DECISION

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

4 yearly review of modern awards – Plain language re-drafting – Clerks—Private Sector Award

(AM2016/15, AM2014/219)

JUSTICE ROSS, PRESIDENT
VICE PRESIDENT HATCHER
COMMISSIONER HUNT

MELBOURNE, 6 SEPTEMBER 2018

4 yearly review of modern awards – plain language re-drafting – Clerks—Private Sector Award 2010.

Background

[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). As part of the Review the *Clerks—Private Sector Award 2010* (current award) has been re-drafted in plain language.

[2] On 1 December 2017 a revised plain language exposure draft (revised PLED) was published.[1] The revised PLED incorporated amendments made to reflect discussions at a conference held on 17 September 2017 (September conference).[2] In a Statement[3] issued on 19 January 2018 (January Statement) we outlined a number of outstanding items in relation to the revised PLED. Interested parties were invited to make submissions in respect of those items.

[3] The following parties made submissions in response to the January Statement:

- Australian Industry Group (Ai Group);[4]
- Australian Municipal, Administrative, Clerical and Services Union (ASU);[5]
- Australian Business Industrial and the New South Wales Business Chamber (ABI);[6]
- Business SA;[7] and

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[1] Revised PLED – 1 January 2018.

[2] Transcript, 15 September 2017.

[3] Statement [2018] FWC 411

[4] Ai Group submission, 20 February 2018.

[5] ASU submission, 15 February 2018.

[6] ABI & NSWBC submission, 22 February 2018.

- Motor Trade Association (MTA).[8]

[4] This decision resolves the majority of outstanding issues that were raised in the January Statement. Some additional issues not subject of the January Statement were also raised by parties in the submissions listed at paragraph [3]. These additional issues are also addressed in this decision with further directions where necessary.

[5] Given that the parties have made submissions on a number of new issues, items are set out in clause order rather than in order of item number.

Clause 2 – Item 155 – Definition of minimum hourly rate

[6] Item 155 relates to the definition of "minimum hourly rate" in clause 2 of the revised PLED. Ai Group noted that "minimum hourly rate" is defined as the minimum hourly rate at clause 16 of the revised PLED, which provides only for adult and junior rates. Ai Group submitted that the definition of "minimum hourly rate" in clause 2 previously included the rates in the Supported Wage System (SWS) and National Training Wage (NTW), as these had appeared in the minimum rates clause (clause 16) of the plain language exposure draft first published on 3 February 2017.[9] Ai Group submitted that the definition of "minimum hourly rate" no longer includes the NTW and SWS because they now appear in separate clauses and this constitutes a substantive change.[10]

[7] The plain language expert proposed an amended definition of "minimum hourly rate" which was inserted in the revised PLED, as follows:

> '**minimum hourly rate**, in relation to an employee, means the minimum hourly rate to which the employee is entitled under this award.'

[8] In the January Statement the Commission invited interested parties to make final submissions in relation to the definition proposed by the expert.[11]

[9] The ASU did not oppose the wording proposed by the expert.[12] Ai Group submitted that the amended definition resolved its concerns.[13] ABI sought further consultation on the definition.[14]

[10] The MTA agreed with the comment in the January Statement that this issue may affect a number of exposure drafts and submitted that the amended definition was unclear.[15] The MTA submitted that the definition should revert back to the definition used in the plain language exposure draft published on 7 July 2017 (July PLED), which was the following:

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[7] Business SA submission, 15 February 2018.

[8] MTA submission, 15 February 2018.

[9] Clerks PLED – 3 February 2017.

[10] Transcript, 15 September 2017 at PN 860.

[11] Statement [2018] FWC 411 at [67].

[12] ASU submission, 15 February 2018, paragraph 26.

[13] Ai Group submission, 20 February 2018, paragraph 63.

[14] ABI & NSWBC submission, 22 February 2018 at paragraph 2.1(a).

[15] MTA submission, 15 February 2018, paragraph 11.

> '**minimum hourly rate** means the minimum hourly rate prescribed in clause 16—Minimum rates.'

[11] Ai Group opposed the proposal advanced by the MTA, noting that the issue identified by the MTA arose from a previous iteration of the PLED, was discussed at the September conference and has been resolved in the revised PLED.

[12] It is not appropriate simply to revert to the definition that appeared in the July PLED. As Ai Group noted, the definition in the July PLED is not technically correct and we are of the view that it should be revised, having regard to the structure of plain language exposure drafts. We acknowledge that this issue may affect other awards, that the MTA opposes the definition and that ABI has requested further consultation. We also acknowledge that the July PLED definition is not particularly helpful because it does not direct the reader to all relevant rates.

[13] We propose to move the SWS and NTW back into clause 16 as subclauses 16.5 and 16.6 and to revert to the definition that appeared in the July PLED. Parties are invited to review the proposed solution and make further submissions in relation to the definition of 'minimum hourly rate'. Submissions are to be filed by **4.00 pm on Monday 24 September 2018**.

Clause 4 – Items 5, 8, 9, 11 and 13 – Coverage

[14] Item 5 relates to clause 4.1 of the revised PLED. In the January Statement parties were invited to review clause 4.1 of the revised PLED and advise if there were any outstanding issues. The MTA submitted that subclause (b) repeats the same words as subclause (a) and the clause should be redrafted to avoid repetition and to be consistent with the definition of clerical work.[16]

[15] The MTA proposed the following:

> '4.1 This occupational award covers private sector employers throughout Australia in relation to their employees who are wholly or principally engaged in clerical work, including administrative duties of a clerical nature, as prescribed in Schedule A—Classification Structure and Definitions.'

[16] Ai Group opposed the MTA's proposed amendment and submitted that no outstanding issue remained.[17]

[17] We are not persuaded to amend clause 4.1 in the terms suggested by the MTA. Clause 4.1 of the revised PLED deals with employers and employees separately and breaks down a long sentence into manageable parts. Clause 4.1 is consistent with equivalent coverage clauses in other plain language exposure drafts and accurately reflects the equivalent provision of the current award. Item 5 is resolved.

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[16] MTA submission, 15 February 2018, paragraph 1.

[17] Ai Group submission, 20 February 2018, paragraphs 4 – 6.

[18] Item 8 relates to the definition of "clerical work" and the effect on the coverage clause. In the January Statement parties were invited to advise if there were any outstanding issues.

[19] The ASU supported the definition in the revised PLED.[18] Ai Group submitted that the revised PLED definition of "clerical work" at clause 2 resolved its concerns.[19] ABI supported the definition in clause 2.[20] Item 8 is resolved.

[20] Item 11 relates to the on-hire provisions at clause 4.2 of the revised PLED. In the January Statement interested parties were invited to advise if there were any outstanding issues.

[21] ABI did not support the proposed amendment to clause 4.2(a) and suggested it should read "…if the ~~employee~~ employer is not covered by another modern award."[21] We have reviewed clause 4.2(a) of the revised PLED, having regard to clause 4.4 of the current award, and are satisfied that the word "employer" should be substituted for "employee" in order to reflect the current entitlement.

[22] Ai Group submitted that the term "employers which provide group training services for trainees" in clause 4.5 of the current award had been changed to "group training employer" in the revised PLED. Ai Group submitted that the revised PLED term is unclear and potentially confusing to the lay person.[22]

[23] We disagree. The term "group training employer" will be retained in the PLED.

[24] Ai Group also submitted that the current award covers a trainee "engaged" in any classifications set out at Schedule B and the reference to "working" in the revised PLED should be replaced with "engaged".[23] We disagree. The host employer does not "engage" the trainee, but provides work for them of a particular nature. The group training employer does not necessarily "engage" a trainee to work in any particular classification. For these reasons, "working" is a better word as it focuses on the work the trainee is performing.

[25] ABI did not support redrafted clause 4.3(a) and submitted that "modern award" should be replaced with "industry award". We have reviewed clause 4.1(a) of the current award and clause 4.3(a) of the revised PLED. We are satisfied that the wording in the revised PLED accurately reflects the entitlement in the current award. The amendment proposed by ABI will not be adopted. Item 11 is resolved.

[26] Item 9 relates to clause 4.4 of the revised PLED and concerns the wording of the exclusion from coverage of employers covered by awards listed in that clause.

