the AWU's submission.[54]

[78] The MUA indicated that the Full Bench could determine this matter on the papers.[55]

[79] Based on the response from the AWU and MUA, it does not appear any variation to the exposure draft is required because the shift pattern in clause 8.2(b) will be used as the basis for calculating annual leave entitlements in clause 14 as per the National Employment Standards.

Item 25 – Definitions

[80] In response to the AWU's submission, the Commission published a revised exposure draft that replaced the words 'laid up' with 'not fully operational'.[56]

[81] Parties were subsequently asked to consider whether the amendment to the definition of 'laid up' and replacing the words 'laid up' with 'not fully operational' throughout the award gives rise to any practical issues.

[82] No further submissions were received from the interested parties. We will adopt the change in terminology and invite interested parties to make further submissions by **4.00pm Friday, 24 November 2017** if they have any concerns about the impact of the change.

[83] The summary of submissions was republished on 10 October 2017. There are no other outstanding items regarding the Dredging Award.

2.3 Educational Services (Post-Secondary Education) Award 2010

[84] An exposure draft based on the *Educational Services (Post-Secondary Education) Award 2010*[57] (Post-Secondary Award) was published by the Commission on 18 December 2015. Pursuant to directions, by 5 May 2016, submissions had been received from a number of parties which identified technical and drafting issues with the exposure draft. A conference was convened before Commissioner Johns on 10 May 2016.[58] Following the conference, the Commission published an updated summary of submissions, followed by a revised exposure draft dated 3 June 2016 that incorporated the changes agreed at the conference. A further updated summary of submissions was published on 10 October 2017.

[85] A mention held before Justice Ross on 7 June 2016 confirmed that most issues had either been resolved by consent or were substantive in nature. The substantive issues in this exposure draft have been referred to a separately constituted Full Bench in AM2015/6.[59] The parties noted that some technical and drafting issues may not be able to be resolved until the outcome of that substantive Full Bench. At the conclusion of the mention before Justice Ross, the parties were directed to review the revised exposure draft and write to the Commission outlining any outstanding drafting or technical issues (those which were not subject to the substantive matters).

[86] The NTEU submitted that all changes indicated in the revised exposure draft published 3 June 2016 properly reflected the discussions of the parties with the exception of the following two clauses.[60]

Item 12 – Academic Teachers – casual rates

[87] The NTEU submit that the second reference in clause 10.1(b) to 'Marking as a supervising examiner' should be deleted rather than the first reference in the clause. That is, the reference to 'marking as a supervising examiner' that should be deleted is the one which includes the words "(where academic holds a relevant doctoral qualification)".[61]

[88] The NTEU also raised this technical and drafting issue in submissions regarding the *Higher Education Industry – Academic Staff – Award 2010* exposure draft. The Group of Eight Universities (Go8), in correspondence received 10 June 2016[62] noted that it agreed with the submissions of the NTEU in relation to this issue in the *Higher Education Industry – Academic Staff – Award 2010*, however it is unclear from the submission whether the Group of Eight Universities agrees with the NTEU position in relation to the *Educational Services (Post-Secondary Education) Award 2010* revised exposure draft.

[89] Interested parties have until **4.00pm Friday, 24 November 2017** to confirm submissions about amended drafting.

Item 25 – Public Holiday substitution

[90] The NTEU submits that clause 20.2 of the revised exposure draft ("Substitution of public holidays by agreement") is inconsistent with the NES.[63]

[91] The NTEU also raised this technical and drafting issue in relation to the *Higher Education Industry – Academic Staff – Award 2010* and the *Higher Education Industry – General Staff Award 2010* (the Higher Education awards). In correspondence dated 10 June 2016[64], the Go8 submitted that (in respect of the Higher Education awards), it believes the existing clauses can be retained. However, Go8 submitted that if the clauses were to be addressed they should be dealt with by this Full Bench.

[92] This Full Bench in the *July 2017 decision*[65] directed the NTEU to respond to the Go8 submission (in relation to the Higher Education awards) that public holiday substitution should be dealt with by this Full Bench.[66] In correspondence received 28 July 2017[67], the NTEU agreed with the Go8 that this issue should be dealt with by this Full Bench.

[93] It appears the issue raised in relation to the Higher Education awards is substantially the same as that raised in the *Educational Services (Post-Secondary Education) Award 2010* revised exposure draft. As such, it is our *provisional* view that this matter will be dealt with by this Bench. Should any party wish to make a submission regarding this provisional view they are to do so by **4.00pm Friday, 24 November 2017.**

Items 8, 10, 13–16, 19, 24, 29

[94] According to the summary of submissions published on 10 October 2017, these items remain outstanding. Interested parties have until **4.00pm Friday, 24 November 2017** to confirm submissions about these outstanding items.

2.4 Educational Services (Schools) General Staff Award 2010

[95] An exposure draft based on the *Educational Services (Schools) General Staff Award 2010*[68] (General Staff Award) was published on 18 December 2015. Submissions and submissions in reply on technical and drafting issues were filed by the parties on or before 6 May 2016. A summary of submissions was published on 26 May 2016.

[96] A number of substantive issues in this award were referred to a separately constituted Full Bench in AM2015/6 in October 2015.[69]

[97] The Independent Education Union of Australia (IEU) made application to vary the General Staff Award. The application was heard on 21 December 2015 and an order to vary the award was issued on that day.[70] This order reflected the consent position of the parties.

[98] A further hearing was held before Justice Ross on 7 June 2016 to address the outstanding technical and drafting issues. There were a number of issues agreed to or not opposed at the hearing. The parties agreed that the remaining outstanding issues could be determined on the material already filed.[71]

[99] A revised summary of submissions was published on 10 October 2017. Items 1, 3, 4, 5, 9, 13, 18, 19, 20, 22 were either agreed or not opposed. The Commission adopts the agreed position on these issues as set out in the revised summary of submissions.

[100] Items 7, 8, 15, 16, 17, 21 were referred to the Full Bench dealing with matter AM2015/6. These issues have been resolved by this Full Bench and are reflected in Order PR575283 issued 21 December 2015.

[101] Items 23, 24, 25, 26 and 28 were not discussed during the hearing on 7 June 2016. Parties are asked to indicate whether they intend to press these matters by no later than **4.00pm Friday, 24 November 2017.**

[102] Item 27 was referred to the Full Bench dealing with AM2015/6 (see Directions issued - Schedule A.2, Item 9).

[103] Items 2, 6, 10, 11, 12, 14 of the summary of submissions are outstanding issues requiring determination. As mentioned previously, the parties have agreed that the remaining outstanding issues could be determined on the material already filed.[72] These outstanding issues are dealt with below.

Item 2 – Part-time employees

[104] The AIS and the IEU seek the inclusion of a cross reference at clause 6.4(a)(ii) of the exposure draft to clause 7 of the exposure draft. Clause 6.4(a)(ii) of the exposure draft deals with part-time employees, while clause 7 deals with leave without pay during non-term weeks. It is submitted that the cross reference should be included for clarification and to make the award easier to understand.[73]

[105] In their reply submission, AFEI outlined that the proposed amendment is unnecessary as it does not clarify the operation of the subclause.[74] AFEI confirmed at the conference on 7

June 2016 that their position is that the cross reference is unnecessary, however they outlined they were 'not completely opposing it'.[75]

[106] The change sought by the AIS and the IEU is outlined below:

> **'6.4 Part-time employees**
>
> (a) A part-time employee is engaged to work:
>
> (i) less than 38 ordinary hours per week or less than an average of 38 hours per week; or
>
> (ii) for less than the full school year pursuant to clause 7—Leave without pay during non-term weeks,
>
> and has reasonably predictable hours of work.'

[107] While AFEI submits the variation is unnecessary, there is no submission before us that the inclusion of a new cross-reference will change the operation of the clause or create some ambiguity.

[108] We agree that the addition of the cross-reference will clarify the operation of the clause. The exposure draft will be updated according to the AIS and IEU's draft.

Insertion of examples (Item 6 – calculating annual salaries and Item 10 – rostering)

[109] The AIS and the IEU seek the insertion of an example of an adjusted salary into clause 7 of the exposure draft. Clause 7 deals with leave without pay during non-term weeks. In their submission of 14 April 2016 the AIS and the IEU included their own example of an adjusted salary. They submit[76] that 'the example in this instance graphically presents in simple form a typical salary calculation for an employee working term weeks only'. The example proposed is set out below:

> *Example – Adjusted annual salary (full-time employee)*
>
> *For example:*
>
> *Brad is a full-time employee classified at Level 3.1. The annual rate of pay for a fulltime employee working 52.18 weeks of the school year is $39,933.*
>
> *Brad is required to take leave without pay during non-term weeks.*
>
> *As there are 39.4 term weeks in the school year, Brad is required to work 39.4 term weeks.*
>
> *The formula in clause 7.2(b) is: A = C x (working weeks + 4 weeks annual leave)*
>
> $$\frac{}{52.18}$$
>
> *Calculating the adjusted annual salary:*
>
> *Step1: (working weeks + 4 weeks annual leave) = 39.4 + 4 = 43.4*

Step 2: 43.4/52.18 = 0.8317

Step 3: $39,933 x 0.8317 = $33,212

Adjusted annual salary = $33,212.

[110] The AIS and the IEU also seek the insertion of an example at the end of clause 10 of the exposure draft. Clause 10 deals with ordinary hours of work for shiftworkers.

[111] The example is extracted below:

Example – Broken shift (part-time employee)

Janet is a part-time employee classified at Level 3.1. Her hourly rate of pay is $20.14.

Janet starts work at 7.00 am Thursday and finishes work at 9.00 am on Thursday. She recommences work at 2.00 pm on Thursday and works until 6.00 pm on Thursday.

Janet will:

- work 6 hours of ordinary time
- work a broken shift.

Calculating the ordinary time pay including the broken shift penalty:
Multiply the hourly rate of pay by the broken shift penalty and by the number of ordinary hours worked = $20.14 x115% x 6 = ($23.16) x 6 = $138.96

Janet is paid a total of $138.96 for Thursday.

NOTE: Calculations in this example are based on the rounded hourly rates in Schedule B.

[112] The AFEI opposes the insertion of both examples outlined above, but advances no reasons as to why they should not be included in the award.[77]

[113] The AFEI and other interested parties had the opportunity to respond to the AIS and IEU's submission to suggest alternative examples or give reasons why examples should not be adopted. We have not received any submissions to that effect.

[114] We agree that including these examples will clarify the operation of the annual salary clause and the broken shift provision. In the absence of any submissions opposing the inclusion of the examples we will include them. The exposure draft will be varied to include the examples drafted by the AIS and IEU.

Item 11 – Rostering

[115] ABI seek the reinsertion of the shiftwork definition into clause 10 of the exposure draft. They submit the following:

> 'We consider that the definitions of shiftwork, which currently appear at clause 25.2 of the current Award, should be inserted back into clause 10 of the Exposure Draft as it deals with ordinary hours for shiftworkers, rather than appearing at clause 15 of the Exposure Draft.

> Alternatively, there may be merit in having the provision appear at both clauses 10 and clause 15. In our view, it is confusing that a clause titled "Ordinary hours of work – shiftworkers" not actually contain the ordinary hours of work for shiftworkers.'[78]

[116] In their reply submission of 5 May 2016, the AIS and IEU submit the proposed amendment is not necessary.[79]

[117] We agree that duplicating the definition of shiftwork in two clauses is unnecessary; however we do not want to create confusion or ambiguity through the redrafting process so some amendment to the exposure draft is necessary.

[118] Rather than including the shiftwork definition in two clauses, we will amend clause 10 of the exposure draft to include a cross-reference to clause 15.1 as follows:

> **10.1 Ordinary hours for shiftwork**
>
> The definitions for shiftwork are provided in clause 15.1. The ordinary hours for shiftwork will:
>
> **(a)** be worked continuously each shift (except for broken shifts and meal breaks);
>
> **(b)** not exceed 10 hours, inclusive of a meal break in any single shift; and
>
> **(c)** be rostered in accordance with clause 10.2.

Item 12 – Altering the roster

[119] The AIS and the IEU submit that clause 10.2(c)(i) of the exposure draft be subject to the provisions of clause 24.2 to indicate the existence of additional obligations in some instances. Their proposed alteration to clause 10.2(c)(i) of the exposure draft is as follows:

> '**10.2 Rostering**
>
> …
>
> **(c) Altering the roster**
>
> (i) A roster may be altered by mutual consent at any time or by amendment of the roster by the employer on seven days' notice subject to the provisions of clause 24.2 – Consultation about changes to rosters or hours of work.'

[120] AFEI are opposed to the above amendment and submit 'a change of roster by mutual consent or with 7 days' notice, will not invoke the consultation process in clause 24.2 of the exposure draft. Including a reference to this clause is likely to lead to employers' misunderstanding their obligations.'[80]

[121] We agree with the AFEI's submission that varying clause 10.2(c)(i) as per the AIS and IEU's submission may create uncertainty or ambiguity about the consultation requirements. We will not make the proposed variation to clause 10.2(c)(i) of the exposure draft.

Item 14 – Broken shifts

[122] In their written submission of 15 April 2016, AFEI submit that clause 10.2(d)(ii) of the exposure draft (which deals with broken shifts) incorporates a substantive change from the current award.[81]

[123] Clause 10.2(d)(ii) of the exposure draft (dealing with ordinary hours of work for shift workers) is in the following terms:

> **'(d) Broken shifts**
>
> (i) An employee may be rostered to work ordinary hours in a broken shift which is defined as a shift that is rostered in two periods of duty, exclusive of breaks, per day.
>
> (ii) Where an employee is rostered to work a broken shift, the employee will be paid in accordance with the appropriate penalty in clause 15.4 with a minimum payment as for two hours for each period of duty.'

[124] AFEI submit that clause 15.4 of the exposure draft (dealing with penalties and overtime) excludes casual employees from this penalty rate and the two hour minimum payment for each period of duty.[82]

[125] Clause 15.4 of the exposure draft is in the following terms:

> **'15.4 Broken shifts**
>
> (a) An employee, other than a casual, rostered to work ordinary hours in a broken shift will be paid 115% of the minimum hourly rate with a minimum payment as for two hours for each period of duty.
>
> (b) The maximum spread between the start of the first period of duty and the end of the second period of duty for a broken shift is 12 hours. Any hours in excess of this 12 hour spread will be paid for as overtime.
>
> (c) The provisions of clause 15.4(b) do not apply to a boarding supervision services employee who is provided with reasonable accommodation including living quarters, fuel and light, and available to the employee for their exclusive use for 52 weeks of the year, at no cost to the employee.'

[126] AFEI submits that 'clause 10.2(d)(ii) of the Exposure Draft should be amended to clarify that the penalty and minimum payment in clause 15.4 applies to employees other than casual employees.'[83]

[127] In their reply submission of 5 May 2016 the AIS and IEU oppose the variation proposed by the AFEI and submit it would change the operation of the award. They submit that the change proposed 'makes it clear that a casual employee is not entitled to be paid the broken shift penalty.'[84] They submit that clause 6.5(d) (i) of the exposure draft makes it clear that a casual employee is engaged and paid for a minimum of two hours per shift. This clause corresponds with the first sentence of cl.10.5(c) of the current award.

[128] They further submit that these two clauses of the exposure draft, when read together, replicate the employment arrangements under the current award. They say, that is, a casual employee engaged to work a broken shift would be engaged for two engagements, each of not less than two hours, during the ordinary spread of hours. The casual employee is entitled to be paid the casual loading but has no entitlement to be paid the broken shift penalty.

[129] We agree with the AIS and IEU's submission that the intention of clause 15.4(a) is to exclude casuals from receiving the 15% loading for a broken shift because they receive the 25% casual loading under clause 6.5(b).

[130] If the AFEI's submission is accepted, it may create ambiguity about the minimum shift entitlements for casuals because a two hour minimum engagement applies to casuals by virtue of clause 6.5(c). The remaining provisions of clause 15.4 apply equally to casuals as to other employees. Accordingly, there is no need to vary the exposure draft.

2.5 Fitness Industry Award 2010

[131] On 18 December 2015 the Commission published an exposure draft based on the *Fitness Industry Award 2010*[85] (Fitness Award), together with a comparison document showing the changes to the structure and language of the award. Interested parties were invited to file submissions about drafting or technical issues in the exposure draft. Submissions were received from the AWU, ABI, Gymnastics Australia, Tennis Australia, Fitness Australia, Aussie Aquatics, Swim Australia and Australian Swimming Coaches & Teachers Association Ltd, Business SA and the FWO. A conference was conducted on 30 May 2016. With the exception of the FWO and Swim Australia and Australian Swimming Coaches & Teachers Association Ltd, it was attended by representatives for each of those organisations. AFEI also participated. Deputy President Clancy published a report to the Full Bench on 3 June 2016 that set out a number of the proposed variations to the exposure draft that were agreed, a number that were not agreed and a list of items from the submissions that would be the subject of further discussions between the interested parties. The report also noted that items 4 and 12 were withdrawn or no longer pressed.

[132] A further conference was held on 9 August 2016 to deal with the outstanding issues. It was attended by Gymnastics Australia, Tennis Australia, Fitness Australia, the AWU, the AFEI and Australian Swim Schools Association Ltd (ASSA). A second report to the Full Bench was made by Deputy President Clancy on 25 August 2016. While some of the outstanding items were resolved, some were still disputed and some required further consideration and discussion. Directions were issued on 14 December 2016 and parties were required to file further material in January 2017.

[133] The material filed identified a number of outstanding issues. A revised summary of submissions was published on 17 February 2017, incorporating submissions lodged on or before 16 February 2017. A further updated summary of submissions was published on 10 October 2017.

[134] Items 1, 2, 2B, 3, 5, 7, 8, 9A, 13, 14, 15, 16A, 16B were either agreed or not opposed. The Commission adopts the agreed position on these issues as set out in the summary of submissions.

[135] A number of items of the revised summary of submissions are outstanding and require determination. We deal with these below.

Items 2A and 32 – Coverage and definitions

[136] Clause 3.4 of the exposure draft provides that the award does not cover an employee who is employed by the employer to provide administrative and other operational support outside of a fitness centre. The language is identical to that used in the coverage clause of the *Fitness Industry Award 2010*.

[137] The ASSA submits that clause 3.4 of the exposure draft conflicts with the classification definitions at levels 1, 2, 3, 6 and 7 contained within Schedule A.[86] The classification definitions relate in part to functions reasonably falling within the activity of providing 'administrative and other operational support'. The ASSA considers this to be a critical issue as these classifications, and the modern award generally, are widely used in the swim school sector to engage support and managerial staff — and clause 3.4 restricts coverage of the award by effectively excluding organisations such as aquatic centres, indoor sports centres, and providers of 'aquatic services or classes'.

[138] The ASSA originally submitted that the clause should be amended to either remove the reference to 'outside of a fitness centre', or alternatively, expanded to cover the full range of activities that are listed in (b) to (k) of the definition of 'Fitness Industry' in clause 3.2. In doing so, the ASSA suggested clause 3.2 would reflect industry custom and practice generally and specifically in regards to swim school operators and their workforce. The only other party to provide a submission on the issue (GA) notes the proposed wording may be unclear in how it extends to providers of gymnastic services.[87]

[139] In later submissions dated 20 January 2017, the ASSA suggest that the award would be enhanced by the inclusion of a definition of 'centres' in Schedule G – Definitions in the following terms:

> 'For the purposes of the Classification Definitions appearing in Schedule A – **centres**' shall mean locations, organisations or activities, as listed in subclause 3.2 under the definition of **fitness industry**.'[88]

[140] The ASSA also suggest the award would be enhanced by the incorporation of a new sub clause 3.4 in the following terms:

> 'This award does not cover an employee who is employed by the employer to provide administrative and other operational support outside of fitness centres, group fitness organisations, weight loss/control centres, aquatic centres, indoor sports centres, golf driving ranges, dance centres, martial arts centres, recreational camps, tennis clubs and centres.'[89]

[141] The ASSA submit the two proposed amendments would avoid uncertainty and ambiguity as to the intended coverage of the award, affirming the operational arrangements currently applying in the swim school sector.[90] Further, the amendments would not disadvantage any party, or unsettle clearly established award demarcations in other allied

sectors. The ASSA submit the proposed amendments are consistent with requirements of s.134(a), (f) and (g) of the Modern Award Objectives in that:

- the need to operate under a multiplicity of awards would place a significant burden on organisations commonly found in this sector, which would ultimately see costs incurred flowing through to the consumer; and

- the Commission, in incorporating the proposed amendments to address deficiencies in the drafting of the award, would be applying principals articulated by Senior Deputy President Polites in *Re. Public Service (Non Executive Staff – Victoria) (Section 170MX) Award 2000* to remedy a 'state of not being definitely known or perfectly clear, doubtfulness or vagueness'.[91]

[142] The ASSA's proposed amendments are submitted on the basis they affirm current operational arrangements in the swim school sector. It is unclear as to whether this is also the case for gymnastics or any of the other activities coming within the definition of fitness industry in clause 3.2 but we note there has been no opposition to the ASSA's proposal submitted to the Full Bench.

[143] Having regard to these factors and noting the duties contained within the award's classification definition, we are persuaded that the approach advocated by the ASSA is appropriate. We have had particular regard to sections 134(1)(f) and 134(1(g) of the Modern Awards Objective in coming to this conclusion and consider it desirable to avoid the administrative burden and potential confusion that could arise from having multiple awards applying in the fitness industry.

[144] Rather than adopt the multiple amendments proposed by the ASSA, we propose to delete the word 'fitness' from clause 3.4 and insert a definition of 'centre' in Schedule G – Definitions as follows:

'**centre** means a venue or location at which operations in the fitness industry are conducted.'

[145] We otherwise propose to ensure that the definition of 'fitness industry' in both clause 3.2 and the Schedule G – Definitions is the same by amending Schedule G-Definitions.

Items 11A and 30 – Allowances for part-time employees

[146] Clause 11.1 of the exposure draft provides that employers '…must pay to an employee the allowances the employee is entitled to under this clause'. There is no equivalent provision within the current modern award. Schedule C.1 of the exposure draft is a summary of wage related allowances, and is similar in content to the allowance sheet linked to the current modern award.

[147] The ASSA submits that the following additional wording should be added prior to the first full stop in clause 11.1: ', provided that employees engaged under sub-clause 7.3 (as part-time), shall be paid all allowances on a pro-rate, hourly, basis'.[92] To ensure consistency between the provisions and to accommodate part-time employment, the ASSA suggest Schedule C.1 may need redrafting to facilitate payments of less than a 'week' or a 'day'.[93] The ASSA claims the amendments address uncertainty about payment of allowances to part-

time employees arising from the current form of clauses 7.3, 11.1 and Schedule C of the exposure draft. No other submissions have been received in relation to this specific proposal.

[148] The issue of payment of allowances on a pro rata basis for other than full time employees was considered at item 5 of the revised summary of submissions. Item 5 arose from a submission of the ASSA that identified a conflict between clauses 7.3(a)(iii) and 11.1 of the exposure draft.[94] The ASSA contend the conflict is a potential source of confusion for employers of part-time staff in relation to the payment of allowances, as evidenced by conflicting views provided by the FWO on the matter. The ASSA therefore submit that the opening sentence in clause 11.1 should be amended to facilitate proportional payments of all allowances relating 'work/wages' on an hourly basis for other than full time employees. BusSA, ABI, and FA agreed with the ASSA's submissions.[95]

[149] In his report to the Full Bench dated 3 June 2016, Deputy President Clancy identified item 5 as an issue under consideration by the parties that may benefit from further discussions. Specifically, the Deputy President wrote that the 'proposal to enable pro rata payment of allowances relating to work and wages on an hourly basis for other than full time employees generally agreed, save for the First-Aid Allowance'.

[150] In the subsequent report to the Full Bench dated 25 August 2016, The Deputy President noted that the parties had reached agreement in relation to item 5 on the following bases:

> 'As to Item 5, there was an agreement for the words "*Employees engaged other than on a full-time basis under sub-clause 7.2 shall be paid pro rata the wage related allowances detailed in paragraph (a) Leading hands and supervisors"* to be inserted after the first sentence in sub clause 11.1. There was also agreement to amend the words in sub clause 11.2(b) to *"An employee, other than a casual engaged under sub-clause 7.4 (c) (ii), working a rostered broken shift must be paid per day $12.24 extra and for excess fares and expense related allowance of $1.89 per day*".'

[151] Item 11A of the revised summary of submissions appears to be an additional amendment proposed by the ASSA to that already agreed by the parties in relation to item 5.

[152] We have had regard to the submissions of the parties and note the agreement of the parties reached in conference on 9 August 2016 in considering the payment of allowances to part time employees under clause 11. We consider it is appropriate that the weekly leading hands and supervisors allowance be payable to part time employees on a pro rata basis and that clause 11.1 be amended in the terms agreed.

Item 14A – Payment for working on a public holiday

[153] Clause 18.3 of the exposure draft provides as follows:

> 'A full-time or part-time employee must be paid at the rate of 250% of the minimum hourly rate for all hours worked on a public holiday. An employee required to work on a public holiday must be engaged or paid for at least four hours' work *at the rate of 250% of the minimum hourly rate*.' (emphasis added)

[154] Clause 26.3(c) of the current modern award adopts similar language to provide the same entitlement.

[155] The ASSA submit that the italicised words are repetitive in nature, serve no useful purpose, and simply replicate the intention of the first sentence.[96] The ASSA therefore suggest that clause 18.3 should be amended by inserting a full stop after 'four hours' work' and removing the second reference to 'at the rate of 250% of the minimum hourly rate'. No other submissions have been received in relation to this specific proposal.

[156] We agree with the submission of the ASSA. The second 'at the rate of 250% of the minimum hourly rate' reference in clause 18.3 is not necessary for the clause to meet the modern awards objective and will be omitted.

Item 14B – Job search entitlement for casual employees

[157] Clause 19.3 of the exposure draft confers an entitlement to employees for up to one day's time off without loss of pay for the purpose of seeking other employment in circumstances where an employer has given notice of termination. The clause replicates clause 14.3 of the current modern award.

[158] The ASSA submits the clause is ambiguous to the extent that it is unclear if the entitlement applies to casual employees.[97] The issue is of particular relevance to the swim school sector, which has a history of employing long-term casuals. The ASSA suggest the ambiguity be resolved by amending the clause to clearly specify if the entitlement applies/does not apply to casual employees. No other submissions have been received in relation to this specific proposal.

