[2018] FWCFB 1405

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, 13 MARCH 2018

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

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ABBREVIATIONS

The Law Firms	21 private law firms (jointly 'the Law Firms')
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
AWU	The Australian Workers' Union
Business SA	South Australian Employers' Chamber of Commerce and Industry Inc trading as Business SA
CFMEU (M&E)	Construction, Forestry, Mining and Energy Union, Mining and Energy Division
Commission	Fair Work Commission
CPSU (VIC)	CPSU, the Community and Public Sector Union Victorian Branch
CTG	Coal Terminals Group
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
ETU	Electrical Trades Union of Australia
FWO	Fair Work Ombudsman
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
MUA	The Maritime Union of Australia
NES	National Employment Standards
NFF	National Farmers' Federation
NTEU	National Tertiary Education Industry Union
October 2017 decision	Full Bench decision – Award stage – exposure drafts – Group 3 awards – technical and drafting – 30 October

	2017 [2017] FWCFB 5536
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
the Academic Staff Award	*Higher Education Industry–Academic Staff–Award 2010*
the Banking Award	*Banking, Finance and Insurance Award 2010*
the Clerks Award	*Clerks—Private Sector Award 2010*
the Coal Award	*Coal Export Terminals 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 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 Award	*Wine Industry Award 2010*

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. The 33 awards allocated to Group 3 are listed at Attachment A to this decision.

[2] This decision deals with a small number of outstanding technical and drafting issues arising out of the awards in Group 3 and should be read in conjunction with the decisions issued on 6 July 2017[1] (the July 2017 decision) and 30 October 2017[2] (the *October 2017 decision*), which also deal with the Group 3 awards.

[3] In addition to the *July 2017 decision* and the *October 2017 decision*, this decision should be read in conjunction with earlier decisions and statements concerning the Review, in particular the decisions of 23 December 2014 (the *December 2014 decision*), 13 July 2015 (the *July 2015 decision*) and the 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.

2. Background relating to the review of Group 3 awards

[4] Conferences were held on 30 March 2015 to identify the issues to be raised by interested parties in respect 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 individual award review webpages.

[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 awards. 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

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[1] [2017] FWCFB 3433

[2] [2017] FWCFB 5536

- 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. The *July 2017 decision* dealt with of 19 of the awards in Group 3 and the *October 2017 decision* dealt with the remaining awards in Group 3. This decision deals with the outstanding issues in relation to 22 of the Group 3 awards, as follows:

Banking, Finance and Insurance Award 2010
Business Equipment Award 2010
Commercial Sales Award 2010
Coal Export Terminals Award 2010
Contract Call Centres Award 2010
Dredging Industry Award 2010
Electrical Power Industry Award 2010
Educational Services (Post-Secondary Education) Award 2010
Educational Services (Schools) General Staff Award 2010
Gardening and Landscaping Services Award 2010
Higher Education Industry–General Staff–Award 2010
Higher Education Industry–Academic Staff–Award 2010
Horticulture Award 2010
Legal Services Award 2010
Labour Market Assistance Industry Award 2010
Nursery Award 2010
Pastoral Award 2010
Ports, Harbours and Enclosed Water Vessels Award 2010
Silviculture Award 2010
State Government Agencies Award 2010
Sugar Industry Award 2010
Wine Industry Award 2010

[9] The issue of overtime for casuals has been identified as an outstanding issue in respect of a number of modern awards. Following the *October 2017 decision*, the substantive matters of overtime entitlements for casuals in the *Sporting Organisations Award 2010* and the *Fitness Industry Award 2010* were referred to a separately constituted Full Bench for consideration (in AM2017/51). On 4 December 2017, the Full Bench constituted to deal with the *Sporting Organisations Award 2010* and the *Fitness Industry Award 2010* published a Statement identifying a number of other awards with similar issues.

[10] The following Group 3 awards contain some ambiguity as to whether overtime is payable to casual employees; when such overtime commences; the rate at which overtime is payable (or some combination of the three). These awards have been referred to the Full Bench constituted to deal with AM2017/51:

Banking, Finance and Insurance Award 2010;
Business Equipment Award 2010;
Clerks - Private Sector Award 2010;

Commercial Sales Award 2010;
Contract Call Centres Award 2010;
Labour Market Assistance Industry Award 2010;
Legal Services Award 2010;
Market and Social Research Award 2010;
Miscellaneous Award 2010;
Real Estate Industry Award 2010;
Telecommunications Services Award 2010;
Educational Services (Post-Secondary Education) Award 2010;
Educational Services (Schools) General Staff Award 2010;
Higher Education Industry-General Staff-Award 2010;
Local Government Industry Award 2010;
State Government Agencies Award 2010;
Coal Export Terminals Award 2010;
Dredging Industry Award 2010;
Electrical Power Industry Award 2010;
Marine Towage Award 2010;
Port Authorities Award 2010;
Ports, Harbours and Enclosed Water Vessels Award 2010;
Gardening and Landscaping Services Award 2010;
Horticulture Award 2010;
Nursery Award 2010;
Pastoral Award 2010;
Sugar Industry Award 2010;
Wine Industry Award 2010.

[11] We now turn to the particular awards.

2.1 Dredging Industry Award 2010

[12] In the *October 2017 decision*, we formed *provisional* views in relation to three outstanding issues in the *Dredging Industry Award 2010* (the Dredging Award). Interested parties were afforded a further opportunity to comment on, or object to, our *provisional* views. No submissions were received.

Item 6 – Span of hours

[13] The first issue was outlined at paragraphs [23]-[35] of the *October 2017 decision* and relates to item 6 of the summary of submissions document. The item deals with the hours of work clause in the Award, in particular to the span of hours. The issue arose from a submission of the Australian Workers' Union (AWU). We outlined a *provisional* view that clause 8.2 of the Exposure Draft should read 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.'

[14] Parties were invited to make submissions on our *provisional* view. No submissions were received. We confirm our *provisional* view that clause 8.2 of the exposure draft will read as outlined at paragraph [13] above.

Item 12 – Weekly aggregated rate

[15] The second outstanding issue was in relation to item 12 of the summary of submissions document dealing with weekly aggregated wages. This issue was outlined at paragraphs [39]-[46] of the *October 2017 decision*.

[16] Parties were invited to make submissions on our provisional view. No submissions were received.

[17] We confirm our *provisional* view that the exposure draft will be varied to adopt the Maritime Union of Australia (MUA)'s methodology. The relevant extract from the *October 2017 decision* is set out below:

> '[44] By correspondence dated 7 October 2016 the Commission asked the parties to confirm how the aggregated wages ought to be calculated. 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.'[3]

[18] We also confirm that a definition of 'aggregate rate' will be added to the exposure draft, as per paragraphs [40]-[43] of the *October 2017 decision*. The definition will be inserted into the definition section of the exposure draft. The definition will read as follows:

[3] [2017] FWCFB 5536 at [44]-[45]

> ‘**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.’

Item 25 – Definitions

[19] The third outstanding issue was in relation to item 25 of the summary of submissions document and was outlined at paragraphs [80]-[83] of the *October 2017 decision*.

[20] A revised exposure draft replacing the words ‘laid up’ with ‘not fully operational’[4] in response to a submission made by the AWU was published. Parties were invited to make submissions if they had any concerns about the impact of the change. No submissions were received. The wording ‘not fully operational’ will permanently replace the words ‘laid up’ throughout the Exposure Draft.

2.2 Educational Services (Post-Secondary Education) Award 2010

[21] A number of outstanding items remain in relation to the *Educational Services (Post-Secondary Education) Award 2010* (the Post-Secondary Award).

Item 12 – Academic Teachers – casual rates

[22] In the *October 2017 decision*, we referred to an issue outlined at item 12 of the summary of submissions relating to an incorrect reference. The National Tertiary Education Union (NTEU) made a submission 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)”.[5] The Group of Eight Universities (Go8) agreed with the submissions of the NTEU in relation to this issue in the *Higher Education Industry – Academic Staff – Award 2010*, however it was unclear from it’s submission whether the Group of Eight Universities agrees with the NTEU position in relation to the Post-Secondary Award revised exposure draft.[6] Interested parties were provided with a further opportunity to confirm their submissions about the amended drafting.[7]

[23] One submission relating to this issue was received from Australian Business Industrial and the New South Wales Business Chamber (jointly ABI), confirming that they do not oppose the drafting proposed by the NTEU.[8] We will adopt the submission made by the NTEU and delete the second reference in clause 10.1(b) to ‘Marking as a supervising examiner’.

Item 25 – Public Holiday substitution

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[4] AWU, submission – exposure draft, 18 April 2016, at para 22.

[5] October 2017 decision at [87]; NTEU, submission, 8 June 2016

[6] October 2017 decision, at [88]

[7] Ibid, at [89]

[8] ABI, submission, 24 November 2017, at para 7

[24] The NTEU submits that clause 20.2 of the revised exposure draft ("Substitution of public holidays by agreement") is inconsistent with the NES.[9]

[25] 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,[10] the Go8 submitted that (in respect of the Higher Education awards), the existing clauses can be retained, but that if the clauses were to be addressed they should be dealt with by this Full Bench.

[26] The *July 2017 decision*[11] 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.[12] In correspondence received 28 July 2017,[13] the NTEU agreed with the Go8.

[27] It appears the issue raised in relation to the Higher Education awards is substantially the same as that raised in the Post-Secondary Award revised exposure draft. We expressed a *provisional* view in the *October 2017 decision* that this matter be dealt with by this Bench. We invited submissions regarding this *provisional* view.

[28] ABI subsequently submitted that they are content for the matter to be dealt with by the presently constituted Full Bench.[14]

[29] We propose to determine the matter.

[30] Clause 20.2 of the exposure draft is set out in the following terms:

> **'20.2 Substitution of public holidays by agreement**
>
> By agreement between the employer and the majority of employees in an enterprise another day may be substituted for a public holiday.'

[31] Clause 29.2 of the current award deals with substitution of public holidays by agreement and is in identical terms to that of the exposure draft.

[32] In their submission of 14 April 2016 and 8 June 2016, the NTEU submits that clause 20.2 of the revised exposure draft ("Substitution of public holidays by agreement") is inconsistent with the NES,[15] as follows:

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[9] NTEU, submission, 8 June 2016

[10] Go8, submission, 10 June 2016

[11] [2017] FWCFB 3433

[12] Ibid, at [57] and [62]

[13] NTEU, submission, 28 July 2017

[14] ABI, submission, 24 November 2017, at para 8

[15] NTEU, submission, 8 June 2016

> **'Clause 20 – Public Holidays**
>
> S. 115(3) of the Fair Work Act allows for substitution arrangements to be provided for in a modern award, but on the basis of agreement between "an employer and employee", rather than, as provided in subclause 20.2, by agreement between "an employer and the majority of employees".
>
> 20.2 therefore appears to be inconsistent with the NES.
>
> A better approach would be to replace the words "the majority of employees in an enterprise" with the words "an employee". The table in clause 5.2 would need to be amended accordingly.'

[33] Section 115(3) of the Act states the following:

> **'s.115 Meaning of public holiday**
>
> . . .
>
> (3) A modern award or enterprise agreement may include terms providing for *an employer and employee to agree* on the substitution of a day or part-day for a day or part-day that would otherwise be a public holiday because of subsection (1) or (2)' [Emphasis added]

[34] A number of other parties made submissions on this issue. The Australian Higher Education Industrial Association (AHEIA) agreed with the NTEU's submission in relation to compliance with the NES.[16]

[35] In their submission in reply dated 6 May 2016, the South Australian Employers' Chamber of Commerce and Industry Inc trading as Business SA (Business SA) submit that they 'agree with the NTEU's submission regarding clause 20.2 'as they wish to maintain NES compliance.[17] In their submission of 6 May 2016, ABI submit that they 'agree with the submissions of the NTEU and the AHEIA as the current wording appears to be inconsistent with the NES.'[18] In their later submission of 24 November 2017, it appears that ABI change their position and submit that the clause is not inconsistent with the NES. They refer to s.115(3) of the Act noting that it specifically provides for the ability to substitute public holidays in the manner set out in the proposed clause 20.2.[19]

[36] We note that the issue raised by the NTEU also arises in a number of other modern awards, including the:

- *General Retail Industry Award 2010*;
- *Manufacturing and Associated Industries and Occupations Award 2010*; and
- *Mining Industry Award 2010*.

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[16] AHEIA, submission, 15 April 2016

[17] Business SA, submission, 6 May 2016, at para 5.14

[18] ABI, submission, 6 May 2016, at para 14.3

[19] ABI, submission, 24 November 2017, at para 8

[37] As the determination of the issue in the context of this award may have implications for other awards we do not propose to deal with the issue in this decision. This issue will be the subject of a Statement by the President shortly.

[38] The *October 2017 decision* noted that according to the summary of submissions published on 10 October 2017, items 8, 10, 13–16, 19, 24, 29 remain outstanding. Interested parties were provided an opportunity to confirm submissions about these outstanding items. We deal with these items in the following paragraphs.

Items 8 and 10 – Breaks

[39] Business SA made a submission[20] in relation to clause 9.3 of the exposure draft, proposing that the clause be moved to under the 'all employees' provisions at clause 9.4. They submit the following:

> 'Clause 9.3 Breaks, allows a penalty to be paid for all employees who work through their normal meal break until they are provided a break. This provision lay under the heading 'All Employees' in the current award but has been placed out of that heading and may possibly be read as applying only to non-shift workers. Business SA proposes this clause be moved under the All Employees provisions at 9.4 becoming the new 9.4.'[21]

[40] In a submission filed on 24 November 2017, ABI agreed with Business SA's submission and submit that the change accords with the existing provision set out at clause 22.3(c).[22] It appears that no other party has commented on the issue.