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[18] ASU submission, 15 February 2018, paragraph 4.

[19] Ai Group submission20 February 2018, paragraph 7.

[20] ABI & NSWBC submission, 22 February 2018

[21] ABI & NSWBC submission, 22 February 2018 at paragraph 2.3(c).

[22] Ai Group submission, 20 February 2018, paragraphs 18 – 19.

[23] Ai Group submission, 20 February 2018, paragraph 20.

[27] In respect of the lead-in words to clause 4.4, Ai Group submitted that the wording "for employees covered by the award" is unclear.[24] Ai Group submitted that the purpose of the equivalent clause in the current award is to ensure that the award does not cover employers covered by the other awards listed, *with respect to employees covered by those awards*. However, the current award may cover an employer in relation to other employees who are not covered by the awards specifically listed (assuming no other exclusions apply).[25] Ai Group submitted that the phrase "for employees covered by the award" is not sufficiently clear to convey the meaning of clause 4.6 of the current award.

[28] ABI did not support the inclusion of the words "for employees covered by the award".[26]

[29] We have reviewed clause 4.4 of the PLED and 4.6 of the current award. We agree with Ai Group and have decided to amend 4.4 of the PLED for greater consistency with the current award as follows:

> **4.4** Without limiting clause 4.3, this occupational award does not cover employers covered by any of the following industry awards with respect to employees covered by the awards:

[30] Clause 4.4 of the revised PLED included additional awards to those listed at clause 4.6 of the current award, after the inclusion of additional awards was discussed during the September conference. A further revised list of awards proposed for inclusion at clause 4.4 was at Attachment A to the January Statement. Interested parties were invited to make submissions regarding the potential inclusion of additional awards.

[31] Business SA submitted that a list of awards as appeared in the revised PLED was preferable to a general provision.[27] Business SA submitted that a list of awards would provide more certainty in determining coverage and without it, an employer or employee may be disadvantaged if an incorrect assessment on coverage were made.

[32] The ASU expressed concern about the addition of modern awards to the list that exclude Clerks Award coverage at clause 4.4 of the revised PLED.[28] The ASU attached a list of awards that it proposed should be included.

[33] The ASU made the following submission regarding potential inclusion of additional awards:

> '6. … The Horse and Greyhound Training Award 2010, the Joinery and Building Trades Award 2010 and the Timber Industry Award 2010 contain a cursory classification of clerical functions to the extent that these Awards could not be described as containing clerical classifications in the sense that there are no more than one clerical classification in these respective Awards.

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[24] Ai Group submission, 20 February 2018, paragraph 9.

[25] Ai Group submission, 20 February 2018, paragraph 10.

[26] ABI & NSWBC submission, 22 February 2018 at paragraph 2.3(b)

[27] Business SA submission, 15 February 2018, paragraph 1.

[28] ASU submission, 15 February 2018, paragraph 5.

> 7. Further there is no consistency in the wording used for position descriptions and duties between the proposed awards to be included and the CPS [Clerks award] Award. For instance the Local Government Industry Award 2017 and the Water Industry Award 2010 does not use the wording of "clerk" or "clerical" at all, preferring the use of the word "administrative". Similarly other awards such as the Labour Market Assistance Industry Award 2017 and the Australian Government Industry Award 2017 use "clerk" or "clerical" fewer than three times.
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> 8. The ASU has listed the comparable classifications, along with the ordinary hours of work, overtime and weekend penalties for each award that is proposed to be included in the attachment to this submission. As the Australian Industrial Relations Commission noted at item [222] in the Award Modernisation (AM2008/1–12) Decision ([2008] AIRCFB 1000) "*As other awards with clerical classifications are made throughout the process we propose to add these to the list in cl.4.3. When each other industry is dealt with the position of clerical employees will be considered. A relevant consideration will obviously be the extent and nature of award-covered employees in the industry*". In the ASU's submission the extent and nature of award covered employees of those awards listed by the Commission requires further deliberation before any amendments are considered.'[29]

[34] The ASU submitted that the addition of awards to the list at clause 4.4 of the revised PLED should be dealt with at the time of reviewing other awards. The ASU submitted that the three additional awards added to the list at clause 4.4 of the revised PLED should not be included at this point in time and would require further consideration.[30] The ASU also submitted that there is already a mechanism for addressing coverage of modern awards with clerical and administrative classifications through clause 4.5 of the revised PLED.[31]

[35] Ai Group submitted that the addition of awards to the list at clause 4.4 of the revised PLED is not necessary as there is no evidence that the current provision gives rise to confusion or uncertainty.[32] Ai Group supported maintaining a general exclusion equivalent to current award clause 4.1(a) (4.3(a) of the revised PLED) and the awards listed at current award clause 4.6 (4.4 of the revised PLED). Ai Group submitted that this approach enables consideration to be given to any changes made to the coverage of other modern awards in relation to clerical work and avoids the risk of inadvertently substantively altering award coverage through this process.[33]

[36] ABI did not support the addition of more awards to the list.[34] The MTA submitted that a general provision is adequate and is its preferred approach to a list of awards.[35]

[37] Inclusion of additional awards is opposed by Ai Group and ABI. The ASU express caution to inclusion of more awards. The ASU suggest further consideration should be given when reviewing other awards and should not be done at this time. We agree and determine that the list of awards at clause 4.4 of the revised PLED will be replaced with the list appearing in clause 4.6 of the current award. Item 9 is resolved.

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[29] ASU submission, 15 February 2018, paragraphs 6 – 8.

[30] ASU submission, 15 February 2018, paragraph 9.

[31] ASU submission, 15 February 2018, paragraph 10.

[32] Ai Group submission, 20 February 2018, paragraph 13.

[33] Ai Group submission, 20 February 2018, paragraph 14.

[34] ABI & NSWBC submission, 22 February 2018 at paragraph 2.3(b)

[35] MTA submission, 15 February 2018, paragraph 2.

[38] Ai Group made a further submission in relation to clause 4.5 of the revised PLED.[36] Ai Group submitted that clause 4.7 of the current award provides that an employee will be covered by the classification most appropriate to the work they perform and to the environment in which they normally perform that work. Ai Group submitted that the revised PLED potentially alters this because the relevant consideration is the environment in which the employee normally performs the work *not* the environment in which the work is generally performed. Ai Group submit that the clause should be amended to read "…and to the environment in which the employee normally performs the work."

[39] We have considered Ai Group's submission and we are not persuaded that there is a material difference between current award clause 4.7 and clause 4.5 of the revised PLED. The word "it" in the last line of clause 4.5 of the revised PLED refers to "the work" earlier in the same sentence. The revised PLED will not be amended. Item 13 is resolved.

Clause 10 – new Item and Item 21 – Part-time employment

[40] Following the January Statement Ai Group raised concerns about clause 10.1 of the revised PLED.[37] Ai Group submitted that clause 10.1 is substantively different to clause 11.1 of the current award.

[41] Clause 11.1 of the current award provides:

> '**11.1** A part-time employee is an employee who is engaged to perform less than the full-time hours at the workplace on a reasonably predictable basis.'

[42] Clause 10.1 of the revised PLED provides:

> '**10.1** An employee who is engaged to work for fewer ordinary hours than 38 per week (or the number mentioned in clause 9.2 (Full-time employment)) and whose hours of work are reasonably predictable is a part-time employee.'

[43] In correspondence dated 16 October 2017,[38] Ai Group submitted that the current award clause defines an employee as a part-time employee if the employee is *engaged* to work less than full-time hours on a reasonably predictable basis. Ai Group submitted that clause 10.1 *deems* that an employee engaged to work less than full-time hours on a reasonably predictable basis is a part-time employee. Ai Group submitted that an employee who works less than full-time hours on a reasonably predictable basis may also be a casual employee. The distinction that Ai Group raise is that the part-time employee *must* be engaged to work that pattern whereas a casual employee *may* happen to work that pattern, but is not specifically engaged to do so. A casual employee is engaged to work on a casual basis. Ai Group submitted this distinction is blurred by the re-drafting.

[44] Ai Group submitted that clause 10.1 should be amended as follows (changes in red):

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[36] Ai Group submission, 20 February 2018, paragraphs 23 – 25.

[37] Ai Group submission, 20 February 2018, paragraphs 64 – 66.