[159] Clause 19.3 sits within the 'Termination of employment' clause of the Fitness award and it is stated that notice of termination is provided for in the NES, which in turn make it clear that the rights and obligations in relation to notice of termination of employment do not extend to casual employees. However, the job search entitlement in clause 19.3 is not a NES entitlement.

[160] The 'Termination of employment' provisions are currently being considered as part of the plain language re-drafting process.[98] To avoid any drafting inconsistencies, this item will be referred to the plain language Full Bench for further consideration. Interested parties should consider the Full Bench's decision regarding a model 'Termination of employment' clause[99] and the Statement and Directions regarding further submissions about that draft clause.[100]

Item 31 – 2016 Part-day Public Holidays

[161] Schedule F of the exposure draft and Schedule E of the modern award, entitled '2016 Part-day Public Holidays', operates where the award otherwise contains provisions dealing with public holidays that supplement the NES. The ASSA query if the provision is redundant.[101] We note this matter is being dealt with by the Public Holidays Common Issue Full Bench in AM2014/301 and do not propose to comment further.

Substantive issues

[162] A number of other items from the revised summary of submissions remain in dispute. These items can be broadly categorised into two groups:

1. Entitlement of casual employees to overtime (items 6, 9, 10, 11, 11B, 11C and 29); and
2. Classification definitions for the swim industry (items 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, and 28).

[163] In relation to the first category, a report back by the parties dated 30 May 2016 identified this issue as an area of dispute on which it is unlikely the parties will come to an agreement. In the Report to the Full Bench dated 25 August 2016, Deputy President Clancy noted that the parties were committed to conducting a teleconference to discuss the issues further and would provide a report back by close of business on 29 August 2016. The AWU subsequently provided a report to the Commission which noted the parties remained in dispute, and suggested the matter was a substantive one that should be subject to comprehensive submissions by the parties if arbitrated. In accordance with Directions dated 14 December 2016, submissions have been received by interested parties on the issue.

[164] In relation to the second category of disputed items, Directions were issued on 7 February 2017 requiring parties to file further material in relation to classification descriptions for swimming coaches. Submissions have been received from:

- The Australian Workers' Union;
- Australian Swim Schools Association;
- Australian Swimming Coaches and Teachers Association; and
- Australian Business Industrial and the NSW Business Chamber.

[165] Pursuant to the Directions issued on 14 December 2016, outstanding matters would be determined by the Full Bench on the basis of the material filed without an oral hearing unless so requested. However, on 7 February 2017 the AWU requested a hearing in regards to the two broad categories of dispute. In light of the nature of the dispute, the material received, and the AWU's request, we consider both categories of disputed items require determination by a separately constituted Full Bench.

[166] There are no other outstanding matters for this Full Bench to determine in relation to the Fitness Award.

2.6 Gardening and Landscaping Services Award 2010

[167] On 15 January 2016 the Commission published an initial exposure draft based on the *Gardening and Landscaping Services Award 2010*[102] (Gardening Award), together with a comparison document showing the changes to the structure and language of the award. Interested parties were invited to file submissions about drafting or technical issues in the exposure draft. Submissions were received from the AWU, ABI, AFEI, and Business SA. A conference was held on 30 May 2016 and was attended by representatives from those organisations.

[168] Deputy President Clancy published a report to the Full Bench on 3 June 2016 that set out a number of agreed variations to the exposure draft, a number of variations that were not agreed and a list of items from the submissions that would be the subject of further discussions between the interested parties. The report also noted that a number of items were withdrawn at the conference or were being considered by a separately constituted Full Bench of the Commission.

[169] A further conference was held on 9 August 2016 to deal with the outstanding issues. Deputy President Clancy provided a second report to the Full Bench on 25 August 2016. It noted that further consideration by the parties in relation to most of the outstanding items, which include the entitlement to overtime payments for casual employees, was required.

[170] Directions were issued on 14 December 2016 and parties were required to file further material in January and February 2017. No further submissions have been received in response to the directions. A further updated summary of submissions was published on 10 October 2017. The Full Bench intends to determine the outstanding technical and drafting matters on the basis of material provided to date.

[171] Items 2 and 20, regarding overtime, remain unresolved. If the parties wish to pursue a variation to existing overtime provisions they may do so by making submissions to that effect by **4.00pm Friday, 24 November 2017.**

[172] We agree that item 4, regarding part-time employees, represents a substantive change to the existing part-time employment clause. On that basis, we will amend the exposure draft to re-instate the words "regular part-time employee".

[173] Item 5, regarding part-time employees, was ultimately unopposed. The reference to "minimum hourly rate" in clause 6.4(c) of the exposure draft will be replaced with "ordinary hourly rate".

[174] Item 11, regarding rest breaks, represents a substantive change to the existing award provision. AWU's initial submission proposed adding in the words "or shift" to the clause however that was opposed on the grounds that the award did not include shift provisions. The employer parties have not responded to the AWU's alternate proposal which was:

> **9.3** Employees will be allowed a paid rest break of 10 minutes each morning or at an appropriate time if water restrictions are in place.

[175] AWU's initial submission was that some provision needed to exist for circumstances where employees worked outside the normal span of hours due to water restrictions. Business SA initially objected on the grounds that "shift" was an undefined term. ABI objected on the grounds that introducing the term "shift" expanded the entitlement to a paid rest break.

[176] Given AWU's amended proposal does not use the term "shift" and would only apply in limited circumstances where water restrictions are in place we are minded to adopt the amendment. Clause 9.3 of the exposure draft will be varied accordingly.

[177] Item 16 was debated between the parties. Clause 15.1 of the current modern award (replicated in clause 11.3(a) of the exposure draft) states that the leading hand allowance is

paid in addition to any other wage specified for the employee. The parties disagreed about whether the leading hand allowance is an all purpose allowance. The first Group 3 Decision identified the allowance as an all purpose allowance.[103]

[178] We do not intend to deviate from the view expressed in our previous decision.

[179] Parties were encouraged to have further discussions about item 19, regarding rest periods after overtime duty. Parties have not provided an agreed position for the Full Bench to consider. The exposure draft reflects the wording of the current modern award. In the absence of any alternate proposal, the exposure draft will not be varied.

[180] In item 23, the AWU submitted that Schedule B of the exposure draft should provide rates for casuals performing overtime. Generally, overtime rates for casuals have not been provided in the schedules of hourly rates however, as the parties have indicated that it would be of assistance, the Commission's research area will prepare rates and add them to the revised exposure draft for interested parties to consider. The rates will be prepared having regard to the AWU's draft.[104]

[181] To avoid any confusion, the overtime rate for casuals will be calculated by adding the overtime loading to the casual loading. The overtime loading is not paid instead of the casual loading. The casual overtime rates will be calculated according to the following formulas:

Monday to Sunday		**Public Holiday**
First 2 hours	After first 2 hours	All overtime hours
Minimum hourly rate *+ (25% + 50%)*	*Minimum hourly rate* *+ (25% + 100%)*	*Minimum hourly rate* *+ (25% + 150%)*

[182] There are no other outstanding matters for this Full Bench to determine in relation to the Gardening Award.

2.7 Horticulture Award 2010

[183] On 15 January 2016 the Commission published an exposure draft based on the *Horticulture Award 2010*[105] (Horticulture Award), together with a comparison document showing the changes to the structure and language of the award. Interested parties were invited to file submissions about drafting or technical issues in the exposure draft. Submissions were received from the AWU, ABI, AFEI, Ai Group, the NFF, the VOH and Business SA. A conference was held on 1 June 2016. With the exception of the VOH, it was attended by representatives for those organisations. The NUW also participated.

[184] Deputy President Clancy published a report to the Full Bench on 3 June 2016 that set out a number of the proposed variations to the exposure draft that were agreed, a number that were not agreed and a list of items from the submissions that would be the subject of further discussions between the interested parties. The report also noted that a number of items were

withdrawn at the conference and others were being considered by or suggested for referral to separately constituted Full Benches of the Commission.

[185] A further conference was held on 8 August 2016 to deal with the outstanding issues. It was attended by representatives of the AWU, AFEI, Ai Group, NFF, UV, South Australian Wine Industry Association and VOH. A second report to the Full Bench was issued by Deputy President Clancy on 25 August 2016. That report set out the proposed variations to the exposure draft that were agreed, nine issues (some 10 items) that were not agreed and two issues that were being considered by separately constituted Full Benches of the Commission. Further hearings in relation to the substantive claims have been listed in mid-2017.

[186] Parties should refer to the Deputy President's second report to the Full Bench to identify which issues are being dealt with by a separately constituted Full Bench. We do not propose to list them in this decision.

[187] A further updated summary of submissions was published on 10 October 2017. We turn now to the remaining unresolved issues.

Item 53 – Definition of 'wine industry'

[188] As noted in the Deputy President's second report to the Full Bench Ai Group indicated it may vary its position after having the benefit of reviewing an analysis of the definition of 'wine industry' as it appears in this award and in other awards. The analysis was to be published by the Commission's research team.

[189] A subsequent review of the definition of 'wine industry' reveals that it is defined in the same terms in the *Wine Industry Award 2010* and the *Pastoral Award 2010*, with the Commission having previously formed the view that consistency should be maintained between modern awards wherever possible.[106] The definition of wine industry in the exposure draft of the *Horticulture Award 2016* differs from these awards in minor respects, in that it does not include 'the planting of wine grape vines' and it describes 'laboratory activities and making or repairing barrels, vats, casks and like articles' in marginally different terms. As to other 'agricultural awards', there is no definition of 'wine industry' in the *Aquaculture Industry Award 2010*, the *Seafood Processing Award 2010*, the *Silviculture Award 2010* or the *Sugar Industry Award 2010*.

[190] Having regard to these factors, we do not consider there would be any unintended substantive changes to Award coverage if we were to amend the exposure draft so that the definition of 'wine industry' matches the definition used in both the *Wine Industry Award 2010* and the *Pastoral Award 2010*.

[191] We now turn to the issues that involve a consideration of whether the term 'ordinary hourly rate' should be used as opposed to 'minimum hourly rate' and vice versa.

Item 12 – Part-time employees

[192] Ai Group proposes replacing the words 'ordinary hourly rate' in clause 6.4(b) of the exposure draft with the words 'minimum hourly rate'. Clause 6.4(b) is in the following terms:

> '**(b)** For each ordinary hour worked, a part-time employee will be paid no less than the ordinary hourly rate for the relevant classification in clause 10—Minimum wages.' (emphasis added)

[193] Ai Group submits (with support from Business SA[107] and VOH[108]) that the reference in clause 6.4(b) to 'ordinary hourly rate' and the cross reference to clause 10 is confusing because clause 10 does not include any ordinary hourly rates.[109] Further, at the 8 August 2016 conference before Deputy President Clancy, Ai Group submitted that it had reviewed the earlier Full Bench decision[110] that was said to address the issue and was unsure that 'the decision resolves this particular issue'.[111] The AFEI does not oppose the changes proposed by Ai Group.[112]

[194] The NFF supports the Ai Group position and expresses a preference for maintaining the status quo, that is, to return to the use of the word 'minimum' as opposed to 'ordinary'.[113] It submits that clause 6.4(b) should be consistent with clause 10 which deals with minimum rates of pay not ordinary rates of pay.[114]

[195] The AWU is opposed to any change and submits that the exposure draft terminology is consistent with the earlier Full Bench decision[115] concerning the inclusion of ordinary hourly rates for awards with an all purpose allowance.[116] Further, the AWU submits that the purpose of the cross reference to clause 10 is to provide employees with their applicable classification to then work out their ordinary hourly rate.[117]

[196] We agree with the AWU. For awards where all purpose allowances(s) only apply to some employees, as is the case with the *Horticulture Award 2010*, the use of the term 'ordinary hourly rate' is used to make it clear that any all purpose allowance(s) need to be added to the minimum rate of pay before calculating any penalty rate. The *July 2015 decision* determined this issue:

> 'Definitions of ordinary rate of pay have been inserted in the exposure drafts that include an allowance or loading that is payable for "all purposes" along the following lines (depending on the application of the all purpose allowances):
>
> | **All purpose provisions** | **Ordinary hourly rate definition** |
> |---|---|
> | Only all purpose allowance is an industry allowance applying to all employees | **ordinary hourly rate** means the hourly rate for an employee's classification specified in clause X.1, inclusive of the industry allowance |
> | All purpose allowance(s) only applying to some employees | **ordinary hourly rate** means the hourly rate for the employee's classification specified in clause X, plus any allowances specified as being included in the employee's ordinary hourly rate or payable for all purposes |
> | Industry allowance applying to | **ordinary hourly rate** means the hourly rate for an employee's |

all employees for all purposes and other all purpose allowance(s) only applying to some employees	classification specified in clause X, inclusive of the industry allowance. Where an employee is entitled to an additional all purpose allowance, this allowance forms part of that employee's ordinary hourly rate

The term 'ordinary hourly rate' has been used in contrast to 'minimum hourly rate' in affected awards to make it clear that all purpose allowances must be added to the minimum rate of pay before calculating any penalty rate.'[118]

[197] Further, we agree with the AWU in that the reference to clause 10 provides parties with a signpost to their appropriate classification from which they can then determine what their ordinary rate of pay will be. Nevertheless we appreciate Ai Group's concern. We propose to adopt a similar approach to that taken for the *Business Equipment Award 2010* and discussed at greater length in the *July 2017 decision*. The definition for 'ordinary hourly rate' in this award is as follows:

'**ordinary hourly rate** means the hourly rate for the employee's classification specified in clause 10.1(a) and 10.3(a), plus any allowances specified as being included in the employee's ordinary hourly rate or payable for all purposes'

[198] To add clarity to the wage tables at clause 10.1(a) and to alleviate Ai Group's concern, we propose amending each table by adding a footnote next to 'minimum hourly rate' in the heading row of the rates tables which states:

'[1]Consistent with the definition for **ordinary hourly rate** in Schedule G—Definitions all purpose allowances need to be added to the rates in the table where they are applicable.'

[199] Parties are to provide any objections to this proposal and/or comments by **4.00pm Friday, 24 November 2017.**

Items 13 and 14 – Casual loading

[200] Ai Group submits that the casual loading is based on the minimum hourly rate before adding any all purpose allowance(s) and that for this reason the reference to 'ordinary hourly rate' should be replaced with 'minimum hourly rate'.[119] Business SA[120] and VOH[121] support the Ai Group proposal. As with the issue discussed directly above under item 12, Ai Group is not persuaded that the Full Bench decision noted in the revised summary of submissions (the *July 2015 decision*) resolves this issue.[122]

[201] In the *July 2015 decision* the Full Bench expressed the following provisional view:

'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.

> 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 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.'[123] (footnotes omitted)

[202] Following that decision, parties were given a further opportunity to make written submissions in relation to whether the casual loading should be applied to any all purpose allowances. The same Full Bench then determined that the approach in the provisional decision as identified above should not be adopted. The Full Bench stated:

> 'We have come to the conclusion that the approach in the provisional decision should not be adopted. We are not satisfied on balance that there are sufficiently cogent reasons to justify a departure from the general approach adopted in the *2008 decision*. Leaving aside the dispute concerning the interpretation of the relevant provisions of the *On-Site Award* for the time being, we do not consider that there is anything before us which suggests that there has been any practical difficulty in the operation of current modern awards provisions which are consistent with the *2008 decision*. In that circumstance, the adoption of a change which may cause not insignificant reductions in pay to some award-dependent employees is not justified.
>
> Additionally, and on reflection, the application of the provisional decision may add unnecessary complexity to modern awards. Its effect would be that allowances which are currently described as all purpose in nature would no longer operate on a truly all purpose basis, but would apply for certain purposes only. For the sake of clarity, that would then require those purposes to be clearly identified. As was pointed out in the submissions of the AWU, a requirement in the case of casual employees that the casual loading be calculated on the minimum hourly rate, but that other loadings and penalties be calculated on the ordinary hourly rate would add difficulty to the process of calculating the correct hourly rate. This difficulty will not be able to be overcome by the addition of detailed rate schedules specifying the casual hourly rates payable for each ordinary time, overtime, weekend work and shift work scenario because, particularly in those awards where there are different all purpose allowances applying to different categories of employees, it will become impracticable to produce comprehensive rate schedules coverings every possible scenario for every category of employee.
>
> The concern which underlay the provisional decision was whether it was appropriate for certain allowances currently expressed as all purpose allowances to be paid at an increased level for casual employees by reason of the application of the casual loading. Ultimately however we have concluded that to deal with this concern in the manner proposed by the provisional decision is too broad-brush an approach and involves conducting the analysis from the wrong starting point. We consider that the preferable approach is to permit reconsideration, on an award-by-award basis during the course of the 4-yearly review, as to whether any existing allowance should retain its "all purpose" designation or should be payable on some different basis.
>
> 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.'[124] (our emphasis).

[203] The *September 2015 decision* addresses the issue raised by Ai Group. We do not propose to depart from the 'general approach'. The term 'ordinary hourly rate' in clause 6.5(c)(i) of the exposure draft will remain such that any allowances described as payable for all purposes will operate on a 'truly all purpose basis'.

Item 23 – Meal break

[204] Ai Group submits that the use of the term 'appropriate ordinary hourly rate' as opposed to the term 'appropriate minimum wage' constitutes a substantive change to the award and contends that 'appropriate minimum wage' is 'clearly a reference to the rates prescribed in clause 14.1' of the current award which do not yet incorporate all purpose allowances.[125] The NFF supports retaining the wording that is in the current award.[126]

[205] The AWU disagrees that there has been a substantive change with the incorporation of the term 'appropriate ordinary hourly rate' and submits that the term 'appropriate minimum wage' in the current award includes any all purpose allowance(s).[127]

[206] We disagree with the Ai Group position. It is apparent from the current award (and now the exposure draft) which allowances apply for all purposes of the award. The use of the term 'appropriate' ought to direct an employer and employee to consider what the correct rate is, which should in turn involve a consideration of which all purpose allowances may need to be included in the employee's rate of pay. By using the term 'ordinary hourly rate' employers and employees are put on notice that all purpose allowances may apply. Further, for the reasons expressed above at paragraphs [202]–[203] we do not propose to adopt Ai Group's proposal. To do so would be to adopt an approach that is inconsistent with the *Award Modernisation Decision* of 19 December 2008[128] and with our *September 2015 decision,* as it would mean that the all purpose allowances would apply for certain purposes only. As we noted in our *September 2015 decision* to adopt such an approach would add unnecessary complexity to the award.

Item 45 – Summary of hourly rates of pay

[207] At the 8 August 2016 conference before Deputy President Clancy it was noted that the parties had not yet reached agreement in respect of whether the headings for the tables in Schedule B should reference 'ordinary hourly rate' or 'minimum hourly rate'. In addition, it was noted that Ai Group would prepare a submission identifying all modern awards in respect of which it contends this issue arises. A submission was received from Ai Group on 31 August 2016. The list of modern awards in that submission did not include the *Horticulture Award 2010*. Nevertheless, in that submission, Ai Group's concern was further expressed as follows:

> 'Often the heading for particular columns will use the term "ordinary hourly rate" when the figures in the column are based on the minimum hourly rate. For some employees the ordinary hourly rate will be the same as the minimum hourly rate but, for employees who are entitled to one or more all-purpose allowances, the rates will be different.'[129]

[208] This issue is discussed generally at paragraphs [353] – [362] of the *July 2017 decision*. For the reasons given in those paragraphs we intend to adopt the approach proposed at

paragraph [360] – [361] of the *July 2017 decision*. Parties are to provide any objections to this proposal and/or comments by **4.00pm Friday, 24 November 2017.**

[209] We turn now to the five remaining items.

Items 15 and 47 – Casuals

[210] The issues in items 15 and 47 both relate to whether casual shiftworkers can be engaged under this award. Therefore we will deal with them together.

[211] In correspondence to the Commission, the FWO advised that it has received enquiries as to whether the shiftwork provisions in clause 22.2 of the current award apply to casual employees.[130] At a conference before Deputy President Clancy the NFF and AFEI queried whether there can be casual shiftworkers working under this award and expressed concerns 'about a table in the award reflecting that position'.[131] Ai Group advised the Commission that it does not have a concluded view on the matter.[132] The AWU firmly stated its position in support of wage rates tables for casual shiftworkers being included in the exposure draft:

> '…we are very clear that casual employees can be engaged as shift workers under the current award and that should remain the case in the exposure draft, and we press the point that a rates table for casual shift workers should be included which would have the standard shift work rates plus the 25 per cent casual loading.'[133]

[212] Following the conference before the Deputy President, the NFF confirmed its position and submitted:

> '…the NFF does not agree that casual employees can be shiftworkers under the current Horticulture Award 2010. Our interpretation relies in part on the fact that the shiftwork provisions in clause 22.1 of the Award are closely connected to the ordinary hours of work provisions for full time and part time employees in clause 22.1.
>
> The initial exposure draft for the Horticulture Award 2016 changed this by moving clause 22.2 of the current Award to a stand alone clause 14. In our view, this represents a substantive change as to the scope of the shiftwork provisions, and the categories of employment to whom they apply.
>
> On that basis, the NFF does not support the separation of clauses 22.1 and 22.2 of the current Award in connection with the exposure draft process. We seek that the two clauses remain co-located and we suggest that this be achieved by moving clause 14 of the Exposure Draft to clause 8.2.'[134]

[213] We agree with the NFF that, on the face of it at least, the recasting of clause 22.2 of the *Horticulture Award 2010* as a standalone clause 14 in the exposure draft could result in a substantive change. Absent the provision of further material we are not in a position to determine this issue. Parties are to advise the Commission by **4.00pm Friday, 24 November 2017** as to whether they wish to pursue this issue.

[214] The determination of whether casual shiftworkers may be engaged under this award (item 15), will resolve the question of whether casual employees can receive shiftwork rates, an issue which the NFF contends is also substantive.[135]

Item 24 – Rest break

[215] At clause 9.2 of the exposure draft, parties were asked to respond to the following query:

> 'Parties are asked whether employees working afternoon or night shift are entitled to a paid rest break. Clause 9.2(a) below states that the paid rest break is to be taken in the morning.'

[216] Ai Group contends that an employee working afternoon or night shift will not be entitled to the paid rest break.[136] Ai Group submits as follows:

> '…The plain and ordinary meaning of that provision is that the break it provides for is to be allowed during the morning. An entitlement to the break does not, therefore, arise at times other than the morning. If work performed by an employee during an afternoon or night shift as defined by clause 14.1(b) of the Exposure Draft does not occur during the morning, the entitlement does not arise.'[137]

[217] The AWU submits that 'it would clearly be unjust for day workers to receive a paid rest break but not shiftworkers' and propose amending the clause to read (changes tracked):[138]

> **(a)** Employees will be allowed a paid rest break of 10 minutes each ~~morning~~ day or shift.

[218] The NFF and AFEI support the AWU proposal.[139] Ai Group submits that the AWU's proposal 'would result in a substantive increase to employee entitlements and as such is not appropriately considered as part of this process'.

[219] The question for us to determine is whether the inclusion of a term that would grant afternoon and night shift workers a paid rest break of 10 minutes each shift is necessary for the modern awards objective of a fair and relevant minimum safety net to be met. In relation to the matters required to be taken into account in s.134 of the Act, we consider the inclusion of such a term would assist in meeting the objectives and/or needs in paragraphs (a), (da), (e) and (g), in terms of simplicity, albeit it would necessarily impose at least some level of cost on employers (s.134(f)). While issues pertaining to the other factors in s.134 are not aroused, we are nonetheless persuaded, on balance, that the AWU proposal should be adopted.

Item 25 – Break after ceasing work

[220] The AWU proposes amending clause 9.3(a) to read as follows (changes tracked):

> **(a)** An employee is entitled to a break of 10 hours between finishing work on one day and commencing work on the next day or shift.

[221] The AWU submits that its proposed variation would 'eliminate ambiguity which could arise when a night shift ceases and then commences again on the same calendar day'.[140] Business SA[141] agrees with the AWU and the NFF does not oppose.[142]

[222] Conversely, Ai Group submits that the circumstance referred to by the AWU is not caught by the clause and therefore no ambiguity arises. Further, it notes that it is 'unaware of

any practical problem arising from the current wording of the award'.[143] Ai Group opposes the proposal and contends:

> '…the proposal appears to simply be an attempt to introduce a new requirement that there be a 10 hour break between "shifts". The AWU proposed amendment should not be made.
>
> However, if the Commission is concerned about a possible ambiguity, clause 9.3 could simply be amended to clarify that it does not apply to shift workers.'[144]

[223] Having regard to the positions adopted by the parties and the matters required to be taken into account in s.134 of the Act, we consider the variation as proposed by the AWU that would provide a break of 10 hours between shifts is both desirable from a work, health and safety perspective and necessary for the modern awards objective of a fair and relevant minimum safety net to be met. We consider a uniform entitlement to a break of 10 hours is warranted and would assist in meeting the objectives and/or needs in paragraphs (a), (c), (d) and (g). There is no evidence before us suggesting it would result in additional costs for employers or negatively impact on business efficiency and productivity (s.134(f)) or negatively impact upon the factors in s.134(h) of the Act.

Item 27 – Pieceworkers

[224] The NFF proposes defining the full and base rate of pay for pieceworkers for the purpose of calculating NES entitlements. The NFF submits that its approach 'reflects the fact that hours of work are not always recorded for pieceworkers'.[145] Its proposal is as follows:

> 'For the purpose of the NES, the **full rate of pay** for a pieceworker is calculated by dividing the total amount earned by the employee during the 12 months immediately preceding the taking of the NES entitlement by the total daily tally for the employee for days worked in that period, and dividing that daily tally by 7.6.
>
> For the purpose of the NES, the **base rate of pay** for a pieceworker is calculated in the same way as the full rate of pay for a pieceworker and then reduced by 15% (for permanent employees) or 40% (for casual employees).' [146]

[225] The AWU opposes the proposal and submits it:

> '…uses the definition from the Fair Work Regulations for base rate of pay as the definition of full rate of pay and then adopts a lower entitlement for base rate of pay in the award, so we don't see that whatever goes in the award should be lower than the safety net for award and agreement free workers.'[147]

[226] Ai Group submits that the proposal would amount to a substantive change and for this reason considers that the proposal should be dealt with in the process the Commission has adopted for dealing with substantive changes sought that are contentious.[148] Ai Group advised it may seek to be heard (at the appropriate time) in relation to this proposal.[149]

[227] At a conference before the Deputy President, AFEI agreed to inform the Commission of its position by 27 August 2016, however no correspondence from AFEI has been received in respect of this issue to date.[150] AFEI are asked to confirm its position by **4.00pm Friday, 24 November 2017.**

[228] In light of the nature of this dispute, the desirability of establishing clarity for arrangements relating to pieceworkers, and the Ai Group's request, we consider it requires determination by a separately constituted Full Bench.