[41] The relevant extract from the exposure draft is set out below:

> '9.3 If an employee is required to work through their normal meal break the employee will be paid 200% of the minimum hourly rate for all time so worked until the meal break is given.
>
> **9.4 All employees**
>
> (a) An employee must be allowed two paid 10 minute rest breaks on each day as follows:
>
> . . .'

[42] Clause 22.3 of the current award is set out as follows:

> **'22.3 All employees**
>
> (a) An employee must be allowed two 10 minute rest breaks on each day as follows:
>
> (i) one 10 minute break between the time of commencing work and the usual meal break; and

[20] Business SA, submission, 15 April 2016

[21] Ibid, at para 5.1.2

[22] ABI, submission, 24 November 2017, at para 9

(ii) a second 10 minute break between the usual meal break and the time of ceasing work.

(b) An employee who works more than four hours overtime on a Saturday morning must be allowed a rest break of 10 minutes between commencing and finishing work.

(c) If an employee is required to work through their normal meal break the employee will be paid double time for all time so worked until such time as the meal break is given.

(d) An employee working overtime will be allowed a meal break of 20 minutes without deduction of pay after each four hours of overtime worked.'

[43] We agree with Business SA's submission. It is clear from the current award that the provision applies to all employees, and making the change suggested by Business SA will ensure clarity for the parties. The exposure draft will be updated in accordance with the submission of Business SA, that is, the current clause 9.3 of the exposure draft will appear under the heading 'all employees'.

Item 13 – teachers and tutor/instructors – rounding rules for annual and weekly rates

[44] The exposure draft contained a question for parties asking whether the same rounding rule should be used for annual and weekly rates for teachers and tutor/instructors as for academic teachers. The rounding rule for academic teachers is contained in a note at the end of clause 14.1 of the current award and is as follows:

'NOTE: The weekly rate of pay for an employee will be determined by dividing the annual salary by 313, multiplying that amount by 6, *and rounding to the nearest $0.10'* [Emphasis added]

[45] Clause 14.3 of the current award provides the annual salary for teachers and tutor/instructors and has the following note at the end of the table:

'NOTE: The weekly rate of pay for an employee will be determined by dividing the annual salary by 313 and multiplying that amount by 6.'

[46] Business SA did not support the inclusion of a similar rounding rule for teachers and tutor/instructors as for academic teachers submitting that by including a rounding rule for the weekly rate there would be a flow on effect to the hourly rate which is calculated in the exposure draft but not in the current award.[23]

[47] ABI and NSW Business Chamber do not oppose the continuation of rounding rules in the award.[24] It is not clear from the submission whether they would support including a rounding rule for teachers and tutor/instructors.

[48] AHEIA did not have a concluded view on whether a rounding rule should be included.

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[23] Business SA, submission, 15 April 2016, at para 5.2.3

[24] ABI, submission, 15 April 2016, at para 14.1

[49] We note that in the current award the annual rates for academic teachers are rounded to the nearest dollar whereas the annual rates for teachers and tutor/instructors are rounded to the nearest cent. The likely reason that the annual rates are rounded differently in the current award is that the rates were derived from separate pre-modern awards. As the tables already appear to have divergent rounding rules for calculating annual rates we see no reason to include a consistent rounding rule for the calculation of weekly wages at this point. Should we decide to adopt a consistent approach across awards in relation to rounding we may revisit this issue.

Item 14 – teacher and tutor/instructors – hourly and daily rates

[50] Item 14 relates to annotations to the table of minimum hourly and daily rates of pay for teachers and tutors/instructors within the exposure draft. The current award expresses the minimum pay rates for teachers and tutor/instructors in clause 14.3 as an annual salary only, with a note as to how to calculate weekly rates of pay.

[51] The casual rates for teachers and tutor/instructors is found in the current award at clause 14.5–Casual rates–teachers, tutor/instructors and general staff, which is reproduced below:

'14.5 Casual rates—teachers, tutor/instructors and general staff

(a) A teacher and a tutor/instructor will be paid a daily rate except where the engagement is for less than five hours when payment will be at the hourly rate. Where an hourly rate is paid, it will be payable for each hour of attendance other than for timetabled tea breaks (in respect of which no more than 15 minutes will be deducted) and timetabled lunch breaks.

(b) Other than as specified above, casual rates for staff will be calculated as follows:

Category	**Calculation**
General staff	Weekly applicable rate for full-time employees divided by 38 plus 25% Daily rate: annual salary divided by 261 plus 25% Hourly rate: daily casual rate divided by 5
Tutor/instructors	Daily rate: annual salary divided by 261 plus 25% Hourly rate: daily casual rate divided by 5'

[52] The exposure draft expresses the rates of pay for teachers and tutor/instructors in one table in clause 10.1(c), as produced below:

'(c) Teachers and tutor/instructors

Employee classification level	Minimum annual rate $	Minimum weekly rate[1] $	Minimum hourly rate $	Casual daily rate[2] $	Casual hourly rate[3] $
Level 1	47,456.22	909.70	23.94	227.28	45.46
Level 2	48,089.00	921.83	24.26	230.31	46.06

Employee classification level	Minimum annual rate $	Minimum weekly rate[1] $	Minimum hourly rate $	Casual daily rate[2] $	Casual hourly rate[3] $
Level 3	49,039.77	940.06	24.74	234.86	46.97
Level 4	50,000.09	958.47	25.22	239.46	47.89
Level 5	52,022.48	997.24	26.24	249.15	49.83
Level 6	53,370.67	1,023.08	26.92	255.61	51.12
Level 7	54,598.17	1,046.61	27.54	261.49	52.30
Level 8	55,946.45	1,072.46	28.22	267.94	53.59
Level 9	57,301.06	1,098.42	28.91	274.43	54.89
Level 10	59,049.95	1,131.95	29.79	282.81	56.56
Level 11	60,678.08	1,163.16	30.61	290.60	58.12
Level 12	62,115.33	1,190.71	31.33	297.49	59.50

[1] The weekly rate of pay for an employee is determined by dividing the annual salary by 313 and multiplying that amount by 6.

[2] ~~The daily rate is paid where the engagement is for more than five hours~~. As provided in clause 10.2 the daily rate is paid where the engagement is for 5 hours or more.

[3] ~~The hourly rate is paid where the engagement is for less than five hours~~. As provided in clause 10.2 the hourly rate is paid where the engagement is less than 5 hours.

[53] Business SA proposes notes 2 and 3 to clause 10.1(c) of the exposure be amended 'to ensure clarity' [25] to read as follows:

> [2] As provided in clause 10.2 the daily rate is paid where the engagement is for 5 Hours or more.
> [3] As provided in clause 10.2 the hourly rate is paid where the engagement is for less than 5 hours.

[54] Clause 10. 2 to of the exposure draft is produced below:

> '**10.2 Casual rates—teachers, tutor/instructors and general staff**
>
> **(a)** A teacher and a tutor/instructor will be paid a daily rate except where the engagement is for less than five hours when payment will be at the hourly rate. Where an hourly rate is paid, it will be payable for each hour of attendance other than for timetabled tea breaks (in respect of which no more than 15 minutes will be deducted) and timetabled lunch breaks.
>
> **(b)** Other than as specified in clause 10.1(b), casual rates have been calculated as follows:

Category	Calculation
General staff	Weekly applicable rate for full-time employees divided by 38 plus 25%
Teachers	Daily rate: annual salary divided by 261 plus 25%

[25] Business SA, submission, 15 April 2016, at para 5.1.3

	Hourly rate: daily casual rate divided by 5
Tutor/instructors	Daily rate: annual salary divided by 261 plus 25% Hourly rate: daily casual rate divided by 5

[55] There were no submissions on this issue from other interested parties.

[56] We agree with Business SA on this issue. Amending notes 2 and 3 to reference clause 10.2 provides clarity as to when a casual teacher or tutor/instructor is to be paid the casual daily rate or the casual hourly rate, and directs employers and employees to the clause which explains how casual daily rates and casual hourly rates are calculated.

Item 15 – minimum wages – referencing the annual wage reviews

[57] The Commission asked parties if the award should specify whether any Annual Wage Review increase is applied to the annual or weekly rates of pay in clauses 10.1(a), (c) and (d).[26]

[58] The current award annual and weekly rates of pay tables do not reference the annual wage reviews.

[59] The NTEU supports the award stating the latest Annual Wage Review rates applied and how submitting that this would enable parties at the workplace level to ascertain if current wage rates are being applied.[27] Australian Business Industrial and the NSW Business Chamber do not oppose the NTEU's submission.[28] AHEIA does not object to a reference to the Annual Wage Review within the award. Business SA submitted that they were seeking clarification from their members[29] but have not subsequently made any further submission on the issue.

[60] We agree with the NTEU's submission. A proposed set of words will be incorporated in the next iteration of the exposure draft.

Item 16 – expense related allowances – meal allowance general staff

[61] Business SA submits that clause 11.2(c) of the exposure draft unintentionally entitles employees who work overtime on a Sunday to two meal allowance payments within the first 5 hours of overtime.[30]

[62] The current award meal allowance clause is 15.4. It is produced below:

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[26] initial exposure draft, 18 December 2015

[27] NTEU, submission, 22 November 2017

[28] ABI, submission, 24 November 2017, para 13

[29] Business SA, submission, 15 April 2016, at para 5.2.4

[30] Ibid, at para 5.1.4

‘**15.4 Meal allowance**

Clause 15.4 applies only to general staff employed under this award. An employee required to work for more than one and a half hours of overtime, without being given 24 hours’ notice, after the employee’s ordinary time of ending work or who works approved overtime for more than five hours on a Saturday or Sunday, will be paid a meal allowance of $15.14 or supplied with a meal instead. Where such overtime work exceeds four hours a further meal allowance of $12.12 will be paid.’

[63] The meal allowance clause of the current exposure draft has been the same since the first exposure draft of this award under this review.[31] Clause 11.2(c) of the exposure draft is as follows:

‘**11. Allowances**

Employers must pay to an employee the allowances the employee is entitled to under this clause.

…

11.2 Expense related allowances

…

(c) Meal allowance—general staff

(i) A meal allowance of $15.14 will be paid to a general staff employee who:

- works more than one and a half hours of overtime after the employee’s ordinary time of ending work without being given 24 hours’ notice; or
- works approved overtime for more than five hours on a Saturday or Sunday.

(ii) Where overtime worked exceeds four hours, a further meal allowance of $12.12 will be paid.

(iii The allowance in clause 11.2(c) is not payable when a meal is supplied by the employer.’

[64] Business SA proposes that the second meal allowance in 11.2(c)(ii) be paid after nine hours for overtime worked on a Sunday.[32] ABI and the NSW Business Chamber supports Business SA’s submission.[33]

[65] The NTEU accepts the meal allowance clause within the current exposure draft, however propose amending 11.2(c)(ii) as follows (additional words bolded for clarity):[34]

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[31] Exposure Draft – Educational Services (Post-Secondary Education) Award 2015, published 18 December 2015, at cl 11.2; Comparison of exposure draft to modern award, 18 December 2015, at p 23

[32] Business SA, submission, 15 April 2016, at para 5.1.4

[33] ABI, submission, 24 November 2017, at para 14

'11.2(c)(ii) Where overtime worked exceeds four hours, **or exceeds nine hours if worked on a Saturday or Sunday**, a further meal allowance of $12.12 will be paid.'

[66] We agree with Business SA's submission. Clause 11.2(c) in the current exposure draft unintentionally entitles employees working on a Sunday to two meal allowances in the first 5 hours of overtime.

[67] It is our *provisional* view that the exposure draft be amended in the manner proposed by the NTEU. Interested parties are invited to comment on our *provisional* view by **4:00pm Tuesday, 10 April 2018.**

Item 19 – Penalty rates

[68] United Voice made a submission[35] in relation to the penalty rates clause at clause 14 of the exposure draft. United Voice submit that the formatting of the penalty rates clause in the exposure draft will create uncertainty about the penalty rate applicable to casual employees on Saturdays, Sundays and Public Holidays. A summary of the applicable penalty rates for casual employees who are not shift workers is available at Schedule D.2.1. United Voice submit the inclusion of the table in the main body of the award will improve its utility as a working document.

[69] United Voice propose the deletion of clauses 14.1(a), (b) and (c)(i) of the exposure draft and replace them with the following table:[36]

Day	Penalty Rate	Casual penalty rate (inclusive of 25% loading)
		% of minimum hourly rate
Saturday	125%	150%
Sunday	200%	225%
Public Holiday	250%	275%

[70] In their submission of 22 November 2017 the NTEU note that they have no objection to the inclusion of a table format as suggested by United Voice, as this would provide clarity for casual staff.[37]

[71] In their submission dated 24 November 2017 ABI and the NSW Business Chamber oppose the submission of United Voice and submit that no confusion arises and the amendment is unnecessary.[38]

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[34] NTEU, submission, 22 November 2017, para 10

[35] United Voice, submission, 31 March 2016

[36] Ibid, at para 2.

[37] NTEU, submission, 22 November 2017, at para 11

[38] ABI, submission, 24 November 2017, at para 15

[72] We agree with the submission of ABI and the NSW Business Chamber. The table already exists, albeit in a longer form, at Schedule D to the award. There is no need to summarise this table and then insert it in the penalty rates clause of the award.

Item 24 – Payment of annual leave

[73] Business SA made a submission[39] in relation to a note in clause 16.3 of the exposure draft, which is in the following terms:

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

[74] Business SA submit:

> 'The exposure draft adds an unnecessary note to this subclause, the intent of which is already provided by s 16 and 90 of the legislation. Business SA submits this note not be added to the revised award.' [40]

[75] The NTEU agree to the removal of the note[41] and ABI and the NSW Business Chamber also support the submission of Business SA.

[76] This note was inserted into all exposure drafts as a result of the Full Bench decision in [2015] FWCFB 4658.[42] The Full Bench decision deals with a number of technical and drafting issues including the issue of the rate of pay an employee receives when they are on leave. The decision outlined that a note would be inserted into all modern awards explaining that when the base rate of pay is higher than the ordinary rate in the award, the higher rate must be paid to the employee while on leave.[43]

[77] The note will remain in the exposure draft.