[38] Ai Group correspondence, 16 October 2017.

> '**10.1** A part-time employee is an ~~An~~ employee who is engaged to work for fewer ordinary hours than 38 per week (or the number mentioned in clause 9.2 (Full-time employment)) ~~and whose hours of work are~~ on a reasonably predictable basis ~~is a part-time employee~~.'

[45] ABI supported the amendment proposed by Ai Group.

[46] We agree that the plain language re-drafting may subtly affect the meaning of clause 10.1. We propose to adopt the amendment to clause 10.1 proposed by Ai Group as set out in paragraph [44].

[47] Item 21 relates to clause 10.2 of the revised PLED. In the January Statement the Commission expressed a provisional view that clause 10.2 should be deleted because, according to normal principles of statutory interpretation, the terms of an award apply to everyone covered by it unless otherwise specified.[39] Clause 10.2 was deleted from the revised PLED.

[48] Ai Group did not oppose the deletion and indicated it would not necessarily press for the inclusion of the current pro rata clause given the way entitlements, such as wages, are expressed in the PLED.

[49] The ASU submitted that maintaining clause 11.2 of the current award would address its concerns and that the proposed clause 10.2 may have unintended consequences. The ASU submitted that no anomalies had been identified in the operation of clause 11.2 and maintaining the clause would allow for a methodology for determining the terms and conditions of employment for part-time employees.[40]

[50] No other party objected to the proposed deletion of clause 10.2 of the revised PLED.

[51] During the September conference parties engaged in a discussion about the problematic nature of clause 10.2 of the July PLED. The clause is inaccurate because a number of conditions of full-time employees do not apply to part-time employees on a pro rata basis, for example breaks and allowances.[41]

[52] We confirm the provisional view expressed in the January Statement to delete clause 10.2. We note that the first aid allowance at clause 21.2 of the PLED is expressed as a weekly allowance. Interested parties are invited to make submissions about how the first aid allowance applies to part-time and casual employees by **4.00 pm, Monday 24 September 2018**.

[53] The MTA made a new submission in relation to clause 10.6 of the revised PLED. Clause 10.6 provides:

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[39] Statement [2018] FWC 411 at [18]

[40] ASU submission, 15 February 2018, paragraphs 12 – 13.

[41] Transcript, 15 September 2017, PNs 249 – 261.

> '**10.6** All time worked in excess of the number of ordinary hours agreed under clause 10.2 or as varied under clause 10.3 is overtime and must be paid at the overtime rate in accordance with clause 24—Overtime (employees other than shiftworkers).'[42]

[54] The MTA submitted it did not take issue with the changes proposed by parties and those reflected in clauses 10.3 and 10.6, but clause 10.6 could be further clarified by inserting "in excess of the number of hours' after "under clause 10.2 or".[43] The MTA submitted that this would prevent the clause being interpreted as providing that all time worked in excess of the number of hours as varied under clause 10.3 must be paid as overtime.[44]

[55] The change proposed by the MTA is not necessary. The purpose of clause 10.6 is to provide clarity about the overtime entitlements for part-time employees. The clause as drafted in the revised PLED is sufficiently clear. We are of the view that the placement of in excess of the number of ordinary hours" as drafted in the revised PLED is sufficiently connected to the number of ordinary hours as agreed under clauses 10.2 or 10.3. Clause 10.6 will be adopted in the terms set out in paragraph [53].

Clause 11 – Item 24 – Casual employment

[56] Item 24 relates to clause 11.1 of the revised PLED, the definition of casual employment. In the January Statement the Commission expressed the provisional view that clause 11.1 should be drafted as follows:

> 'An employee is a casual employee if they are engaged as a casual employee.'[45]

[57] Interested parties were invited to advise whether there was any outstanding issue in respect of item 24. Business SA and Ai Group supported the provisional view.[46] No other party made submissions on the matter. The provisional view expressed in the January Statement is adopted and item 24 is resolved.

Clause 12 – Item 26 – Classifications and Schedule A

[58] Item 26 relates to clause 12.2 (Classifications) of the revised PLED and is connected to issues relating to Schedule A (item 146). ABI did not support the continued omission of "as determined by the employer" from clause 12.2.[47] The MTA submitted that clause 12.2 should be deleted because Schedule A contains instructions on how to classify an employee[48] or, alternatively, that clause 12.1 should be amended as follows to be more consistent with Schedule A:

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[42] MTA submission, 15 February 2018, paragraph 13

[43] MTA submission, 15 February 2018, paragraph 13.

[44] MTA submission, 15 February 2018, paragraph 13.

[45] Statement [2018] FWC 411 at [21].

[46] Ai Group submission, 20 February 2018, paragraph 26; Business SA submission, 28 February 2017, paragraph 2.

[47] ABI & NSWBC submission, 22 February 2018 at paragraph 2.3(d).

[48] MTA submission, 15 February 2018, page 2.

> 'The classification of an employee by an employer must be based on the level of competency and skill that the employee is required to exercise in order to carry out the principal functions of their employment as determined by the employer.'[49]

[59] Ai Group opposed the MTA's submission that clause 12.2 should be deleted on the basis that it provides concise guidance about how to classify employees and is not inconsistent with Schedule A.[50] Ai Group proposed an amendment to clause 12.2 on the basis that the Schedule does not refer to "competencies" but "characteristics" and that their amendment clarifies that the "principal functions of employment" are determined by the employer; they are not assessed or determined by the employee. Ai Group's proposed amendment is as follows:

> 'The classification by the employer must be based on the ~~competencies~~ characteristics that the employee is required to have, and skills that the employee is required to exercise, in order to carry out the principal functions of the employment as determined by the employer.'

[60] We have decided to amend clause 12.2 to increase consistency between clause 12.2 and Schedule A, and to clarify that the classification of an employee is based on the requirements of the employer:

> 'The classification by the employer must be based on the ~~competencies~~ characteristics that the employer requires the employee ~~is required~~ to have and skills that the employer requires the employee ~~is required~~ to exercise in order to carry out the principal functions of the employment.'

Clause 13 – Items 27, 35 – 40 – Ordinary hours of work

[61] Item 27 relates to the title of clause 13.1. Ai Group reserved their position in the September conference but made no further submission in relation to this item following the January Statement. Item 27 is resolved.

[62] Items 35, 36 and 37 related to clause 13.5 (setting ordinary hours by a different award) and were dealt with together at the September conference and in the January Statement.

[63] Business SA and ABI do not oppose the re-drafted clause of the revised PLED.[51] Ai Group submitted that the issue they raised at paragraphs 184 – 185 of their 28 February 2017 submissions remains outstanding in respect of clause 13.5(b) of the revised PLED. Ai Group pressed its 28 February 2017 submission.[52]

[64] The issue raised by Ai Group in its 28 February 2017 submission is:

> '184. **Fourthly**, clause 13.7(b) [now 13.5(b)] of the Exposure Draft grants an employer the right to direct employees 'to work the spread of ordinary hours' in the modern award that covers the majority of employees at the workplace.

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[49] MTA submission, 15 February 2018, page 2.

[50] Ai Group submission, 20 February 2018, paragraph 29.

[51] Business SA submission, 28 February 2017, paragraph 3; ABI & NSWBC submission, 22 February 2018 at paragraph 2.2(e).

[52] Ai Group submission, 20 February 2018, paragraph 31.

185. The spread of hours prescribed in an award establishes certain parameters within which ordinary hours may be worked. An employee does not as such 'work the spread of ordinary hours'. Rather, an employee may perform ordinary hours of work within that spread. The expression used in the Exposure Draft is therefore erroneous.'

[65] In order to resolve items 35 – 37 and address Ai Group's concern, we propose to amend clause 13.5(b) of the revised PLED as follows:

'**(b)** The employer may direct the employees mentioned in paragraph (a)(i) who are covered by this award to perform work within the spread of ordinary hours ~~in~~ prescribed by the modern award that covers the majority of employees at the workplace.'

[66] This resolves any outstanding issue in respect of clause 13.5(b).