Item 9 – Facilitative Provisions

[229] The interested parties generally did not oppose the NFF's proposal to insert sub-clause 15.2(b)(i) in the list of facilitative provisions. The AWU did not oppose the variation so long as there is consistency in the TOIL provisions across exposure drafts.

[230] A number of outstanding award-specific matters are still being considered by the Full Bench dealing with the award flexibility common issue. Those proceedings have not concluded and we anticipate that there will be determinations issued in due course. In the meantime, we see no reason not to add clause 15.2(b)(i) to the list of facilitative provisions so the exposure draft will be varied accordingly.

Item 19 – Ordinary hours and roster cycles

[231] The AWU submits that clause 8.1(a)(iv) of the exposure draft could be improved by adding reference to work outside the span of ordinary hours. VOH oppose the variation because the drafting is consistent with the current award provision.

[232] We agree that the clause would be improved by clarifying when overtime applies. Clause 8.1(a)(iv) of the exposure draft will be varied to read as follows:

> **(iv)** All time worked by full-time and part-time employees in excess of the ordinary hours or outside of the ordinary hours will be deemed overtime

Item 56 – Definitions

[233] We anticipate that this item will be considered as part of separate substantive proceedings for AM2016/25. If the matter requires further consideration following the conclusion of the substantive proceedings, interested parties may make submissions to that effect.

[234] There are no other outstanding matters for this Full Bench to determine in relation to the Horticulture Award.

2.8 Legal Services Award 2010

[235] On 18 December 2015 the Commission published an exposure draft of the *Legal Services Award 2015* (Legal Services Award), together with a comparison document showing the changes to the structure and language of the award. Interested parties were invited to file submissions about drafting or technical issues in the exposure draft. Submissions were received from the ASU, ABI, the AFEI, the Ai Group, Business SA and a number of private legal firms (jointly 'the Law Firms'). A conference was held on 30 May 2016. With the exception of the ILOE-Vic, it was attended by representatives of those organisations. Deputy President Clancy published a report to the Full Bench on 3 June 2016 that set out a number of

the proposed variations to the exposure draft that were agreed and a list of items from the submissions that would be the subject of further discussions between the interested parties. The report also noted that a number of items had been referred to separately constituted Full Benches of the Commission and the views of the interested parties on the question of whether the Legal Services Award should be combined with the *Clerks – Private Sector Award 2010*, which was generally not supported.

[236] The same parties attended a further conference on 9 August 2016 to deal with the outstanding issues. At its conclusion, the interested parties indicated they would report back in relation to various matters. A second report to the Full Bench was made by Deputy President Clancy on 25 August 2016. This indicated that the parties had reached agreement on some of the outstanding matters, including the definition of '*law graduate*', confirmed the matters that were not agreed and noted the other matters still under consideration and due for report back opposing a number of the positions of the Law Firms.

[237] Directions were issued on 14 December 2016 and parties were required to file further material in January 2017 and reply material in February 2017. They responded as follows:

- On 20 December 2016, the ASU filed comments in response to the revised Summary of submissions published on 22 July 2016; [151]
- On 10 January 2017, the Law Firms filed comments in response to the revised Summary of submissions published on 22 July 2016;
- On 20 January 2017, the Law Firms filed submissions;
- On 30 January 2017, the ASU filed submissions in reply to the submissions of the Law Firms;
- On 7 February 2017, the Law Firms issued submissions in reply.

[238] The Commission published a revised summary of submissions on 17 February 2017. A further updated summary of submissions was published on 10 October 2017.

Item 2 – Definition of Law Graduate, Item 14 – daylight saving and Item 11 – Shift work on public holidays

[239] The parties confirmed their agreement to the proposed definition of '*law graduate*' as outlined by Deputy President Clancy in his Report to the Full Bench on 25 August 2016. We propose to amend the definition in the manner suggested.

[240] The Law Firms submit that the daylight saving issues arising from clause 28.1 of the current award are remedied by clause 8.5 of the exposure draft and on the basis that this wording is maintained, the Law Firms do not pursue any variation.

[241] Further, the parties appear to have agreed that the wording at the start of sub clause 13.4(c)(iii) of the exposure draft should be changed to 'where shifts fall partly on a public holiday…'. We agree and, as such, we propose to amend the definition in the manner suggested.

Item 8 – Changing from the term 'shift allowances' to 'shift penalties'

[242] The word 'penalties' has been inserted into the exposure draft at clause 13.3, changing the reference from shift work 'allowances' to shift work 'penalties'. The Law Firms noted the lack of consensus regarding this but the parties have not developed their submissions further.

[243] On the limited material before us we do not propose to change the exposure draft, at this time.

Item 13 – Ordinary hours of work and roster cycles – day workers

[244] While Law Firms do not object to the wording of clause 8.1 of the revised exposure draft, noting it uses slightly different language to that adopted in clause 24.1 of the current award, their proposed variation would read as follows:

> **8.1 Ordinary hours and roster cycles—day workers**
>
> (a) The ordinary hours of work for day workers are to average 38 hours per week but must not exceed 152 hours in 28 days.
>
> (b) By agreement between an employer and an employee, the employee's ordinary hours of work may be arranged on the basis that the weekly average of 38 ordinary hours is achieved over a period which exceeds 28 consecutive days but does not exceed 26 weeks.
>
> ~~(b)~~(c) The ordinary hours of work may be worked on any day or all of the days of the week, Monday to Friday.
>
> **~~(c)~~(d) Span of Hours**
>
> (i) The ordinary hours of work are to be worked continuously, except for meal breaks, at the discretion of the employer between 7.00 am and 6.30 pm, Monday to Friday.
>
> (ii) The spread of hours may be altered by up to one hour at either end of the spread, by agreement between the employer and the majority of employees concerned.
>
> (iii) Subject to clause 8.1~~(c)~~(d)(iv) any authorised work that is required or requested by an employer to be performed outside the spread of hours is to be paid for at overtime rates as prescribed in clause 14—Overtime.
>
> (iv) Any work performed by an employee prior to the spread of hours which is continuous with ordinary hours for the purpose, for example, of getting the workplace in a state of readiness for other employees to start work is to be regarded as part of the 38 ordinary hours of work.
>
> **~~(d)~~(e) Rostered days off**
>
> (i) Arrangements for rostered days off may be reached between an employee and an employer.
>
> (ii) Such arrangements will outline:
>
> - the method of accruing time towards a rostered day off; and
> - an agreed method of accumulating and taking rostered days off.

[245] The Law Firms submit the proposed amendments provide greater flexibility and clarity in the arrangement of hours of work and s.63 of the Act places no limitation on the period of time across which hours may be averaged. They suggest that it is uncontentious that the nature of work within a law firm, and within practice areas within a law firm, fluctuates significantly depending upon the types of matters being handled at any given time.

[246] The Law Firms contend that given that qualified and admitted lawyers are not covered by a modern award and may have an agreement with their firm to average their ordinary hours of work over a 26 week period (see s.64 of the Act), award covered employees who work side-by-side with qualified and admitted lawyers should have the same opportunity to average their hours in order that they can work fewer hours of work during quiet periods of time, balanced against periods in which they may worker greater hours of work. The Law Firms submit the variation would fulfil the modern awards objective at s.134 of the Act that modern awards should promote modern workplace practices and the efficient and productive performance of work.

[247] Regarding the proposal that overtime must be authorised, the Law Firms submit there are a number of modern awards which already contain this requirement. It says employees covered by the Award work in an environment in which they are highly autonomous and the proposed variation makes it clear that employees will only be entitled to be paid for additional work they perform outside their ordinary hours where this has been authorised. It says the clarification provides certainty with respect to what an employee is entitled to be paid in any pay period and also creates a disincentive against an employee performing unreasonable additional hours that have not been authorised, which might otherwise create a risk to health and safety. The Law Firms submit the variation is necessary to achieve the modern awards objective of promoting efficient and productive performance of work (s.134(1)(d)) and that the Award is simple and easy to understand (s.134(1)(g)).

[248] In reply, the ASU submit the Law Firms are seeking to go beyond the current award provision, which it says gives some protection to employees regarding their hours of work. It says the proposed variation makes working hours less predictable, which may be detrimental to an employee's working and family life, and it diminishes the current conditions of employees. The ASU submit the Law Firms confuse s.64 of the Act with s.63 of the Act.

[249] In response to the ASU's submissions, the Law Firms submit that as the ASU did not make any submissions in opposition to the proposed requirement that overtime must be authorised, the proposed variation may be adopted.

[250] We are disposed to granting the claim of the Law Firms for the insertion of a requirement that overtime be authorised.

[251] As to the proposal for the averaging of hours for a period up to 26 weeks, in our view the proposed is a substantive change and will be referred to a separate Full Bench for determination.

Item 16 – Rest breaks

[252] The Law Firms propose that clause 33.2 of the current award be amended. While they note that clause 9.2(a) of the revised exposure draft uses slightly different language to that

adopted at clause 33.2 of the current award and they do not object to this, they propose variations to clause 9.2(a) of the revised exposure draft as follows:

> **9.2 Paid rest breaks**
>
> (a) All employees will be allowed two paid rest breaks, subject to the reasonable business needs of the practice, on each day as follows:
>
> (i) the first of 10 minutes to be allowed between the time of starting work and the usual meal break; and
>
> (ii) the second of 10 minutes to be allowed between the usual meal break and the time of finishing work for the day.

[253] The Law Firms contend they do not propose that employees covered by the current award should not receive, or should not be paid for, rest breaks of up to 20 minutes on each day on which they perform work, notwithstanding that a number of predecessor pre-reform awards to the current award did not provide any entitlement to a rest break in addition to meal breaks, paid or otherwise. The Law Firms outline pre-reform awards in various States and the corresponding provision in their submissions. They submit that, while not objecting to a minimum rest break entitlement, reasonable business demands such as court deadlines, may affect demands upon the work performed by a particular employee, necessitating some flexibility around the taking of paid rest breaks.

[254] The Law Firms submit the current award is to a large degree based upon the drafting of the *Clerks – Private Sector Award 2010*. It said the nature of the work performed by employees covered by both awards is largely of an administrative nature, save that, it submits it can be accepted that work of employees covered by the *Legal Services Award 2010* at times may be of a higher competency level given the nature of the legal industry. However, the Law Firms submit that unlike the current award, the *Clerks – Private Sector Award 2010* provides for the taking of rest breaks in a manner that takes into account the reasonable needs of the employer's business.[152]

[255] The Law Firms conclude it is necessary to adopt the proposed variation to provide for commensurate flexibility in the taking of rest breaks to that provided under the *Clerks – Private Sector Award 2010* and to achieve the modern award objective to promote flexible modern work practices and the efficient and productive performance of work (s.134(1)(d)).

[256] The ASU submit under the current award, employees are entitled to two 10 minutes paid rest breaks. It says the safety net of the Award covers moderately remunerated employees who are award dependent, whose current entitlements should not be diminished. The ASU queries whether employees would be denied the rest break if it does not suit the 'reasonable business needs of the practice'?

[257] In response, the Law Firms submit that the proposed variation will not impact upon the remuneration of the employees covered by the Award and allows employees to take their rest breaks at times that are convenient to them and to their firm.

[258] On the basis of the material filed, we are attracted to amending clause 9.2(a) of the exposure draft but in a manner that more closely reflects the provision for rest breaks in the *Clerks –Private Sector Award 2010*. As such, our *provisional* view is that clause 9.2(a) of the exposure draft should be amended as follows:

> **9.2 Paid rest breaks**
>
> (a) All employees will be allowed two paid rest breaks on each day. Each rest break should be taken at a time suitable to the employer, taking into account the reasonable business needs of the practice. If suitable to the reasonable business needs of the practice:
>
> > (i) the first of 10 minutes to be allowed between the time of starting work and the usual meal break; and
> >
> > (ii) the second of 10 minutes to be allowed between the usual meal break and the time of finishing work for the day.

Item 18 – Law Graduates

[259] Clause 39 of the current award provides:

> **39.1** A law graduate is entitled to leave of absence with pay:
>
> **(a)** for study and attendance at examinations, not exceeding four days in respect of each subject for which they present themselves for examination which is necessary to enable the employee to qualify for admission; and
>
> **(b)** to attend lectures and organised classes at a university or other course of instruction which is required to enable the employee to qualify for admission.

[260] The Law Firms submit this clause should be deleted and replaced with:

> **39. Special conditions of employment—Law graduate**
>
> 39.1 A law graduate is entitled to paid study leave to attend a course of instruction, and prepare for and attend examinations, that relate to the practical legal training required for their admission to practise as an Australian lawyer.
>
> 39.2 Paid study leave should be taken at a time agreed with the employer and may not, unless otherwise agreed between the employer and the law graduate, exceed a total of 20 days in any 12 month period for the purposes of attending any course of instruction required to complete practical legal training, including one day to prepare for each examination in addition to the time reasonably required to attend the examination.

[261] The Law Firms submit the proposed variation is necessary to reflect the different admission requirements that apply to new law graduates to those that operated at the time the Award was made. In correspondence of 29 August 2016,[153] the Law Firms summarised the admission requirements for graduates. The Law Firms submit that the revised wording allows graduates to access their entitlements holistically, rather than strictly tying them to certain subjects and enables the graduates to use their leave of absence as and when they need it. They advise there is no mandated training time that a law graduate must fulfil in order to

complete a graduate diploma and submit that in their experience, it is appropriate that the time allowed to be taken as a leave of absence is no more than 20 days.

[262] The Law Firms submit the proposed variation sensibly accommodates the admission requirements of law graduates and is necessary to achieve the modern award objective that the Award promote flexible modern work practices and the efficient and productive performance of work (s.134(1)(d)).

[263] With respect to clause 39.1(a), the ASU submit the proposed variation is unclear and subject to interpretation by the employer as to the practical legal training (PLT) required for admission to practice. It says the proposal diminishes the clearly spelt out current provisions and could lead to disputation.

[264] The ASU contend the proposed variation to current clause 39.1(b) is more concerning, as it would make the current entitlement subject to the agreement of the employer, which is presently not required. It also says there is currently no cap on lectures and organised classes, whereas the variation seeks a total of 20 days in any 12 month period. The ASU submit this proposal diminishes the current clause by placing caps on class attendance and subjecting the leave to employer agreement which is to the disadvantage of the employee.

[265] The Law Firms reject the proposition that the proposed variation may lead to disputation around what constitutes PLT. They say there are statutory rules which are prescriptive as to the PLT required for a law graduate to be admitted to practise. They submit there can be no question as to what types of study leave relate to PLT and attract an entitlement to be released from duties without deduction of pay, and what types of study do not.

[266] This issue will be referred to a separate Full Bench for determination.

[267] In the Directions issued on 14 December 2016, parties seeking a hearing were directed to make a request in writing by 7 February 2017. In its submissions dated 7 February 2017, the Law Firms advised they do not wish to be heard at an oral hearing with respect to the outstanding variations they seek. There were no other responses either way.

[268] If any party wishes to respond to the *provisional* views expressed above, they should do so by **4.00pm Friday, 24 November 2017.**

[269] There are no other outstanding items for the Legal Services Award.

2.9 Nursery Award 2010

[270] On 15 January 2016 the Commission published an exposure draft based on the *Nursery Award 2010*[154] (Nursery Award), together with a comparison document showing the changes to the structure and language of the award. Interested parties were invited to file submissions about drafting or technical issues in the exposure draft. Submissions were received from the AWU, ABI, AFEI, Business SA, and Nursery & Garden Industry Australia. A conference was held on 30 May 2016. With the exception of Nursery & Garden Industry Australia, it was attended by representatives of those organisations. Deputy President Clancy

published a report to the Full Bench on 3 June 2016 that set out a number of the proposed variations to the exposure draft that were agreed, a number that were not agreed and a list of items from the submissions that would be the subject of further discussions between the interested parties. The report also noted that a number of items had been referred to separately constituted Full Benches of the Commission.

[271] A further conference was held on 9 August 2016 to deal with the outstanding issues. A second report to the Full Bench was made by Deputy President Clancy on 25 August 2016. This dealt with the three outstanding matters and of these, it was noted one had been agreed. As to the other two, the interested parties suggested one ought be considered again once the Casual and Part-time employment Common issue proceedings are completed and the other as part of the consideration of the terms '*ordinary hourly rate*' as opposed to '*minimum hourly rate*' across a range of awards. Directions were issued on 14 December 2016 and parties were required to file further material in January 2017. No further submissions were received.

[272] A further updated summary of submissions was published on 10 October 2017.

[273] The agreed matter, *Item 13*, concerned the inclusion of a term that would provide for a paid rest break of 10 minutes each day as opposed to only each morning, as is currently the case. For the same reasoning we outlined in paragraph [218] above, we are persuaded the AWU proposal should be adopted.

Item 5 – Part-time employment

[274] The AWU submitted that there should be a new clause inserted at clause 6.4 to clarify the distinction between casual and part-time employment. ABI opposes the AWU's submission. The parties suggested this item should be re-visited after the decisions in the Casual and Part-time employment common issue proceedings were handed down.

[275] If interested parties now seek to re-enliven item 5, they are to provide any further submissions by **4.00pm Friday, 24 November 2017.** In the absence of further submissions the Item will be considered withdrawn.

Item 9 – Casual employees – ordinary hours of work

[276] The AWU's proposal is for a new sub clause 6.5(f) stating "A casual employee's ordinary hours of work are the lesser of 38 hours per week or the hours required to be worked by the employer" to be inserted because the exposure draft does not currently prescribe the weekly ordinary hours of work for casual employees with sufficient clarity to satisfy s147 of the Act. The AFEI and Business SA opposed this on the basis that it would represent a substantive change. Therefore, the parties suggested this item should be re-visited after the decisions in the Casual and Part-time employment common issue proceedings were handed down.

[277] In that proceeding and decision, the Full Bench dealt with this issue with reference to the *Horticulture Award 2010*, as follows:

> '…we accept the submission of the AWU that the Horticulture Award does not properly prescribe the ordinary hours of employment for casual employees, and therefore does not

> comply with s.147. This requires rectification. Further, as a matter of general principle, for essentially the same reasons set out in Chapter 4 in connection with the Hospitality Award, we consider that it is necessary to achieve the modern awards objective of a fair and relevant safety net for a modern award which prescribes overtime penalty rates for weekly employees to also prescribe them to casual employees. In reaching that conclusion, we have similarly taken into account the consideration specified in s.134(1), and have placed particular weight upon s.134(1)(da)(i) and (f). The identified principle requires application to the Horticulture Award. However, this requires considerable caution having regard to the particular circumstances applicable to this award.'[155]

[278] In the Casual and Part-time employment Common issue proceedings, the Full Bench heard evidence on the issue before concluding the position should be that the hours of casuals are the lesser of an average of 38 hours per week or the hours required to be worked by the employer and expressing a provisional view as to both a period for the averaging of weekly hours and when overtime penalty rates would be payable. However, because the Full Bench had not had the benefit of evidence and submissions relating to the issue, it called for further submissions and, if necessary, further evidence prior to proceeding to make a final decision. It also directed the parties to confer further. As the issue raised by the AWU will be determined by the Casual and Part time Full Bench we do not propose to take any further steps in respect of the issue.

Item 20 – Summary of hourly rates of pay – casual employees

[279] While the parties in attendance at the conference on 30 May 2016 conference supported the overtime rates appearing in Table B.3.2 of Schedule B of the exposure draft of the *Nursery Award 2016*, as published on 29 July 2016, the AFEI and Business SA indicated support for a consistent approach across modern awards regarding the titles of the tables and the use of the term "*ordinary hourly rate*" as opposed to "*minimum hourly rate*". As such, they appeared to suggest Table B.3.2 of Schedule B should be considered in light of any submission filed by the Ai Group outlining its position across a range of Awards on the issue of adopting the term "*ordinary hourly rate*" as opposed to "*minimum hourly rate*" in tables outlining overtime rates for casual employees.

[280] The Ai Group subsequently made the submission "often the heading for particular columns will use the term *'ordinary hourly rate'* when the figures in the column are based on the minimum hourly rate. For some employees the ordinary hourly rate will be the same as the minimum hourly rate but, for employees who are entitled to one or more all-purpose allowances, the rates will be different" before concluding that to address this "would require substantial changes to the approach which the Commission has taken in preparing the exposure drafts".[156] We do not understand the Ai Group to have advanced its position beyond these submissions.

[281] Accordingly, unless we are advised by any interested party that it intends to make a submission to the contrary, we intend to insert proposed Table B.3.2 of Schedule B into the *Nursery Award 2016.* Parties are to provide any final objections to this proposal and/or comments by **4.00pm Friday, 24 November 2017.**

[282] There are no other outstanding items for this Full Bench to determine in the Nursery Award.

2.10 Pastoral Award 2010

[283] The technical and drafting issues in respect of the *Pastoral Industry Award 2010* (the Pastoral Award) were substantially dealt with in the *July decision*, but the following matters remain outstanding:

- Item 9 Part 2: meal breaks and meal allowances.
- Item 26 clause 10.1(c): first aid allowance.
- Item 49 clauses 27.2, 38.1 and Schedules B.2.2, B.5.2 and B.6.1: overtime and penalty rates.
- Items 101 and 103 Schedule B.4.1 – Pig Breeding and Raising – ordinary and penalty rates.
- Various *provisional* views expressed in the *July decision.*
- Item 55 clause 31.1(b) and (c) – the 'continuous work' provisions.
- Items 102 and 104 Clauses B.4.2 and B.4.5 – Pig Breeding and Raising – shiftworker rates.

[284] We now turn to deal with each of these matters.

Item 9 Part 2 – meal breaks and allowances

[285] On 6 October 2016 the Commission's research area published a document[157] identifying potential inconsistencies between the general employment conditions and occupation streams in the current award. One of the potential inconsistencies identified concerned clauses 17.2 and 36.10, dealing with overtime and meal breaks for piggery attendants.

[286] Clause 17.2(c)(ii) of the current award states:

> **'17.2 Expense-related allowances**
>
> (c) Meal allowance
>
> (i) If an employee is required to work overtime after working ordinary hours (except where the period of overtime is fewer than one and a half hours), the employee will be paid $12.93 for the first and any subsequent meals. Alternatively, the employer may supply the employee with a meal.
>
> (ii) An employee required to work overtime for more than two hours after the employee's ordinary ceasing time without having been notified before leaving work on the previous day that the employee will be required to work overtime, will be provided free of cost with a suitable meal, and if the work extends into a second meal break, another meal, provided that in the event of the meal not being supplied the employee is entitled to a payment of $12.93 for each meal not supplied.'

[287] Clause 36.10 of the current award states:

> '36.10 Where overtime is unplanned and not notified the day or days beforehand, a payment will be made of $12.93 after two hours of overtime if work will continue beyond the meal break. Alternatively the employer may supply the employee with a meal.'

[288] The Commission identified the following potential conflict in respect of clauses 17.2(c)(ii) and 36.10:

> 'If a pig breeding and raising employee works overtime that he/she was not notified of the previous day, and the overtime extends to a second meal break, is the employee entitled to a second meal in accordance with clause 17.2(ii) or limited to one in accordance with clause 36.10?'

[289] In the *July decision* we made the following observations about these provisions:

> 'The AWU submits that clause 36.10 is not limited to one allowance or meal. It submits that:
>
> > 'When unplanned overtime is worked, an employee receives a payment or a meal after two hours of overtime if work will continue beyond the meal break. This applies after each two hours of overtime if work will continue after the meal break.'[158]
>
> The AWU's submission appears to be a logical reconciliation of the two clauses and is consistent with the terms of such provisions in other modern awards (see Attachment D). However, it seems to us that the terms of clauses 17.2(c)(ii) and 36.10 are far from clear and in our view should be redrafted in plain language. It is necessary to first attempt to determine what entitlements the clauses are intended to provide.
>
> It appears that clause 17.2(c) provides that an employee is entitled to a meal allowance in the following circumstances:
>
> - the employee is required to work overtime after their ordinary 'ceasing time' on a particular day;
> - the employee works 'more than two hours' overtime;
> - the employee is *not* 'provided free of cost with a suitable meal'; and
> - the employee was not notified of the requirement to work overtime 'before leaving work the previous day'.
>
> In addition, if the overtime work 'extends into a second meal break' then a further meal allowance would be payable (provided that the circumstances set out above have been met).
>
> But clause 17.2(c) is unclear in a number of respects. In particular, the meal allowance is payable where an employee works '*more* than two hours' overtime, which simply begs the question, how much more? Nor is it clear when an employee is entitled to a second meal allowance. The clause appears to provide for the payment of a further allowance in circumstances where the overtime 'extends into a second meal break', but it does not specify *when* overtime can be said to extend into a 'second meal break'. Is it after a further two hours? Or a longer period?
>
> Clause 36.10 also lacks clarity. It appears to provide for the payment of a meal allowance in circumstances where an employee is not notified of the request to work overtime ('the day or

> days beforehand') and the employer does not provide the employee with a meal. But the amount of overtime required to be worked to qualify for payment of the meal allowance is unclear. The clause states that the allowance is payable 'after two hours of overtime if work will continue beyond the meal break'. What this means is anyone's guess. The award is silent on when 'the meal break' would be required and hence one cannot determine whether the overtime 'will continue beyond the meal break'.
>
> It seems to us that the meaning of the existing provisions needs to be clarified before we can attempt to reconcile any conflict between the provisions.'[159]

[290] A further conference was convened in an effort to clarify the intended operation of clauses 17.2(c)(ii) and 36.10. At the conference on 24 July 2017[160] there was general agreement that, in relation to clause 17.2(c)(ii), the initial meal allowance is payable after a period of two hours, however the time at which the second meal allowance would be payable was disputed.[161] It was also noted that there is tension between the meal allowance provisions contained in clauses 36.5, 36.10 and 36.11. Following that conference the parties were directed by the Commission to file further submissions in relation to:

- the intended operation of clause 17.2(c)(ii) of the Pastoral Award, in particular when the second meal allowance is payable;
- the operation of the meal allowances provisions in clause 36, in particular the provisions contained at 36.5, 36.10 and 36.11; and
- the operation of clauses 10.2(d) and 32.7 of the exposure draft.[162]

[291] Written submissions were filed by ABI, the AWU and the NFF. No consensus emerges from those submissions and the parties remain in dispute regarding the intended operation of these clauses.