Item 29 – Schedule I – Definitions of teacher and tutor/instructor

[78] This item relates to a query from the Commission that was inserted into the exposure draft at Schedule I – Definitions. The query relates specifically to the definition of 'teacher' and 'tutor/instructor', as follows:

> 'Parties are asked to clarify whether an employee who does not hold a teaching qualification and is teaching a course or units which are accredited falls within the definition of a teacher or tutor/instructor.'

[79] Schedule I of the exposure draft provides the following definitions of 'teacher' and 'tutor/instructor':

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[39] Business SA, submission, 15 April 2016, at para 5.1.6

[40] Ibid, at para 5.1.6

[41] NTEU submission, 22 November 2017 at para 12

[42] [2015] FWCFB 4658, at [73] – [94]

[43] Ibid, at [94]

‘**teacher** means an employee engaged to teach students where a teaching qualification is mandatory or required by the employer, and where the work required involves teaching a course of study or units of work recognised within or pursuant to the Australian Qualifications Framework or accredited by a relevant state or territory authority and which is neither the work of an academic teacher nor a tutor/instructor

tutor/instructor means an employee engaged in providing tutoring/instruction to students where the course is not accredited and where the employer may not require a teaching qualification and which is neither the work of an academic teacher nor a teacher’

[80] The same definitions appear in the clause 3 of the current award.

[81] In their submission of 22 November 2017, the NTEU repeat their earlier submission, as follows:

‘. . . it is a requirement for the registration of a Registered Training Provider that the employer institution demonstrate to the regulatory authority that the staff delivering accredited courses are teacher qualified, and therefore that this circumstance should not arise. A person without the qualification would not be able to be employed in such work without the employing institution jeopardising its registration.

NTEU submits that no changes are needed to the definitions to deal with a hypothetical category of employee who cannot be employed in this industry.’[44]

[82] ABI and the NSW Business Chamber made a submission[45] in relation to this item in which they also repeat their earlier submission, as follows:

‘We note that this ambiguity has arisen because the definitions of teacher and tutor/instructor do not cater for this particular situation. Therefore, in the absence of either of the above definitions, we must turn our attention to the definition of category D teacher in clause B .3 .1 (d). A category D teacher is defined as:

“any other teacher, including a Vocational Education and Training (VET) tutor who has the qualifications required by the accredited curriculum or training package and who delivers and/or assesses nationally recognised competency based training which may result in a qualification or Statement of Attainment under the Australian Recognition Framework (ARF).”

As a minimum, to be considered a teacher for the relevant course the employee would need to meet this definition. If they do not meet this definition in the circumstances, they would have to be considered a tutor/instructor.’[46]

[83] Business SA also made a submission relating to this issue, as follows:

‘Business SA sought clarification from members as to the existence of this issue as the definitions do not contemplate this circumstance. Our members stated that their teachers must

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[44] NTEU, submission, 14 April 2016, at p.17

[45] ABI, submission, 24 November 2017, at para 17

[46] ABI, submission, 15 April 2016, at paras 14.3 – 14.5

have qualifications either in their field or at least a Training and Assessment Certificate IV (TAE IV) qualification. Alternatively, tutors/instructors were considered a person who does not yet hold a TAE IV qualification or is supporting a specialist TAE IV where that tutor can only provide a complementary level of contribution.

Members explicitly stated that there are too many under-skilled TAFE teachers earning an income above their skill or capability level. Business SA submits that employees without adequate teaching qualifications should be employed as a tutor/instructor.'[47]

[84] We have decided that the definitions should remain as they currently appear in the award.

2.3 Educational Services (Schools) General Staff Award 2010

[85] In relation to the *Educational Services (Schools) General Staff Award 2010* (General Staff Award), items 23, 24, 25, 26 and 28 of the summary of submissions were not discussed during the hearing on 7 June 2016. These items remain outstanding. In our *October 2017 decision*, parties were asked to indicate whether they intend to press these matters.

[86] The Associations of Independent Schools (AIS) and Independent Education Union of Australia (IEU) filed a submission indicating that they continue to press the variation of the exposure draft in the manner proposed. They note that the changes proposed in items 24, 25 and 26 are minor and technical and if the Commission is so minded, could be determined on the material already filed.[48] We will now determine these items.

Item 24 and Item 25– reasonable additional hours for part-time employees.

[87] The Association of Independent Schools (AIS) and IEU made a submission[49] relating to clause 16.3 of the exposure draft which deals with reasonable additional hours for part-time employees. This was noted at item 24 of the summary of submissions document.

[88] The change the AIS and IEU are seeking to the exposure draft is set out below:

'16.3 Reasonable additional hours—part-time employees

(a) An employer may require a part-time employee to work reasonable additional hours in accordance with clause 16.3.

~~(a)~~(b) ~~Where the employee's hours are averaged~~

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

(i) fall within the applicable daily spread of hours in clause 9.5;
(ii) do not result in the employee working more than eight hours on that day; and

[47] Business SA, submission, 16 April 2016, at para 5.2.8

[48] AIS and IEU, submission, 24 November 2017

[49] AIS and IEU, submission, 14 April 2016, at para 19

(iii) do not result in an employee whose hours are averaged, to working more than the allowed maximum weekly ordinary hours during the averaging period.

~~(b)~~ (c) The employee will be paid for all additional hours at the applicable overtime rate in clause 16—Overtime for all hours worked that:

(i) Are outside the applicable daily spread of hours in clause 9.5; and
(ii) result in the employee working more than eight hours on that day, or
(iii) result in an employee whose hours are averaged, to working more than the allowed maximum weekly ordinary hours during the averaging period.'

[89] They submit that the words 'where the employee's hours are averaged' be removed and the clause be renumbered accordingly.

[90] AFEI made the same submission,[50] noting that the heading appears to limit reasonable additional hours to part time employees whose hours are averaged. They submit this is a substantive change as the current award does not contain this limitation.

[91] The current award states:

'**22.4** An employer may require a part-time employee to work reasonable additional hours in accordance with the provisions of this clause.

(a) Where the employee's hours are averaged:

(i) the employee will be paid for all such additional hours at the casual hourly rate of pay, provided that the additional hours fall within the applicable daily spread of hours in clause 22.3, do not result in the employee working more than eight hours on that day, and do not result in the employee working more than the allowed maximum weekly ordinary hours during the averaging period; and

(ii) in all other cases the employee will be entitled to payment at the appropriate overtime rate of pay for any additional hours worked.

(b) Where the employee's hours are not averaged:

(i) the employee will be paid for all such additional hours at the casual hourly rate of pay, provided that the additional hours worked fall within the applicable daily spread of hours in clause 22.3, and do not result in the employee working more than eight hours on that day; and

(ii) in all other cases the employee will be entitled to payment at the appropriate overtime rate of pay for any additional hours worked.

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

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[50] AFEI, submission, 15 April 2016, at para 17; see item 25 of the summary of submissions document

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

[92] The exposure draft will be amended as suggested by the parties. It appears that in redrafting the clause, the heading 'where the employee's hours are averaged' has been incorrectly positioned.

Item 26 – payment for annual leave

[93] The AIS and the IEU submit that the percentage in clause 17.3(b)(i) (relating to annual leave loadings and exceptions) is incorrect and has been incorrect in the award since the award modernisation process.[51] The percentage in the clause is currently 1.3426%. The AIS and IEU submit that it should be 1.3415% as this is 17.5% of 4 weeks salary and this is consistent with what appears in the *Educational Services (Teachers) Award 2010*.

[94] The relevant clause from the exposure draft is extracted below:

'17.3 Payment for annual leave

(a) During a period of annual leave, an employee will receive a loading calculated on the rate of wage prescribed in clause 12—Minimum wages of this award. Annual leave loading is payable on leave accrued on the following bases:

(i) Day workers

Employees who would have worked on day work only had they not been on leave—17.5% of their ordinary rate of pay.

(ii) Shiftworkers

Employees who would have worked on shiftwork had they not been on leave—17.5% of their ordinary rate of pay or the applicable shift loading, whichever is the greater.

(b) Exception

An employer may, at its election, pay:

(i) annual leave loading to the employee with each salary payment throughout the school year by increasing the annual rate of pay as at the commencement of the school year, or as subsequently varied, by 1.3426%. Where an employer elects to pay annual leave loading with each salary payment throughout the school year, the employer must advise the employee in writing; or

(ii) annual leave loading in respect of the school year to the employee with the first salary payment in December of that school year at the rate of pay applicable on 1 December of that school year.

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[51] AIS and IEU, submission, 14 April 2016, at p.34

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

[95] The relevant clause from the current award states:

'28.3 Annual leave loading

(a) During a period of annual leave, an employee will receive a loading calculated on the rate of wage prescribed in clause 15—Minimum wages of this award. Annual leave loading is payable on leave accrued on the following bases:

(i) Employees who would have worked on day work only had they not been on leave—17.5% of their ordinary rate of pay.

(ii) Employees who would have worked on shiftwork had they not been on leave—17.5% of their ordinary rate of pay or the applicable shift loading, whichever is the greater.

(b) Except that an employer may, at its election, pay:

(i) annual leave loading to the employee with each salary payment throughout the school year by increasing the annual rate of pay as at the commencement of the school year, or as subsequently varied, by 1.3426%. Where an employer elects to pay annual leave loading with each salary payment throughout the school year, the employer must advise the employee in writing; or

(ii) annual leave loading in respect of the school year to the employee with the first salary payment in December of that school year at the rate of pay applicable on 1 December of that school year.'

[96] No other party has made a submission on this issue.

[97] Interested parties have a further opportunity to comment on the submission made by the AIS and IEU. Such comments are to be made by no later than **4:00pm Tuesday, 27 March 2018.** If no submissions are received the Commission will determine the matter.

Item 23– broken shifts and Item 28–Schedule B–summary of hourly rates of pay

[98] The AIS and IEU noted in their submission that the variations at items 23 and 28 seek to preserve entitlements varied (possibly unintentionally) by the exposure draft. In order that the matters are dealt with expeditiously they request that the Commission convene a conference in respect of the items.

[99] Item 23 deals with the issue of broken shifts. The AIS and the IEU ae seeking to insert a new clause 15.4(b) and make changes to clause 15.5 of the exposure draft to correct what they say is a significant error which has arisen during the redrafting of the award. They submit that 'in condensing and amalgamating several clauses the exposure draft has applied the non-accumulation provisions of clause 26.3 of the current award, which deals specifically with the interrelationship between clause 26–Penalty Rates and clause 27–Overtime, to the provisions

of clause 25.3–Broken shifts.' They further submit that 'in this sector of the industry broken shift payments are and have been paid in addition to other penalty payments.'[52]

[100] The change that the AIS and IEU are seeking to the exposure draft is set out below:

'15.4 Broken shifts

(a) An employee, other than a casual employee, rostered to work ordinary hours in a broken shift will be paid 115% of the minimum hourly rate with a minimum payment ~~as for~~ of two hours for each period of duty.

(b) The broken shift penalty under clause 15.4(a) is in addition to any other applicable penalty under clause 15.2 –Payment for shiftwork, clause 15.3 – Saturday and Sunday work and clause 16 – Overtime.

~~(b)~~(c) 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)~~(d) The provisions of clause 15.4(~~b~~c) 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.

15.5 The penalty rates within ~~this~~ clause 15.2 – Payment for shiftwork, relating to afternoon and evening shifts, and clause 15.3 – Saturday and Sunday work and in clause 16—Overtime are not cumulative. Where an employee is entitled to more than one penalty or overtime rate, the employee will be entitled to the highest single penalty rate.'

[101] AFEI, in their reply submission of 9 May 2016 oppose the amendments proposed by the AIS and IEU as they say it would involve a substantive change to the award. AFEI submits that the current award does not require the broken shift penalty to be paid in addition to other penalties.[53]

[102] Item 28 deals with an amendment that is being sought by the AIS and the IEU in relation to Schedule B.1.2 of the exposure draft which deals with summary hourly rates of pay. The AIS and IEU submit that, consistent with the changes they seek at item 23 of the summary of submissions document (outlined above), there is a need for additional rates tables reflecting the rates paid in event of a broken shift being worked during another shift.[54]

[103] No other party has commented on the above proposal by the AIS and the IEU in respect of Item 28.

[104] As requested by the AIS and IEU a conference will be convened on **Thursday, 29 March 2018 at 12:00pm** before Commissioner Johns for the purposes of finalising item 23

[52] Ibid, at para 18

[53] AFEI, submission, 9 May 2016, at para 31

[54] AIS and IEU, submission, 14 April 2016, at para 21

and 28 of the summary of submissions document. Following this conference, a short statement will be issued outlining the outcome of the conference and setting out the process for finalising the technical and drafting aspects of this award.

2.4 Gardening and Landscaping Services Award 2010

[105] The *October 2017 decision* noted we outlined that there were two items (items 2 and 20) regarding the entitlement to overtime for part-time and casual employees, which remain unresolved. Parties wishing to pursue the variation were requested to make submissions to that effect.[55] No submissions were received.

[106] A separate Full Bench has been constituted to look at the issue of whether casual employees are entitled to overtime (AM2017/51), as the issue has been identified as an outstanding item in a number of other modern awards through the award stage of the review. A Statement[56] was issued outlining a process for parties seeking a variation to any of the modern awards identified. The *Gardening and Landscaping Services Award 2010* is one of the awards identified in the Statement.[57]

[107] There are no other outstanding items in relation to this award.

2.5 Horticulture Award 2010

[108] After the *October 2017 decision* a number of matters remained outstanding and interested parties were granted time to provide further submissions on the issues. Submissions were received from the National Farmers Federation (NFF), the Australian Federation of Employers and Industries (AFEI) and the Australian Industry Group (Ai Group). We now turn to those outstanding issues.