[67] Item 38 relates to the example under clause 13.5 (Setting ordinary hours by a different award) of the revised PLED. The ASU made no further submission regarding this item and ABI did not oppose the example.[53] The MTA submitted that there was no major issue with the example but proposed an alternative example to provide further clarification.[54] Ai Group opposed the example proposed by the MTA on the basis that it introduces notions of the maximum number of days over which ordinary hours may be worked which confuses the application of clause 13.5.[55]

[68] We are not persuaded to amend the example in the terms proposed by the MTA. The example below clause 13.5 of the revised PLED will be adopted. Item 38 is resolved.

[69] Items 39 and 40 relate to clause 13.6 of the revised PLED and were dealt with together. In the January Statement the Commission expressed the *provisional* view to adopt the clause as drafted in the revised PLED , as follows:

'**13.6** Ordinary hours of work are to be worked:

(a) continuously, except for rest breaks and meal breaks as specified in clause 15—Breaks (employees other than shiftworkers); and

(b) at the discretion of the employer in accordance with this award.'

[70] The ASU made no further submissions and Ai Group supported the *provisional* view. We confirm the *provisional* view and adopt clause 13.6 as set out in paragraph [69]. Items 39 and 40 are resolved.

Clause 14 – Items 42 and 44 – Rostered days off

[71] Item 42 relates to clause 14.2 (rostered days off – employees other than shiftworkers) of the revised PLED. Clause 14.2 was amended following the September conference. In the

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[53] ASU submission, 15 February 2018, paragraph 17; ABI & NSWBC submission, 22 February 2018 at paragraph 2.2(e).

[54] MTA Submission, 15 February 2018, page 3.

[55] Ai Group submission, 20 February 2018, paragraph 31.

January Statement the Commission expressed the *provisional* view to adopt clause 14.2 as amended in the revised PLED, as follows:

> '**14.2** An employer may roster employees in such a way that the employees:
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> **(a)** work longer hours on one or more days over a roster cycle as part of their ordinary hours of duty; and
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> **(b)** take a rostered day off at some later time.'

[72] In the January Statement interested parties were invited to make submissions on clause 14.2. ABI did not oppose the revised PLED clause.[56]

[73] The ASU submitted that the wording of clause 14.2 in the revised PLED allows the employer to impose a rostered days off system. The ASU submitted that clause 14.2 should be varied to read:

> '**14.2** An employer and employees at an enterprise may agree to establish a system of rostered days off in such a way that the employees: …'[57]

[74] Ai Group opposed the amendment proposed by the ASU.[58] Ai Group submitted that the current award does not require an agreement be reached between an employer and employee for the employer to have the ability to roster ordinary hours in a way that entitles an employee to a rostered day off. Ai Group submitted that the change proposed by the ASU is substantive.[59]

[75] We agree that the current award does not require agreement between the employer and employees to impose a system of rostered days off. Clause 14.2 of the revised PLED will not be varied in the terms proposed by the ASU.

[76] The MTA proposed alternative drafting of clauses 14.2, 14.3 and 14.4:

> '14.2. An employer may roster full-time employees on any combination of ordinary hours of work within the roster cycles specified in Clause 13.2.
>
> 14.3 (a) Where the option of a rostered day off is adopted in the operation of ordinary hours of work, the employee will be entitled to a paid rostered day off when the employee has accrued sufficient hours for a rostered day off.
>
> 14.3 (b) Where a rostered day off is accumulated on each 20 day roster cycle, the employee will be entitled to 12 rostered days off in a 12 month period, subject to the appropriate accrual of hours.
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> 14.4. Employees working on a rostered day off work cycle must be given four weeks' notice by the employer of the day the employee is to take as a rostered day off.'[60]

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[56] ABI & NSWBC submission, 22 February 2018 at paragraph 2.2(g).

[57] ASU submission, 15 February 2018, paragraph 19.

[58] Ai Group submission, 20 February 2018, paragraph 35.

[59] Ai Group submission, 20 February 2018, paragraph 35.

[60] MTA submission, 15 February 2018, page 3.

[77] The MTA also submitted that the note at clause 14.1 of the revised PLED should be amended to "Rostering arrangements for shiftworkers are set out in Part 6—Shiftwork." The MTA did not provide any supporting reasoning for their proposed amendment.

[78] Ai Group opposed the MTA's proposed amendments on the bases that aspects of the amendment to clause 14.2 are unclear and limit application of clause 14.2 to full-time employees – a substantive change. Ai Group submitted that the MTA's proposed amendment to clause 14.4 introduces notions of "a rostered day cycle" and it is unclear what this means.[61]

[79] In the absence of any supporting reasoning for the MTA's proposed amendment, we are not persuaded to vary the revised PLED in the terms proposed by the MTA. Clause 14.2 will be adopted in the terms set out in the revised PLED. Item 42 is resolved.

[80] Item 44 relates to clause 14.6 (Banking rostered days off) of the revised PLED. Following the September conference, the July PLED was amended to address concerns that earlier drafting had constituted a substantive change. In the January Statement the Commission expressed the *provisional* view to adopt clause 14.6 as it appeared in the revised PLED:

> '**14.6 Banking rostered days off**
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> (a) The employer and an employee may agree to an arrangement under which the employee works on their normal rostered days off and accumulates up to 5 banked rostered days off that may be taken at times that are convenient to both the employer and employee.
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> (b) The employer must keep a record of the employee's banked rostered days off.
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> (c) The employee must give at least 5 days' notice before taking a banked rostered day off.
>
> (d) No payments or penalty payments are to be made to an employee for working more than the average number of ordinary hours per week as a result of working on a rostered day off under the banking system.
>
> (e) No reduction in payment is to be made for an employee working less than the average number of ordinary hours per week as a result of taking banked rostered days off but the employee must be paid according to the average pay system during any week the employee elects to take a banked rostered day off.
>
> (f) On the termination of an employee's employment, the employer must pay an employee for any banked rostered day off that has not been taken an amount equal to 20% of the employee's average weekly wages over the period of 6 months immediately before the termination.'

[81] ABI supported re-drafting clause 14.6 of the revised PLED and the ASU made no further submissions.[62] Ai Group did not make a submission in relation to clause 14.6 of the revised PLED.

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[61] Ai Group submission, 20 February 2018, paragraphs 36 – 37.

[62] ABI & NSWBC submission, 22 February 2018 at paragraph 2.2(h); ASU submission, 15 February 2018, paragraph 20.

[82] The MTA submitted that subclauses (d) and (e) should be redrafted to meet the objective of plain language and proposed that the revised PLED clauses be replaced with the following:

> '(d) The employer will pay the average ordinary time weekly wage when the employee works under the banking rostered days off system.
>
> (e) There will be no additional payments, including overtime payments, or reduction in payment to be made to an employee for working more or less hours than the average number of ordinary hours per week under the banking rostered day off system.'[63]

[83] The MTA also made a submission regarding clause 14.6(f) of the revised PLED. Clause 14.6(f) deals with payment of banked rostered days off not taken on termination of employment. The MTA submitted that clause 14.6(f) of the revised PLED should be amended as follows:[64]

> '(f) On the termination of an employee's employment, the employer must pay an employee for any banked rostered day off that has not been taken an amount equal to **20%** of the ~~employee's average weekly wages~~ employee's average ordinary time weekly wage over the period of 6 months immediately before the termination.'

[84] In respect of clause 14.6(f), the MTA submitted that rostered days off are solely based on the accumulated ordinary time hours and the inclusion of other components of an employee's wage, including overtime, is not appropriate.[65] The MTA submitted that the words "average weekly wages" may imply payment of all earnings of the six months prior to termination of employment, including overtime.

[85] The equivalent clauses to clauses 14.6(d) to (f) of the PLED in the current award are 25.4(d) and (e), which state:

> '(d) No payments or penalty payments are to be made to employees working under this substitute banked rostered day off. However the employer will maintain a record of the number of rostered days banked and will apply the average pay system during the weeks when an employee elects to take a banked rostered day off.
>
> (e) Employees terminating prior to taking any banked rostered day(s) off must receive one fifth of average weekly pay over the previous six months multiplied by the number of banked substitute days.'

[86] We are of the view that the wording of clause 14.6(d) of the PLED could be clearer and that read in the context of the clause, payments or penalty payments in clause 25.4(d) means overtime. An employee should receive penalty payments applicable to the ordinary hours they work.

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[63] MTA submission, 15 February 2018, page 4.