[292] The operation and interaction of these clauses is ambiguous and they require review before the Commission can be satisfied that the relevant terms achieve the modern awards objective. The issues raised by these clauses goes well beyond what may be characterised as technical and drafting issues. Accordingly they will be referred to a separately constituted Full Bench for determination.

[293] We now turn to the issue in respect of the first aid allowance.

Item 26 – clause 10.1(c) – first aid allowance

[294] The AWU submits that the wording in the exposure draft of 15 January 2016 'conveys that the employee would have to actually carry out first aid duties to receive the allowance' and propose amending the clause.[163] The AWU's proposed amendments read as follows (changes tracked):

> 'An employee appointed by their employer to perform first aid duty as required in addition to their usual duties, and holding a current recognised first aid qualification, such as one from St John Ambulance or similar body, must be paid an allowance of **$2.55** per day ~~to carry out such work~~.'

[295] In the *July decision*, we expressed the *provisional* view that the AWU's proposed amendment be accepted and provided interested parties with an opportunity to make further submissions on that *provisional* view, if they wished to do so.[164]

[296] Submissions were received from the NFF, SCAA, Business SA, and ABI.

[297] The NFF opposed the *provisional* view stating that the allowance 'is deemed an all purpose allowance in both the current award and Exposure Draft' and that 'there is not evidence that the clause in its present form does not operate as intended'.[165]

[298] The SCAA submits that the current wording of the provision entitles an employee to the first aid allowance only when actively engaged in performance of first aid, as opposed to being on 'stand by' to perform first aid when required.[166] The SCAA submits:

> 'The worker is not additionally burdened with any daily tasks by being the appointed first aid officer and therefore needs only to be paid when they are doing 'first aid tasks', in addition to what their normal duties require.'[167]

[299] Business SA does not oppose the provisional view expressed by the Full Bench.[168] Business SA agrees with the NFF that 'there is no evidence demonstrating the clause does not operate as intended at present', but also submit that the wording proposed by the AWU does not alter the operation of the provision.

[300] ABI submits that it does not necessarily agree with the AWU that the wording in clause 10.1(c) of the exposure draft is expressed to the effect that an employee would have to actually carry out first aid duties to receive the allowance,'[169] noting that the exposure draft makes clear that the first aid allowance is an all-purpose allowance and therefore included in the employee's rate of pay.[170] However, ABI does not oppose the AWU's propose amendments.[171]

[301] No further submissions were made in relation to this issue.

[302] The relevant aspects of clause 10 – Allowances of the exposure draft are as follows:

> '**10.1 Wage related allowances**
>
> **(a) All purpose allowances**
>
> Allowances paid for **all purposes** are included in the rate of pay of an employee who is entitled to the allowance, when calculating any penalties or loadings or payment while they are on annual leave. The following allowances are paid for all purposes under this award:
>
> …
>
> (ii) first aid allowance (clause 10.1(b)(ii)) …
>
> **(c) First aid allowance**

> An employee appointed by their employer to perform first aid in addition to their usual duties, and holding a current recognised first aid qualification, such as one from St John Ambulance or similar body, must be paid an allowance of $2.55 per day to carry out such work.'

[303] The comparable provisions in the current award are as follows:

> '**17.4 All-purpose allowances**
>
> The following allowances apply for all purposes of this award:
>
> …
>
> **(b) First aid allowance**
>
> An employee designated by the employer to render first aid in addition to his or her usual duties and who is the current holder of a recognised first aid qualification, such as one from St John Ambulance or a similar body, must be paid a daily allowance of 14% of the standard rate to carry out such work.'

[304] It is plain from the terms of the current award that the first aid allowance is an 'all purpose' allowance and it follows that, contrary to SCAA's submission, it is *not* only paid when an employee is actually performing first aid duties. It is desirable that clause 10.1(c) be amended to clarify the operation of the term. We confirm the *provisional* view expressed in the *July decision* and will adopt the AWU's proposed amendment.

Item 49 – clauses 27.2, 38.1 and Clauses B.2.2, B.5.2 and B.6.1 – Overtime and penalty rates – various

[305] Clause 27.2 of the exposure draft deals with overtime and penalty rates for broadacre farming and livestock operations and clause 38.1 deals with overtime and penalty rates for poultry farmers.

[306] Clause B.2.2 of the exposure draft sets out overtime rates for full-time and part-time farm and livestock hand adult employees; Clause B.5.2 deals with ordinary and penalty rates for full-time and part-time piggery attendant junior employees (shiftworkers) and clause B.6.1 of the exposure draft sets out ordinary and penalty rates for full-time and part-time poultry farm worker adult employees.

[307] The NFF submits that the tables in clauses 27.2 and 38.1 of the exposure draft 'imply that all hours worked on weekends are overtime'[172] and that employees, other than piggery attendants, are entitled to overtime only after 152 ordinary hours have been worked in a period of four weeks.[173] The proposed amendments to these tables, and the relevant tables in Schedule B of the exposure draft, were outlined in the July Decision.[174]

[308] The AWU opposes the NFF position, noting that overtime may be payable in additional circumstances. The AWU submits that 'the current provisions are sufficient to determine when overtime rates are payable and the amendments sought by the NFF will complicate rather than clarify their operation.'[175]

[309] In the *July decision* we directed the parties to file a joint paper setting out the changes they believed were required and setting out a short argument in support of those changes.[176] The parties have filed the joint paper and have reached agreement on the changes they believe should be made to the exposure draft.[177]

[310] The joint proposal of the NFF and AWU is as follows:

Clause 27.2

For overtime worked	**Overtime rate % ordinary hourly rate**
Monday to Saturday	150
Sunday ~~— all hours —~~ feeding and watering stock	150
Sunday ~~— all hours —~~ other than feeding and watering stock	200

Clause 38.1(b)

For overtime worked	**Overtime rate % ordinary hourly rate**
Monday to Saturday	150
Sunday ~~— all hours —~~ feeding and watering stock	150
Sunday ~~— all hours —~~ other than feeding and watering stock	200

Clause B.2.2 Full-time and part-time farm and livestock hand adult employees – overtime rates

	Monday to Saturday – Overtime hours		**Sunday – Overtime hours**
	feeding & watering stock		**other than feeding & watering stock**
	% of ordinary hourly rate[1]		
	150%	**150%**	**200%**
	$	**$**	**$**
FLH1	27.44	27.44	36.58
FLH2	28.22	28.22	37.62
FLH3	28.62	28.62	38.16
FLH4	29.30	29.30	39.06
FLH5	29.82	29.82	39.76
FLH6	30.32	30.32	40.42
FLH7	31.94	31.94	42.58
FLH8	34.32	34.32	45.76

With keep – **$125.13** per week is deducted where keep is provided in accordance with clause 24.3.

[1]Rates in table are calculated based on the minimum hourly rate, see clauses B.1.1 and B.1.2

Clause B.6.2 Full-time and part-time poultry farm worker adult employees~~—overtime rates~~

	Ordinary hours	**Monday to Saturday – Overtime hours**	**Sunday – Overtime hours**		**Public holiday**
			Feeding or watering stock	**Other than feeding or watering stock**	
			% of ordinary hourly rate[1]		
	100%	**150%**	**150%**	**200%**	**200%**
	$	**$**	**$**	**$**	**$**
PW1	18.29	27.44	27.44	36.58	36.58
PW2	19.08	28.62	28.62	38.16	38.16
PW3	19.88	29.82	29.82	39.76	39.76
PW4	21.29	31.94	31.94	42.58	42.58

[1]Rates in table are calculated based on the minimum hourly rate, see clauses B.1.1 and B.1.2

[311] The parties also submit that the table appearing at Clause B.3.2 should be amended to reflect the changes outlined to Clause B.2.2, above.[178]

[312] We are satisfied that the joint proposal of the NFF and AWU appropriately clarifies the operation of the provisions, without giving rise to further complexity or ambiguity. The exposure draft will be amended to reflect the joint proposal of the NFF and AWU.

Items 101 and 103 – Clause B.4.1 – Pig Breeding and Raising – Piggery attendant employees and Clause B.4.4 – Casual piggery attendant adult employees (all employees including shiftworkers)—ordinary and penalty rates

[313] The AWU had previously expressed a view that the current award is 'ambiguous in terms of whether a day worker can work ordinary hours on a Sunday'.[179] In the *July decision*, we asked the AWU to advise the Commission as to whether it pressed its claim in relation to these items.[180]

[314] In correspondence dated 26 July 2017 the AWU advised that it no longer presses these claims.[181]

Provisional views

[315] A number of matters raised in the Group 3 Decision[182] remain outstanding. In particular we had expressed *provisional* views on a range of matters and indicated that we would seek further submissions in relation to these issues. The *provisional* views expressed in the *July decision* are set out below:

(i) clauses 17 and 29: provision of a saddle

[316] At [135] to [137] of the *July decision* we said:

> 'Our *provisional* view is that where a station hand is required by the employer to supply their own saddle, and the employee does not own a saddle and must purchase one, then the employee is to be reimbursed for the cost of purchasing the saddle (under clause 17(a)(i)). But in such circumstances the employee is *not* also entitled to receive the allowance specified in clause 29.1. It seems to us that the saddle allowance is intended to cover wear and tear and depreciation over time. It does not seem reasonable to apply such an allowance in circumstances where the employer has reimbursed the employee for the full cost of the saddle.
>
> We can see no reasonable basis for the AWU's contention that the allowance specified in clause 29.1 is for the purpose of compensating an employee for 'the additional task of finding one's own…saddle'.
>
> We will seek further submissions in response to our *provisional* view and on the question of whether an amendment is required to clause 29.1 to make clear that the allowance is not payable if a station hand has been reimbursed by the employer for the cost of purchasing a saddle (pursuant to clause 17(a)(i)).'

(ii) clauses 10.3 and 30.1: station cooks and part-time rates

[317] The *July decision* identified a potential conflict between these provisions:

> 'Clause 10.3(f) provides that 'all time worked in excess of mutually arranged hours will be overtime' for a part-time employee. The overtime provision at clause 31 appears to apply to farm and livestock hand employees only. A station cook employee appears to be excluded from the overtime provisions in clause 31. Overtime rates for station cook employees are provided at clause 30.3 and are paid where the employee works for more than five and a half days in one week. It is unclear what a part-time station cook would be paid.'

[318] The AWU advanced the following submission in respect of this potential conflict:

> 'The AWU considers a part-time station cook would be entitled to overtime as per clause 10.3 (f) and clauses 31.1 and 31.2 of the Award.
>
> Clause 31.1 defines overtime and indicates it applies when in excess of the ordinary hours in clause 30.1 are worked. Station cooks are not excluded from clause 30.1 – they are only excluded from clause 30.2.
>
> Given a station cook is classified as a Farm and livestock hand Level 1 – they are not prevented from accessing the overtime rates in clause 31.2. The definition of "Farm and livestock hand" in clause 3.1 of the Award also does not exclude a station cook.'[183]

[319] We expressed the *provisional* view that the AWU's submission be accepted.

(iii) clauses 26 and 38.3 – public holidays for piggery attendants

[320] The *July decision* identified a potential conflict between these provisions:

> 'Clause 38.3 appears as though for an employee to accrue time off instead of payment for working on a public holiday an agreement between the majority of employees is first required

('agreement between an employer and the employees'). The same clause appears to allow the timing of taking TOIL to be determined by the employer and individual employee ('a mutually agreed time'). Does clause 38 wholly supersede clause 26 insofar as it applies to piggery attendants?'

[321] The AWU contended that there was no conflict, for these reasons:

> 'Clause 26 determines when a public holiday is observed.
>
> Clause 38 is concerned with payment for public holidays for piggery attendants.
>
> Clause 38.3 allows a TOIL system to be applied for work on public holidays by agreement. If the TOIL system is agreed, the individual employee can then determine whether to utilise it and when to take the time off.'[184]

[322] We expressed the *provisional* view that the AWU's submission be accepted as the clauses are directed at difference subject matters.

[323] A revised exposure draft will be published shortly. The revised draft will incorporate the changes referred to in this decision and those made in the *July decision.* Rather than seek submissions on both the revised exposure draft *and* the provisional views set out above we propose to amend the exposure draft in accordance with the *provisionally* expressed views. This does not mean that we have reached a concluded view in respect of these matters. Parties may make further submissions on the *provisional* views by reference to the proposed clause in the revised exposure draft.

[324] Parties are directed to make submissions on the revised exposure draft by **4.00pm Monday, 20 November 2017.** Submissions in reply are to be filed by **4.00pm Monday, 4 December 2017.** All submissions must be sent to amod@fwc.gov.au. We propose to determine any disputed issues on the papers unless a party seeks an oral hearing. Any such request should be made at the time submissions are filed.

[325] Two matters remain outstanding.

(iv) Item 55 clause 31.1(b) and (c) – the 'continuous work' provisions.

[326] The first matter concerns clause 31.1 of the current exposure draft.

[327] In their submission of 17 April 2016, the AWU raised concerns relating to clause 31.1 and submits that clause 31.1 of the exposure draft ('shiftwork definitions') no longer has the same meaning as the corresponding clause in the current award (clause 35.3 of the current award). It submits that by inserting a definition for 'non-continuous work' at clause 31.1(c), the exposure draft has 'conflated the concepts of non-continuous work and non-successive shifts'.[185] Clause 31.1(c) of the exposure draft is in the following terms:

> '**(c) Non-continuous work** means work carried [out] by a shiftworker who works on an afternoon or night shift which does not continue:
>
> (i) for at least five successive afternoons or nights on a five day site or six successive afternoons or nights on a six day site; or

(ii) for at least the number of ordinary hours prescribed by one of the alternative arrangements in clauses 31.1(f)(ii) or (iii) of this award;'

Note: the word 'out' that should appear between the words 'means work carried' and 'by a shiftworker' is missing from the most recently published exposure draft.

[328] The AWU submits:

> '"Non-continuous work" is referring to the system of shifts that operates at the enterprise. In contrast, "non-successive shifts" is concerned with the shifts worked by an individual employee and is specifically directed at prescribing higher rates when they perform less than a full week of afternoon or night shift.' [186]

[329] The AWU contends that the shift allowances in clause 31.5 of the exposure draft 'are related to the disability an employee experiences from working different shifts during a week' and that the allowances may apply irrespective of whether the enterprise operates continuously.[187] The AWU submits that the redrafted clauses may have the unintended effect of removing the 'entitlement to higher rates of pay for employees who perform less than a full week of shifts in a continuous enterprise'. [188]

[330] The NFF agrees with the AWU position[189] and submits that the 'issue arises from the inclusion in the exposure draft of a new definition of "non-continuous work"', a previously undefined term.[190] Although the AWU and NFF agree with respect to the issue, they each propose different solutions.

[331] The NFF submits that the exposure draft should be changed to reflect the current award arrangements. It proposes deleting the 'non-continuous work' definition (clause 31.1(c)) and replacing clause 31.5 of the exposure draft with the current award clause 35.9.[191]

[332] The AWU proposes replacing the term 'non-continuous work' in clause 31.1(c) with 'non-successive shifts.' The same change is consequentially proposed for the table appearing at clause 31.5—Afternoon or night shift allowances.[192] In addition, the AWU proposes inserting a definition for 'non-continuous work' at clause 31.1.[193] A summary of the AWU's proposed amendments is set out below:

(i) amending clause 31.1(c) to read (changes tracked):

'~~**Non-continuous work**~~ Non-successive shifts means work carried out by a shiftworker ~~who works~~ on ~~an~~ afternoon or night shift which does not continue…';

(ii) amending clause 31.1 by inserting a new definition for 'non-continuous work' which reads:

'**Non-continuous work** means shift work which does not meet the definition of "continuous work" '; and

(iii) amending all references to 'Non-continuous afternoon or night' in the table at clause 31.5 to 'Non-successive afternoon or night'.

[333] The AWU also submits that the exposure draft restricts the entitlement of a paid crib break to continuous workers[194] and that this is contrary to the intent of the award, as demonstrated by the 'fact that clause 35.6 (a) of the Award refers to non-continuous workers performing an average of 38 hours per week 'inclusive of crib time'.[195] The AWU proposes removing the distinction in clause 31.2(h) in respect of breaks for employees engaged in 'continuous work' and 'other than continuous work' and amending the clause as follows (changes tracked):[196]

[334] The AWU submits that the distinction in clause 31.2(h) between 'Continuous work' and 'Other than continuous work' should be removed. It proposes clause 31(h) be amended as follows:

~~**(h) Breaks**~~

~~(i) Continuous work~~

~~Shiftworkers on continuous work as defined in clause 31.1(b) will be allowed a 20 minute crib break each shift, which will be counted as time worked.~~

~~(ii) Other than continuous work~~

~~Shiftworkers who are not engaged in continuous work as defined in clause 31.1(b):~~

- ~~will work ordinary hours continuously except for meal breaks at the discretion of the employer; and~~
- ~~must not be required to work for more than five hours without a break for a meal.~~

(h) Shiftworkers will be allowed a 20 minute crib break each shift, which will be counted as time worked.

(i) Shiftworkers will work ordinary hours continuously except for crib breaks at the discretion of the employer.

[335] ABI 'agree generally with the other parties that clause 31.1 of the exposure draft requires further attention' and indicated its support for further discussion between the parties.[197] ABI made no further submissions in relation to these issues.

[336] In the *July decision* we said that we agreed with ABI and that the issues should be the subject of further discussion between the parties. A conference will be convened for that purpose, at **2.00pm Thursday, 21 December 2017.**

[337] This issue also relates to Items 102 and 104, which are about the wages tables for shiftworkers in Clause B.4.2 and B.4.5. The AWU submits that the references to 'non-

continuous' in these schedules should be amended to 'non-successive'. Further, it submits that footnote 2 in both tables be amended.[198] The NFF does not support the changes proposed.

[338] The determination of this issue is related to the resolution of the matters concerning clause 31.1 of the current exposure draft and will also be discussed at the conference at **2.00pm Thursday, 21 December 2017.**

(v) Items 102 and 104 Clauses B.4.2 and B.4.5 – Pig Breeding and Raising – shiftworker rates – Sunday work

[339] The second matter also concerns Items 102 and 104. In addition to the changes outlined in [337], the AWU also submits that the footnote 3 in Clauses B.4.2 and B.4.5 should be deleted. This footnote relates to rates of pay for shiftworkers on Sundays but limits payments at the higher rate to "[w]here the major portion of the shift is performed on a Sunday."[199] The NFF does not support the deletion of this note.

[340] These issues will also be discussed at the conference at **2.00pm Thursday, 21 December 2017.**

2.11 Silviculture Award 2010

[341] On 15 January 2016 the Commission published an exposure draft based on the *Silviculture Award 2010*[200] (Silviculture Award), together with a comparison document showing the changes to the structure and language in the award. Interested parties were invited to file submissions about drafting or technical issues in the exposure draft. Submissions were received from the AWU. A conference was held on 30 May 2016 attended by representatives of the AWU and the AFEI. Deputy President Clancy published a report to the Full Bench on 3 June 2016 in which the AWU's response to 28 items in the exposure draft was noted. Subsequently, a submission on the exposure draft was received from the NFF and a further conference was held on 8 August 2016 attended by representatives of the AWU and the NFF. Deputy President Clancy made a second report to the Full Bench on 25 August 2016 that set out the proposed variations to the exposure draft that were agreed, a number that were not agreed and a list of items from the submissions that would be the subject of further discussions between the interested parties. The interested parties were encouraged to undertake further discussions. Directions were issued on 14 December 2016 and parties were required to file further material in January 2017.

[342] Submissions were received from the NFF and the AWU. A revised summary of submissions was published on 17 February 2017. A further updated summary of submissions was published on 10 October 2017.

[343] A number of items listed in the second report to the Full Bench have been resolved by the agreement of the parties. We accept the changes agreed to by the parties on the proviso that the agreed position will not be adopted where it is inconsistent with any previous decision of the 4 Yearly Review Full Bench as set out in paragraphs [1] and [2] of this decision. We now turn to the outstanding items.

Items 6 and 8 – Definition of full-time and part-time employees

[344] Item 6 refers to clause 6.3 of the exposure draft which sets out the definition for full-time employees. The AWU has sought to include the word 'ordinary' in the phrase 'an average of 38 ordinary hours per week'. Similarly, item 8 refers to clause 6.4(a)(i) of the exposure draft which sets the definition for part-time employees. The AWU seeks to include the word 'ordinary' in the phrase 'less than 38 ordinary hours per week'.

[345] The NFF opposes the proposed changes. In relation to item 6 the NFF submits the inclusion of 'ordinary' is unnecessary and may mean that a full-time employee who works outside the span of hours could not be classified as full-time. The span of ordinary hours in the current award (and exposure draft) is 5.00 am to 5.00 pm. The NFF provides an example of a full-time employee who works from 10.00 am to 6.00 pm five days a week. The NFF submits that this employee would fail to meet the definition of full-time employee as proposed by the AWU as they would work only 35 *ordinary* hours per week.[201]

[346] The AWU submits that the insertion of the word 'ordinary' reflects the requirement in the Act that the award provide ordinary hours of work for all classes of employees.[202] The AWU also submits that a full-time employee is guaranteed 38 hours per week. The NFF submits that this clause is not dealing with rates of pay but is rather a clause defining a full-time employee and the word 'ordinary' is not necessary.[203]

[347] We are not presently persuaded that the word 'ordinary' should be inserted into either clause 6.3 or 6.4(i) of the exposure draft. However, we seek comment from the parties in relation to the following possible wording that adopts the approach that appears to have been applied in relation the same clauses in the Pastoral Award:

> **'6.3 Full-time employees**
>
> **(a)** A full-time employee is an employee who is engaged to work an average of 38 hours per week over a four week period.
>
> …
>
> **6.4 Part-time employment**
>
> **(a)** A part-time employee is an employee who:
>
> **(i)** is engaged to work less than an average of 38 hours per week over a four week period…'

[348] Parties are to provide comment and/or advise the Commission by **4.00pm Friday, 24 November 2017** as to whether they wish to pursue this issue.

Item 12 – Delayed meal breaks

[349] Parties were asked to confirm what penalty would apply if an employee was working during a meal break. The current award refers to 'the rate of 200% in addition' at clause 25.2. The AWU proposed the following wording 'An employee who is required to defer a meal break prescribed by clause 9.1 must, for the duration of such deferment, be paid at a rate of 200% of the applicable rate of pay'.[204] The NFF opposes the use of the phrase 'applicable rate of pay' and notes that this has not been agreed in the context of other exposure drafts in the

agriculture industry. The NFF submits that the entitlement could be worded as an allowance and proposes the following wording:

> 'An employee who is required to defer a meal break prescribed by clause 9.1 must be paid an allowance of 100% of the ordinary hourly rate until their meal break is taken.'[205]

[350] The distinction between the wording provided by the parties appears to be whether the rate whilst working on a meal break would be inclusive of any applicable penalties. The reference rate proposed by the NFF would be exclusive of penalty rates whereas, presumably the rate proposed by the AWU would include any penalties. The wording proposed by the AWU has the complication that 'applicable rate' is not defined in the award and may create further ambiguity. The proposal by the NFF appears to allow for a person who is in receipt of a penalty to continue at that rate and be paid an additional allowance that is based on the ordinary hourly rate.

[351] As mentioned in a comment in the exposure draft, the *Silviculture and Afforestation Award* (the pre-modern Silviculture Award) contained a similar provision but with the wording 'paid at single time in addition to the appropriate rate'.[206]

[352] It seems to us that it would be unlikely that the wording of the pre-modern Silviculture Award would have had an overtime rate for a shiftworker working through a break that was based on a lower rate than what applied immediately before the break fell due. However we do not agree with the AWU proposal to retain the wording in the current award as the phrase 'applicable rate' is undefined and could lead to further ambiguity.

[353] We think the appropriate course is to redraft clause 9.2 in the exposure draft to provide:

> 'An employee who is required to defer a meal break prescribed by clause 9.1 must be paid at **200%** of the rate applying immediately before the meal break was due until their meal break is taken.'

[354] We consider this drafting largely reflects the current provision and provides appropriate compensation to an employee working through a meal break.

Item 13 – Overtime crib breaks

[355] The AWU have proposed to insert the phrase 'applicable rate of pay' as the rate employees will be paid for their crib break rather than 'ordinary hourly rate'. [207] The AWU submits that the use of the phrase 'ordinary hourly rate' would mean that employees working ordinary hours on a weekend, public holiday or shiftwork would drop to a lower rate while on crib.

[356] The NFF submits that the clause provides a 20 minute break before starting overtime and should be treated as ordinary time rather than overtime for payroll purposes.[208] The NFF submits that the wording could by revised as follows:

> 'An employee working at least one and a half hours of overtime must be allowed a *paid* crib break of 20 minutes before starting overtime after working ordinary hours (inclusive of time

> worked for accrual purposes in clause 8 – ordinary hours of work and rostering and clause 13.6). *The crib break will be treated as time worked during ordinary hours.*' (their emphasis)

[357] At conference the parties appeared to indicate that they both believed the applicable rate for the break to be paid at is the rate applying immediately before the overtime commenced.[209]

[358] The NFF made a further submission indicating their position was that the rate should remain 'ordinary hourly rate'.[210]

[359] The issue at hand is whether an employee working on a shift that attracts a penalty would be paid for the break at the loaded rate or whether they would drop back to the 'ordinary hourly rate'. The current award states:

> **'(b)** An employee working at least one and a half hours of overtime must be allowed a crib break of 20 minutes (before starting overtime after working ordinary hours, inclusive of time worked for accrual purposes in clause 24—Ordinary hours of work and rostering and clause 26.6) which will be paid for at ordinary rates.'

[360] In the exposure draft an issue arises as the clause has been redrafted and now refers to the 'ordinary hourly rate' which is a term with a defined meaning. The ordinary hourly rate means the hourly rate for an employee's classification inclusive of any all purpose allowances. This rate does not include any shift penalties. The term 'ordinary hourly rate' is obviously different to the term 'ordinary rates' used in the current award. We consider it conceivable that the latter term has been used in order to indicate that the rate payable for the crib break is the one applicable immediately prior to the commencement of the overtime. We therefore propose the following wording for clause 9.3(b) of the exposure draft:

> **'(b)** An employee working at least one and a half hours of overtime must be allowed a crib break of 20 minutes (before starting overtime after working ordinary hours, inclusive of time worked for accrual purposes in clause 8—Ordinary hours of work and rostering and clause 13.6) which will be paid at the rate applying immediately before commencing overtime.'