Item 12 – Part-time employees

[109] The *October 2017 decision* rejected a submission from Ai Group that the term ‘ordinary hourly rate’ appearing in clause 6.4(b) should be replaced with ‘minimum hourly rate’.[58] Clause 6.4(b) appears 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)

[110] In order to add clarity to the wages table appearing at clause 10.1(a), and to alleviate Ai Group’s concern that clause 6.4(b) is confusing because clause 10 does not contain ordinary hourly rates, we proposed 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.’[59]

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[55] [2017] FWCFB 5536, at [171]

[56] [2017] FWCFB 6417

[57] See Attachment A to [2017] FWCFB 6417

[58] [2017] FWCFB 5536, at [192]-[199]

[111] Parties were invited to comment on this proposal. One submission was received from the NFF advising that it did not object to the proposal.[60]

[112] This matter will be given further consideration by the Plain Language Full Bench.

Item 45 – Summary of hourly rates of pay

[113] The *October 2017 decision* set out our intention to adopt the approach proposed at paragraphs [360] – [361] of the *July 2017 decision*, namely where an award contains an all-purpose allowances that applies to all employees and that allowances has been incorporated in the rates in the hourly rates tables, identified by a note along the following lines:

> '[x] **Ordinary hourly rate** includes the industry allowance payable to all employees for all purposes.'

[114] Parties were provided with an opportunity to comment on the proposal. The NFF, was the only party to make a comment, and advised that they did not oppose the Commission's proposal.[61]

[115] In the absence of any views to the contrary, we will adopt the proposed course of action and include the note as outlined above.

Items 15 and 47 – Casuals

[116] 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.[62] Ai Group advised that it does not have a concluded view on the matter.[63] The AWU position is that casuals can be engaged as shiftworkers and pressed for the inclusion of wage rates tables for casual shiftworkers 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.'[64]

[117] The NFF 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.

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[59] [2017] FWCFB 5536, at [198]

[60] NFF, submission, 24 November 2017, at para 3

[61] NFF, submission, 24 November 2017, at para 4

[62] FWO, correspondence, 2 March 2015, at item 19

[63] Transcript, 8 August 2016, at [PN589]

[64] Ibid, at [PN591]

> 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.'[65]

[118] In the *October 2017 decision* we indicated our support of the position of the NFF that, on the face of it at least, the recasting of clause 22.2 of the *Horticulture Award 2010* (Horticulture Award) as a standalone clause 14 in the exposure draft could result in a substantive change.[66]

[119] Absent the provision of further material we were not in a position to determine the issue at that time. Parties were directed to advise whether they wished to pursue this issue.[67]

[120] The only party to make any further submissions was the NFF, which 'maintains that casual employees cannot be engaged as shift workers under the Horticulture Award and therefore, clause 22.2 of the current award should be co-located with clause 22.1 in the exposure draft.'[68]

[121] Given our previous support for the NFF's position, and the absence of further submissions promoting an alternate view, we will maintain the status quo and amend the exposure draft by moving clause 14 to appear at clause 8.2. If the AWU wish to pursue the issue as a substantive variation they should advise us of their intent to do so by **4:00pm Tuesday, 10 April 2018.**

Item 27 – Pieceworkers

[122] The NFF proposed defining the full and base rate of pay for pieceworkers for the purpose of calculating NES entitlements and submits that its approach 'reflects the fact that hours of work are not always recorded for pieceworkers'.[69] Ai Group submitted that the proposal would amount to a substantive change and should be dealt with in the process the Commission has adopted for dealing with substantive changes that are contentious. Ai Group advised it may seek to be heard in relation to the proposal.[70] The NFF's proposal is opposed by the AWU.[71]

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[65] NFF, further submission – exposure draft, 15 August 2016

[66] [2017] FWCFB 5536, at [213]

[67] Ibid at [213]

[68] NFF, submission, 24 November 2017, at para 5

[69] NFF, submission – pieceworkers, 5 August 2016

[70] Ai Group, correspondence – outstanding issues, 24 August 2016

[71] Transcript, 8 August 2016, at [PN638]

[123] In the *October 2017 decision* we determined that the matter should be referred to a separately constituted Full Bench, and requested that AFEI advise the Commission of its position in relation to this issue.[72] AFEI has advised the Commission that it 'does not support the proposal put forward by the National Farmers' Federation (NFF), which is a significant departure from the terms of the current award.'[73] AFEI submits that the issue 'is not a technical or drafting issue and should be pursued as a substantive change.'[74]

[124] Given the approach of all other parties the NFF is asked to confirm whether or not it presses the proposed variation by **4:00pm Tuesday, 10 April 2018.** If the matter is pressed it will be referred to a separately constituted Full Bench for determination as a substantive change to the current award provisions.

Item 50 – Definition of 'ordinary hourly rate'

[125] In submissions filed in 2016, Ai Group submitted that the definition of 'ordinary hourly rate' should be amended to replace the reference to clause 10.1(a) with a reference to clause 10, so that rates payable to junior employees (which appear at clause 10.3) were captured.[75] Parties with an interest in the Horticulture Award agreed to the clause being amended as proposed by Ai Group.

[126] Ai Group have since made a further submission arguing that, with the agreed change adopted, the clause fails to have regard to employees to whom the National Training Wage or Supported Wage System applies.[76] Ai Group submits that the definition of 'ordinary hourly rate' should be amended as follows:

> '**ordinary hourly rate** means the hourly rate for the employee's classification specified in this award ~~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'[77]

[127] We have decided that interested parties should be given an opportunity to comment on Ai Group's subsequent suggestion. Interested parties will have until **4:00pm Tuesday, 10 April 2018** if they wish to comment on the issue.

2.6 Legal Services Award 2010

[128] In the *October 2017 decision* we expressed two *provisional* views in relation to the *Legal Services Award 2010* (the Legal Services Award). Interested parties were provided an opportunity to file further submissions on these *provisional* views. A revised exposure draft for the Legal Services Award was published on 2 November 2017. One submission was received from a group of 21 private law firms (jointly 'the Law Firms'). No submission from

[72] [2017] FWCFB 5536, at [227]

[73] AFEI, submission, 24 August 2017

[74] Ibid

[75] Ai group, submission, 14 April 2016, at para 337

[76] Ai Group, submission, 24 November 2017, at para 3

[77] Ibid, at para 4

any other party was received. We deal with these two *provisional* views in the following paragraphs.

Item 13 – Ordinary hours of work and roster cycles

[129] The *October 2017 decision* expressed a *provisional* view in relation to the proposed re-drafting of clause 8.1 of the exposure draft. Clause 8.1 deals with ordinary hours of work and roster cycles. The Law Firms proposed a variation to clause 8.1 which, in short, inserted a requirement that overtime be authorised.[78] In the *October 2017 decision* we noted that we were disposed to granting the claim.[79] It was also noted that 'the ASU did not make any submission in opposition to the proposed requirement that overtime must be authorised.'[80] In the absence of any further submission regarding this issue, we confirm our *provisional* view that the requirement that overtime be authorised will be inserted into clause 8.1(d)(iii) of the exposure draft as follows:

'**(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(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.'

Item 16 – Rest Breaks

[130] The *October 2017 decision* set out our *provisional* view that we would amend clause 9.2(a) of the exposure draft in a manner that more closely reflects the provision for rest breaks in the *Clerks –Private Sector Award 2010*. 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

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[78] [2017] FWCFB 5536 at [244]-[251]; See specifically [247]

[79] Ibid, at [250]

[80] Ibid, at [249]

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.'

[131] Parties were afforded an opportunity to comment on the *provisional* view. One submission was received from the Law Firms, noting that they 'support the proposal of the Commission to vary clause 9.2(a)…'[81] They also noted that they no longer press the previous proposed variation to clause 9.2(a) of the exposure draft.[82]

[132] We confirm our *provisional* view and clause 9.2(a) of the exposure draft will be amended as noted at [130] above.

[133] There are no outstanding technical and drafting matters in relation to the Legal Services Award.

2.7 Nursery Award 2010

Item 5 – Part-time employment

[134] The parties suggested this item (dealing with casual and part-time employment) should be re-visited after the decisions in the Casual and Part-time employment common issue proceedings were handed down.

[135] In the *October 2017 decision* parties were asked to make a submission if they wished to have the issue enlivened.[83] No submissions were received. In the absence of any further submissions we consider that this item is withdrawn.

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

[136] The *October 2017 decision*,[84] indicated that we intend to insert proposed Table B.3.2 of Schedule B into the *Nursery Award 2016.* Parties were given a final opportunity to object to this proposal. No submissions or objections were received. The table will be inserted into the exposure draft.

2.8 Pastoral Award 2010

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[81] Submission of the Law Firms, 24 November 2017 at para 5

[82] Ibid, at para 6

[83] [2017] FWCFB 5536, at [274] – [275]

[84] Ibid, at [279]-[281]

[137] A Statement was issued on 20 December 2017[85] in relation to the *Pastoral Industry Award 2010* (the Pastoral Award) setting out the process for dealing with the outstanding issues relating to this award.

[138] A further conference was held on 9 February 2018[86] and a Report[87] published on the same day.

[139] The AWU and NFF subsequently filed submissions in relation to the matters dealt with in the Report.[88] The outstanding issues are dealt with below.

1. Provision of a saddle: clauses 17.2 and 29 of the current award and clause 25.1 of the revised exposure draft.

[140] The AWU and NFF support the proposal advanced by the Commission at the conference on 9 February 2018 to vary clause 25.1 of the revised exposure draft to read:

> '25.1 Where a station hand is required by the employer to find their own horse and/or saddle, the employee will be paid weekly allowances of:
>
> (a) $7.26 for the horse; and
>
> (b) $5.80 for the saddle.
>
> The allowance specified in clause 25.1(b) is not payable where the employer has reimbursed the employee for the cast of the saddle.'

[141] It was also agreed that there be no variation to clause 10.2(a) of the revised exposure draft.

[142] We endorse the position agreed to by the AWU and NFF. The revised exposure draft will be amended accordingly.

2. Station cooks and part-time rates: clauses 10.3 and 30.1 of the current award

[143] The background to this issue, including the Full Bench's *provisional* view is set out at paragraphs [317]-[323] of the *October decision* (Also see [126]-[130] of the *July decision).*

[144] There was no objection to the adoption of the *provisional* view expressed in the *July decision* at [130]. No amendment is required to the exposure draft.

3. Public holidays for piggery attendants: clauses 26 and 38.3 of the current award

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[85] [2017] FWC 6871

[86] Transcript, 9 February 2018

[87] Report and directions, 9 February 2018

[88] AWU, submission, 5 March 2018; NFF, submission, 6 March 2018

[145] The background to this issue and the Full Bench's *provisional* view is set out at paragraphs [320]-[322] of the *October decision* (Also see [155]-[159] of the *July decision).*

[146] There was no objection to the adoption of the *provisional* view expressed in the *July decision* at [159]. No amendment is required to the exposure draft.

4. Outstanding issue relating to meal breaks and allowances (clauses 17.2(c)(ii) and 36.10 of the current award)

[147] The background to this issue is set out at paragraphs [285] – [292] of the October 2017 decision.

[148] In short, the Full Bench determined the operation and interaction of the two clauses is ambiguous and requires review before the Commission can be satisfied that the relevant terms achieve the modern awards objective.

[149] The interested parties submitted draft directions for the determination of the matter. The draft directions have been confirmed and have been issued.[89]

5. Definition regarding non-continuous work (inserted at clause 31.1 of the exposure draft)

6. Proposal to amend footnotes in clause B.4.2 and B.4.5 of the exposure draft

[150] In accordance with the agreement reached at the conference on 9 February 2018 the Commission will provide a plain language draft of clause 35.9 of the current award to the parties for their consideration.

2.9 Silviculture Award 2010

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

[151] The *October 2017 decision* dealt with an issue relating to the definition of full-time and part-time employees. Item 6 of the revised summary of submissions refers to clause 6.3 of the exposure draft, which sets out the definition for full-time employees. The AWU sought to include the word 'ordinary' in the phrase 'an average of 38 ordinary hours per week'.[90] Similarly, item 8 of the summary of submissions document refers to clause 6.4(a)(i) of the exposure draft which sets the definition for part-time employees. The AWU also seeks to include the word 'ordinary' in the phrase 'less than 38 ordinary hours per week'.[91]

[152] 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. [92]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

[89] Report and directions, 9 February 2018

[90] AWU, submission, 17 April 2016, at para 3

[91] Ibid, at para 5

[92] NFF, submission, 9 June 2016, at para 13; NFF, submission, 7 February 2018, at para 13

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.[93]

[153] 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.[94] 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.[95]

[154] The *October 2017 decision* stated that we were not persuaded that the word 'ordinary' should be inserted into either clause 6.3 or 6.4(i) of the exposure draft but sought comment from the parties in relation to the following possible wording that adopts the approach that has been applied in relation the same clauses in the Pastoral Award exposure draft:

> '**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…'

[155] Parties were provided an opportunity to comment and/or advise the Commission as to whether they wish to pursue this issue.

[156] One submission was received by the NFF in relation to this issue. No submissions were received from any other party. The NFF submit the following:

> 'Should the AWU be minded to pursue this issue, the NFF remains opposed to the insertion of the word 'ordinary' into clauses 6.3 and 6.4(i). We are not opposed to the wording proposed by the Commission at paragraph [347] of the Decision.'[96]

[157] In absence of any submission from the AWU, we have decided to adopt the approach outlined in our *October 2017 decision*, that is, we will adopt the same approach that has been used in relation to the same clauses in the Pastoral Award.

Item 15 – Actual weekly rate

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[93] NFF, submission, 9 June 2016, at paras 13-14; NFF, submission, 7 February 2018, at para 12

[94] Transcript, 8 August 2016, at [PN39]

[95] Transcript, 8 August 2016, at [PN40]

[96] NFF, submission, 24 November 2017, at item 6 and 8, para 1.