[64] MTA submission, 15 February 2018, page 4.

[65] MTA submission, 15 February 2018, page 4.

[87] However, we are cautions about including an additional way of describing rates of pay in awards given the introduction of other new terminology used to describe rates of pay in exposure drafts. We formed a *provisional* view to amend clause 14.6(d) of the exposure draft as follows:

> '(d) An employee is not entitled to overtime payment for working more than the average number of ordinary hours in a week as a result of working on a rostered day off under the banking system.'

[88] We also propose the following amendment to clause 14.6(f) of the exposure draft in order to clarify that overtime is not included in the calculation of average weekly wages for the purpose of paying out banked rostered days not taken on the termination of an employee's employment. This amendment would mean that payment would be consistent for rostered days off regardless of whether they are taken or paid out on termination.

> '(f) On the termination of an employee's employment, the employer must pay an employee for any banked rostered day off that has not been taken an amount equal to **20%** of the employee's average weekly wages (not including overtime) over the period of 6 months immediately before the termination.'

[89] Interested parties are invited to make submissions on the proposed amendments to clauses 14.6(d) and (f) of the PLED by **4.00 pm Monday 24 September 2018**.

Clause 15 – Item 54 and new item – Breaks

[90] Item 54 relates to the penalty payable under clause 15.4 of the revised PLED when an employee is required to work through a meal break. Following the September conference, the July PLED was amended to clarify Ai Group's concerns regarding when the higher rate is payable. In the January Statement interested parties were invited to make final submissions about this item.

[91] Ai Group did not make any further submissions and submitted that the revised PLED appeared to resolve its concerns.[66] ABI did not oppose the re-drafted clause and the ASU made no further submissions[67].

[92] The MTA submitted that the construction of clause 15.4 of the revised PLED is somewhat unclear and proposed that clause 15.4 should be amended to the following:

> '15.4 An employer must pay an employee who is required to work through their meal break 200% of the minimum hourly rate from when the meal break would have commenced until a meal break is allowed.'[68]

[93] Ai Group submitted that it did not oppose the wording proposed by the MTA in respect of clause 15.4 of the revised PLED.[69]

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[66] Ai Group submission, 20 February 2018, paragraph 38.

[67] ABI & NSWBC submission, 22 February 2018 at paragraph 2.2(i); ASU submission, 15 February 2018, paragraph 21.

[68] MTA submission, 15 February 2018, page 4.

[69] Ai Group submission, 20 February 2018, paragraph 39.

[94] Clause 15.4 of the revised PLED is as follows:

> '15.4 An employer must pay an employee who is required to work through their meal break **200%** of the minimum hourly rate from when they begin to so work until a meal break is allowed.'

[95] We are satisfied that the MTA's proposed amendment improves the clarity of clause 15.4 and will adopt clause 15.4 in the terms proposed by the MTA. Item 54 is resolved.

[96] The MTA also submitted that the revised PLED is silent on the meal break entitlements for shiftworkers when they work a shift that is not an afternoon or night.[70] The MTA submitted that the current award does not preclude an employee from working both shiftwork and non-shiftwork in one roster cycle. The MTA submitted that it is common for an employee's roster cycle to be made up of a combination of afternoon shifts, night shifts and shifts that do not fall within either of those definitions.

[97] To address their concern, the MTA proposed that the heading of clause 15 be amended to "Breaks (employees not engaged on afternoon or night shift)" and that clause 15.1 be amended to clarify entitlements or, alternatively, that the definition of shiftworker be amended to allow an employer to apply both shiftworker and non-shiftworker provisions in a roster cycle.[71]

[98] Ai Group opposed the MTA's submissions in respect of shiftworkers.[72] Ai Group agreed that employees can (and do) work a combination of day work and shiftwork under the award. However, Ai Group submitted that the concept of a day shift does not arise from the terms of the award. Where an employee is not required to work ordinary hours in accordance with the definition of afternoon or night shift, they are necessarily a day worker. Ai Group submitted that the award is not silent on the entitlements and submitted that the MTA's proposed amendment should not be made.

[99] We are not satisfied that the terms of the award need to be amended in either manner proposed by the MTA. We note that we have determined to amend clause 27.1 to clarify the application of Part 6—Shiftwork (see [140]) and that this amendment addresses MTA's concern set out at [96].

[100] In addition to its submission in respect of clause 15.1 of the revised PLED, and previous submissions (items 149 and 151), Ai Group noted that the "day shift" column in the tables at B.2.1 and B.3.2 should be removed from the revised PLED, consistent with the terms of the current award.[73] The "day shift" column will be removed from these tables.

Clause 16 – Items 57, 60 and 64 and new items – Minimum rates

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[70] MTA submission, 15 February 2018, pages 4 – 5.

[71] MTA submission, 15 February 2018, page 5.

[72] Ai Group submission, 20 February 2018, paragraphs 40 – 41.

[73] Ai Group submission, 20 February 2018, paragraphs 42 – 43.

[101] Item 57 relates to the amended lead in words to Table 3 in clause 16.1 of the revised PLED. In the January Statement interested parties were invited to make submissions. No party made further submissions in relation to the lead in words to Table 3. Item 57 is resolved.

[102] Following the January Statement the MTA made submissions in relation to clause 16.3 of the revised PLED. Clause 16.3 was the subject of submissions earlier in the plain language re-drafting process (item 60). At the September conference the Commission was advised this item was resolved. Clause 16.3 of the revised PLED provides as follows:

> '16.3 If required by their employer, an employee must provide reasonable evidence to verify their service as mentioned in clause 16.2.'

[103] The MTA submitted that the revised PLED appeared to move the onus of the employee to provide evidence of service to the employer (as per clause 15.3 of the current award) onto the employer, resulting in a requirement for the employer to seek the evidence. The MTA proposed that current award clause 15.3 be reinstated.

[104] Clause 15.3 of the current award provides as follows:

> '15.3 "Year" in respect to the minimum weekly wages in clause 16 shall mean any service within the classification level of clerical work, including administrative duties of a clerical nature. The onus is on the employee to provide reasonable evidence to verify their service within the industry.'

[105] We disagree. The onus under clause 16.3 of the revised PLED is still on the employee to substantiate any claim of service under clause 16.2 by providing reasonable evidence. The addition of the words "if required by the employer" at clause 16.3 provides practical guidance regarding the provision of evidence. Further, we consider that the word "onus" in clause 15.3 of the current award to be a technical legal term. The revised PLED clause 16.3 maintains the current entitlement without using legal jargon. We have determined to adopt clause 16.3 in the terms of the December 2017 PLED.

[106] Item 64 relates to clause 16.4 (junior employees) of the revised PLED and the lead in words to Table 4. Interested parties were invited to make submissions. Business SA proposed that column 2 of Table 4 be amended from "% of minimum weekly rates" to "% of minimum rate".[74] Business SA submitted that this will allow the percentage to apply to the appropriate minimum rate, be it the minimum weekly rate or the minimum hourly rate and note that a similar approach was taken in the Pharmacy Award. No other parties made submissions.

[107] The variation sought by Business SA was made in the revised PLED; however, we note that the title of column 2 of table 4 states "rates" rather than "rate". This will be amended. Item 64 is resolved.

Clause 23 – Item 78A and new item – Penalties – Sunday rates

[108] Item 78A relates to subclauses 23.3(a) and (b) (Sunday penalty rates) of the revised PLED. In the January Statement the Commission expressed a *provisional* view to adopt

[74] Business SA submission, 28 February 2017, paragraph 9.

subclauses 23.3(a) and (b) as they appeared in the revised PLED. We confirm that the *provisional* view will be adopted.

[109] The MTA raised a new issue in relation to clauses 23.3(c) and 24.4(c) (Payment for overtime) of the revised PLED. The MTA submitted that these clauses introduce entitlements that do not exist in the current award. The equivalent provision in the current award, clause 27.2(c), provides as follows:

> '(c) An employee required to work on a Sunday is entitled to not less than four hours' pay at penalty rates provided the employee is available for work for four hours.'