Item 14 – calculation of the minimum weekly rate

[361] This item relates to clause 10.2 of the exposure draft. Subsequent to the publication of the report to the Full Bench it appears the parties have agreed that this clause should be removed altogether. We are prepared to adopt this approach.

Item 15 – Actual weekly rate

[362] At clause 10.3 of the exposure draft there is a definition of the how the 'actual weekly rate' is calculated. The actual weekly rate is calculated along with the minimum weekly wage rate and minimum hourly wage rate in the table of minimum wages in clause 10.1 of the exposure draft. The NFF submits that the 'actual weekly rate' is in effect the 'ordinary rate of pay' under this award. The NFF proposes that a single approach be adopted in this award with regard to the 'actual weekly rate' and provide two options to give effect to this.

[363] Either by replacing clauses 10.2 and 10.3 with the following:

> '**10.2 Ordinary weekly rate**
>
> The ordinary weekly rate will be calculated by:
>
> - Adding the amounts prescribed by clauses 10.1, 11.2 and 11.3(a); then
> - Multiplying this amount by 52; then
> - Dividing this amount by 50.4, rounded to the nearest 10 cents.
>
> **10.3 Ordinary hourly rate**
>
> The ordinary hourly rate is calculated by dividing the ordinary weekly rate by 38.'

[364] Or by deleting clause 10.2 and 10.3 and including the following in the definitions section:

> '**Ordinary weekly rate** is calculated by adding the minimum weekly wage rate in clause 10.1, the special allowance in clause 11.2 and the industry allowance in clause 11.3(a), then multiplying that amount by 52 and then dividing by 50.4, rounded to the nearest 10 cents.
>
> **Ordinary hourly rate** means the ordinary weekly rate divided by 38.'[211]

[365] It was indicated in the hearing that the parties would have further discussions on this point. The submissions following the hearing make no mention of this item.

[366] We have considered the suggestion by the NFF and can see the utility of changing the terminology of the award to make it consistent with other awards. There are however potential issues arising out of such a change. The main issue about re-naming the 'actual weekly rate' as the 'ordinary weekly rate' with the additional definition for 'ordinary hourly rate' is that 'ordinary hourly rate' is used throughout the exposure draft as a reference rate. The current drafting of the exposure draft defines 'ordinary hourly rate' as the hourly rate for the employee's classification in clause 10.1, inclusive of any all purpose allowances. The proposal by the NFF would seem to change the definition to clarify that penalties in the award were based on the rate currently defined as the 'actual weekly rate' albeit divided by 38 to obtain the hourly rate. The adoption of either of the proposals of the NFF appears to us to improve the operation of the award in that it resolves a potential ambiguity created by the insertion of the 'ordinary hourly rate' definition. It is our provisional view that the second of the two options proposed by the NFF, inserting two new definitions in the 'Definitions' clause is to be preferred. This is consistent with the drafting style being used in this process. We also propose to update the heading of 'actual weekly rate' in the table of clause 10.1 to 'Ordinary weekly rate' for consistency. Should parties wish to comment further on this issue they may do so by **4.00pm Friday, 24 November 2017.**

Item 16 – Pieceworker—written requirement—rates

[367] The AWU proposed amending clause 10.4(a) of the exposure draft to state:

> 'Employees may agree in writing to work on piecework rates. The piecework agreement must specify the applicable piecework rate which will be paid for all work performed under the

> piecework agreement. Provided that where an employee works on piecework rates, that employee must receive at least the ordinary hourly rate per hour of work.'

[368] The clause in the exposure draft, which reflects the provision in the current award provides:

> 'Employees may work on piecework rates. Provided that where an employee works on piecework rates, that employee must be paid at least the ordinary hourly rate.'

[369] The wording proposed by the AWU contains two additional requirements in addition to the current award:

- the piecework agreement must be in writing; and
- the agreement must specify the applicable piecework rate.

[370] The NFF oppose the changes proposed by the AWU on the grounds that it represents a substantive change to the award. The NFF propose an alternative clause which they submit has the effect of reinserting the reference to the 'relevant classification'.

> 'Employees may work on piecework rates. Provided that where an employee works on piecework rates, the employee must be paid at least the amount the employee would have received for time worked at the ordinary hourly rate for the relevant classification.'

[371] This matter does appear to raise a substantive issue which is disputed by the parties. We are unable to determine the merits of the proposals based on the limited submissions before us. As the parties have indicated that they wish to pursue these changes they will be referred to a separately constituted Full Bench.

Item 17 – Pieceworker leave entitlements

[372] The AWU proposed an amendment to clause 10.4(d) and (e) of the exposure draft that the AWU submits will clarify the entitlements for paid leave for pieceworkers. Their proposal is to insert a provision stating that:

> 'during periods of paid leave a pieceworker is entitled to receive the greater of the following amounts:
> - The rate of pay specified in the Exposure Draft the appropriate type of leave; or
> - The employee's average piecework earnings calculated in accordance with the definition of "base rate of pay" for award/agreement free pieceworkers contained in Regulation 1.09 of the *Fair Work Regulations 2009*'[212]

[373] The NFF agrees that the meanings of 'full rate of pay and 'base rate of pay' should be reviewed but do not support the AWU proposal as the NFF believes that it would create new substantive entitlements. In particular the NFF submits that the definition of 'base rate of pay' for a shiftworker in the current award is circular as it refers to the NES which in turn refers to the award.[213] To resolve this issue the NFF proposes alternative clauses 10.4(d) and (e) as follows:

> '(d) For the purpose of the NES, the full rate of pay for a pieceworker is calculated by dividing the total amount earned by the employee during the 12 months immediately

preceding the taking of the NES entitlement by the total hours worked by the employee in that period.

(e) For the purpose of the NES, the base rate of pay for a pieceworker is calculated in the same way as the full rate of pay for a pieceworker, except that the total amount earned by the employee over the preceding 12 month period must be reduced by any incentive-based payments and bonuses, loadings, monetary allowances, overtime or penalty rates or any other separately identifiable amounts paid in that period.'

[374] It appears to us that this issue is related to Item 16 and is a substantive issue that is in dispute. We consider that both items will require determination by the same separately constituted Full Bench.

Item 19 – Leading hand allowance

[375] The AWU submits that the current wording of clause 11.3(b) of the exposure draft arguably indicates that an employee working as a leading hand may be paid their normal rate of pay. The exposure draft provides:

'**(b) Leading hand allowance**

An employee appointed as a leading hand will be paid a leading hand allowance each week. The allowance will be whichever of the following two amounts is greater:

(i) the amount specified in the table below, in addition to the weekly wage rate of the highest classification of the employees supervised,

In charge of	**$ per week**
1 person	18.85
2 to 5 persons	41.90
6 to 10 persons	53.13
more than 10 persons	70.78

or;

(ii) the employee's own rate.'

[376] The AWU propose the following amendments:

'An employee appointed as a leading hand will be paid a leading hand allowance each week in accordance with the following table:

INSERT CURRENT TABLE

The allowance will be paid in addition to the employee's own rate, or the rate of the highest classification of the employees supervised, whichever is the higher.'

[377] The AWU referred the pre-modern Silviculture Award which contained the following provision:

'A person specifically appointed to be a leading hand (as defined) shall be paid at the rate of the undermentioned amounts **above the rates** of the highest classification supervised, or his own rate, whichever is the highest in accordance with the number of persons in his charge. (their emphasis).'[214]

[378] The current award expresses the allowance as follows:

18.3 Leading hand allowance

An employee appointed as a leading hand will be paid a leading hand allowance each week. The allowance will be whichever of the following two amounts is greater:

(a) the percentage of the standard rate (as per the table below) in addition to the weekly wage rate of the highest classification of the employees supervised,

In charge of	**% of standard rate per week**
not more than 1 person	94
2 and not more than 5 persons	209
6 and not more than 10 persons	265
more than 10 persons	353

or;

(b) the employee's own rate.

[379] The NFF opposes the changes proposed by the AWU. The NFF submits that the intention of the provision is that an employee appointed as a leading hand whose rate of pay is higher than the rate provided in clause 11.3(b)(i) would not be entitled to receive the allowance.[215] The NFF also proposes that the rate referred to in clause 11.3(b)(i) should be either the 'actual weekly rate' or the 'ordinary weekly rate'.

[380] We agree with the AWU that the drafting of the exposure draft has changed the operation of this provision. This was unintentional and we consider it appropriate to redraft the provision to reflect the correct operation of the current provision. The wording of this provision in the current award could be clarified and we propose to do so.

[381] We also agree with the proposal by the NFF to change the reference rate in clause 11.3(b)(i) to 'ordinary weekly rate' as this will clarify the operation of the provision.

[382] Our *provisional* view is that the clause 11.3(b) should be re-drafted as follows:

(b) Leading hand allowance

(i) An employee appointed as a leading hand will be paid a leading hand allowance each week in accordance with the following table:

In charge of	**$ per week**
1 person	19.47
2 to 5 persons	43.28

In charge of	$ per week
6 to 10 persons	54.88
more than 10 persons	73.11

(ii) The allowance will be paid in addition to either the employee's ordinary weekly rate or the ordinary weekly rate of the highest classification of the employees supervised, whichever amount is greater.

[383] Should parties wish to comment further on this issue, they may do so by **4.00pm Friday, 24 November 2017.**

Item 23—Fares and travelling time allowance—cross references

[384] The NFF submits that the cross references in clauses 11.4(f)(i) and (v) to clauses 11.4(f)(iii) and (iv) are incorrect and should be to clauses 11.4(d)(i) and (ii) to reflect the current award.

[385] The equivalent provision in the current award to clause 11.4(f)(i) of the exposure draft is clause 18.1(f). Clause 18.1(f) begins 'Subject to clauses 18.1(d)(i) and (ii)…'.

[386] As the NFF points out the equivalent clauses in the exposure draft are to clauses 11.4(d)(i) and (ii) and we shall correct those cross references.

[387] The equivalent provision in the current award to clause 11.4(f)(v) of the exposure draft is clause 18.1(h). The relevant sentence begins 'Provided that clause 18.1(n)…'. The equivalent provision of clause 18.1(n) of the current award in the exposure draft is clause 11.4(l). Clause 11.4(l) of the exposure draft deals with transport from the employer's location and does not appear to be relevant to clause 11.4(f).

[388] It appears to us that, having regard to the equivalent provision in the pre-modern Silviculture Award[216] that the cross references in 11.4(f)(v) of the exposure draft are correct. It seems that there may have been an error in the award modernisation process in relation to this cross reference. The current award will be re-drafted to be consistent with the pre-modern Silviculture Award and the exposure draft.

Item 24 – Travelling time allowances

[389] The AWU seek to insert an additional cross reference into clause 11.4(f)(iv) of the exposure draft to clause 11.6(d) as they submit clause 11.6(d) also prescribes a travelling time entitlement.

[390] The NFF opposes the inclusion of this cross reference as they say that clause 11.6(d) deals with 'camping out' and is not a travelling entitlement.

[391] We disagree with the AWU that clause 11.6(d) contains a travelling time entitlement. Clause 11.6(d) does contain provisions for camping out but does not make any reference to travelling time. We decline to make the proposed change on the limited material before us.

Item 24A – Transfer during ordinary working hours

[392] The NFF seeks to re-insert the words "provided that" at the beginning of clause 11.4(i)(ii) to reflect , it submits, the operation of the current award in paying employees either the reasonable cost of public transport fares or, where the employer asks them to use their own car and they agree, a cents per kilometre rate in lieu of public transport fares. Not to do so, the NFF submits, would leave it unclear that one allowance is paid in lieu of the other and significantly increase reimbursement costs for travel during working hours.

[393] We consider further clarity might assist and propose to amend clause 11.4(i)(ii) in the exposure draft by inserting the words ''instead of the reasonable cost of fares referred to in clause 14(i)(i)" and the end of the sentence.

Item 26 – Living away from home allowance

[394] The NFF submits that the wording of clause 11.6(a)(i) exposure draft unintentionally changes the operation of the current provision. The exposure draft provides as follows:

> **(a) Eligibility for payment**
>
> **(i)** An employee will be entitled to the provisions of clause 11.6 when employed on a job such a distance from their usual place of residence that they cannot reasonably return to that place each night, provided that:
>
> - the employee is maintaining a separate place of residence; and
> - on being requested by the employer, the employee informs the employer at the time of engagement that they maintain a separate place of residence from the address recorded on the job application.

[395] The provision in the current award is as follows:

> **(a) Qualification for payment**
>
> An employee will be entitled to the provisions of this clause when employed on a job such a distance from their usual place of residence that they cannot reasonably return to that place each night, subject to the following conditions:
>
> **(i)** the employee is maintaining a separate place of residence to which it is not reasonable to expect them to return each night; and
>
> **(ii)** the employee, on being requested by the employer, informs the employer, at the time of engagement, that they maintain a separate place of residence from the address recorded on the job application.

[396] The NFF submits that the removal of the words 'to which it is not reasonable to expect them to return each night' from the first dot point broadens the scope of the term.[217]

[397] The AWU propose that there only need be one dot point stating:

> 'if the employee is maintaining a separate place of residence, on being requested by the employer, the employee must inform the employer at the time of engagement that they maintain a separate place of residence from the address recorded on the job application.'[218]

[398] The NFF further submits that the exposure draft inserts a reference to 'usual' place of residence in clause 11.6(a)(ii) which the NFF submits limits the scope of the rule on making 'false statements'.

[399] We agree with the NFF that the drafting of the exposure draft has the potential to change the operation of this provision through a broadening of the scope of clause 11.6(a)(i) of the exposure draft and a narrowing of clause 11.6(a)(ii). This was not the intention and we will redraft the provision to reflect its current operation. We propose to reinsert the words 'to which it is not reasonable to expect them to return each night' into the first dot point of clause 11.6(a)(i) of the exposure draft and to delete the word 'usual' from clause 11.6(a)(ii).

Item 27– Expense related allowances—board and lodging

[400] The NFF submits that the last sentence of clause 11.6(c)(iv) of the exposure draft duplicates the provisions of the dispute resolution clause in clause 24 of the exposure draft. The last sentence of clause 11.6(c)(iv) is as follows:

> 'In the event of disagreement, the matter may be referred to the Fair Work Commission for determination.'

[401] The current award contains very similar wording at clause 18.4(c)(ii). The equivalent clause of the pre-modern Silviculture Award contained identical wording to the modern award.[219] The pre-modern Silviculture Award also contained a separate dispute resolution procedure which set out a process for resolving disputes at the workplace.[220]

[402] The dispute resolution clause, in clause 24 of the exposure draft sets out the process for disputes about matters under the award. A dispute arising out of any provision of the award may ultimately be referred to the Commission for resolution after following a process as set out in the provision. The provision in clause 11.6(c)(iv) appears to allow disputes over the operation of the board and lodging clause to proceed straight to the Commission without following the dispute resolution procedure as set out in clause 24.

[403] Section 146 of the Act requires that each modern award contains a dispute settling procedure. During award modernisation the Full Bench came up with standard wording for a dispute resolution clause that was to be included into all modern awards. In the Full Bench decision of 12 September 2008, the Full Bench stated that the clause, then in draft form, would outline a process that encourages settlement of disputes at the workplace with the Commission to be involved only with the agreement of the parties and if the dispute is unable to be resolved in the workplace.[221] They noted further that they had generally not included reference to the dispute resolution provision in clauses dealing with particular conditions.

[404] In our view clause 11.6(c)(iv) of the exposure draft contains a process that is at odds with the process set out in the dispute resolution clause. The process set out in clause 24 of the exposure draft reflects the intention of the award modernisation Full Bench and that maintaining a separate process for a particular provision within the award is unnecessary. Accordingly the last sentence in clause 11.6(c)(iv) of the exposure draft will be deleted.

Item 31 – Rest period after overtime

[405] The AWU suggests, and the NFF agrees, that clause 13.3(a) of the exposure draft would be clearer if it stated:

> 'Overtime will be arranged so that employees have at least 10 consecutive hours off duty after completing the overtime.'

[406] We agree and the amendment will be made.

Item 35 – Bushfire fighting

[407] The AWU submits that the change in the reference rate in clause 15.7 of the exposure draft to 'the ordinary hourly rate' from 'the appropriate rate' in the current award may result in shift workers falling onto a lower rate while bushfire fighting.[222]

[408] The NFF submits that the provisions relating to bushfire fighting deal specifically with bushfire conditions and that shift work provisions, along with a number of other provisions are not relevant whilst an employee is engaged on bushfire fighting activities.[223] The NFF submits that the shiftwork provisions do not apply when an employee is fighting bushfires. The NFF submits that the phrase 'applicable hourly rate' is not defined in the award and would increase the uncertainty of the provision.[224] The NFF proposes that the term 'ordinary hourly rate' be used as the term is 'well understood and will provide certainty for parties'.[225]

[409] Clause 27.7 of the current award is drafted to provide 'ordinary time for the first eight hours and at the rate of 150% of the appropriate rate for the next two hours, and at the rate of 200% after that'. The phrases 'ordinary time' and 'appropriate rate' are not currently defined in the award. The exposure draft replaces the instances of 'ordinary time' and 'appropriate rate' with 'ordinary hourly rate' which defined in the award and as the AWU points out is not inclusive of shift penalties.

[410] The bushfire fighting provisions apply in the specific circumstance of a bushfire burning out of control requiring emergency attendance. These provisions stand in the place of a number of provisions contained elsewhere in the award including the hours of work, rest breaks, meal breaks, weekend work and overtime rates. The current drafting of clause 27.1 makes it clear that the employee's classification immediately before the outbreak of wildfire. Clause 27.1 also makes higher duties provisions available where applicable. The clause makes no mention of shiftwork provisions.

[411] The phrase 'ordinary time' appeared in the equivalent clause of the pre-modern Silviculture Award.[226] However the phrase 'appropriate rate' was not used and overtime provisions were expressed as at 'time and one half for the next two hours, and at the rate of double time thereafter'. The rate 'ordinary time' given its ordinary meaning in this context does not include shift penalties. As the phrase 'appropriate rate' contained in the current award appears to give effect to the equivalent provision in the pre-modern Silviculture Award we think that the rate being referred to is 'ordinary time'.

[412] As such, we propose that the phrase 'ordinary hourly rate' be retained.

Item 39 – Annual leave loading

[413] The NFF submits that the change of terminology in clause 16.5(b) of the exposure draft increases the amount payable for annual leave loading.[227] Clause 16.5(b) of the exposure draft provides the following:

> **(b)** an additional loading of **17.5%** of the ordinary hourly rate. (emphasis added)

[414] The current award contains the following provision for annual leave loading at clause 29.7(b):

> **(b)** an additional loading of 17.5% of the minimum rate prescribed in clause 14—Minimum wages. (emphasis added)

[415] As mentioned in the July 2015 decision, the award modernisation Full Bench determined that it was not possible to develop a single model clause for annual leave as there were differing provisions in pre-modern instrument.[228] The pre-modern Silviculture Award made the following provision for the payment of annual leave:

> (g) Leave Payment
>
> (i) Payment for period of leave
>
> Each employee, before going on leave, shall be paid in advance the wages which would ordinarily accrue to him/her during the currency of the leave.
>
> (ii) Annual leave loading
>
> In addition to the payment prescribed in paragraph (i) hereof an employee shall receive during a period of annual leave a loading of 17-1/2% calculated on the rates, loadings, and allowances prescribed by Part III - Wage Rates and Related Matters, Clause 1 - Wage Rates, Part V - Hours of Work, Penalty Payments and Overtime, Clause 5 - Call Outs and Part VI - Leave and Holidays With Pay, Clause 1 - Annual leave of this award if applicable, together with any overaward payment for the ordinary hours of work per week.

[416] It appears from the wording above that in the pre-modern Silviculture Award the annual leave loading was calculated including the two all-purpose allowances, the special allowance and the industry allowance, which was contained in Part III, Clause 1. The exposure draft contains the following definitions for 'ordinary hourly rate' and 'all purposes':

> **ordinary hourly rate** means the hourly rate for an employee's classification specified in clause 10.1, inclusive of any all purpose allowances
>
> **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 annual leave (see clause 11.1)

[417] In our view the correct rate to calculate the annual leave loading under this award is the 'ordinary hourly rate'. The wording proposed by the NFF does not reflect the provision contained in the pre-modern Silviculture Award and nor does it account for the all purpose

nature of the special allowance and the industry allowance in the current award. The wording in the exposure draft reflects the all purpose nature of the allowances and clarifies the correct approach to calculating the annual leave loading and should be retained.

Item 41– Bushfire fighting—shiftwork

[418] The AWU submits that Schedule A should contain bushfire fighting rates for shiftworkers. The exposure draft currently provides bushfire fighting provisions for full-time and part-time employees other than shiftworkers.[229]

[419] The NFF submits that the bushfire fighting provisions should be in a completely separate table as the NFF submits that they are standalone provisions. They rely on their submissions in relation to Item 35.

[420] We agree with the submissions of both parties and propose that the bushfire fighting provisions be extracted from the table in clause A.2.1 and moved to a standalone clause with a heading that makes it clear that they apply to all full-time and part-time employees working on bushfire fighting. For consistency we will also remove the bushfire fighting provisions from clause A.3.1 and put them in a separate table to make it clear that those provisions apply to all casual employees working on bushfire fighting.

Items 43, 45 and 46 – Shiftworkers and casual shiftworkers—Sunday rates

[421] The NFF submits that the current award does not specify a Sunday rate for shiftworkers. The NFF further submits that this reflects the terms of the pre-modern Silviculture Award.

[422] The AWU submits that clause 13.5(b)(i), which sets out the penalty rates for work on Sunday, makes no distinction between the types of employees to which it applies and is therefore applicable to all employees.[230] The AWU further submits that clause 14.10 provides that shiftworkers 'are paid at the rate of 115% (other than on a Saturday, Sunday or public holiday)' which the AWU submits is because on those days other penalties apply.

[423] The AWU proposes inserting an additional Sunday rates column in clause A.2.3 which sets out the rates for full-time and part-time shiftworkers and clause A.3.2 for casual shiftworkers. The AWU submits that full-time and part-time shiftworkers are paid 200% for Sundays and casual shiftworkers are paid 225%.

[424] The current award contains provisions for shiftwork in clause 28. Clause 28.11 sets the rate for Saturday work at 150%. Clause 28.12 sets out the following provisions for Sundays and public holidays:

> **(a)** Subject to this clause, the provisions of clause 32—Public holidays will apply to shiftworkers. Where shifts commence between 11.00 pm and midnight on a Sunday or public holiday, the time so worked before midnight will not entitle the employee to the Sunday or public holiday rate.
>
> **(b)** The time worked by an employee on a shift commencing before midnight on the day preceding a Sunday or public holiday and extending into a Sunday or public holiday

> must be regarded as time worked on such Sunday or public holiday. Where shifts fall partly on a Sunday or a holiday that shift the major portion of which falls on a Sunday or a public holiday will be regarded as the Sunday or public holiday shift.

[425] Clause 32 of the current award states that public holidays are provided for in the NES.

[426] The pre-modern Silviculture Award contains a similar provision in relation to Sundays and public holidays for shiftworkers:

> Subject to this clause the provisions of Clause 37 - Public Holidays and Holiday Work, of this award shall apply to shift workers. Where shifts commence between 11.00 p.m. and midnight on a Sunday or holiday, the time so worked before midnight shall not entitle the employee to the Sunday or holiday rate; provided that the time worked by an employee on a shift commencing before midnight on the day preceding a Sunday or holiday and extending into a Sunday or holiday shall be regarded as time worked on such Sunday or holiday. Where shifts fall partly on a Sunday or a holiday that shift the major portion of which falls on a Sunday or a holiday shall be regarded as the Sunday or holiday shift.[231]

[427] It is not entirely clear on the face of the award where the cross reference to 'clause 37 - Public Holidays and Holiday Work' is intended as the award does not contain a clause 37. It is probable that the reference is to Part IV clause 5 but it is not clear. The pre-modern Silviculture Award was made by consent in 1999 by the Tasmanian Industrial Commission.[232] It does not appear to have been restructured or re-numbered since that time so it is possible that the error in the reference has existed since the award was made.

[428] In our view it is unlikely that the pre-modern Silviculture Award would have intentionally contained references to 'a Sunday or holiday rate' without containing a Sunday rate for shiftworkers. Indeed shiftworkers who work on bushfire fighting on Sundays would be have been entitled to double time. Nor does it seem probable that the pre-modern Silviculture Award would contain a provision for time and half on Saturdays for shiftworkers only to have them drop down to ordinary time on a Sunday.

[429] Perhaps the only logical conclusion that can be drawn from the provisions of the pre-modern Silviculture Award is that the rate for shiftworkers working on Sunday was accidentally omitted. This omission appears to have been carried over into the current award.

[430] In our view the award should contain Sunday rates for shiftworkers. Our *provisional* view is that the appropriate rate for full-time and part-time shiftworkers working on a Sunday would be 200% of the ordinary hourly rate. Our *provisional* view is that casual shiftworkers should be paid 225% of the ordinary hourly rate for Sunday work. On that basis inserting the following additional clause to clause 14.12 of the exposure draft would be appropriate:

> **(b)** Subject to this clause, employees working shifts on a Sunday will be paid at **200%** of the ordinary hourly rate.

[431] The current clause 14.12(b) of the exposure draft would then would be re-numbered 14.12(c) with the following deletion made:

> **(c)** Where shifts commence between 11.00 pm and midnight on a Sunday or public holiday, the time worked before midnight will not entitle the employee to the Sunday or public holiday rate ~~in clauses 13.5(b)(i) and 13.5(c)(i)~~.

[432] The tables contained in clauses A.2.3 and A.3.2 will be updated to include Sunday rates for shiftworkers.

[433] Parties have until **4.00pm Friday, 24 November 2017** to comment on our provisional view and the suggested wording.

Item 44 – Overtime rates for casual employees

[434] The AWU submits that it would be helpful to include overtime rates for casual employees as they are a cause of confusion. The NFF seeks to be given the opportunity to comment should overtime rates for casual employees be included.