[158] An outstanding issue remains in relation to item 15 of the summary of submissions document. This was dealt with in detail in the *October 2017 decision*. At clause 10.3 of the exposure draft there is a definition of 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.[97] The NFF proposes that a single approach be adopted in this award with regard to the 'actual weekly rate' and offer two options to give effect to this.[98]

[159] The NFF submits that the Commission could by replace 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.'[99]

[160] Alternatively, the Commission could delete clause 10.2 and 10.3 and include 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.'[100]

[161] 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.

[162] In the *October 2017 decision* we noted that 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 arising from 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 exposure draft defines 'ordinary hourly rate' as the hourly rate for the employee's classification in clause 10.1, inclusive of any all

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[97] NFF, submission, 9 June 2016, at para 24

[98] NFF, submission, 9 June 2016, at paras 25-26; NFF, submission, 17 January 2017, at para 8

[99] NFF, submission, 9 June 2016, at paras 25-26

[100] Ibid, at para 27

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 NFF's proposals 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.

[163] We expressed a *provisional* view that we preferred the second of the two options proposed by the NFF. This is consistent with the drafting style being used in this process. We also proposed to update the heading of 'actual weekly rate' in the table of clause 10.1 to 'Ordinary weekly rate' for consistency.

[164] Parties were provided an opportunity to comment further on the issue. One submission was received from the NFF stating that they support our *provisional* view[101]. We confirm our *provisional* view, and the exposure draft will be updated as set out at para [90] of this decision. The heading of 'actual weekly rate' in the table of clause 10.1 will be changed to 'ordinary weekly rate' for consistency.

Item 19 – Leading hand allowance

[165] In our *October 2017 decision* we dealt with an issue relating to the leading hand allowance in the exposure draft. 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.[102] Clause 11.3(b) of the exposure draft provided:

'**(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.'[103]

[166] The AWU propose the following amendments:

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[101] NFF, submission, 24 November 2017, at item 15 para 2.

[102] AWU, submission, 17 April 2016, at para 15

[103] Exposure Draft – *Silviculture Award 2016*, published 29 July 2016

‘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.’ [104]

[167] The AWU referred to 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).’[105]

[168] The current Silviculture 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.’

[169] 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.[106] 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’.

[170] We agree with the AWU that the drafting of the exposure draft has resulted in an unintentional change in the operation of this provision. It is appropriate that the provision be

[104] AWU, submission, 17 April 2016, at para 15

[105] AWU, submission, 9 February 2017, at para 3

[106] NFF, submission, 9 June 2016, at para 35

redrafted to reflect the correct operation of the current provision. The wording of the current Silviculture Award should be clarified and we propose to do so.

[171] 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.

[172] In our *October 2017 decision*, we expressed a *provisional* view that clause 11.3(b) of the exposure draft 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
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.'[107]

[173] Parties were provided an opportunity to comment on our *provisional* view. One submission was received from the NFF relating to the issue. The NFF state in their submission of 24 November 2017 that they support the Commission's *provisional* view that the reference rate in clause 11.3(b)(ii) should be changed to 'ordinary weekly rate'.[108] But go on to submit the following:

'. . . the NFF presses its submission in relation to the calculation of the rate of pay. The NFF submits that the intent of "leading hand allowance" is to provide an employee who supervises other employees with an additional allowance if his/her ordinary rate of pay does not already include a component in recognition of those supervising responsibilities. If the rate already has such a competence "built-in" then the employee should get his/her "own rate" as currently provided for in clause 11.3 of the exposure draft. That may be assumed where he/she is already earning significantly more than the employees which he/she supervises. It may be observed that the grade 5 and 6 classification apply to employees who are "in charge": clauses 7.5 and 7.6. Indeed, the fact of being "in charge" is the essential element of that classification — if they are not "in charge" then they fall within grades 3 or 4 — and therefore the additional duties and responsibility which accompanies supervising other workers is clearly built into the increase in wage. They should not also get the leading hand allowance; effectively, "double dipping".'

This interpretation is clearly supported by the drafting of the modern Silviculture Award 2010. Furthermore, with respect the NFF contends that it is also the correct interpretation of clause 3

[107] *October 2017 decision*, at para [382]

[108] NFF, submission,24 November 2017

> of the pre-modern award which the Commission cites at clause [377] of the decision. In our view the alternative pay rates under that clause were "the undermentioned amounts above the rates of the highest classification supervised" or "his own rate", whichever is higher. The placement of the commas around "his own rate", irrespective of whether it is grammatical correct, supports this view.'[109]

[174] We do not agree with the submission of the NFF. We confirm our *provisional* view that clause 11.3(b) of the exposure draft will be redrafted as set out above at [172].

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

[175] In the *October 2017 decision*, we dealt with an issue relating to the absence of Sunday rates for shiftworkers. We outlined our view that the award should contain Sunday rates for shiftworkers and expressed a *provisional* view that the appropriate rate for full-time and part-time shiftworkers working on a Sunday would be 200% of the ordinary hourly rate. We expressed a *provisional* view 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.'

[176] 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)~~.'

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

[178] Parties were provided an opportunity to comment on our *provisional* view and the suggested wording. One submission in relation to the issue was received from the NFF, stating that they did not oppose the Commission's *provisional* view.[110] We confirm our *provisional* view outlined at [175]-[177] above. These changes will be made to the exposure draft.

Item 44 – Overtime rates for casual employees

[179] In the *October 2017 decision* we dealt with an issue relating to whether casual employees are entitled to overtime. 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:

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[109] Ibid, at 4-5

[110] NFF, submission, 24 November 2017, at para 6

> '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.'

[180] 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.

[181] The submissions from the parties were silent on this point but the NFF sought the opportunity to comment on any inclusion of overtime rights for casuals in the table in Clause A.3. We noted in the *October 2017 decision* that 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. If this were intended then the award would contain wording to that effect.

[182] We expressed a *provisional* view 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 included tables reflecting this in the summary of hourly rates schedule in the exposure draft and parties were provided a further opportunity to comment.

[183] One submission was received from the NFF, noting they accepted the Commission's *provisional* view that any casual loading would be cumulative with the overtime allowance, but would not compound with the overtime allowance.[111]

[184] We confirm our *provisional* view outlined at [182] above. The tables in the summary of hourly rates schedule will form part of the exposure draft.

2.10 Sugar Industry Award 2010

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

[185] In our *October 2017 decision*, we dealt with an issue relating to altering the spread of hours in the exposure draft. The parties agreed to delete clauses 11.3(c) and (d) and insert a new clause 11.3(c) (see 3 June 2016 exposure draft).

[186] We noted that, in our view, the agreed position of the parties alters the operation of the provision in the current award. Having considered the parties' agreed position, we expressed a 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

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[111] Ibid, at item 44, para 1

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)

[187] Parties were invited to comment on the proposed amendment to clause 11.3(d). 3 submissions were received.

[188] Both the AWU and the Australian Manufacturing Workers' Union (AMWU) note that this is one of a group of awards containing similar ambiguous phraseology in relation to the alteration of the spread of hours. The AMWU submit that the issue 'should be considered at the conclusion of the Award stage of the Review in accordance with the decision of the Full Bench [2015] FWCFB 7236 at [159]'.[112]

[189] The AWU strongly oppose the proposed additional words 'other than in accordance with clause 11.3(c)' as the AWU submits that it does not reflect the current provision in the award.[113] The AWU submits that the current provision makes overtime payable for work done outside the spread of hours regardless of whether the spread has been altered by agreement. The AWU further submits that the current provision is not ambiguous and that the change would result in a reduction of the entitlement to overtime.

[190] The NFF makes no further submission on the issue.[114]

[191] We have considered the argument put by the AWU but find it unpersuasive. We see little utility in the ability to alter the spread as provided in clause 29.3(c) if work done within the agreed altered spread is to be paid at overtime rates. The clause enabling the spread of hours to be altered, by agreement is intended to provide the flexibility of a longer span in which to roster ordinary hours without having to pay overtime.

[192] We have decided to confirm our *provisional* view that 11.3(c) and 11.3(d) be retained and our redrafted clause 11.3(d) will be inserted into the exposure draft. The remaining issue of the potential ambiguity in clause 11.3 will be dealt with at the conclusion of the Award stage of the Review.

Proposed variations not agreed between the parties

Item 11 – Facilitative Provisions

[193] In the *October 2017 decision* we noted that the AMWU had advised the Commission that there is substantial agreement between the parties as to the list of provisions to be

[112] AMWU, submission, 28 November 2017, at paras 4-5

[113] AWU, submission, 28 November 2017, at paras 7-8

[114] NFF, submission, 28 November 2017, at para 3

included. Parties were afforded an opportunity to provide an agreed list of facilitative provisions for clause 6 for the consideration of the Full Bench.[115] In their submission dated 28 November 2017, the AMWU state that 'the parties have been unable to confirm a written record of the provisions consented to, due to the change in the officers with carriage of the matters since July 2016. The AMWU propose that the list of facilitative provisions be revisited to confirm what the respective positions of the parties are.[116]

[194] Clause 6 of the exposure draft contains the list of provisions that the Commission has identified as facilitative provisions.

[195] Parties are directed to file their submissions on the facilitative provisions contained in the exposure draft by **4:00pm Tuesday, 10 April 2018.**

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

[196] In the *October 2017 decision*, we dealt with an issue relating to the correct Sunday rate for field sector employees. The issue was set out at paragraphs [479] to [491] of the *October 2017 decision*.

[197] In that decision we expressed a *provisional* view that the existing definition of 'shiftwork' in clause 26.2(a) should not be amended. We noted that the current clause would be retained, unless interested parties provided a persuasive submission as to why the definition should be varied.

[198] We also set out a provisional view that we would abandon proposed clause 26.X and adopt the AWU's proposed amendment[117] to clause 26.4 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.'

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[115] [2017] FWCFB 5536, at [474] – [476]

[116] AMWU, submission, 28 November 2017, at para 7

[117] AWU, submission, 21 July 2016, at para 10

[199] We noted that the amendment would require further drafting. Parties were invited to comment further on the proposed amendment to clause 26, in particular we requested that parties submissions answer 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 do not have equivalent entitlements to shift workers as sugar milling?

[200] We have not received any submissions addressing the above questions. Parties are directed to file submissions addressing the above questions by **4:00pm Tuesday, 10 April 2018.**

Item 33 – Single contract hourly rate

[201] 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.

[202] The report of DP Asbury 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.'

[203] 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 submit 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,[118] due to the operation of cl 13.2(b) which defines the minimum hourly rate for employees engaged.[119]

[204] 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.'

[205] 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.'

[206] 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.[120]

[207] 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 Tuesday, 10 April 2018.**

Item 45 - Allowances

[208] In our *October 2017 decision* we dealt with an issue relating to the rounding associated with the conversion from imperial to metric measurements at clauses 16.1(f)(ii) and 16.1(r) of the exposure draft. We proposed to round the figures, as follows: 510kg, 15 metres and 23 metres. Parties were provided an opportunity to comment on this proposal.

[209] The AWU submits that rounding the measurements is unnecessary as the unrounded figures are not causing any confusion. The AWU were particularly opposed to the rounding of the carting and/or handling allowance from 508 kilograms to 510 kilograms. The AWU submit that 508 kilograms is already a round figure and do not see 510 kilogram as more specific.

[210] The NFF supports the Commission's proposed rounding figures.

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[118] NFF, submission, 8 July 2016

[119] Ibid

[120] AWU, submissions, 21 July 2016, at para 18–21

[211] Upon further consideration we do not find it necessary to round the figures contained in clauses 16.1(f)(ii) and (r) as the figures are rounded to the nearest kilogram and centimetre and are sufficiently clear.

Item 42 – Tool allowance

[212] In our *October 2017 decision* we asked the AMWU to indicate whether it intended to pursue a claim to insert a tool allowance into *Sugar Industry Award 2010* (Sugar Award). In their submission of 28 November 2017 the AMWU indicated that they would pursue the claim,[121] and in correspondence to the Commission dated 22 December 2017,[122] the AMWU requested this be referred to a separate Full Bench. The Full Bench constituted to hear the substantive issues in the Sugar Award (AM2017/56) will hear and determine the proposed insertion of the tool allowance.

2.11 Wine Industry Award 2010

[213] Following the *October 2017 decision*, a small number of issues remained outstanding in relation to the *Wine Industry Award 2010* (Wine Award), as outlined in the summary of submissions document republished on 10 October 2017.

Items 25 and 30-32: ordinary hours of work

[214] Item 25 of the summary of submissions document deals with an issue relating to ordinary hours of work and rostering (clauses 8.1 – 8.4 of the exposure draft). The summary notes that a proposal relating to this item was agreed during the conferences held in relation to the Wine Award. The exposure draft was subsequently updated and republished on 2 November 2017. Ai Group made the following submission on 24 November 2017:[123]

> 'We are concerned that the renumbering of provisions under clause 8 has resulted in an anomaly arising from the most recent version of the exposure draft. Specifically, it is our submission that:
>
> - Clauses 8.2 – 8.5 apply to day workers and shiftworkers;
> - Clause 8.6 applies only to day workers; and
> - Clauses 8.7 – 8.9 apply to day workers and shiftworkers.
>
> The text inserted at clause 8.1 does not reflect this position, which we understand to be broadly agreed between interested parties who participated in the conferencing process before Deputy President Clancy.'

[215] Clause 8 in the exposure draft currently states:

> **'8 Ordinary hours of work and rostering**

[121] AMWU, submission, 28 November 2017

[122] AMWU, correspondence, 22 December 2017

[123] Ai Group, submission, 24 November 2017, at paras 8-9

8.1 The following provisions in clause 8 apply to day workers and shift workers except for clause 8.5

8.2 Maximum weekly hours and requests for flexible working arrangements are provided for in the NES.

8.3 Subject to clause 8.7, the ordinary hours for a day worker or shiftworker are an average of up to 38 per week.

8.4 Ordinary hours are to be worked continuously, except for meal breaks.

8.5 Ordinary hours must not exceed 10 hours on any day, except where there is agreement between the employer and the majority of employees in the relevant workplace or section of it, in which case the daily maximum may be extended to up to 12 hours.