[110] Clauses 23.3(c) and 24.4(c) of the revised PLED provide:

> '**23.3 Sunday**
>
> …
>
> **(c)** A employee required to work ordinary hours on a Sunday is entitled to not less than 4 hours' pay, if the employee is available to work for 4 hours.
>
> …
>
> **24.4 Payment for working overtime**
>
> …
>
> **(c)** An employer must pay an employee a minimum of 4 hours at overtime rates for overtime worked on a Sunday, if the employee is available to work for 4 hours. However, paragraph (c) does not apply if the employee, as a result of working ordinary hours on that day, has accrued an entitlement under clause 23.3(c) to not less than 4 hours' pay.'

[111] The MTA submitted that clause 27.2(c) of the current award applies when an employee is available to work four hours and relates to overtime, not to ordinary hours as provided in clause 23.3(c) of the revised PLED. The MTA submitted that it was not envisaged that ordinary hours would be worked after 12.30 pm on a Saturday, except where the terms of another award apply. In the MTA's view, all provisions under clause 27 of the current award (except clause 27.2(a)) apply to overtime conditions. Further, the MTA submitted that, where ordinary hours are worked on a Sunday and clause 13.5 of the revised PLED applies, those hours will be based on the roster as part of the employee's ordinary hours and the employee must be available to work those hours. Therefore, the minimum engagement under clause 23.3(c) of the revised PLED is inappropriate.

[112] The MTA submitted that clause 23.3(c) and the final sentence of 24.4(c) of the revised PLED should be deleted.

[113] We disagree with the MTA's submission that all provisions under clause 27 of the current award apply only to overtime, except clause 27.2(a). Clause 27 is titled "Overtime rates and penalties (other than shiftworkers)". Clause 27.2 is titled "Payment for working Saturdays and Sundays". Clause 27.2(a) is clearly a penalty as it expressly only applies to "work within the spread of ordinary hours on Saturday". Ordinary hours of work on a Saturday include work between 7.00 am and 12.30 pm. It also includes work on Saturday in accordance with the spread of ordinary hours in another award in circumstances where the second sentence of clause 25.1(b) applies.

[114] The application of clause 27.2(b) of the current award was set out at paragraph [53] of the January Statement:

> '[53] Clause 27.2(b) of the current award applies to 'all work done on a Sunday'. 'All work' in the current award covers both ordinary hours and overtime hours. The exception at clause 25.1(b) of the current award and clause 13.5 of the revised PLED allows ordinary hours to be worked in accordance with the spread of ordinary hours in another award subject to the requirements of that clause. This could include ordinary hours on a Sunday if ordinary hours can be worked on Sunday under the other award. If ordinary hours are worked on a Sunday in accordance with the spread of hours in another award then the rates in clause 23.3 of the revised PLED would apply.'

[115] Clause 27.2(c) of the current award applies to "work on a Sunday", which includes both ordinary hours and overtime. Ordinary hours could be worked on a Sunday where, pursuant to clause 25.1(b), ordinary hours are worked on a Sunday in accordance with the spread of ordinary hours under another award. Under clause 27.2(c) an employee is entitled to the minimum payment in clause 27.2(c) for both the ordinary hours and the overtime.

[116] Other subclauses in clause 27 of the current award specifically state that they apply when either ordinary hours or overtime is worked. If this were the intention in clauses 27.2(b) and (c), the current award would specifically state that they only applied to overtime work, as clause 27 does in respect of other subclauses.

[117] The minimum engagement for both ordinary hours and overtime worked on a Sunday in clauses 23.3(c) and 24.4(c) of the revised PLED reflect clause 27.2(c) of the current award. We are satisfied that clauses 23.3(c) and 24.4(c) reflect the provisions of the current award. However, we consider that the retention in both provisions of the condition that the employee is "available to work 4 hours" is likely to have little practical work to do and may lead to disputation concerning the circumstances in which an employee may be said to be "available". We also consider that the drafting of clause 24.4(c) could be simplified. Accordingly we have reached the *provisional* view that clauses 23.3(c) and 24.4(c) should be amended to read as follows:

> '**23.3(c)** An employee required to work ordinary hours on a Sunday is entitled to not less than 4 hours' pay.
>
> . . .
>
> **24.4(c)** An employee required to work overtime hours on a Sunday is entitled to not less than 4 hours' pay (inclusive of ordinary hours worked).'

[118] Interested parties are invited to review the proposed amendment to clause 24.4(c) by **4.00 pm, Monday 24 September 2018**.

Clause 24 – Item 92 – Overtime

[119] Item 92 relates to clause 24.4(b) (Payment for working overtime) of the revised PLED. The words "ready, willing and available" in the current award were replaced with the word "available" in the revised PLED. In the January Statement the Commission expressed the *provisional* view that item 92 is resolved and invited interested parties to advise whether there was any outstanding issue in respect of item 92. No submissions were received. Item 92 is resolved.

Clause 25 – new Item, Items 96 and 98 – 101 – Rest period after working overtime

[120] Ai Group made a new submission in relation to clause 25 (Rest period after working overtime (employees other than shiftworkers)) of the revised PLED. In relation to clause 25.2, Ai Group submitted that revised PLED clause 25.2 is a substantive change from clause 27.3(a) of the current award.[75] Clause 27.3(a) of the current award provides:

> '(a) When overtime work is necessary it must wherever reasonably practicable, be so arranged that employees have at least 10 consecutive hours off duty between the work of successive days.'

[121] An amendment to clause 25.2 was proposed in the July PLED as follows:

> '25.2 ~~When overtime is required to be worked,~~ ~~e~~Employees must, wherever reasonably practical, have at least 10 consecutive hours off duty between hours worked on successive days.'

[122] Ai Group submitted that the proposed amendment does not relate to the arrangement of overtime and would result in the application of the clause no longer being confined to circumstances where the overtime is required to be worked.[76] Ai Group submitted that the words at the beginning of clause 25.2 of the revised PLED should be retained. We agree. Clause 25.2 of the revised PLED will not include the amendment to clause 25.2 as set out at [121].

[123] Items 96 and 98 to 101 relate to clauses 25.3 and 25.4 of the revised PLED. Following discussions at the September conference, the clauses were amended. In the January Statement parties were invited to review the clauses and make final submissions.

[124] ABI did not support the re-drafted clause 25.3 (item 96) or 25.4 (item 99) and proposed that "ordinary hours" be replaced with "ordinary rostered hours".[77]

[125] Ai Group submitted that the re-drafted clauses 25.3(b) (item 98) and 25.4(c) (items 100 and 101) did not address its concerns. Ai Group submitted that clause 27.3(b) of the current award provides for an entitlement (in relevant circumstances) to payment for ordinary hours that the employee would have worked had they not been absent by virtue of that clause. The current award clause does not grant an entitlement to all hours classed as ordinary hours by the award.

[126] Ai Group further submitted that the revised PLED provides that an employee must not suffer loss of pay for "ordinary hours not worked as a result of being released from duty". Ai Group submitted that this is a substantive change and the clause should be amended to reflect provisions of the current award.

[127] ABI did not support the re-drafted clause 25.4 (item 99) and proposed that "ordinary hours" be replaced with "ordinary rostered hours".

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[75] Ai Group submissions, 20 February 2018, paragraphs 67-69.

[76] Ai Group submission, 20 February 2018, paragraph 67 – 68.

[77] ABI & NSWBC submission, 22 February 2018 at paragraph 2.3(f).

[128] The ASU made no further submissions.

[129] We propose the following amendments to clauses 25.3 and 25.4 in order to address the concerns of ABI and the Ai Group:

> '**25.3** Despite clause 25.2 but subject to clause 25.4, where an employee, due to overtime worked, would be required to start working their ordinary rostered hours without having had 10 consecutive hours off duty ~~since last working ordinary hours~~:
>
> **(a)** the employer must release the employee from duty after finishing the overtime until the employee has had 10 consecutive hours off duty; and
>
> **(b)** the employee must not suffer any loss of pay for any ordinary rostered hours ~~not worked~~ that the employee did not work as a result of being released from duty in accordance with paragraph (a).
>
> **25.4** If, at the direction of the employer, an employee continues work or resumes ~~work~~ working ordinary rostered hours ~~or continues work~~ without having at least 10 consecutive hours off duty in accordance with clause 25.3 all of the following apply:
>
> **(a)** the employer must pay the employee at **200%** of the employee's minimum hourly rate until such time as the employee is released from duty; and
>
> **(b)** the employer must release the employee from duty until the employee has had 10 consecutive hours off duty; and
>
> **(c)** the employee must not suffer any loss of pay for any ordinary rostered hours ~~not worked~~ that the employee did not work as a result of being released from duty in accordance with paragraph (b).'