[435] In the July 2017 Decision, the Full Bench stated that where there is a substantive entitlement for casuals to overtime then those rates should be included in the award.[233] The current award does not explicitly state that casual employees are entitled to overtime. Clause 10.4(b) states that a casual employee will be paid an hourly rate for the class of work performed plus a loading of 25 per cent. The overtime provision in clause 26.1 of the current award provides the following:

> 'Except as otherwise provided in this clause, all time worked by an employee in excess of or outside the ordinary hours of work (inclusive of time worked for accrual purposes) must be paid at a rate of 150% of the appropriate rate for the first two hours and 200% thereafter.'

[436] From these two clauses the obvious question that arises is what is the 'appropriate rate' for a casual employee. In other words should the 150% or 200% overtime rate be applied to the rate that includes the casual loading or should both the casual loading and the overtime rate be applied to the ordinary hourly rate.

[437] The submissions from the parties are silent on this point but, as mentioned, the NFF seeks the opportunity to comment on any inclusion of overtime rights for casuals in the table in Clause A.3. It seems to us that it would be unlikely from the wording of the current award that the overtime rate would be compounded on the casual loading. We are of the view that if this were intended then the award would contain wording to that effect.

[438] Our *provisional* view is that casual employees are entitled to overtime and there is no reason, based on a plain reading of the current award, to assume that casual employees working overtime would not be entitled to the casual loading. The outcome of this would be that the casual loading would be cumulative on the overtime rate. We will include tables reflecting this in the summary of hourly rates schedule in the exposure draft and parties have until **4.00pm Friday, 24 November 2017** to comment.

Additional drafting issues

[439] We make the following minor change to clause 15.7(c)(iii) to remove a redundant phrase:

(iii) ~~the rate of~~ **200%** of the ordinary hourly rate after that.

[440] The AWU submits that the definition of 'silviculture and afforestation' is not necessary in Schedule F. The NFF expressed a preference for the definition to remain in the coverage clause. We will change the definition in Schedule F consistent with the July 2017 Decision.[234]

[441] There are no other items for this Full Bench to determine for the Silviculture Award.

2.12 Sporting Organisations Award 2010

[442] On 18 December 2015 the Commission published an exposure draft based on the *Sporting Organisations Award 2010*[235] (Sporting Organisations Award), together with a comparison document showing the changes to the structure and language of the award. Interested parties were invited to file submissions about drafting or technical issues in the exposure draft. Submissions were received from the AWU, AFEI and Business SA. These parties attended a conference on 30 May 2016 and reached an agreed position on a number of items in the exposure draft. Deputy President Clancy published a report to the Full Bench on 3 June 2016 that set out the items from the submissions that had not been agreed but would be the subject of further discussions between the interested parties.

[443] A further conference was held on 9 August 2016 to deal with the outstanding issues. Additional interested parties participated in this conference. They were Gymnastics Australia, Tennis Australia, Fitness Australia and ASSA. A second report to the Full Bench was made by Deputy President Clancy on 25 August 2016. While one of the three outstanding items was confirmed as withdrawn, the parties remained in dispute regarding the entitlement to overtime payments for casual employees. Directions were issued on 14 December 2016 and parties were required to file further material in January 2017 and February 2017. In response, the following material has been filed:

- On 10 January 2017, Gymnastics Australia filed comments in response to the revised Summary of submissions published on 22 July 2016;
- On 10 January 2017, Tennis Australia filed comments in response to the revised Summary of submissions published on 22 July 2016;
- On 11 January 2017, the AWU filed comments in response to the revised Summary of submissions published on 22 July 2016
- On 20 January 2017, Tennis Australia filed submissions in relation to claims it still pursues;
- On 27 January 2017, the AWU filed submissions in relation to claims it still pursues relating to overtime and casual employment;
- On 7 February 2017, Gymnastics Australia, Tennis Australia, the Australian Football League (AFL) and AFEI issued submissions in reply;
- On 13 February 2017, the AWU filed submissions in reply to the submissions of Tennis Australia dated 20 January 2017.

[444] A further updated summary of submissions was published on 10 October 2017. It is apparent from this material that the AWU is claiming overtime is payable to coaching staff.

Gymnastics Australia, Tennis Australia, the Australian Football League (AFL) and AFEI maintain this is a new claim, made in addition to the two outstanding matters, *Item 3* and *Item 6*, and they oppose it.

Item 6 – Rates of pay for junior employees

[445] The AWU proposal is to replace the reference to "*% of Grade 1 or 2*" in the table in sub clause 10.2(b)(i) with "*% of the appropriate minimum wage in clause 10.2*" on the basis that junior employees should be paid according to their classification. As to the current award's wording, the AWU suggested it presumably reflects that junior employees are rarely employed in higher classifications than Grade 1 or 2 in clerical and administrative roles.

[446] AFEI remains opposed to this claim and favours instead the retention of the wording in the current version of the Sporting Organisations Award at clause 17.2(b).

[447] While we support in principle the proposition that junior employees should be paid according to their classification, we would need to be persuaded that this is not occurring due to the application of the formula in the current award, which has been adopted in the exposure draft. In the absence of evidence to this effect, we are not persuaded the current formula should be amended in the terms put by the AWU.

Item 3 – Overtime payments for casual employees and *overtime payments for coaching staff*

[448] It is clear the parties remain in dispute regarding *Item 3* and that the AWU claim for overtime payments for coaching staff is strongly opposed. The most significant areas of dispute appear to be:

- The AWU claim for casual employees to be engaged to work less than 38 ordinary hours per week;
- The AWU claim for the ordinary hours of work of part time and casual employee not to exceed 11 hours on any one day;
- The AWU claim for the span of ordinary hours to extend to casual employees; and
- The AWU claim for coaching staff to be entitled to overtime provisions.

[449] We have noted the AWU's request for a hearing in relation to the application of ordinary hours for both this award and the *Fitness Industry Award 2010* and that *Item 3* and these various claims will require determination. In light of the nature of the matters in dispute, the material received to date, and the AWU's request, we consider these various disputed items require determination by a separately constituted Full Bench.

Items 4A and 4B – span of hours

[450] These items were considered as related items to item 3 and remain outstanding. In light of item 3 being referred to a separately constituted Full Bench, we consider it is also appropriate to refer items 4A and 4B to the same Full Bench.

[451] There are no other outstanding items for this Full Bench to determine for the Sporting Organisations Award.

2.13 Sugar Industry Award 2010

[452] The exposure draft for the *Sugar Industry Award 2010* (the Sugar Award) was first published on 15 January 2016 (the 15 January 2015 exposure draft). Deputy President Asbury conducted conferences with interested parties on 27 April 2016, 26 May 2016, 2 June 2016 and 14 July 2016 to discuss the submissions made in response to the published draft.

[453] The outcome of those conferences (excluding 14 July 2016) was explained in a Report to the Full Bench (the Asbury DP report) which was published by the Commission on 3 June 2016.[236] The Asbury DP report sets out in detail the matters agreed between the parties, those items which were still being considered by the parties, and those matters which were not agreed and remain in dispute.

Proposed variations agreed in principle between the parties

[454] Revised versions of the exposure draft were published on 1 June 2016 (the 1 June 2016 exposure draft) and again on 3 June 2016 (the 3 June 2016 exposure draft) which incorporated the changes agreed to by the parties. Some of those changes included moving entire clauses and has resulted in numbering changes which change clause numbers between the 15 January 2015 exposure draft and the 3 June 2016 exposure draft. For the purposes of this decision we will refer to the clause numbers as they appear in the 3 June 2016 exposure draft unless otherwise advised.

[455] We are content to accept the changes agreed to by the parties (outlined in Annexure A to the Asbury DP report) with the following three exceptions.

Item 4 – National Employment Standards

[456] The NFF submitted that clause 2.3 of the 15 January 2015 exposure draft should be amended to reflect the wording in the Sugar Award and should make provision for situations where there is no noticeboard of internet coverage.[237] The Asbury DP report advises that the parties have agreed to amended wording, and that wording was reflected in clause 3.3 of the 3 June 2016 exposure draft.

[457] The revised wording suggested for clause 3.3 of the 3 June 2016 exposure draft would be inconsistent with the standard clause in all other modern awards. This standard clause was determined by the Full Bench in the Group 1 stage of the 4 yearly review.[238] We are not persuaded to adopt this variation and the exposure draft will be amended to retain the standard clause.

Item 13 – Types of employment – seasonal employment

[458] The Asbury DP report notes that the parties have agreed that the definition of 'seasonal employment' in the 15 January 2015 exposure draft should be deleted from "Clause 2 – Definitions" and inserted into "Clause 7 – Types of employment" as a new employment category (Sugar Award clauses 3 and 11). The parties have proposed to insert the following into clause 7.6

7.6 Seasonal employment

(a) A seasonal employee is an employee engaged by the employer on a full time or part time basis, on or about the commencement of the crushing season, for the purpose of performing duties directly and indirectly related to crushing season operations and whose duties are completed and employment terminated on or about the end of the mill's crushing season.

(b) For the purpose of a 38 hour week only, all employees not specifically engaged as seasonal who are engaged after the first Monday of June in any one year and before the first Monday in June in the subsequent year, will be deemed to be seasonal until the first Monday of June in that subsequent year

[459] This variation presents a number of possible issues. We agree that the definition of seasonal employee from the current award contains both a definitional element but, more problematically, an element that affects substantive entitlements which may be more appropriately dealt with elsewhere in the award.

[460] We are not convinced, however that the solution proposed by the parties will overcome the cross-purposes of this clause. In addition the so-called 'deeming' provision of proposed clause 7.6(b) affects the entitlements of employees who are not specifically engaged as seasonal employees so may be inappropriately placed in a clause entitled 'Seasonal employment'. It seems to us that this proposed change is a substantive issue and would be better dealt with by a separately constituted Full Bench.

Item 23 – Hours of work – altering the spread of hours

[461] The Asbury DP report notes that the parties have agreed to delete clauses 11.3(c) and (d) and inserting a new clause 11.3(c) (see 3 June 2016 exposure draft). The parties agreed clause is as follows:

(c) Altering the spread of hours

(i) The ordinary hours of work are to be worked continuously, except for meal breaks, at the discretion of the employer. The spread of hours may be altered by up to one hour at either end of the spread by agreement between an employer and the majority of employees concerned or, in appropriate circumstances, between the employer and an individual employee.

(ii) Where the spread of hours is altered in accordance with sub clause 11.3(c)(i), work outside the hours of 6.00 am to 6.00 pm will be paid at overtime rates and will be deemed to be part of the ordinary hours of work for the purposes of clause 11—Ordinary hours of work and rostering—other than shiftworkers.

[462] In our view, the agreed position of the parties alters the operation of the provision in the current award. To our mind the 'Altering of spread of hours' provision is included in the award to allow parties to agree to increase the spread of ordinary hour by up to two hours. To

make the change as proposed by the parties would mean that, even if parties had agreed to alter the spread of hours, the employer would still be required to pay an employee working during the altered spread of hours at the overtime rate.

[463] We do not consider this reflects the current award provision. The new clause 11.3(c) contains two parts, (i) and (ii). Having considered the parties' agreed position, it is our view that item (ii) should not be contingent on item (i). Our provisional view is that existing clauses 11.3(c) and (d) should be retained but that 11.3(d) should be amended to clarify when overtime is payable as follows:

> **(c) Altering the spread of hours**
>
> The ordinary hours of work are to be worked continuously, except for meal breaks, at the discretion of the employer. The spread of hours may be altered by up to one hour at either end of the spread by agreement between an employer and the majority of employees concerned or, in appropriate circumstances, between the employer and an individual employee.
>
> **(d)** Work done outside the hours of 6.00 am to 6.00 pm, other than in accordance with clause 11.3(c), will be paid at overtime rates and will be deemed to be part of the ordinary hours of work for the purposes of clause 29—Ordinary hours of work and rostering—other than shiftworkers.
>
> (emphasis added)

[464] Parties are invited to comment on the proposed amendment to clause 11.3(d) as per the "Next Steps" set out below at [593] by **4.00 pm Friday, 24 November 2017**.

Proposed variations not agreed between the parties

Item 6 – Coverage

[465] Parties were asked whether the terminology used to describe the various sectors of the sugar industry in clauses 4.2(b) to (e) (the Coverage clauses) should be consistent with the definitions of those sectors contained in the definitions clause. Clauses 4.2(b) to (e) read as follows:

> **'4.2** In this award **sugar industry** means the following:
>
> …
>
> **(b)** sugar milling including the following operations of the sugar miller: cane railway construction, maintenance, repair and operation; factory maintenance, repair and operation; raw sugar refining at a sugar mill; by-product manufacture and processing at a sugar mill; and packaging operations performed at a sugar mill;
>
> **(c)** refining raw sugar at sugar refineries and those refineries' packaging operations;
>
> **(d)** distilling sugar by-products for industrial purposes and packaging work in a distilling operation directly linked to a sugar mill;

> **(e)** bulk (packed or loose) receival, storage, outloading and ship loading at the industry's bulk terminals, including handling incidental commodities or material;…'

[466] The relevant definitions (contained within Clause 2—Definitions) read as follows:

> **'2. Definitions**
>
> In this award, unless the contrary intention appears:
>
> …
>
> **bulk terminal operations** means all handling and storage operations of the bulk sugar terminals of sugar, its products or any other commodity the terminals may handle from time to time
>
> …
>
> **distillery sector** means all distilling operations of sugar by-products for industrial purposes and packaging operations in a distillery directly linked to a sugar mill
>
> …
>
> **milling sector** means the operations of transporting and processing cane including all rail construction, maintenance and operation; factory maintenance and operation; sugar cane by-product manufacture and processing at a sugar mill; and packaging and storage operations performed at a sugar mill
>
> …
>
> **refinery sector** means all refining operations of raw sugar at sugar refineries and those refineries own packaging and storage operations'

[467] The DP Asbury report advises that the parties do not accept that there is an issue with inconsistency between the respective provisions and contend that the provisions should not be amended.[239]

[468] We are concerned that the inconsistent terminology may create ambiguity and intend for this matter to be canvassed further by the separately constituted Full Bench.

Item 10 – Coverage

[469] The NFF submitted that clauses 4.3 and 4.7 deal with the same matters and should not both be included in the exposure draft.[240]

[470] Clauses 4.3 and 4.7 read as follows:

> **4.3** Where a sugar industry employer is also engaged in another industry not covered by this award the employees of that employer in the other industry will be covered by the industry award of that other industry.
>
> …
>
> **4.7** Where an employer is covered by more than one award, an employee of that employer is covered by the award classification which is most appropriate to the work performed by the employee and to the environment in which the employee normally performs the work.

[471] In their respective submissions in reply, the AMWU[241] and Ai Group[242] stated that they did not view the two provisions as being incompatible, but rather aimed at differing circumstances. The AMWU and Ai Group support the retention of the two clauses.

[472] The AWU submitted that the wording of clause 4.3 was ambiguous and should be deleted. It submitted that issues of overlapping award coverage would then be dealt with by clause 4.7. It was noted by the AWU that this was the general approach adopted across other modern awards.[243]

[473] We agree that clauses 4.3 and 4.7 apply in different circumstances and are not incompatible. The existing clauses will be retained.

Item 11 – Facilitative Provisions

[474] The NFF submitted that the list of facilitative provisions at clause 6.2 should be exhaustive and refer to all facilitative provisions in the award that "permit parties to agree on award variations".[244] In the *December 2014 Decision* the Full Bench determined that it is desirable for awards to contain an index of facilitative provisions.[245]

[475] The AMWU has advised the Commission that there is substantial agreement between the parties as to the list of provisions to be included.

[476] Parties have until **4.00pm Friday, 24 November 2017** to provide an agreed list of facilitative provisions for clause 6 for the consideration of the Full Bench.

Items 19 and 20 – Apprentices

[477] Clause 8 contains provisions relating to apprentices engaged in the sugar industry. The NFF submitted that references to training authorities contained within the clause require updating. It was submitted that references to 'Manufacturing Skills Australia or its successors' and 'the National Skills Standards Council or its successor' should be amended so that the clause refers to the 'Ministerial Council for Tertiary Education and Employment'.[246] There was no objection to this during the conferences convened by Asbury DP,[247] and no subsequent submissions were received on this issue. This issue also affects Schedule H of the Exposure Draft. Changes to Schedule H – National Training Wage – will be dealt with by the Full Bench dealing with the National Training Wage common issue (AM2016/17).

[478] Upon investigation by staff at the Commission, it was discovered that the Ministerial Council for Tertiary Education and Employment was succeeded in 2011 by the Standing Council of Tertiary Education, Skills and Employment.[248] In 2014, the Standing Council became known as the Education Council.[249] While we are content to update references to relevant education and training bodies we are conscious of the frequency with which these bodies are reconstituted or renamed. Therefore, we intend to retain the words 'or its successor' where relevant, and amend clauses 8.4 and 8.5 of the exposure draft to read as follows:

> **'8.4** An apprentice may be engaged under a training contract approved by the relevant apprenticeship authority, provided the qualification outcome specified in the training

contract is consistent with that established for the vocation in the relevant training package determined from time to time by Manufacturing Skills Australia or its successors and endorsed by the Council of Australian Governments (COAG) ~~Education Council~~ Industry and Skills Council or it successor. Such apprenticeships include but are not limited to the following trades:

(a) Engineering Tradesperson (Mechanical);

(b) Engineering Tradesperson (Fabrication);

(c) Engineering Tradesperson (Electrical/Electronic);

(d) Higher Engineering Tradesperson and Advanced Engineering Tradesperson.

8.5 An apprentice may also be engaged where the qualification outcome specified in the training contract is consistent with the qualifications established for electrical vocations within the relevant electrical/utilities training package and endorsed by the COAG Industry and Skills Council or its successor.'

Item 21- Overtime and penalty rates – other than shiftworkers and Items 55, 55A and 55B – Shiftwork

[479] The FWO in correspondence regarding the awards in Groups 3 and 4 noted that "award users may have difficulty determining the correct Sunday rate for field sector employees".[250] The exposure draft published 15 January 2015 asked parties to clarify the interaction between clauses 10.2(c) and 25.2(b) of that exposure draft and queried what the correct rate is for field sector employees working on a Sunday.

[480] The AWU agreed that the rates applicable to shift work on the weekend by field workers is unclear.[251] The AWU submitted that cl 11.2(c) of the 3 June 2016 exposure draft states all ordinary time worked on Saturdays and Sundays by field sector employees will be paid at 150% of the minimum hourly rate; however the heading for clause 11 suggests that the ensuing provisions only apply to day workers (i.e. excluding shiftworkers).[252]

[481] The parties agreed, in principle, to a variation to clause 25.2 as follows:

'25.2 Payment for working rostered day off~~,~~ or overtime on Saturdays or Sundays

(a) An employee~~, other than a bulk sugar terminals employee,~~ required to work on a rostered day off or overtime commencing on Saturday will be paid at **150%** of the minimum hourly rate for the first three hours and **200%** of the minimum hourly rate after that for a minimum of three hours.

(b) ~~All work done~~ An employee required to work overtime commencing on a Sunday must be paid at **200%** of the minimum hourly rate with a minimum of three hours' work or payment provided the employee is available for work for three hours'.'

[482] The parties advised DP Asbury that they were considering the impact the above change would have for bulk sugar terminals employees. The Asbury DP report indicates that the parties were considering the insertion of the following text to deal with bulk sugar terminals employees as follows:

'**Proposed new clause 26.X - Extra weekend payments for continuous shift work – bulk sugar terminals**

For bulk sugar terminal employees where continuous shift work is regularly performed on a three shifts per day basis, over a period of seven days per week, all time worked up to eight hours in any shift between midnight Friday and midnight Saturday must be paid at **150%** of the minimum hourly rate and between midnight Saturday and midnight Sunday, at the rate of **200%**.'

[483] Related to these submissions is the AWU submission that the current definition of shiftwork at clause 26.2 of the Sugar Award (which remains in the most current 3 June 2016 exposure draft) creates ambiguity with the provisions which follow because those provisions are not confined to employees working in a 24/7 continuous operation. The AWU submitted that the definition at cl 26.2 appears more directed at the entitlement to an additional week of annual leave for the purposes of the NES (which is outlined at clause 27.2).[253]

[484] A new definition of shiftwork in clause 26.2(a) was proposed in the Asbury DP report as follows:

'**(a)** Shiftworker is an employee who can be regularly rostered to work in accordance with a roster where more than one shift a day is worked or on Sundays and public holidays where the employer operates shifts continuously rostered 24 hours a day seven days a week.'

[485] Interested parties provided submissions in response to the draft clause. The AWU submitted that the penalty rates for shift workers are ambiguous in the Sugar Award and the exposure draft.[254] The AWU submitted that its position on the proposed variation was dependent on whether the provisions in the exposure draft adequately deal with the rates payable for ordinary hours worked on a Sunday for all classes of employees.[255] The AWU submitted that the definition of 'shiftworker' in clause 26.2(a) should clause 26.4be amended as per the Report to the Full Bench (above) and suggested an amendment to deal with the residual issues.

[486] The Australian Sugar Milling Council (ASMC) agreed that the Sugar Award is silent on weekend penalty rates for bulk terminals.[256] ASMC agrees to the amendment proposed by the AWU so long as it does not result in two penalty rates applying to the same hours of work.

[487] The ASMC noted that Bulk Terminals should be defined separately, not captured in a general 'other' category. The AWU amendment to clause 26.4 is as follows:

'26.4 Extra weekend payments – other than field sector

(a) Sugar milling

For sugar mill employees, where continuous shiftwork is regularly performed on a three shifts per day basis, over a period of seven days per week, all time worked up to eight hours in any shift between midnight Friday and midnight Sunday must be paid at 150% of the minimum hourly rate. Such payments will be in addition to any allowance payable for the working of an afternoon or night shift.

(b) Bulk terminals

For bulk terminal employees, shift work ordinary hours performed between midnight Friday and midnight Saturday must be paid at the rate of 150% of the minimum hourly rate. Shift work ordinary hours performed between midnight Saturday and midnight Sunday must be paid at the rate of 200% of the minimum hourly rate.'

[488] We acknowledge that it may be difficult to determine the correct rate for field sector employees (both day workers and shift workers) working on a Sunday. The variation to clause 25.2, as outlined above, would clarify payments on the weekend for overtime.

[489] The variation for 25.2 set out above necessitates a change to deal with ordinary hours worked on the weekend by field sector shift workers.

[490] Our *provisional* view regarding the existing definition of 'shiftwork' in clause 26.2(a) is that it should not be amended. Unless the parties provide a persuasive submission as to why the definition should be varied, the current clause will be retained.

[491] Following consideration of the parties' submissions, our preliminary view is to abandon the proposed clause 26.X and adopt the AWU's proposed amendment to clause 26.4 (above); however the amendment will require further drafting. Parties are invited to comment further on the proposed amendment to clause 26 as per the "Next Steps" set out below at [594] by **4.00 pm Friday, 24 November 2017**.

Item 31 – Meal breaks on overtime

[492] The 15 January 2015 exposure draft queried whether the award should provide an alternative to the employer supplied overtime meal for the field sector. The 15 January 2015 exposure draft noted that as the Sugar Award is currently drafted, the milling, distillery, refinery and maintenance and bulk sugar terminal operations sectors provide a meal allowance as an alternative to the provision of a meal.

[493] The Asbury DP report notes that this variation is not pressed (see summary of submissions amended).

Item 33 – Single contract hourly rate

[494] Clause 13 provides for minimum wages in the field sector. The clause provides that field sector employees may be engaged in writing on a single contract hourly rate basis.

[495] The Asbury DP report notes that the parties have agreed to an amendment to clause 13.2(a) of the exposure draft to provide as follows;

'**13.2 Single contract hourly rate**

(a) Field sector employees may be engaged in writing on a single contract hourly rate basis and will be paid 115% of the minimum hourly rate and must be paid that rate for each and every hour of work, instead of the provisions of clauses 11.2(c), irrespective of the number of hours worked per day or per pay period or the days of the pay period on which work is performed.'

[496] The NFF and Canegrowers Mackay have subsequently advised the Commission of an issue in relation to the table of rates contained in clause 13.1. The NFF submitted that the inclusion of the column in the table of rates headed "Single contract hourly rate" has the effect of changing the minimum hourly rate for employees engaged on this basis so that it includes the 15% loading for all purposes.[257] The NFF submits that this is due to the operation of cl 13.2(b) which defines the minimum hourly rate for employees engaged.[258]

[497] The NFF proposes that the column in clause 13.1 headed "Single contract hourly rate" be deleted and that the proposed change to clause 13.2(a) be amended as follows:

> '**13.2 Single contract hourly rate**
>
> (a) Field sector employees may be engaged in writing on a single contact (sic) hourly rate basis and will be paid a 15% loading above the minimum hourly rate for each hour actually worked instead of the provisions of clauses 11.2(c), 25.1 and 25.2, irrespective of the number of hours worked per day or per pay period or the days of the pay period on which work is performed.'

[498] The NFF propose a new clause 13.2(d) be added as follows:

> 'To avoid doubt, the 15% loading payable under clause 13.2(a) does not apply to payment for public holiday and leave entitlements.'

[499] The AWU does not oppose an amendment to clarify that the 15% loading is not paid in addition to public holiday penalty rates and generally accept that the 15% loading would not currently be paid on periods of annual leave under the modern award or the NES. The AWU note however that any amendment made to the clause should be worded in a manner that does not purport to remove the entitlement for periods of long service leave.[259]

[500] We propose to amend the table of rates and insert a new clause 13.2(d). Parties are to provide any objections to this proposal and/or comments by **4.00pm Friday, 24 November 2017.**

Item 45 - Allowances

[501] The 15 January 2015 exposure draft queried whether a measurements of weight and height—appearing at clauses 16.1(f)(ii) and 16.1(r), respectively—could be rounded to simpler figures. The sub clauses provide as follows:

> '**(f) Carting and/or handling cement**
>
> (i) Employees engaged in carting and/or handling cement must be paid an allowance of $3.13 per day in addition to their ordinary wages whilst so engaged.
>
> (ii) This will not apply when quantities of less than 508 kg are carted or handled.
>
> …

(r) Height money

(i) Employees must be paid an allowance of $0.33 per hour when required to perform work at a height of between 15.24 and 22.86 metres above the ground or low water level or nearest horizontal plane.

(ii) Employees must be paid an allowance of $0.51 per hour when required to perform work at a height of more than 22.86 metres above the ground or low water level or nearest horizontal plane.'

[502] It appears that the figures have been converted from imperial measurements. 508 kg is equal to 80 stone, and 15.24 and 22.86 metres equal 50 and 75 feet, respectively. Similarly, the reference to 76.2 cm in clause 16.3(ee) appears to have been converted from 2 feet 6 inches.