8.6 Ordinary hours of work—day workers

(a) Ordinary hours are worked between the hours of 6.00 am and 6.00 pm, Monday to Friday, subject to the following exceptions:

(i) ordinary hours for an employee rostered to perform work in the cellar door ~~may~~ are to be worked between 6.00 am and 6.00 pm, Monday to Friday, and 8.00 am and 6.00 pm on Saturday and Sunday; and

(ii) ordinary hours for an employee rostered to perform work in the vineyard ~~may~~ are to be worked between 5.00 am and 6.00 pm, Monday to Saturday, during the period of the vintage.

(b) Vineyard employees during the vintage

(i) For the purposes of ~~this~~ clause 8.6, **vintage** means a period not exceeding six months between November and June inclusive, which starts on the date when the harvest of wine grapes begins at a particular vineyard and ends on the date the last wine grapes are harvested at that vineyard.

(ii) The employer must make and retain a record of the beginning and end of each vintage in conjunction with relevant time and wages records.

~~**(iii)** Where at the commencement of this provision an employer was utilising the extended ordinary hours for vineyard employees under the former clause 28.2(d) of this award, the terms of that provision will apply until the commencement of the vintage as defined in clause 28.2(d)(ii) above.~~

(c) The spread of hours may be varied by agreement between an employer and the majority of employees in the relevant workplace or the section or sections of it.

8.7 **Methods of arranging ordinary working hours**

The following provisions in clause 8 apply to day workers and shift workers except for clause 8.5 The method of working the 38 hour week must be agreed between the employer and the

majority of employees in the relevant workplace or section or sections of it and may be worked in one of the following arrangements:

(a) 19 days of eight hours in each four week period, with either a fixed or rostered day off;

(b) nine days of eight hours and one day of four hours in each fortnight with either a fixed half-day off or a rostered half-day off at the beginning or end of the working week;

(c) four days of eight hours and one day of six hours in each week, with the six hour day being at the beginning or end of the working week; or

(d) any other arrangement agreed to by the employer and the majority of employees directly affected.

8.8 Daylight saving

For work performed on a shift that spans the time when daylight saving begins or ends, as prescribed by relevant state or territory legislation, an employee will be paid according to adjusted time (i.e. the time on the clock at the beginning of work and the time on the clock at the end of work).

8.9 Make-up time

(a) An employee may elect, with the consent of the employer, to work make-up time, under which the employee takes times off during ordinary hours and works those hours at a later time, during the spread of ordinary hours provided for in clause 8—Ordinary hours of work and rostering.

(b) On each occasion the employee elects to use this provision the resulting agreement must be recorded in the time and wages records at the time when the agreement is made.'

[216] The clause in the exposure draft that Ai Group take issue with is clause 8.1. In DP Clancy's Report to the Full Bench dated 25 August 2016, Attachment A outlines the following:

'Items 25 and 30-32. Parties agreed to the following words proposed by the AWU being inserted at the start of Clause 8 and that these would resolve these four (4) items– "The following provisions in clause 8 apply to day workers and shift workers except for clause 8.5".'[124]

[217] These are the words that have been inserted into the exposure draft. No other party has commented on Ai Groups submission. [125] If any other interested party agrees with Ai Group's submission that the wording at 8.1 of the exposure draft is not reflective of the agreed position of the parties, they are to notify the Commission in writing no later than **27 March 2018**. If other interested parties are in agreement with Ai Group then clause 8 will be redrafted.

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[124] Report to the Full Bench, 25 August 2016, at p 3

[125] Ai Group, submission, 24 November 2017

Item 31 – Daylight savings

[218] In relation to this issue, interested parties previously indicated that they may benefit from further discussions about the AWU's proposal to vary the clause. We noted in the *October 2017 decision* that no further update had been provided to the Full bench about the status of these discussions, and interested parties were afforded a further opportunity to confirm whether this variation is being pursued and whether any agreement has been reached.

[219] No submission was received from the AWU regarding their proposal to vary the clause. We do not propose to deal with their proposal further, however we note that this issue may relate to the issue set out above concerning clause 8 of the exposure draft.

Item 53 – Overtime claim

[220] In the *October 2017 decision* we outlined that the substantive claim regarding overtime is not agreed and noted that the parties have previously taken the view that resolution of this issue depends on the outcomes in the Casual and Part-time employment Common issue proceedings.

[221] In the *October 2017 decision*, we requested parties write to the Commission to indicate whether they wish to pursue this item. No submission was received from any party regarding this issue. We do not intend to deal with this matter further.

Item 62 – Public holidays

[222] In the *October 2017 decision* we stated the following in respect of this issue:[126]

> '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.
>
> 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[127] 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.'[128]

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[126] [2017] FWCFB 5536, at paras [573]-[574]

[127] [2017] FWCFB 3177

[128] Ibid, at [76]-[78]

[223] Interested parties were requested to write to the Commission to indicate whether they wish to pursue this item and whether they consider further discussions may resolve the issue. No submission was received.

[224] We will adopt the reasoning of the Full Bench in relation to the Manufacturing Award, that is, the payment option of 7.6 hours of pay at the ordinary rate of pay.

Ai Group Submission relating to causal conversion

[225] In their 24 November 2017 submission, Ai Group note that items 17 – 24 of the summary of submissions document remain outstanding as they were deferred pending the outcome of the casual and part-time employment common issues proceedings.[129] They note that the relevant Full Bench has since issued its decision and has concluded that existing casual conversion provisions will not be varied. Ai Group seek that the Commission now give consideration to whether the current casual conversion clause has been properly redrafted having regard to the various submissions made by interested parties.

[226] This is an issue in a number of awards currently containing a casual conversion clause. The issue will be determined at the conclusion of the award stage.

[227] Interested parties are to advise whether there are any outstanding issues in respect of this award by **4:00pm Tuesday, 10 April 2018.**

2.12 Banking, Finance and Insurance Award 2010

[228] Following the *July 2017 decision* a revised version of the *Banking, Finance and Insurance Award 2010* exposure draft was published incorporating the changes that were agreed to by the interested parties. Parties were afforded a final opportunity to comment on the exposure draft.

[229] The only award-specific submission that was made concerning the revised exposure draft was received from ABI.[130] ABI responded to a question posed by the Commission at clause 6.4(d) of the exposure draft, which asked parties to clarify whether the effect of the clause is to exclude casual employees from entitlement to overtime, penalty rates and allowances. Clause 6.4(d) of the exposure draft currently appears in the following manner:

> ‘The casual loading is paid instead of annual leave, personal/carer’s leave, notice of termination, redundancy benefits and the other attributes of full-time or part-time employment.’[131]

[230] ABI confirmed its view that ‘the payment of the casual loading is in substitution for overtime, penalty rates and other loadings.’[132]

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[129] Ai Group, submission, 24 November 2017

[130] ABI, submission, 9 August 2017

[131] Exposure Draft – Banking, Finance and Insurance Award 2015, republished 14 July 2017

[132] ABI, submission, 9 August 2017 at paras 7-8

[231] A Full Bench has been constituted in AM2017/51 to deal with this issue.

2.13 Business Equipment Award 2010

[232] Following the *July 2017 decision* a revised version of the *Business Equipment Award 2010* exposure draft was published incorporating the changes that were agreed to by the interested parties, as well as changes arising from our determination of outstanding issues. Parties were then afforded a final opportunity to comment on the exposure draft. Submissions were received from Ai Group,[133] ABI[134] and the Electrical Trades Union of Australia (ETU).[135]

[233] Ai Group's submission responded to a question posed by the Commission at clause 7.2(a) of the exposure draft, which asked parties to clarify whether the provision permitted the spread of hours to only be altered at one end, or whether it permitted the spread of hours to be altered at both ends by up to a total of two hours. The term in the exposure draft currently reads:

> '**(a)** The following forms of flexibility may be implemented in respect of all employees in a workplace or section/s thereof, subject to agreement between the employer and the majority of the employees concerned in the workplace or relevant section/s. Agreement in this respect may also be reached between the employer and an individual employee:
>
> **(i)** the spread of hours (i.e. 6.30 am to 6.30 pm) may be altered by up to one hour at either end of the spread;'[136]

[234] Ai Group submitted that 'the provision allows for the spread of hours to be altered by up to one hour at one or both ends of the spread simultaneously.'[137] ABI was of the same view, and further submitted that 'this interpretation applies where 'either' is also used in respect of clause 15.2(b) in the Exposure Draft with regards to standard shift work.'[138] The ETU submitted that 'The intention of the clause is that the spread of hours can be altered by up to one hour total That [sic] is to say, the spread of hours cannot be 5:30am to [sic] 7:30pm.'[139]

[235] This is an issue that appears in a number of exposure drafts. As noted in the Full Bench decision [2015] FWCFB 7236,[140] this issue may have implications for other awards. Accordingly we do not propose to determine this issue at this time. A separate Full Bench will be constituted to deal with these issues.

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[133] Ai Group, submission, 2 August 2017

[134] ABI, submission, 9 August 2017

[135] ETU, submission, 28 July 2017

[136] Exposure Draft – Business Equipment Award 2015, republished 17 July 2017

[137] Ai Group, Submission, 2 August 2017, at para 20

[138] ABI, submission, 9 August 2017, at para 9

[139] ETU, submission, 28 July 2017, at para 13

[140] See para [159]

[236] Ai Group submitted that clause 7.8(b) should be deleted at it states that 'Country employees' are defined in clause 17.6(a)'[141], despite a definition of 'country employees' not appearing anywhere in the exposure draft. AIG submitted that a definition of 'country employees' is not necessary.[142]

[237] We agree with the submission of Ai Group. Clause 7.8(b) will be deleted from the exposure draft.

2.14 Commercial Sales Award 2010

[238] Following the *July 2017 decision* a revised version of the *Commercial Sales Award 2010* exposure draft was published incorporating the changes that were agreed to by the interested parties. In response to the republished exposure draft, ABI submitted that, despite the Commission having proposed to remove the words 'in soliciting orders' from clause 16.3, the words are still present. [143] ABI submitted that following wording should appear at the beginning of the clause:

> 'All work done by an employee, other than travelling, at the request of the employer on a public holiday…'[144]

[239] We agree with ABI, this is clearly an administrative error and will be rectified.

2.15 Coal Export Terminals Award 2010

[240] Following the *July 2017 decision* a revised version of the *Coal Export Terminals Award 2010* (Coal Award) exposure draft was published incorporating the changes that were agreed to by the interested parties. Parties were afforded a final opportunity to comment on the exposure draft. Submissions were subsequently received from the Coal Terminals Group (CTG), [145] ETU[146] and the Construction, Forestry, Mining and Energy Union, Mining and Energy Division (CFMEU (M&E)).[147]

[241] CTG submitted that the title of the Coal Award should reflect the year in which the award is to be made. The same submission was made in relation to the reference in clause 3.3 to the *Port Authorities Award 2016*.[148] It appears that what CTG means by this submission is that the awards should be titled such that the year 2017 (or 2018, as the case may be) appears in the title of the award. The CFMEU (M&E) disagrees with the submission of CTG. The CFMEU (M&E) submitted that, as the Commission is not going to 'make' new awards—and

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[141] Exposure Draft – Business Equipment Award 2015, republished 17 July 2017

[142] Ai Group, submission, 2 August 2017, at para 21

[143] ABI, submission, 9 August 2017

[144] Ibid, at paras 10-11

[145] CTG, submission, 28 July 2017

[146] ETU, submission, 28 July 2017

[147] CFMEU (M&E), submission, 25 August 2017

[148] CTG, submission, 28 July 2017, at para 3(a)

that the Commission has stated it will be varying the awards rather than superseding them—the date in the award titles should remain as 2010.[149]

[242] Once the exposure draft process is finalised, the existing awards will be varied (rather than superseded). To that extent, we agree with the submission of the CFMEU (M&E). However, the award title will also be varied, and awards will be retitled with the year that the variation occurs (i.e. 2018).

[243] CTG submitted that the references to clause 21.2 appearing in clauses 8.5(a)(ii), 8.5(b)(ii) and 8.5(c)(i) should be deleted. CTG submits that, as clause 21.2 deals with consultation about changes to rosters rather than dispute resolution, its inclusion is inappropriate.[150] These submissions are supported by the CFMEU (M&E).[151]

[244] Clauses 8.5(a) and 8.5(b) of the exposure draft read as follows:

‘8.5 Rostering

(a) Rostering of hours and length of shifts

(i) The employer can determine the type of rosters to be worked.

(ii) The employer can determine the length of shifts to be worked up to a maximum of 10 hours. Shifts of more than 10 ordinary hours can only be implemented by agreement between the employer and the majority of employees affected or, in the absence of agreement, as resolved in accordance with clauses 21.2 and 22 of this award.

(b) Shift starting and finishing times

(i) The start and finish times of shifts up to 10 ordinary hours may be determined by the employer.

(ii) Shifts in excess of 10 ordinary hours will be worked between the starting and finishing times that are agreed between the employer and the majority of employees affected or, in the absence of agreement, as resolved in accordance with clauses 21.2 and 22 of this award.

(c) Roster and shift changes

(i) Subject to clause 21.2, an employer may vary an employee’s days of work or start and finish times to meet the needs of the business by giving at least 48 hours’ notice. A shorter period can be agreed on between the employer and individual employee.