[130] Interested parties are invited to make submissions on the proposed amendments to clauses 25.3 and 25.4 by **4.00 pm on Monday 24 September 2018.**

[131] In relation to clause 25.4(a), Ai Group also submitted that, consistent with the approach taken throughout the revised PLED, the word "employee's" should be deleted because "minimum hourly rate" is defined by reference to an individual employee.[78]

[132] We note that Ai Group raises the same issue in relation to clauses 33.5(a) of the revised PLED.[79] Clauses 34.3(c)(i) & (ii) and (d)(i) & (ii) of the revised PLED also use this terminology.

[133] We agree. For consistency of the manner in which rates are referred to within the revised PLED we have decided to delete the word "employee's" from before the words "minimum hourly rate" in clause 25.4(a), 33.5(a), 34.3(c)(i) & (ii) and (d)(i) & (ii).

Clause 27 – Items 3, 27, 45, 66, 84, 105, 106 & 110 – Shiftwork and items pending determination of shiftwork concerns

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[78] Ai Group submissions, 20 February 2018, paragraph 70.

[79] Ai Group submissions, 20 February 2018, paragraph 71.

[134] Items 105 and 106 relate to the definition of shiftwork at clause 27 of the revised PLED. Ai Group had previously sought to amend the drafting of clause 27.1 to clarify the application of Shiftwork provisions (Part 6).[80] Ai Group now raise concerns that if an employee, subject to the facilitative provision in clause 13.4, worked their ordinary hours under clause 13.3 until 8.00 pm on a week night, the employee may be covered by clause 27.1 as re-drafted in the July PLED.[81]

[135] Discussions took place at the September conference in relation to the interaction between the facilitative provision in clause 13.4 of the revised PLED (which allows the spread of hours to be altered by up to one hour at either end by individual or majority agreement at the workplace covered by the award) and clause 27.1.

[136] As a result of discussions at the September conference clause 27.1 was amended to the following:

> '27.1 Part 6 applies to employees who are required to work their ordinary hours on any of the following shifts:
>
> **(a)** a shift finishing after 7.00 pm and at or before midnight **(afternoon shift)**;
>
> **(b)** a shift finishing after midnight, and at or before 7.00 am **(night shift)**;
>
> **(c)** a night shift which does not rotate with another shift or shifts or day work and which continues for a period of 4 consecutive weeks or longer **(permanent night shift)**.'

[137] In the January Statement interested parties were invited to make further submissions in relation to clause 27.1 of the revised PLED.

[138] Ai Group submitted that the re-drafted clause 27.1 in the revised PLED may give rise to concerns as Part 6—Shiftwork is drafted in a way so that it applies to any employee required to work ordinary hours on an afternoon, night or permanent night shift even if the employee works day work.[82] Therefore, when read literally, clauses 13 – 15, 23, 24 and 26 cannot apply to an employee who is required to work ordinary hours in accordance with one of the shift definitions even if the employee is working day work.

[139] Ai Group submitted that the concerns could be addressed by amending clause 27.1 to clarify that Part 6—Shiftwork is limited to when an employee works a shift as defined. Ai Group propose the following amendment to clause 27.1:

> '27.1 Part 6 applies to employees when ~~who are~~ required to work their ordinary hours on any of the following shifts…'

[140] We are not persuaded that the amendment proposed by Ai Group is necessary. If an employee is working on one of the defined shifts, the employee is not working day work by

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[80] Ai Group submissions, 28 February 2017, paragraphs 420-424.

[81] Ai Group submissions, 20 February 2018, paragraphs 50-54.

[82] Ai Group submissions, 20 February 2018, paragraphs 50-54.

definition. We have decided to adopt clause 27.1 in the terms of the December 2017 PLED. Items 105 and 106 are resolved.

[141] We have also decided to change the order of clauses 28 – 30 of the PLED so that the ordinary hours clause appears before the shiftwork clause.

[142] At the September conference parties reserved their positions on items 3, 27, 45, 77, 84 and 110 (in part) related to shiftwork, pending the outcome of Ai Group's concerns about clause 27. In the January Statement, interested parties were invited to review those items in respect of the amendment proposed at clause 27.1 of the revised PLED. Ai Group advised that if its proposed change (noted at [139]) is adopted, items 3, 27, 45, 66, 84 and 110 would be resolved.[83] No other submissions were received.

[143] If Ai Group continues to press items 3, 27, 45, 66, 84 and 110 in light our conclusion at [140] it should file any final submissions in relation to these items by **4.00 pm, Monday 24 September 2018.**

Clauses 28 and 31 – New Item – Penalty rates for shiftwork (clause 28.3) and Overtime for shiftwork (clause 31.4)

[144] The MTA raised concerns about the revised PLED drafting of the shiftwork provisions and their interaction with public holiday provisions. The MTA noted that the unclear drafting of the current award may be a factor in issues related to shiftwork and public holiday provisions in the revised PLED.[84] The MTA submitted that clause 28.3(a) of the revised PLED, which relates to minimum payment for work on a public holiday, introduces a 4-hour minimum payment which is not provided for in clause 28.4(d) of the current award.

[145] The MTA submitted that clause 28.3 of the revised PLED should be deleted as it is inconsistent with the current award. The MTA submitted that the public holiday terms in the current award clause 31.3 apply to non-shiftworkers and clause 23.4 of the revised PLED correctly reflects that entitlement. Clause 28.4(d) of the current award provides rates for shiftworkers whose ordinary hours include weekends and public holidays. Clause 28.6 of the current award provides rates for shiftworkers whose ordinary hours do not include weekends and public holidays. However, clause 28.3 of the revised PLED gives an entitlement to a 4 hour minimum payment, which is inconsistent with clause 28.4(d) of the current award.[85]

[146] The MTA also submitted that clause 31.4 of the revised PLED should be deleted as it is also inconsistent with the current award. Clause 31.4 states that the entitlement to a minimum engagement period while working overtime on shiftwork does not apply if an employee is entitled to a minimum engagement under clause 38.3.[86]

[147] Ai Group agreed with the MTA's submission that clause 28.3 should be deleted and that clause 31.4 should also be deleted, as it is unnecessary if clause 28.3 is deleted.[87] ABI

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[83] Ai Group submissions, 20 February 2018, paragraph 54.

[84] MTA submission, 15 February 2018, paragraph 13.

[85] MTA submission, 15 February 2018, para 13.

[86] MTA submission, 15 February 2018, paragraph 13.

[87] Ai Group submission, 20 February 2018, paragraph 47 – 48.

supported deletion of clauses 28.3 and 31.4 of the revised PLED on the basis there are no equivalent provisions in the current award.[88]

[148] Clause 28.4(d) of the current award provides:

> '**28.4 Hours, shift allowances, special rates, meal interval**
>
> …
>
> **(d)** A shiftworker whose ordinary working period includes a Saturday, a Sunday or a public holiday (as prescribed in Division 10 of the NES) as an ordinary working day must be paid at the rate of time and a half for such ordinary time as occurs on such Saturday, Sunday or public holiday.'

[149] Clause 28.6 of the current award provides:

> '**28.6 Work on Saturday, Sunday or public holiday**
>
> A shiftworker whose ordinary working period does not include a Saturday, a Sunday or a public holiday (as prescribed in Division 10 of the NES) as an ordinary working day must, if required to work on any such day be paid for double time for work done with a minimum payment of four hours at double time if the employee is available for work during such four hours. This provision for minimum payment does not apply where the work on such day is continuous with the commencement or completion of the employee's ordinary shift.'

[150] Clause 31.3 of the current award provides:

> '**31. Public holidays**
>
> …
>
> **31.3** Work on a public holiday or a substituted day must be paid at double time and a half. Where both a public holiday and substitute day are worked public holiday penalties are payable on one of those days at the election of the employee. An employee required to work on a public holiday is entitled to not less than four hours pay at penalty rates provided the employee is available to work for four hours.'