[503] Whilst the parties are not opposed to the above measurements being rounded to a simpler measurement there was no agreement about how that rounding should occur. The Asbury DP report indicates that the union and employer parties are opposed to rounding that would disadvantage or advantage, respectively, employees.[260]

[504] We agree that the literal conversion from imperial to metric measurements are very specific and propose to round the figures, as follows: 510kg, 15 metres and 23 metres. Parties are to provide any objections to this proposal and/or comments by **4.00pm Friday, 24 November 2017.**

Item 47 - Hot work allowance

[505] Clause 16.1(t)(iv) provides that the 'hot work' allowance is payable 'instead of any other provision relating to hot work, unpleasant conditions, confined spaces repair work or dirty work; provided that the rates for wet, hot or noxious gas fumes confined space and repair work in this award will not be paid in addition'. The 15 January 2015 exposure draft stated that it appeared unclear what allowances are not payable when the hot work allowance is paid. Accordingly, parties were asked to specify which clauses they believed did not apply in these circumstances.

[506] The Asbury DP report notes that the parties do not wish to identify the allowances that do or not apply in addition to the hot work allowance.[261]

[507] We are of the view that the award should specify which allowances are and are not payable at any time. This matter will also be referred to a separately constituted Full Bench for further consideration.

Items 50, 62, 63, 64, 64A, 64B, 64C – Schedule D – Summary of Hourly Rates of Pay

[508] As with most exposure drafts, this exposure draft includes a schedule containing a summary of hourly rates of pay. The Employer parties seek the deletion of, or alternatively the simplification of, the tables. The Union parties seek to retain the schedule.

[509] If the Schedule is to be retained, there were a number of issues identified in relation to the Schedule as follows.

[510] The 15 January 2015 exposure draft sought clarification from the parties as to the effect clause 17.3(b) and (c) of that draft in respect of the hourly rates set out in Schedule D.2 (which are based on a 38 hour week).

[511] The parties advised that the hourly rates prescribed in Schedule D.2 are calculated on a 38 hourly divisor and the schedule does not contemplate those employees whose pay rates are calculated on a 36 or 40 hourly divisor (as provided for in clause 17.3(b) and (c) of the 15 January 2015 exposure draft; renumbered as 15.3(b) and (c) in the 3 June 2016 exposure draft). It was proposed by AiGroup that a clear notation should be inserted that the Schedule D.2 hourly rates do not necessarily apply.[262]

[512] The NFF submitted that the columns dealing with Saturday and Sunday overtime rates should be deleted or alternatively, amended to make clear that the rates only apply after 152 hours in 4 weeks has been exceeded (for example those contained in Schedule D1.2).[263] The AWU in reply assert that ordinary hours have to be fixed under clause 11.2(a) and hours in addition to these will be overtime, even if the 152 hours over a 4 week period has not been worked.[264]

[513] The AWU submitted that the column containing Monday to Friday rates in Schedule D.3.1 are incorrect and should be deleted. The AWU notes that the permanent employee rate for ordinary hours within this period is 100% and hours outside this span would be paid at the overtime rate of 200%.[265] The AWU submitted the same error is contained in Schedule D.3.4. The ASMC advised that it agrees with the AWU's view that the column is incorrect.

[514] The AWU submitted that Schedule D.3.2 should be amended to include in the heading a reference to shiftworkers, as the rates contained therein are only payable to shiftworkers.[266] The AWU submitted that the column heading "other than day shift" would be clearer if it read "continuous afternoon/night shift or no rotation to day shift" with a footnote to clause 26.5. The AWU submitted that this change would also be required for Schedule D.3.5.[267] The ASMC submitted that the added text for the Schedule should be "continuous shift worker".[268]

[515] The AWU submitted that the word "shiftworkers" should be deleted from Schedule D.3.3 as the overtime rates are payable to all employees in bulk terminals.[269]

[516] These matters will be referred to a separately constituted Full Bench.

Item 58A – Inconsistent terminology

[517] In line with their submissions regarding a number of exposure drafts, the Ai Group submitted that the exposure draft contains inconsistent terminology with regards to additional rates of pay such as penalty rates and loadings.[270] The Ai Group submitted that the exposure draft contains such an inconsistency in clauses 26 and 27.[271]

[518] This has been addressed in the first Group 3 decision. (See *[2017] FWCFB 3433* at [367]-[377]). It is also discussed further at [526] below.

Item 59 – Calculation of annual leave – bulk terminal operations

[519] The exposure draft published 15 January 2015 asked parties whether clause 27.6(c) required clarification. The note in the exposure draft stated that "[t]his provision appears to have been taken from AN140048 - *Bulk Terminals Award - State 2003*".

[520] The Asbury DP report noted that clause 27.6(c) deals with the ability for employees to convert additional travel days to superannuation contribution but noted that the current modern award does not provide for an entitlement to the additional travel days. The Asbury DP report noted that these additional travel days are found in enterprise agreements.

[521] The parties appeared to agree that the provision required clarification. The AWU submitted that the provision needs to be clarified with reference to the predecessor instrument.[272] Ai Group submitted that should the AWU submission be accepted, the Ai Group requested that the parties be given an opportunity to review and provide comments in respect of that change.

[522] We consider it is appropriate to delete clause 27.6(c) this will be reflected in the revised exposure draft.

Item 61 – Dispute resolution

[523] It was noted in the 15 January 2015 exposure draft that the wording of clause 35.6 differed from the standard wording for this type of clause, in that it refers to a direction that is 'safe and legal' for the employee to perform, instead of 'safe and appropriate'. Parties were asked whether the different wording should be maintained or replaced with the standard wording. The parties indicated that the existing wording should be retained.[273]

[524] We have been unable to find any explanation for this unique terminology. It was not discussed in Stage 3 of the award modernisation process, in either the statement or the decision.[274] We believe that, in order to avoid any ambiguity or uncertainty, the standard wording should be adopted.

Proposed variations which are not agreed and are substantive in nature

Item 17 and 34 – Piecework Rate

[525] In correspondence to the Commission of 2 March 2015, the FWO noted that there was uncertainty as to whether the casual loading applies to piecework rates and, if so, that there was further uncertainty as to its interaction with the 20% piecework loading.[275]

[526] The Report to the Full Bench notes that the employer parties seek to have the matter referred to the Casual Employment Full Bench (AM2014/197), and that the Union parties seek to have the issue addressed by this Full Bench. As the Casual Employment common issue is drawing to a close, with substantive hearings and deadlines for submissions having already passed, it is not possible to refer this issue to that Full Bench at this late stage.

[527] We agree that this matter warrants further consideration. It will be referred to a separate Full Bench for consideration.

Item 42 – Tool allowance

[528] The AMWU, in its submission of 2 February 2015, proposed the insertion of a tool allowance for apprentices employed under the Sugar award. The AMWU submitted that this could be achieved by either creating a separate entitlement for apprentices, or by making the current tool allowance—applying to tradespersons—applicable to apprentices.[276]

[529] The AMWU made a similar application during the 2012 Review, and pointed to a number of other modern awards containing tool allowances for apprentices. It also submitted that some pre-reform awards (that were forerunners to the current modern awards) provided for apprentices to receive a tool allowance.[277] This application was opposed by Ai Group.

[530] The application was refused by a Full Bench of the Commission, which commented that:

> 'Whilst we accept that the entitlement of apprentices to tool allowance was not the subject of any substantive consideration in the making of the modern award, it would seem that it also was not a matter of contention at the time between the parties. Although there was an entitlement under previous awards to tool allowance for some groups of apprentices now covered by the Sugar Award, it has not been demonstrated that the absence of such entitlement in the modern award means that the award is not operating effectively or fails to meet the modern awards objective. We are not persuaded on the limited material and submissions presented that the proposed variation should be made.'[278]

[531] In the matter currently before us, the AMWU has noted that it anticipates the issue being referred to a separately constituted Full Bench.[279]

[532] We agree that an evidentiary case would be required to determine whether a new allowance should be inserted in the award. If the AMWU intends to pursue the claim it will be referred to a separate Full Bench. The AMWU is asked to advise whether it will pursue the matter as per the "Next Steps" set out below at [593].

Next steps – Sugar Award

[533] A further updated summary of submissions was published on 10 October 2017. An amended exposure draft has been prepared and will be published following the issuing of this decision. The following issues have been noted previously in the decision and require further information from the interested parties before they can be finalised.

[534] As per [463] above, parties are invited to comment on the proposed amendment to clause 11.3(d). Submissions should address the intention of each clause and the circumstances where overtime rates are payable. Submissions are due by **4.00pm Friday, 24 November 2017.**

[535] As per [490] above, parties are invited to comment on the proposed amendment to clause 26.4. Submissions should address the following questions:

- Are there any interaction issues with clause 26.3(b), concerning ordinary hours of work and proposed extra weekend payments for continuous shift work for work on weekends which is within 'ordinary hours of work'?
- Would there be an extra payment for continuous shift workers working ordinary hours between midnight Friday and midnight Sunday?
- Would bulk sugar shift workers still be entitled to penalty rates for working afternoon and night shifts on weekends as per clause 26.5?
- How would 'all time worked up to 8 hours' interact with the ordinary hours of a shift worker in clause 26?
- Does the proposed 'minimum hourly rate' refer to that of a shift worker (with loading) or that of a permanent employee?
- Is there reason why bulk sugar terminals does not have equivalent entitlements to shift workers as sugar milling?

[536] Submissions addressing these points are due by **4.00pm Friday, 24 November 2017.**

[537] The AMWU is directed to advise whether it will pursue the claim to introduce a tool allowance for apprentices, by **4.00pm Friday, 24 November 2017.** If the claim is being pursued it will be referred to a separately constituted Full Bench for consideration.

2.14 Wine Industry Award 2010

[538] On 15 January 2016 the Commission published an exposure draft based on the *Wine Industry Award 2010*[280] (Wine Industry Award), together with a comparison document showing the changes to the structure and language of the award. Interested parties were invited to file submissions about drafting or technical issues in the exposure draft. Submissions were received from the AWU, United Voice, AFEI, the NFF, ABI, the Ai Group, the South Australian Wine Industry Association (SAWIA) and the FWO. A conference was held on 1 June 2016. With the exception of the FWO, it was attended by representatives of those organisations. Business SA also participated.

[539] Deputy President Clancy published a report to the Full Bench on 3 June 2016 that set out a number of the proposed variations to the exposure draft that were agreed, a number that were not agreed and a list of items from the submissions that would be the subject of further discussions between the interested parties. The report also noted that a number of items had been referred to separately constituted Full Benches of the Commission.[281]

[540] A further conference was held on 8 August 2016 to deal with the outstanding issues. A second report to the Full Bench was made by Deputy President Clancy on 25 August 2016. This indicated that the parties had reached agreement on some of the outstanding matters, while other matters remained outstanding. We deal with the outstanding matters below.

[541] The second report to the Full Bench outlined that the 8 August 2016 conference was attended by representatives of:

- AFEI;
- Ai Group;
- NFF;
- SAWIA;
- AWU; and
- United Voice.

[542] At the conference the parties discussed the exposure draft of the Wine Industry Award as published on 29 July 2016 and the Summary of Submissions dated 26 July 2016 completed by the Commission and worked through the items outlined in Attachments B and C of the Report to the Full Bench dated 3 June 2016. A further updated summary of submissions was published on 10 October 2017.

[543] A number of proposed variations were agreed to by the parties and are summarised in Attachment A to the Deputy President's first and second reports to the Full Bench. We do not propose to deal with each and every agreed item in this decision. The 37 items that are agreed will be incorporated into the exposure draft.

[544] Items 74 and 75 have been determined by a separately constituted Full Bench.[282]

[545] As to item 77, the parties expressed the view that a comparison of the definition of "wine industry" in the Wine Industry Award and the definition of "wine industry" in others should be undertaken by the Commission, including an assessment of any inconsistencies.

[546] The definition of 'wine industry' is identical in the *Wine Industry Award 2010* and the *Pastoral Award 2010*. We indicated in our consideration of this issue as it relates to the Horticulture Award, that we did not consider there would be any unintended substantive changes to Award coverage if we were to amend the relatively minor differences in the exposure draft for the Horticulture Award so that it matches the definition of 'wine industry' used in both the Wine Industry Award and the Pastoral Award. Further, we noted the other 'agricultural awards', comprising the *Aquaculture Industry Award 2010*, the *Seafood Processing Award 2010*, the *Silviculture Award 2010* and the *Sugar Industry Award 2010*, do not have a definition of 'wine industry'.

[547] A consistent definition of 'wine industry' will therefore be achieved through the amendment the exposure draft for the *Horticulture Award 2016* in the manner we have foreshadowed.

[548] A query was raised in relation to the wording of the exposure draft for the Wine Industry Award 2015, as published on 29 July 2016 and the extent to which it reflected agreed positions in relation to items 15 and 16.

[549] As to item 15, the parties submitted that in previous discussions wording for Clause 6.5(a) was agreed, such that the exposure draft of the Wine Industry Award 2015, as published on 29 July 2016, should be amended to read "A casual employee is an employee who is engaged and paid as a casual employee".

[550] As to item 16, the parties submitted that there is agreement for the insertion of words at the start of Clause 6.5(a), such that the exposure draft of the Wine Industry Award 2015, as

published on 29 July 2016, should be amended to read "*Except in the case of pieceworkers, for each ordinary hour worked, a casual employee must be paid…".*

[551] The amendments to the exposure draft set out at paras [549]–[549] above (items 15 and 16) will be made to the exposure draft.

[552] The December directions requested parties to file comments on the further revised summary of submissions document and the revised exposure draft (both published on 29 July 2016). Parties were to identify which technical and drafting clams were being pursued and whether any party still contends that a clause in the revised exposure draft has a different legal effect to the current modern award.

[553] The directions noted that the Full Bench would determine the matter on the basis of the material filed without an oral hearing unless a hearing is requested by a party. No such request was received.

[554] We deal with the outstanding issues below.

Item 31 – Daylight savings

[555] The interested parties previously indicated that they may benefit from further discussions about the AWU's proposal to vary clause 8.7. No further update has been provided to the Full bench about the status of these discussions. Interested parties have until **4.00pm Friday, 24 November 2017** to confirm whether this variation is being pursued and whether any agreement has been reached.

Item 35 – Working through meal break

[556] In the 25 August 2016 report Deputy President Clancy noted that while the wording for Clause 9.3(a) of the exposure draft is agreed, the wording of Clause 9.4 of the exposure is not yet agreed. The Deputy President noted at that time that the issue arising under Clause 9.4 was that the SAWIA and the Ai Group supported the wording in the exposure draft, the AWU and NUW submitted the loading should be applied to the rate then applying to the employee and the NFF and AFEI did not consider the loading to be a cumulative loading.

[557] In response to the December directions, United Voice filed submissions dated 20 January 2017 in support of its claim. It firstly outlined that clause 29.4 of the current award provides:

> 'An employee not given a meal break in accordance with clauses 29.1, 29.2 and 29.3 must be paid from then on a loading of 50% until the meal break is given.'

[558] For purposes of context, United Voice also outlined:

- Clause 29.1, which provides that a day worker must not be required to work more than 5 hours without an unpaid meal break;
- Clause 29.2, which provides that a shift worker must not be required to work for more than 4 and a half hours without a paid meal break; and

- Clause 29.3, which provides that an employee required to work more than 2 hours overtime must be given a paid meal break prior to the commencement of the overtime and after each 4 hours of overtime worked thereafter.

[559] United Voice noted that clause 29.4 provides that if, in any of the above circumstances, the meal break is not provided, a loading of 50% is given and submitted that the 50% is applied to the hourly rate applying to the employee (not the minimum hourly rate). United Voice submitted that clause 29.4 of the current award does not specify the rate by reference to which the loading is calculated, leaving the rate to be determined by the circumstances, depending on whether it is day work, shift work or overtime after the initial two hours of overtime. It submits this construction is supported by the final sentence of clause 29.3, which provides that meal breaks prior to commencing and during overtime must be paid 'at the rate then applying' and envisages the rate will differ according to circumstances.

[560] Clause 9.4 of the exposure draft provides:

> **9.4 Working through meal break**
>
> An employee not given a meal break in accordance with clauses 9.1, 9.2 and 9.3 must be paid from then on with an additional loading of 50% of the minimum hourly rate until the meal break is given.

[561] The 'minimum hourly rate' for each classification is set out in clause 10.1 of the exposure draft. United Voice submit it is clear that the minimum hourly rate is the hourly rate for day workers performing work in the span of ordinary hours (between 6.00 am and 6.00 pm Monday to Friday) and therefore, the legal effect of clause 9.4 is to provide an additional loading of 50% of the day worker ordinary hourly rate. United Voice submits the effect of the adoption of the concept of 'minimum hourly rate' is to reduce the payment to which the employee will be entitled in the relevant circumstances below that to which they are currently entitled and such a reduction is not appropriate in the absence of a substantive case.

[562] United Voice also made submissions regarding the development of these provisions through the Award Modernisation process and contended the Commission clearly intended that different rates would be used to calculate the 50% loading where a meal break was not provided, according to the circumstances. For these reasons, United Voice submitted clause 9.4 of the exposure draft should be amended by deleting the words 'of the minimum hourly rate' or in the alternative, these words should be replaced by 'of the rate applying to the employee'.

[563] As outlined in its submissions dated 3 February 2017, the Ai Group opposes United Voice's position in relation to Item 35. It submits the United Voice claim does not contain any limitations as to what the applicable rate would be and it would arguably include over-award payments as well as shift loadings, penalties and other amounts applicable under the current award. In this regard, it cited the Full Bench decision from early in the Review:

> '[96] Modern awards provide a safety net of minimum entitlements. The modern award prescribes the minimum rate an employer must pay an employee in given circumstances. Overaward payments, while permissible, are not mandatory. Further, if an employer chooses to

> pay an employee more than the minimum amount payable for ordinary hours worked, the employer is not required to use that higher rate when calculating penalties and loadings.'[283]

[564] More specifically, they oppose the contention that the 50% loading given to an employee working through a meal break under clause 29.4 of the Wine Award is calculated by reference to the rate applicable to the employee at the time the break is not provided.[284] Ai Group contend that United Voice's claim does not contain any limitations as to what that applicable rate would be and arguably includes over-award payments as well as shift loadings, penalties and other amounts applicable under the award. It submits the loading in clause 9.4 of the exposure draft should not apply to over-award payments but only to minimum rates prescribed by the award of the NES, disputed the United Voice interpretation of the Award Modernisation process and contended there is no reason why it should be assumed that a consistent approach should be adopted within clauses 29.3 and 29.4 of the current award because they deal with different circumstances. The Ai Group also cited the conditions prevailing in the *Horticulture Award 2010* and submitted the applicable loading should be applied to the same rate under both awards.

[565] The SAWIA and NFF both oppose the United Voice position, essentially contending that payment based on the minimum hourly rate is sufficient to meet the modern awards objective of a 'fair and relevant safety net of terms and conditions' of employment.

[566] There are no similar provisions to clauses 29.1 - 29.4 in the current award or 9.1 - 9.4 in the exposure draft in either the *Horticulture Award 2010* or the *Silviculture Award 2010.* We consider that clause 29.4 of the current award clearly contemplates that employees may work through their meal break during day work, shift work or overtime and that employees coming within the operation of clauses 29.1 – 29.3 are required to be paid the applicable day, shift or overtime rates. As such, we are satisfied that clause 29.4 of the current award requires the loading of 50% to be applied to the pay rate applying to the worker at the time. The wording of clause 9.4 of the exposure draft would alter this situation and as such, we will amend it so that it reads:

> **9.4 Working through meal break**
>
> An employee not given a meal break in accordance with clauses 9.1, 9.2 and 9.3 must be paid from then on at **150%** of the rate of pay applying immediately before the meal break was due until the meal break is given.

Item 49 – Allowances – boilers and flues

[567] Clause 16.2(d) of the exposure draft provides that an employee engaged in washing out and chipping boilers or in cleaning flues must be paid 150% of the minimum hourly rate while they are engaged in such work.

[568] In the 25 August 2016 report, Deputy President Clancy noted that SAWIA, AFEI and AiGroup support the wording in sub-clause 16.2(d) of the exposure draft, although the SAWIA also advised that its members consider this sub-clause redundant because they no longer engage in the work it provides for. The AWU submitted the loading should be applied to the rate then applying to the employee and while the NUW supported this position, it also indicated a belief that the work the sub-clause provides for is not very extensive. The NFF

does not consider the loading to be a cumulative loading but does not hold a strong view about the sub-clause. The Ai Group again submitted the Full Bench has held in the Review that award-derived penalties and loadings should not be applied to over-award payments.[285]

[569] The corresponding clause in the modern award is clause 24.6(a) which provides that an employee engaged in the relevant work must be paid 50% extra while engaged in that work. United Voice contends that the clear legal effect of this clause is that an employee performing the relevant work is entitled to an additional 50% of the rate then applying to the employee in the circumstances of the work. Therefore, where the employee is a day worker working Saturday or Sunday, or a shift worker, or a casual employee, the employee is entitled to an additional 50% of the rate then applying to the employee. United Voice submits clause 16.2(d) of the exposure draft would reduce the entitlement for workers other than day workers working within the span of ordinary hours.

[570] We consider that clause 26.4(a) of the current award requires the loading of 50% to be applied to the pay rate applying to the worker while they are engaged in washing out and chipping boilers or in cleaning flues. The wording of clause 16.2(d) of the exposure draft would alter this situation without a substantive case for change having been made. As such, we will amend clause 16.2(d) of the exposure draft it so that it reads:

> **(d) Boilers and flues**
>
> An employee engaged in washing out and chipping boilers or in cleaning flues must be paid 150% of the hourly rate applying while they are engaged in such work.

Item 53 – Overtime claim

[571] This substantive claim regarding overtime is not agreed and the parties have previously taken the view that resolution of it depends on the outcomes in the Casual and Part-time employment Common issue proceedings.

[572] With the finalisation of the casual and part-time employment common issue proceedings, parties are requested to write to the Commission by **4.00pm Friday, 24 November 2017** to indicate whether they wish to pursue this item. If so, a separately constituted Full Bench may be allocated the matter.

Item 62 – Public holidays

[573] In respect of item 62, clause 24.3(a)(i) of the exposure draft provides that where a full time employee's rostered day off falls on a public holiday, then the employee is entitled to 7.6 hours of pay at the minimum hourly rate. For the reasons set out above, the legal effect of this provision is that the employee is entitled to 7.6 hours of pay at the rate for a day worker working ordinary hours during the span of ordinary hours. The corresponding clause in the current award is clause 34.3(a)(i). It provides that in the same circumstances, an employee is entitled to 7.6 hours of pay at the ordinary time rate. United Voice contends that the phrase "ordinary time rate" means the ordinary time rate for that employee. That is, where the employee is a shift worker, the ordinary time rate is the rate inclusive of the shift penalty.

[574] The issue relating to this sub-clause has also arisen in the *Manufacturing and Associated Industries and Occupations Award 2010* (Manufacturing Award). The resolution of it may depend on the outcome in the Manufacturing Award. The parties previously agreed that further discussions may resolve the issue once the position in the Manufacturing Award becomes clearer. The Full Bench has now delivered its decision in relation to the Manufacturing Award[286] dealing with this issue and determined in that case, the payment option should be 7.6 hours of pay at the ordinary hourly rate, as opposed to 7.6 hours of pay at the applicable rate of pay.[287] With the finalisation of the issue in relation to the Manufacturing Award, parties are requested to write to the Commission by **4.00pm Friday, 24 November 2017** to indicate whether they wish to pursue this item and whether they consider further discussions may resolve the issue.

Items 71 and Item 72 – overtime for casual employees (table B.2.3)

[575] Table B.2.3 of the exposure draft outlines overtime rates for casual adult employees. The second report to the Full Bench by Deputy President Clancy indicated that these rates were agreed by the NUW and the NFF and were not opposed by the Ai Group, AFEI and Business SA. The Deputy President's report outlined that responses regarding the rates were still required from the AWU and the SAWIA. The SAWIA wrote to Vice President Hatcher on 8 August 2016 confirming that the table in B.2.3 of the exposure draft correctly sets out overtime rates for casual employees.[288] The AWU submit at para 2 of their submission dated 18 January 2017 that they endorse the table. [289]

[576] No further action is required in respect of these items.

[577] As noted in the report to the Full Bench of 3 June 2016, items 41, 47, 48, 51, 61, 63, 64, 66, 67, 68, 69 and 76 have been referred to separately constituted Full Benches.

[578] There are no other outstanding items for this Full Bench to determine for the Wine Industry award.

3. Other matters

Provisional views in previous decision

[579] In the *July 2017 decision*, we expressed provisional views in relation to a number of matters including:

- Placement of the definitions clause
- Hourly rates of pay schedules
- Minimum hourly rates and percentages of ordinary hourly rates in the hourly rates of pay schedules
- Occupational health and safety references

[580] A number of submissions were received about these "other matters" following the *July 2017 decision*. The issues concern the use of consistent expressions, and the sequencing of clauses, across all modern awards. In our view these matters are more appropriately

determined by the Plain Language Full Bench and the President has referred them to that Full Bench.

References to "allowances", "rates", or "loadings" as opposed to "shift penalties"

[581] Ai Group raised concerns about the various ways that penalty rates are referred within exposure drafts.[290] Ai Group's position is that where an award provides that a shiftworker be paid 15% extra, that rate can be referred to as a "loading" or an "allowance" but not as a "penalty rate". Where an award provides that a shiftworker be paid 115% of the ordinary hourly rate, this rate may be referred to as a "penalty rate" but not a "loading or an allowance". We note that in most exposure drafts we have adopted the second approach referred to by Ai Group with the majority of the exposure drafts having penalty rates expressed a percentage of the ordinary or minimum hourly rate for example "115% of the ordinary hourly rate".

[582] This issue will also be referred to the Plain Language Full Bench.

Annual leave loading

[583] Ai Group contend that this terminology is particularly problematic in annual leave clauses that provide that an employee be paid the higher of the annual leave loading or the "shift loading".[291] Ai Group submits that the way some exposure drafts are worded could be interpreted as an employee on annual leave is to be paid the higher of 17.5% or a shift loading of, for example 130%. The Ai Group further submits that this could lead to some shiftworkers being paid 230% while on annual leave.