(ii) Where an employee is performing shiftwork, the employer may change shift rosters or require an employee to work a different shift

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[149] CFMEU (M&E), submission, 25 August 2017, at paras 1-3

[150] CTG, submission, 28 July 2017, at para 3(b)

[151] CFMEU (M&E), submission, 25 August 2017, at para 10

roster upon 48 hours' notice. These time periods may be reduced where agreed by the employer and the employee or at the direction of the employer where operational circumstances require.

(iii) The employer must consult with directly affected employees about any changes made under this clause in accordance with clause 21.2.

(iv) In the case of an emergency an employer may vary or suspend any roster arrangement immediately, notwithstanding anything elsewhere in clause 8.5.' [152]'

[245] In relation to clauses 8.5(a)(ii) and b(ii) of the exposure draft, it is clear that the reference in clause is meant to refer to the dispute resolution clause of the Coal Award only. The exposure draft will be updated to include references to the dispute resolution clause, and the reference to clause 21.2 will be removed.

[246] In relation to clause 8.5(c)(i) and (iii) of the exposure draft, the references to clause 21.2 do not appear to be incorrect, however they appear to be unnecessary and will therefore be removed.

[247] CTG further submitted that, consistent with the amendment agreed to by CTG and the CFMEU (M&E)—and reflected in the Report to the Full Bench dated 10 August 2016[153]—the words 'other than a shiftworker' should be removed from clause 8.6(a) of the exposure draft.[154] This is supported by the CFMEU (M&E).[155] This would result in the clause reading 'All ordinary hours worked by an employee on the following days will be paid for at the following rates:…'. We agree and will make the change proposed.

[248] The CFMEU (M&E) submitted that, consistent with the current Coal Award and the consent position arrived at between the parties, references to 'day workers' appearing in clause 8.3 should be amended to read 'employees other than shiftworkers'.[156] Clause 8.3 of the exposure draft appears in the following terms:

> 'Dayworkers may be required to work up to 10 ordinary hours per day, between 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.'[157]

[249] The current Coal Award differs from the exposure draft in that it refers to 'employees, other than shiftworkers' and that the word 'hours' appears before '6.00 am'.[158] We agree with the CFMEU (M&E) submission and will vary the exposure draft accordingly.

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[152] Exposure Draft – Coal Export Terminals Award 2016, republished 14 July 2017

[153] Report to the Full Bench, 10 August 2016

[154] CTG, submission, 28 July 2017, at para 3(c)

[155] CFMEU (M&E), submission, 25 August 2017, at para 8

[156] CFMEU (M&E), submission, 25 August 2017, at paras 4-7

[157] Exposure Draft – Coal Export Terminals Award 2016, republished 14 July 2017

[158] *Coal Export Terminals Award 2010*, at cl.16.2(a)

[250] Finally, CTG submitted that the reference in paragraph 13.3(b) of the exposure draft to 'shiftwork rates in clause 8.4(b)' should instead be to clause 8.4, and that the reference in clause 14.4(b) of the exposure draft to 'the rate in clause 8.6(a)' should instead be to clause 8.6.[159] These proposals are supported by the CFMEU (M&E).[160] Clauses 8.4 and 8.6 of the exposure draft relevantly provide:

'8.4 Shiftwork

(a) Definitions

(i) Afternoon shift means any shift, the ordinary hours of which finish after 7.00 pm and at or before midnight.

(ii) Night shift means any shift, the ordinary hours of which finish after midnight and at or before 8.00 am.

(iii) Permanent night shift means a shift during a period which an employee:

- works night shift only;
- stays on night shift for a longer period than four consecutive weeks; or
- works on a roster that does not give at least one third of the employee's working time off night shift in each roster cycle.

(b) Shiftwork rates

A shiftworker or continuous shiftworker will be paid the following rates, on the following shifts:

	% of minimum hourly rate
Afternoon shift	115
Night shift	115
Permanent night shift	125

…

8.6 Weekend and Public Holiday rates – All Employees

(a) All ordinary hours worked by an employee other than a shiftworker on the following days will be paid for at the following rates:

Day	**Rate of pay (% of minimum hourly rate)**
Monday to Friday	100%
Saturday–First 4 hours	150%
Saturday–After 4 hours	200%
Sunday	200%

[159] CTG, submission, 28 July 2017, at paras 3(d)-(e)

[160] CFMEU (M&E), submission, 25 August 2017, at para 11

Public Holiday	250%

(b) The rates in this clause are maximum rates, and are in substitution for and not cumulative upon any other rate in this award (including shiftwork rates in clause 8.4(b).’[161]

[251] We agree with the CTG’s proposal.

[252] In response to the question posed by the Commission at clause 10.2 of the exposure draft (‘Parties are asked to clarify what the “applicable adult weekly wage” is for the purposes of clause 10.2(b)’)[162] both CTG and the CFMEU (M&E) refer to their previous submissions.[163] Both parties submitted that the applicable rate is ‘Maintenance Trades – Competent Rate’.[164] We agree.

2.16 Contract Call Centres Award 2010

[253] There are no outstanding issues in relation to this *Contract Call Centres Award 2010*.

2.17 Electrical Power Industry Award 2010

[254] Following the *July 2017 decision* we published a revised version of the *Electrical Power Award 2010* exposure draft, which incorporated the changes that were agreed to by the interested parties. Those parties were then afforded a final opportunity to comment on the exposure draft.

[255] The CFMEU (M&E) submits that, as the Commission is not making new awards, but rather superseding existing awards, the date in the title and commencement clause should remain ‘2010’ rather than be amended to read ‘2016’, and the commencement date should remain 1 January 2010.[165]

[256] As noted at [255] above, the year the award is varied (i.e. 2018) will be the year that is contained in the title of the awards.

[257] The Commission posed a question to interested parties, inviting them to clarify the interaction between clauses 9.4 and 9.6 of the exposure draft. Those clauses are in the following terms:

‘9.4 Work which is continuous with ordinary hours

(a) An employee who is required to work overtime for not less than two hours but not more than four hours before or after working ordinary rostered hours will receive a crib break of 20 minutes during that overtime which will count as

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[161] Exposure Draft – Coal Export Terminals Award 2016, republished 14 July 2017

[162] Ibid

[163] CTG, submission, 28 July 2017, at para 4; CFMEU (M&E), submission, 25 August 2017, at para 11

[164] CFMEU (M&E), submission, 14 April 2016, at paras 18-20; CTG, submission, 19 April 2016, at paras 12-14

[165] CFMEU (M&E), submission, 29 August 2017, at paras 1-2; CFMEU (M&E), submission, 25 August 2017, at paras 1-3

time worked. A meal will be provided by the employer or a meal allowance will be paid in accordance with clause 11.3(a).

(b) Where the overtime is to continue for more than four hours (and after each subsequent four hours) the employee will receive a crib break of 20 minutes which will count as time worked. A meal will be provided by the employer or a meal allowance as per clause 9.4(a).

…

9.6 Rest breaks during overtime

(a) An employee may take a paid rest break of 20 minutes after each four hours of overtime worked if the employee is required to continue to work after the rest break.

(b) An employer and an employee may agree to any variation of this clause to meet the circumstances of the workplace, provided that the employer is not required to make any payment in excess of or less than what would otherwise be required under this clause.

[258] The ETU submits that there is no overlap between the clauses, and that they should therefore remain unaltered:

> 'Clause 9.4 deals with paid meal breaks ('crib break') where employees have worked certain number of hours. Clause 9.6 deals with employees' entitlement to paid rest breaks for every four hours of overtime worked.'[166]

[259] The position of the ETU is supported by the CFMEU (M&E) which submits that, as clause 9.4 of the exposure draft deals with overtime that is continuous with ordinary hours and clause 9.6 of the exposure draft deals with overtime more generally, the clauses complement one another.[167] No party made a contrary submission.

[260] We do not propose to amend the revised exposure draft.

[261] At clause 13 of the exposure draft, the Commission asked parties to clarify when overtime is payable, and whether each day stands alone. The ETU submits that overtime is payable when an employee works 'beyond their ordinary hours of work', 'outside the agreed number of hours' or 'outside the spread of ordinary hours'.[168] The ETU also submits that 'For the purpose of calculating overtime, each day stands alone.'[169] This position is supported by the CFMEU (M&E).[170]

[262] We propose to vary the exposure draft to clarify that for the purpose of calculating overtime each day stands alone.

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[166] ETU, submission, 28 July 2017, at paras 2-3

[167] CFMEU (M&E), submission, 29 August 2017, at paras 3-4

[168] ETU, submission, 28 July 2017, at para 4

[169] Ibid, at para 5

[170] CFMEU (M&E), submission, 29 August 2017, at para 7

[263] The Commission posed a question to the parties, concerning the interaction of clauses 10.7(b) and 14.3(a), in the following terms:

> 'Parties are asked to clarify the interaction of clauses 14.3(a) and 10.7(b). Clause 10.7(b) does not state that the higher duties must resume after the period of leave.'

[264] Clauses 14.3(a) and 10.7(b) of the exposure draft relevantly provide as follows:

> '**10.7 Higher duties**
>
> **(a)** An employee directed by the employer to carry out the duties of a position classified at a higher pay level for a continuous period of not less than four hours will be paid for the day at the minimum rate for the higher pay level.
>
> **(b)** Where an employee has performed higher duties for three months continuously prior to a period of annual leave, personal/carer's leave or a period attracting accident pay, the leave or accident pay will be based on the employee's higher duties rate.
>
> **14.3 Additional monetary entitlements**
>
> **(a)** An employee receiving an allowance on a continuous basis will continue to receive the allowance on all annual leave, subject to, in the case of higher duties allowance in clause 10.7, the employee resuming higher duties on completion of the leave.'[171]

[265] The ETU submits that there is not, and should not be, a requirement for the higher duties to be ongoing following a period of annual leave.[172] This position is supported by the CFMEU (M&E).[173] No party made a contrary submission.

[266] We do not propose varying the exposure draft.

[267] At clause 14.9 of the exposure draft, the Commission asked interested parties to clarify two aspects of the clause's operation. Firstly, parties were asked to 'clarify whether an employee will only be paid out accrued annual [original emphasis] leave under clause 14.9.' Parties were also asked to 'clarify whether the term 'shift allowance' should be replaced with 'shift penalty' in clause 14.9 given the Full Bench comments at [363] to [379] of [2017] FWCFB 3433.' Clause 14.9 of the exposure draft provides the following:

> 'Upon termination of employment for any reason, an employee will be paid out accrued leave at the ordinary rate of pay applicable to the employee on the date when the employment terminated provided that, if the employee is a shiftworker, the employee will also be paid shift allowance and/or Saturday or Sunday penalty rates according to the employee's roster or projected roster.'[174]

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[171] Exposure Draft – Electrical Power Industry Award 2016, republished 14 July 2017

[172] ETU, submission, 28 July 2017, at para 6

[173] CFMEU (M&E), submission, 29 August 2017, at para 6

[174] Exposure Draft – Electrical Power Industry Award 2016, republished 14 July 2017

[268] The ETU supports replacing the term ‘shift allowance’ with ‘shift penalty’.[175] The ETU also submits that, as employees may be entitled to other accrued forms of leave (such as RDOs and long service leave), the term ‘annual’ should not be inserted.[176] Conversely, the CFMEU (M&E) submits the following:

> ‘The CFMEU understand clause 14.9 to be confined to addressing the payment of annual leave upon termination. This is because it is part of the annual leave provision and the reference to payment of shift/weekend penalties are relevant to the payment of annual leave for shift workers. As such clause 14.9 does no address other forms of leave where an entitlement to payment upon termination may exist. It is for that reason the CFMEU did not have an issue with the term *annual* being included in clause 14.9, as it was essentially a term of clarification.’[177]

[269] We propose to replace the term ‘shift allowance’ with ‘shift penalty.’ We propose to insert ‘annual’ to clause 14.9, for the reasons advanced by the CFMEU (M&E).

2.19 Higher Education Industry–Academic Staff–Award 2010

[270] In the *July 2017 decision*, we directed the NTEU to respond to the Go8 submission that the outstanding public holiday substitution issue should be dealt with by this Full Bench.[178] In response, the NTEU directed our attention to its submissions on this matter of 8 June 2016,[179] and requested that the issue be dealt with by this Full Bench.[180]

[271] This issue is similar to the issue dealt with at paras [24] to [37] of this decision, in relation to the General Staff Award.

[272] In their submission of 8 June 2016, the NTEU submit the following:

> ‘It is long established practice that many universities schedule teaching and related activities on some public holidays, and treat these as ordinary working days for the purpose of setting the academic calendar for staff and students. 20.2 reflects this practice, and the quid-pro-quo that the parties in the industry have settled on: a substitute day which itself will be treated as a public holiday for the purposes of matters such as the taking of leave and the payment of penalty rates.
>
> The question arises whether this established practice is consistent with the NES.
>
> The NES (s. 114) commences with an employee’s entitlement to take off public holidays but that entitlement is immediately qualified by an employer right to request that the employee work on a public holiday, a request which can only be refused by the employee if the request is unreasonable. Factors which are relevant to reasonableness relate not only to the operational requirements of the employer, but to the personal circumstances and particular nature of work performed by the employee.

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[175] ETU, submission, 28 July 2017, at para 7

[176] Ibid, at para 9

[177] CFMEU (M&E),submission, 29 August 2017, at para 25

[178] [2017] FWCFB 3433 at [57]

[179] NTEU, submission, 8 June 2016

[180] NTEU, submission, 28 July 2017

In the absence of clause 20.2, it is likely that the practice of universities to require staff to work on public holidays as a matter of course would generally be considered "reasonable". However in order to be consistent with the NES, it seems likely that

(a) the employer would need to pay penalty rates for staff who work on those days, rather than deferring that entitlement to another date (for example, what would be the entitlement of a person who ceased employment before the substituted day came around?);

(b) the employer would need to be open to reasonable requests from staff not to work on those days, having regard to personal circumstances including family responsibilities; and

(c) the request to work on the public holiday should be directed only to those staff where the nature of the work they perform is relevant to the capacity of the institution to perform its business on that day.