[584] We have identified that, of the 112 modern awards that make provision for annual leave loading, 55 awards contain a reference to an employee being paid the higher of the annual leave loading or a shift "loading" or an "allowance". An example of the type of wording that may cause the issue as raised by the Ai Group is contained in the exposure draft of the *Contract Call Centres Award 2010*[292] (Call Centres Award):

> **(b)** Provided that where an employee would have received loadings, in accordance with clause 13—Penalty rates, had the employee not been on leave during the relevant period and such loadings would have entitled the employee to a greater amount than the loading of **17.5%**, then the employee will be paid such greater amount instead of the **17.5%** loading.

[585] An extract of clause 13 of the exposure draft of the Call Centres Award is as follows:

> **13.2 Shiftwork penalties**
>
> **(a)** The shift penalties in this clause apply only to time worked on afternoon or night shift by employees who are designated by the employer as shiftworkers, in respect of the relevant roster period or shift.
>
> **(b)** Subject to clause 13.2(a):
>
> **(i)** employees on an afternoon shift will be paid 115% of the minimum hourly rate; and

(ii) except as provided for in clause 13.2(c), employees on a night shift will be paid **115%** of the minimum hourly rate.

(c) Subject to clause 13.2(a), an employee who:

(i) during a period of engagement on shiftwork, works night shift only;

(ii) remains on night shift for a longer period than four consecutive weeks; or

(iii) works on a night shift which does not rotate or alternate with afternoon shift or with day work so as to give the employee at least one third of the working time off night shift in each shift cycle,

will be paid **130%** of the minimum hourly rate for time worked on such night shift. This penalty is in substitution for and not cumulative upon the night shift penalty prescribed in clause 13.2(b)(ii).

[586] The exposure drafts that we have identified that may have issues with the interaction between the penalty rates clause and annual leave loading are listed in Attachment B. In our view, these exposure drafts may be ambiguous because the annual leave loading clause isolates the loading component of the shiftwork provision and compares it to annual leave loading. As the redrafted penalty rates clause no longer identifies the loading component of the shiftwork penalty separately, the annual leave loading clause is not comparing like with like.

[587] There are also a number of exposure drafts that make provision for employees on annual leave to be paid at the higher of the annual leave loading or their shift loading but that are expressed in a manner that does not appear to be problematic. We have included a list of these exposure drafts at Attachment C.

[588] One example of an exposure draft that contains wording that does not appear to be problematic is the *Ports, Harbours and Enclosed Water Vessels Award 2010*[293] (Ports Award):

14.2 Annual leave loading

A loading of **17.5%** (**20%** for shiftworkers) is payable in addition to the payment for the leave.

[589] The wording in the Ports Award does not appear to be problematic as it identifies the loading component of the shiftwork provision and compares it to the annual leave loading.

[590] Another example of wording that we say is not problematic is contained in the exposure draft of the *Airline Operations-Ground Staff Award 2010* (Airline Operations Award):

25.5 Annual leave loading

(a) Each employee before going on leave must be paid:

(i) in the case of day workers—the employee's ordinary rate of pay for the period of annual leave plus a holiday loading of **17.5%**.

(ii) in the case of shiftworkers—the greater of:

- the amount which the employee would have received had the employee worked their actual roster during the period of leave, excluding overtime and public holiday penalty payments; or
- the employee's ordinary time rate of pay for the ordinary hours the employee would have worked on the roster plus a loading of 17.5%.

[591] As the issues identified are not confined to the Group 3 awards they will be referred to the Plain Language Full Bench for determination.

Other references in exposure drafts

[592] We expressed a view in the July 2017 Decision that a consistent approach to the references to shift penalties is appropriate. We believe, as a general proposition, that where an award no longer contains separately identified shiftwork loadings, that it is desirable for penalty rates to be referred to as "penalty rates", "shiftwork penalties" "shift penalties" or "shift rates". There may, however, be instances where it is appropriate in the context of a particular provision to refer to a separately identified penalty "loading" or "allowance". As this issue is not confined to the Group 3 awards it will also be referred to the Plain Language Full Bench for determination.

4. Next steps

[593] Submissions are to be emailed to amod@fwc.gov.au by the date specified in each section above.

PRESIDENT

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<Price code J, PR597094>

[1] [2015] FWCFB 3023

[2] [2016] FWC 4756

[3] MA000002

[4] [2016] FWCFB 5621 at para [14]

[5] [2016] FWCFB 7967

[6] Transcript, 15 September 2017

[7] MA000085

[8] See Statement [2016] FWC 1838 (attaching Amended Directions)

[9] MUA, submission – exposure draft, 14 April 2016

[10] AWU, submission – exposure draft, 18 April 2016

[11] Transcript, 6 June 2016

[12] Transcript, 4 August 2016

[13] [2016] FWC 7768

[14] Transcript, 4 August 2016 at PN16–329

[15] AWU submission – exposure draft, 18 April 2016 at para 8

[16] *Dredging International Contract Dredging (Non-Propelled Dredges, AWU) Enterprise Agreement 2012* (AE898287); *Great Lakes Contract Dredging (Non-Propelled Dredges, AWU) Greenfields Agreement 2013* (AE400157); *Van Oord Australia Contract Dredging (Non- Propelled Dredges) AWU Enterprise Agreement 2011* (AE897529)

[17] MA000010

[18] MA000026

[19] [2017] FWCFB 3135

[20] AP778702; AP788027; AP787991

[21] AWU submission, 18 April 2016 at para 10

[22] MA000045, at clause 16

[23] Transcript, 4 August 2016 at PN52–PN93

[24] Transcript, 4 August 2016 at PN94–PN134

[25] FWO correspondence, 2 March 2015

[26] Dredging Award exposure draft, 15 January 2016

[27] MUA submission, 9 April 2016, citing AP787991

[28] MUA submission – exposure draft, 14 April 2016 at para 5

[29] AWU, submission – exposure draft, 18 April 2016 at para 20

[30] Fair Work Commission, correspondence, 7 October 2016

[31] MUA, submission – aggregate wage calculation, 17 October 2016

[32] AWU submission – exposure draft, 18 April 2016 at para 21

[33] Research regarding item 13 of submission summary, published 8 November 2016

[34] AWU, submission – exposure draft, 18 April 2016 at para 25

[35] Transcript, 4 August 2016 at PN163–PN184

[36] Listed in Attachment B of [2017] FWCFB 3433

[37] AWU, submission – exposure draft, 18 April 2016 at para 27

[38] Transcript, 4 August 2016 at PN216–PN228

[39] AWU, submission – exposure draft, 18 April 2016 at para 27

[40] AWU, submission – exposure draft, 18 April 2016 at para 29

[41] MA000078

[42] MA000092

[43] AWU, Form F46 – application to vary a modern award, 8 March 2012

[44] Transcript, 4 August 2016 at PN245 –PN262

[45] [2013] FWCFB 6266, at para [108]

[46] [2013] FWCFB 6266, at para [220]
[47] AP778702; AP788027; AP787991
[48] AWU submission, 15 February 2013
[49] AWU submission, 15 February 2013
[50] MA000051
[51] MA000122
[52] MA000086
[53] MUA submission, 14 April 2016 at para 10
[54] AWU submission in reply, 5 May 2016 at para 9
[55] Transcript, 4 August 2016 at PN263 –PN266
[56] AWU, submission – exposure draft, 18 April 2016 at para 22
[57] MA000075
[58] Transcript, 10 May 2016
[59] [2015] FWC 7253
[60] NTEU, submission, 8 June 2016
[61] NTEU, submission, 8 June 2016
[62] Go8, submission, 10 June 2016
[63] NTEU, submission, 8 June 2016
[64] Go8, submission, 10 June 2016
[65] [2017] FWCFB 3433
[66] [2017] FWCFB 3433 at PN57 and PN62
[67] NTEU, submission, 28 July 2017
[68] MA000076
[69] [2015] FWC 7253
[70] PR575283
[71] Transcript, 7 June 2016 at PN137-139
[72] Transcript, 7 June 2016 at PN137-139
[73] AIS and IEU, submission, 14 April 2016 at para 6
[74] AFEI, submission in reply, 9 May 2016 at para 28
[75] Transcript, 7 June 2016 at PN81 – PN88
[76] AIS and IEU, submission, 14 April 2017 at para 9
[77] AFEI, submission in reply, 9 May 2016 at para 29
[78] ABI and NSWBC, submission, 15 April 2016 at para 15.2
[79] AIS and IEU, reply submission, 5 May 2016 at para 13
[80] AFEI, submission in reply, 6 May 2016 at para 30
[81] AFEI, submission – exposure draft, 15 April 2016 at para 14
[82] AFEI, submission – exposure draft, 15 April 2016 at para 15
[83] AFEI, submission, 15 April 2016 at paras 14-16
[84] AIS and IEU, submission in reply 5 May 2016 at para 4
[85] MA000094
[86] ASSA, submission, 4 August 2016 at pp. 1-2; ASSA, submission, 20 January 2017 at para 8.2.4
[87] GA, submission, 10 January 2017 at para 5
[88] ASSA, submission, 20 January 2017 at para 4
[89] ASSA, submission, 20 January 2017 at para 8.2.4
[90] ASSA, submission, 20 January 2017 at para 8.2.4

[91] P1748 V001 M Print T3721, 24 Nov 2000, at p.2

[92] ASSA, submission, 22 December 2016 at p.2 and p.6

[93] ASSA, submission, 22 December 2016 at p.5

[94] ASSA, submission, 7 March 2016 at pp.1-2

[95] BusSA reply submission, 6 May 2016 at para 6.1; ABI&NSWBC reply submission, 6 May 2016 at para 8.5; FA submission, 26 May 2016 at para 2.10

[96] ASSA, submission, 4 August 2016 at p.2

[97] ASSA, submission, 4 August 2016 at p.2

[98] AM2016/15 – Plain language re-drafting

[99] [2017] FWCFB 5258

[100] [2017] FWCFB 5367

[101] ASSA, submission, 22 December 2016 at p.6

[102] MA000101

[103] [2017] FWCFB 3433, at Attachment B

[104] AWU correspondence, 9 August 2016

[105] MA000028

[106] [2013] FWC 9543 at [66]

[107] Business SA, submission in reply, 6 May 2016 at 8.3

[108] VOH, submission in reply – exposure drafts, 5 May 2016 at pp 2–3

[109] Ai Group, submission – exposure drafts at para 319; also see Transcript, 8 August 2016 at PN560–570

[110] [2015] FWCFB 4658

[111] Transcript, 8 August 2016 at PN558

[112] Transcript, 8 August 2016 at PN576

[113] Transcript, 8 August 2016 at PN574

[114] Transcript, 8 August 2016 at PN574

[115] [2015] FWCFB 4658

[116] Transcript, 8 August 2016 at PN572

[117] Transcript, 8 August 2016 at PN572

[118] [2015] FWCFB 4658 at paras 42–43

[119] Ai Group, submission – exposure drafts, at para 320–321

[120] Business SA, submission in reply – exposure drafts at 8.3

[121] VOH, submission in reply – exposure draft at p 3

[122] Transcript, 8 August 2016 at PN577–581

[123] [2015] FWCFB 4658 at paras 69–70

[124] [2015] FWCFB 6656 at paras 107–110

[125] Ai Group, submission – exposure drafts, 14 April 2016 at paras 327–328

[126] Transcript, 8 August 2016 at PN614

[127] Transcript, 8 August 2016 at PN618–620

[128] [2008] AIRCFB 1000

[129] Ai Group, submission – general issues arising from exposure drafts, 31 August 2016 at para 5

[130] FWO, correspondence, 2 March 2015 at item 19

[131] Transcript, 8 August 2016 at PN583–587

[132] Transcript, 8 August 2016 at PN589

[133] Transcript, 8 August 2016 at PN591

[134] NFF, further submission – exposure draft, 15 August 2016

[135] See discussion in Transcript, 8 August 2016 at PN 673–681

[136] Transcript, 8 August 2016 at PN624

[137] Ai Group, submission – exposure draft, 14 April 2016 at para 329

[138] AWU, submission – exposure draft, 17 April 2016 at para 9

[139] Transcript, 8 August 2016 at PN622–626

[140] AWU, submission – exposure draft, 17 April 2016 at para 10

[141] Business SA, submission in reply – exposure draft, 6 May 2016 at 8.11

[142] NFF, submission in reply – exposure draft, 5 May 2016 at 21

[143] Ai Group, submission in reply – exposure drafts, 8 May 2016 at para 165

[144] Ai Group, submission in reply – exposure drafts, 8 May 2016 at paras 166–168

[145] NFF, submission – pieceworkers, 5 August 2016

[146] NFF, submission – pieceworkers, 5 August 2016

[147] Transcript, 8 August 2016 at PN 638

[148] Ai Group, correspondence – outstanding issues, 24 August 2016

[149] Ai Group, correspondence – outstanding issues, 24 August 2016

[150] Transcript, 8 August 2016 at PN 640–646

[151] ASU, submission, 20 December 2016

[152] *Clerks – Private Sector Award 2010* - clause 26.2(a)

[153] Law firms submission, 29 August 2016

[154] MA000033

[155] [2017] FWCFB 3541

[156] Ai Group submission, 31 August 2016 at paras 5 & 6

[157] Potential inconsistencies between the General Employment Conditions and streams, 6 October 2016

[158] AWU, submission in reply - exposure draft, 23 November 2016, at paras 71–72

[159] [2017] FWCFB 3433 at [141] – [147]

[160] Notice of Listing – issued 14 July 2017

[161] Statement [2017] FWC 3883 at [4]

[162] Ibid

[163] AWU submission – exposure draft, 17 April 2016 at 13

[164] [2017] FWCFB 3433 at [178]

[165] NFF submission – first aid allowance, 4 August 2017

[166] SCAA submission – group 3 decision – first aid allowance, 4 August 2017 at 1(i)

[167] Ibid at 1(ii)

[168] Business SA submission – group 3 decision – all purpose allowances – occupational health and safety – Pastoral Award, 4 August 2017 at 2.2-2.3

[169] ABI and NSWBC – submission – group 3 decision – revised exposure draft – first aid and meal allowances, 15 August 2017 at 6

[170] Ibid at 7

[171] Ibid at 9

[172] NFF submission – outstanding claims, 26 October 2016 at para 40

[173] NFF submission – outstanding claims, 26 October 2016 at para 42

[174] [2017] FWCFB 3433 at [206]-[207

[175] AWU submission in reply – exposure draft, 23 November 2016 at para 12

[176] [2017] FWCFB 3433 at [210]

[177] NFF and AWU joint paper – exposure draft – rates schedules, 31 July 2017

[178] NFF and AWU joint paper – exposure draft – rates schedules, 31 July 2017 page 2

[179] AWU submission – exposure draft, 17 April 2016 at 48

[180] [2017] FWCFB 3433 at [277]

[181] AWU submission, 26 July 2017

[182] [2017] FWCFB 3433

[183] AWU, submission in reply - exposure draft, 23 November 2016, at paras 66–68

[184] AWU, submission in reply - exposure draft, 23 November 2016, at paras 75–79

[185] AWU, submission in reply - exposure draft, 23 November 2016, at para 24

[186] AWU, submission - exposure draft, 17 April 2016, at para 28

[187] AWU, submission in reply - exposure draft, 23 November 2016, at para 26

[188] AWU, submission - exposure draft, 17 April 2016, at para 29

[189] NFF, submission - outstanding claims, 26 October 2016, at para 44; and AWU, submission in reply - exposure draft, 23 November 2016, at para 23

[190] NFF, submission - outstanding claims, 26 October 2016, at para 44

[191] NFF, submission - outstanding claims, 26 October 2016, at para 45

[192] AWU, submission - exposure draft, 17 April 2016, at para 31; and AWU, submission in reply - exposure draft, 23 November 2016, at para 27

[193] AWU, submission - exposure draft, 17 April 2016, at para 31

[194] AWU, submission - exposure draft, 17 April 2016, at para 30

[195] AWU, submission - exposure draft, 17 April 2016, at para 30

[196] AWU, submission - exposure draft, 17 April 2016, at para 31

[197] ABI, submission in reply - exposure drafts, 6 May 2016, at para 19.5

[198] AWU, submission - exposure draft, 17 April 2016, at paras 50 and 52

[199] AWU, submission - exposure draft, 17 April 2016, at paras 50 and 52

[200] MA000040

[201] NFF submission, 9 June 2016, para 13

[202] Transcript, 8 August 2016, PN39

[203] Transcript, 8 August 2016, PN40

[204] AWU submission, 18 January 2017, at para 3.3

[205] NFF submission, 9 June 2017, at para 22

[206] AN170096. Part V, cl 2

[207] AWU submission, 17 April 2016, at para 11

[208] NFF submission, 9 June 2016, at para 23

[209] Transcript, 8 August 2016, PN114-PN117

[210] NFF submission, 7 February 2017, at para 19

[211] NFF submission, 9 June 2016, at para 24

[212] AWU submission, 17 April 2016, at para 14

[213] NFF submission, 20 January 2017, para 12

[214] AWU submission, 9 February 2017, para 3

[215] NFF submission, 9 June 2016, para 35

[216] AN170096, Part IV, clause 1(f)

[217] NFF submission, 20 January 2017 , at para 22

[218] AWU submission, 17 April 2016, at para 18

[219] AN170096, Part III clause 6(c)

[220] AN170096, Part VII clause 1

[221] [2008] AIRCFB 717 at para [19]

[222] AWU submission, 17 April 2016, at para 22

[223] NFF submission, 20 January 2017 , at paras 43 - 45
[224] NFF submission, 7 February 2017, at para 31
[225] NFF submission, 7 February 2017, at para 31
[226] AN170096, Part V clause 6(h)
[227] NFF submission, 7 February 2017, at para 33
[228] [2008] AIRCFB 1000, at para [95]
[229] AWU submission, 17 April 2016, at para 26
[230] AWU submission, 9 February 2017, para 4, subpara 1.3
[231] AN170096, Part V clause 7
[232] T8584
[233] [2017] FWCFB 3433, at para [351]
[234] [2017] FWCFB 3433, at para [339]
[235] MA000082
[236] Report to Full Bench, 3 June 2016
[237] NFF submission, 14 April 2016, para 18
[238] [2014] FWCFB 9412 at [29]
[239] Report to Full Bench, 3 June 2016 at Annexure C
[240] NFF Submission, 14 April 2016 at para 26
[241] AMWU submission in reply, 5 May 2016 at page 3
[242] Ai Group submission in reply, 5 May 2016 at paras 284–285
[243] AWU submission, 21 July 2016 at paras 24–25
[244] NFF submission, 14 April 2016 at paras 27–28
[245] [2014] FWCFB 9412 at [37]–[43]
[246] NFF submission, 14 April 2016 at paras 36–38
[247] Report to Full Bench, 3 June 2016 at Annexure B
[248] VOCEDplus, accessed 11 January 2017
[249] Scseec, accessed 11 January 2017
[250] FWO correspondence, 2 March 2015, item 36
[251] AWU submissions, 21 July 2016 para 12
[252] AWU submissions, 21 July 2016 para 11-13
[253] AWU submission, 17 April 2016 at para 33
[254] AWU submission, 21 July 2016 at para 3
[255] AWU submission, 21 July 2016 at para 7
[256] ASMC submission, 5 August 2016
[257] NFF submission, 8 July 2016
[258] NFF submission, 8 July 2016
[259] AWU submissions, 21 July 2016, para 18–21
[260] Report to Full Bench, 3 June 2016 at Annexure C
[261] Report to Full Bench, 3 June 2016 at Annexure C
[262] Ai Group submission, 14 April 2016, para 438
[263] NFF Submissions, 14 April 2016, para 44-45
[264] AWU submissions in reply, 6 May 2016, paras 24-25
[265] AWU submissions, 21 July 2016, paras 26-29
[266] AWU submissions, 21 July 2016, para 30
[267] AWU submissions, 21 July 2016, para 31

[268] ASMC submission, 5 August 2016

[269] AWU submissions, 21 July 2016, para 32

[270] Ai Group submission, 31 August 2016 at para 9

[271] Ai Group submission, 31 August 2016 at para 42

[272] AWU submission, 17 April 2016, para 36

[273] Report to Full Bench, 3 June 2016 at Annexure C

[274] [2009] AIRCFB 100 and [2009] AIRCFB 826

[275] FWO submission, 2 March 2015 at page 11

[276] AMWU submissions, 2 March 2015 at para 3

[277] [2013] FWCFB 9295 at [14]–[16]

[278] [2013] FWCFB 9295 at [17]

[279] AMWU submission, 22 July 2016 at para 5

[280] MA000090

[281] Items 41, 47, 48, 51, 61, 63, 64, 66, 67, 68, 69 and 76 have been referred to separately constituted Full Benches of the Commission

[282] [2017] FWCFB 4174

[283] [2015] FWCFB 4658 at [96]

[284] Ai Group submission, 3 February 2017, at para 4

[285] Ai Group submission, 3 February 2017 at para 38

[286] [2017] FWCFB 3177

[287] Ibid at [76]-[78]

[288] SAWIA submission, 5 August 2016

[289] AWU submission, 18 January 2017

[290] Ai Group submission, 31 August 2016

[291] Ai Group submission, 31 August 2016, para 10

[292] MA000023

[293] MA000052

ATTACHMENT A—List of Group 3 awards by subgroup

Award code	Award title	Matter No.
Sub-group 3A		
MA000019	*Banking, Finance and Insurance Award 2010*	AM2014/217
MA000021	*Business Equipment Award 2010*	AM2014/218
MA000002	*Clerks Private Sector Award 2010*	AM2014/219
MA000083	*Commercial Sales Award 2010*	AM2014/221
MA000023	*Contract Call Centres Award 2010*	AM2014/222
MA000094	*Fitness Industry Award 2010*	AM2014/227
MA000099	*Labour Market Assistance Industry Award 2010*	AM2014/232
MA000116	*Legal Services Award 2010*	AM2014/233
MA000030	*Market and Social Research Award 2010*	AM2014/236
MA000104	*Miscellaneous Award 2010*	AM2014/237
MA000106	*Real Estate Industry 2010*	AM2014/242
MA000082	*Sporting Organisations Award 2010*	AM2014/245
MA000041	*Telecommunications Services Award 2010*	AM2014/248
Sub-group 3B		
MA000075	*Educational Services (Post-Secondary Education) Award 2010*	AM2014/224
MA000076	*Educational Services (Schools) General Staff Award 2010*	AM2014/225
MA000006	*Higher Education—Academic Staff Award 2010*	AM2014/229
MA000007	*Higher Education—General Staff Award 2010*	AM2014/230
MA000112	*Local Government Industry Award 2010*	AM2014/234
MA000121	*State Government Agencies Administration Award 2010*	AM2014/246
Sub-group 3C		
MA000045	*Coal Export Terminals Award 2010*	AM2014/220
MA000085	*Dredging Industry Award 2010*	AM2014/223
MA000088	*Electrical Power Industry Award 2010*	AM2014/226
MA000050	*Marine Towage Award 2010*	AM2014/235
MA000051	*Port Authorities Award 2010*	AM2014/240
MA000052	*Ports, Harbours and Enclosed Water Vessels Award 2010*	AM2014/241
MA000122	*Seagoing Industry Award 2010*	AM2014/243

Award code	Award title	Matter No.
Sub-group 3D		
MA000101	*Gardening and Landscaping Services Award 2010*	AM2014/228
MA000028	*Horticulture Award 2010*	AM2014/231
MA000033	*Nursery Award 2010*	AM2014/238
MA000035	*Pastoral Award 2010*	AM2014/239
MA000040	*Silviculture Award 2010*	AM2014/244
MA000087	*Sugar Industry Award 2010*	AM2014/247
MA000090	*Wine Industry Award 2010*	AM2014/249

ATTACHMENT B

Awards that have been identified that may have an issue with the interaction between the annual leave loading and the penalty rates provisions in the exposure draft

Aboriginal Community Controlled Health Services Award 2010
Aged Care Award 2010
Airport Employees Award 2010
Animal Care and Veterinary Services Award 2010
Asphalt Industry Award 2010
Banking, Finance and Insurance Award 2010
Black Coal Mining Industry Award 2010
Building and Construction General On-site Award 2010
Business Equipment Award 2010
Car Parking Award 2010
Cement and Lime Award 2010
Cleaning Services Award 2010
Clerks - Private Sector Award 2010
Coal Export Terminals Award 2010
Concrete Products Award 2010
Contract Call Centres Award 2010
Dry Cleaning and Laundry Industry Award 2010
Educational Services (Post-Secondary Education) Award 2010
Educational Services (Schools) General Staff Award 2010
Educational Services (Teachers) Award 2010
Electrical Power Industry Award 2010
Electrical, Electronic and Communications Contracting Award 2010
Fast Food Industry Award 2010
Food, Beverage and Tobacco Manufacturing Award 2010
Gas Industry Award 2010
General Retail Industry Award 2010
Graphic Arts, Printing and Publishing Award 2010
Hair and Beauty Industry Award 2010
Health Professionals and Support Services Award 2010
Higher Education Industry-General Staff-Award 2010
Joinery and Building Trades Award 2010
Legal Services Award 2010
Manufacturing and Associated Industries and Occupations Award 2010
Meat Industry Award 2010
Medical Practitioners Award 2010
Miscellaneous Award 2010
Mobile Crane Hiring Award 2010
Nurses Award 2010
Pastoral Award 2010

Pest Control Industry Award 2010
Pharmaceutical Industry Award 2010
Pharmacy Industry Award 2010
Poultry Processing Award 2010
Premixed Concrete Award 2010
Quarrying Award 2010
Road Transport and Distribution Award 2010
Seafood Processing Award 2010
Social, Community, Home Care and Disability Services Industry Award 2010
Storage Services and Wholesale Award 2010
Sugar Industry Award 2010
Telecommunications Services Award 2010
Textile, Clothing, Footwear and Associated Industries Award 2010
Timber Industry Award 2010
Vehicle Manufacturing, Repair, Services and Retail Award 2010
Waste Management Award 2010
Wine Industry Award 2010

ATTACHMENT C

Awards identified that do not appear to have an issue with the interaction between the annual leave loading clause and penalty rates provisions in the exposure draft

Air Pilots Award 2010
Airline Operations—Ground Staff Award 2010
Aluminium Industry Award 2010
Hydrocarbons Industry (Upstream) Award 2010
Mining Industry Award 2010
Oil Refining and Manufacturing Award 2010
Ports, Harbours and Enclosed Water Vessels Award 2010
Security Services Industry Award 2010
Transport (Cash in Transit) Award 2010