S. 115(3) allows for substitution arrangements to be provided for in a modern award, but on the basis of agreement between an employer and an employee, rather than as a blanket, non-negotiable provision. The combination of the words "subject to the provisions of this clause" and the words of clause 20.2 therefore appear to be inconsistent with the provisions of the NES on public holidays.
A better approach would be to delete the words "subject to the provisions of this clause" from 20.1, and to amend the first line of 20.2(a) to read "An employer and an employee may agree to substitute…' [181]

[273] The AHEIA notes in their submission of 15 April 2016 that 'we would be opposed to removing the industry-specific wording that reflects the practice in the sector of substituting public holidays, especially over the Christmas close-down period.'[182]

[274] We note that the issue raised by the NTEU also arises in a number of other modern awards, including the:

- *General Retail Industry Award 2010;*
- *Manufacturing and Associated Industries and Occupations Award 2010; and*
- *Mining Industry Award 2010.*

[275] As the determination of the issue in the context of *Higher Education Industry–Academic Staff–Award 2010* (Academic Staff Award) may have implications for other awards we do not propose to deal with the issue in this decision. This issue will be the subject of a Statement by the President shortly.

[276] There are no further award specific matters concerning the Academic Staff Award.

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[181] NTEU, submission, 8 June 2016, at pp 3-4

[182] AHEIA, submission, 15 April 2016, at p 2

2.19 Higher Education Industry–General Staff–Award 2010

[277] In the *July 2017 decision*, we directed the NTEU to respond to the Go8 submission that the outstanding public holiday substitution issue should be dealt with by this Full Bench.[183] In response, the NTEU directed our attention to their submissions on this matter of 8 June 2016,[184] and requested that the issue be dealt with by this Full Bench.[185]

[278] The Commission asked the parties to comment on 'whether the penalty payable on a public holiday should be included in clause 15 or 20 for the purposes of clause 9.2(b)(v).' In response, the AHEIA submitted that 'clauses 9.2(v) and 16.1 deal adequately [sic] with penalty rates payable on public holidays and it is not necessary to amend either Clause 15 of Clause 20 to also refer to these rates.'[186] Similarly, Go8 submitted that 'it would be unnecessary to include any reference to the public holiday penalty rate in either clause 15 or clause 20 given it is already dealt with in both clause 9.2(b)(v) and clause 16.1.'[187]

[279] Additionally, Go8 submits that, in light of the decision in [2017] FWCFB 3433, the term 'shift loading' as it appears in clause 9.2(b)(iv) of the exposure draft should be amended to read 'shift penalty'.[188]

[280] We agree with the Go8 submission and will amend clause 9.2(b)(iv) of the exposure draft to delete 'shift loading' and insert 'shift penalty'.

[281] At clause 17.5 of the exposure draft, the Commission asked the parties whether 'Australian Statistician's average' should instead read 'Australian Bureau of Statistics' average full-time'. Go8 submitted that the phrase should be changed, in order to reflect the biannual publication of ABS figures. Go8 also noted that the same issue arises in respect of the *Higher Education–Academic Staff–Award.* No other party has commented on the proposed change.

[282] We will amend clause 17.5 in the Exposure Draft to delete 'Australian Statistician's average' and insert 'Australian Bureau of Statistics' average full-time. The amendment has also been made to the relevant clause of the Academic Staff Award Exposure Draft.

[283] At clause 20 of the exposure draft, the Commission asked parties to comment on:

- whether clause 20.3 is inconsistent with the NES (taking into account the Full Bench decision [2014] FWCFB 9412); and
- whether the words 'subject to the provisions of this clause' appearing in clause 20.1 should be deleted.

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[183] [2017] FWCFB 3433, at [57]

[184] NTEU, submission, 8 June 2016

[185] NTEU, submission, 28 July 2017

[186] AHEIA, submission, 4 August 2017

[187] Go8, submission, 4 August 2017, at p 1

[188] Go8, submission, 4 August 2017, p1

[284] In respect of the former, both the AMWU and Go8 submitted that the clause is inconsistent with the NES.[189] That clause in the exposure draft currently reads as follows:

> ‘**20.3 Effect on payment for holidays**
>
> Where an employee is absent from their employment on the working day before or the working day after a public holiday without reasonable excuse or without the consent of the employer, they will not be entitled to payment for the holiday.’[190]

[285] In respect of the latter, both the AMWU and Go8 agree that the words ‘subject to the provisions of this clause’ in clause 20.1 of the exposure draft can be removed, so that the clause would read ‘The entitlement to public holidays is set out in the NES.’[191] We agree and will make the necessary change.

[286] Pursuant to the Full Bench decision in [2014] FWCFB 9412 (at para [107]), we propose to delete clause 20.3 from the exposure draft. Clause 33.3 of the current award will also be deleted and a determination will be issued shortly.

[287] In Schedule C of the exposure draft, the Commission asked the parties whether the top leading hand allowance should be for ‘more than 20 employees’, as per the *Higher Education Workers Victoria Award 2005* [AP844616]. The modern award currently provides differing levels of payment for 3–10 employees, 11–20 employees, and 20 or more employees. [192] The AMWU, Go8 and AHEIA agreed that the top leading hand allowance should be for ‘more than 20 employees’. The exposure draft will be amended accordingly.

2.20 Labour Market Assistance Industry Award 2010

[288] Following the *July 2017 decision* a revised version of the *Labour Market Assistance Industry Award 2010* exposure draft was published incorporating the changes that were agreed to by the interested parties. The parties were then afforded a final opportunity to comment on the exposure draft. ABI was the only party to make such a submission.

[289] Clauses 11.2(a) and 14.1(b) of the exposure draft have been redrafted by staff at the Commission in order to clarify when overtime payments apply with regard to excursions. Parties were invited to comment on the redrafted clauses, which now appear in the following terms:

> ‘**11.2 Wage related allowances**
>
> …
>
> **(b)** Where an employee is required to supervise clients in excursion activities involving overnight stays away from home, the employee will be entitled to payment of a sleepover allowances of $62.10 for every night. This allowance

[189] Go8, submission, 4 August 2017, at p 2; AMWU, submission, 4 August, at para 4

[190] Exposure Draft – Higher Education–General Staff– Award 2015, republished 17 July 2017

[191] Go8, submission, 4 August 2017, at p 2; AMWU, submission, 4 August, at para 6; AHEIA, submission, 4 August 2017

[192] Go8, submission, 4 August 2017, at p 2; AMWU, submission, 4 August, at para 3

is paid in addition to the employee's ordinary hourly rate of pay inclusive of any penalties or loadings.'

…

14.1 Entitlements to payment for overtime

…

(b) Full-time employees

(i) A full-time employee will be entitled to overtime where the employee works more than 152 hours in any 28 day period or where the employee works outside the spread of ordinary hours provided for in clause 8.2.

(ii) A full-time employee will be entitled to overtime where they work in excess of their prescribed hours of duty.'[193]

[290] ABI submitted that it agrees to the proposed redrafting of clause 14.1(b) of the exposure draft 'as it reflects the position of the parties contained in the Joint Report filed on 25 July 2016.'[194] ABI also agree to the proposed redrafting of clause 11.2(b) of the exposure draft, but submits that the words 'which is' should be inserted after the words 'employee's ordinary hourly rate of pay'.[195] We agree with ABI's proposed change and will amend the exposure draft accordingly.

[291] ABI submit that clause 20.2 of the exposure draft—which provides that 'An employee who works on a public holiday will be paid at **250%** of the minimum hourly rate for all time worked'— should be amended so that it instead reads as follows:

'Payment for working on public holiday is provided for in clause 14.2(c).'[196]

[292] ABI submit that having the entitlement in two places will cause confusion.[197] Furthermore, ABI support the Commission's redrafting of clause 14.2(c) of the exposure draft,[198] which has been redrafted in order to clarify the applicable penalty rates for ordinary hours and outside the span of ordinary hours, in a manner consistent with the Plain Language Guidelines. We agree with ABI's proposed change and will amend the exposure draft accordingly.

2.21 Ports, Harbours and Enclosed Water Vessels Award 2010

[293] Following the *July 2017 decision* a revised version of the *Ports, Harbours and Enclosed Water Vessels Award 2010* exposure draft was published incorporating the changes

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[193] Exposure Draft – Labour Market Assistance Industry Award 2015, republished 18 July 2017

[194] ABI, submission, 9 August 2017, para 13

[195] Ibid, at para 13

[196] Ibid, at para 15

[197] Ibid

[198] Ibid, at para 14

that were agreed to by the interested parties. The parties were then afforded a final opportunity to comment on the exposure draft. The MUA was the only party to make such a submission.

[294] In relation to the casual conversion clause, the MUA submits that the model clause should be adopted without change, as there are 'no special provisions…that warrant a departure from the model clause.'[199]

[295] We propose to incorporate the model clause in the revised exposure draft.

[296] In response to the Commission's request that parties comment on whether clause 6.5(b)(i) of the exposure draft requires amendment the MUA submitted that, as overtime and shift allowances are not incorporated into the casual loading, amending clause 6.5(b)(i) is unnecessary.[200] No party made a contrary submission. We agree with the MUA's position.

[297] In response to the Commission's request that parties comment on which rates apply to shift work on weekends, the MUA submitted that 'Shiftwork on weekends should be paid at the Saturday rate.'[201] We propose to convene a further conference of interested parties to discuss the matter further.

2.22 State Government Agencies Award 2010

[298] Following the *July 2017 decision* a revised version of the *State Government Agencies Award 2010* exposure draft was published incorporating the changes that were agreed to by the interested parties. The parties were afforded a final opportunity to comment on the exposure draft.

[299] In the revised version of the Exposure Draft the Commission queried whether payment for excess travelling time, as provided for in clause 11.3(e) of the exposure draft, is paid at the minimum rate or the applicable penalty rate.

[300] Clause 11.3(e) of the exposure draft reads as follows:

'**(e) Excess travelling time**

(i) An employee who is directed to work temporarily at a location other than their normal place of employment may, subject to the following provisions, be granted time off during normal hours of duty in respect of any period of excess travelling time so incurred, or must be reimbursed at the ordinary rate of pay (calculated to the nearest quarter hour) for time reasonably spent in travelling to and from the place of residence and the designated place of work outside normal working hours (in excess of the time normally spent in travelling from the place of residence to the usual place of work and return).

[199] MUA, submission, 4 August 2017, p1

[200] Ibid

[201] MUA, submission, 4 August 2017, at p 1

(ii) Provided that a journey involving excess travelling time of less than 30 minutes daily must not be taken into account and it will be granted only to employees whose salary does not exceed that prescribed for the highest subdivision of Administrative Officer Grade 6—Level C.'[202]

[301] The CPSU (VIC) submitted the following:

> 'The clause provides an entitlement to payment (or time in lieu) for excess travel time "outside normal working hours". The employee must be granted "time off during normal hours of duty" or "be reimbursed at the ordinary rate of pay". Payment is therefore not at the penalty rate but at the employee's ordinary hourly rate.'[203]

[302] We accept the submission advanced by the CPSU, no change will be made to the draft.

3. Next Steps

Educational Services (Post-Secondary Education) Award 2010

[303] Parties are invited to comment on our *provisional* view that the exposure draft be amended in the manner proposed by the NTEU (see [60]). Parties are directed to provide comments by no later than **4.00pm** on **Tuesday, 10 April 2018**.

Educational Services (Schools) General Staff Award 2010

[304] Parties are invited to further comment on the submission made by AIS and IEU that the percentage in clause 17.3(b)(i) (relating to annual leave loadings and exceptions) be amended (see [97]). Parties are directed to provide comments by no later than **4.00pm Tuesday, 27 March 2018**.

Horticulture Award 2010

[305] The AWU must advise by no later than **4.00pm** on **Tuesday, 10 April 2018 i**f it wishes to pursue the issue as a substantive variation (see [121]).

[306] The NFF is asked to confirm whether or not it presses the proposed variation in respect of defining the full and base rate of pay for pieceworkers for the purpose of calculating NES entitlement (see [124]). Comments are due by no later than **4.00pm** on **Tuesday, 10 April 2018.**

[307] Interested parties are invited to comment on Ai Group's suggestion that the definition of 'ordinary hourly rate' be amended (see [127]). Comments are due by no later than **4.00pm** on **Tuesday, 10 April 2018**.

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[202] Exposure Draft – State Government Agencies Award 2015, republished 14 July 2017

[203] CPSU (VIC), submission, 4 August 2017, at p 1

Sugar Industry Award 2010

[308] Parties are directed to file their submissions on the facilitative provisions contained in the exposure draft by no later than **4.00pm** on **Tuesday, 10 April 2018**.

[309] In respect of the Full Bench's proposal to amend the table of rates and insert a new clause 13.2(d), parties are to provide any objections to this proposal by no later than **4.00pm** on **Tuesday, 10 April 2018.**

Wine Industry Award 2010

[310] Interested parties are to advise whether there are any outstanding issues in respect of the Wine Award by no later than **4.00pm** on **Tuesday, 10 April 2018.**

[311] All submissions in respect to all of the above directions are to be sent to amod@fwc.gov.au

PRESIDENT

Appearances:

Z Duncalfe, Australian Workers Union

B Rogers, National Farmers Federation

Hearing details:

Pastoral Award 2010
9 February 2017
Sydney

Final written submissions:

David Tulloh, 29 November 2017

Australian Business Industrial and NSW Business Chamber, 24 November 2017

National Tertiary Education Industry Union, 22 November 2017

Independent Education Union of Australia and Associations of Independent Schools, 24 November 2017

Australian Industry Group, 24 November 2017

National Farmers' Federation, 24 November 2017

Australian Federation of Employers and Industries, 24 November 2017

Russell Kennedy and Others, 24 November 2017

Australian Workers' Union, 6 March 2018

CFMEU - Mining and Energy Division, 29 August 2017

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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