[151] Clause 28.3 of the revised PLED provides:

> '**28.3 Public holidays**
>
> **(a)** An employee required to work ordinary hours on a public holiday is entitled to not less than 4 hours' pay, if the employee is available to work for 4 hours.
>
> **(b)** If an employee works on both a public holiday and the substituted day, the employee is entitled to be paid for one of the days at the penalty rate specified in clause 28.1.
>
> **(c)** The employee may choose which day the penalty rate is applied to.'

[152] Clause 31.4 of the revised PLED provides:

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[88] ABI & NSWBC submission, 22 February 2018 at paragraph 3.1(a).

> '**31.4** However, clause 31.3 does not apply if the employee, as a result of working ordinary hours, has accrued an entitlement under clause 28.3(a) or to not less than 4 hours' pay on the same day.'

[153] Clauses 28.4 and 28.6 of the current award contain penalty rates for shiftworkers working weekends and public holidays. The rates differ depending on whether or not the shiftworker's "ordinary working period" normally includes weekends and public holidays. There is a minimum engagement of four hours only where the shiftworker's "ordinary working period" does not include work on a weekend or public holiday.

[154] We agree with the MTA's submission. Clauses 28.3 and 31.4 will be deleted so that the revised PLED reflects the provisions of the current award. This item is resolved.

Clause 30 – new Item – Breaks for shiftwork – Paid rest break

[155] The MTA submitted that the note at the end of clause 30.3 of the revised PLED should refer to a paid meal break, not an unpaid meal break. We agree. Employees working on shifts in the current award are entitled to paid meal breaks in accordance with clause 30.2. There is no provision for unpaid meal breaks for shiftworkers. The note under clause 30.3 will be amended to refer to a "paid meal break". This item is resolved.

Clause 34 – new Item – Annual leave – Additional paid annual leave for certain shiftworkers

[156] Ai Group submitted that clause 34.2 of the revised PLED does not reflect the current award. Ai Group submitted that clause 29.2 of the current award defines a shiftworker for the purposes of the NES as "a seven day shiftworker…" and is used consistently across a number of modern awards; however, clause 34.2(a) of the revised PLED does not contain that requirement, which constitutes a substantive change.[89]

[157] Clause 29.2 of the current award provides:

> '**29.2 Definition of shiftworker**
>
> For the purpose of the additional week of annual leave provided in the NES, a **shiftworker** is a seven day shiftworker who is regularly rostered to work on Sundays and public holidays in a business in which shifts are continuously rostered 24 hours a day seven days a week.'

[158] Clause 34.2 of the revised PLED provides:

> '**34.2 Additional paid annual leave for certain shiftworkers**
>
> **(a)** Clause 34.2 applies to an employee who is a shiftworker regularly rostered to work on Sundays and public holidays in a business in which shifts are continuously rostered 24 hours a day for 7 days a week.
>
> **(b)** The employee is a shiftworker for the purposes of the NES (entitlement to an additional week of paid annual leave).'

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[89] Ai Group submissions, 20 February 2018, paragraphs 72-74.

[159] Section 87 of the Act deals with the entitlement to annual leave. Under s.87(1)(b)(i) of the Act an employee is entitled to 5 weeks of paid annual leave if a modern award defines or describes an employee as "a shiftworker for the purposes of the NES". We have formed the view that it is unnecessary to include the words "is a seven day shiftworker who…". "Seven day shiftworker" is not used anywhere else in the current award and is not a defined term. Clause 34.2 of the revised PLED describes a shiftworker in the same way as clause 29.2 of the current award, other than referring to a shiftworker as being a "seven day shiftworker".

[160] We are not persuaded by Ai Group's submission to amend clause 34.2 of the revised PLED. The terms of clause 34.2 of the revised PLED have the same effect without including unnecessary undefined terms and are more consistent with the terminology of the NES. Clause 34.2 will be adopted in the terms of the revised PLED.

Clause 34 – new Item – Annual leave – Annual leave loading (clauses 34.3(c) and 34.3(d))

[161] Ai Group submitted that clause 29.3(b)(i) of the current award applies to an employee who would have worked on day work, had they not been on leave, and clause 29.3(b)(ii) applies to an employee who would have worked on shiftwork had they not been on leave, exclusively or in combination with day work.

[162] Ai Group submitted that clause 34.3(c) of the revised PLED is drafted to apply to "an employee other than a shiftworker" and clause 34.3(d) is drafted to apply to "a shiftworker". Ai Group submitted that the drafting does not take into account the possibility that an employee may work both day work and shiftwork during a period had they not been on leave. Ai Group submitted that an employee is a shiftworker whilst employed on shifts and is otherwise a day worker.[90] We accept this submission in respect of the application of the shiftwork part of the revised PLED.

[163] Ai Group submitted that both clauses should be amended and provided the following drafts (proposed changes in red):

> '**34.3(c)** For an employee ~~other than a shiftworker~~ who would have worked on day work only had they not been on leave, the additional payment is the greater of:…
>
> **34.3(d)** For an employee who would have worked on shiftwork had they not been on leave, ~~shiftworker~~ the additional payment is the greater of:…'

[164] ABI supported amending the clauses to clarify the deciding factor in determining the rate of pay – whether an employee would have been on day work or shiftwork had they not been on leave.

[165] We agree. The amendment proposed by Ai Group at paragraph [163] will be adopted to reflect that an employee could have worked both day work and shiftwork over a period of time had they not been on leave. This new item is resolved.

[166] Ai Group also submitted that annual leave loading is not payable for "all ordinary hours of work" during a period of leave as drafted in clauses 34.3(c)(i) and (ii) of the revised

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[90] Ai Group submission, 20 February 2018, paragraphs 75 – 78.

PLED. Instead, it is payable for an "employee's ordinary hours of work in the period" (the ordinary hours that an employee would have worked had they not been on leave). Ai Group submitted that this is consistent with s.90 of the Act and clause 34.3(a) of the revised PLED.[91]

[167] Ai Group submitted that clauses 34.3(c)(i), (ii) and 34.3(d)(i) and (ii) of the revised PLED should be amended and provided the following drafts (proposed changes in red):

> 34.3(c)(i) 17.5% of the employee's minimum hourly rate for ~~all~~ the employee's ordinary hours of work in the period; or…
>
> 34.3(c)(ii) The employee's minimum hourly rate for ~~all~~ the employee's ordinary hours of work in the period…
>
> 34.4(d)(i) 17.5% of the employee's minimum hourly rate for ~~all~~ the employee's ordinary hours of work in the period; or…
>
> 34.3(d)(ii) The employee's minimum hourly rate for ~~all~~ the employee's ordinary hours of work in the period…'

[168] We will amend clauses 34.3(c)(i), (ii) and 34.3(d)(i) and (ii) from "all ordinary hours of work" to "the employee's ordinary hours of work" in the revised PLED as proposed by Ai Group. We note we will also delete the word "employee's" appearing before the words "minimum hourly rate" as discussed in paragraph [133]. This new item is resolved.

[169] Ai Group also submitted that clause 29.3(b)(i) of the current award gives day workers an entitlement to "the relevant weekend penalty rates". Ai Group submitted that this means that an employee is entitled to any weekend penalty rate that would have been payable had the employee not been on leave during that period. Further, the amount payable is only the amount additional to the minimum hourly rate because the employee has a separate entitlement to payment at the base rate of pay for ordinary hours (which equates, in this instance, to the minimum hourly rate).[92]

[170] Ai Group submitted that clause 34.3(c)(ii) the revised PLED is problematic because it requires payment of "the employee's minimum hourly rate", which would be in addition to entitlements under the NES. Ai Group submitted that there is no award entitlement to the minimum hourly rate in addition to the annual leave loading. The entitlement to payment for annual leave arises under the NES and is paid at the employee's base rate of pay.[93] The entitlement is comprised of the base rate of pay plus the payment for annual leave stated at clause 23 of the revised PLED.[94]

[171] Ai Group also submitted that the revised PLED requires payment of "penalty rates as specified in clause 23", which prescribes weekend and public holiday penalty rates. Ai Group submitted that this differs substantively from current award provisions, which refer only to

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[91] Ai Group submission, 20 February 2018, paragraph 79-80.

[92] Ai Group submissions, 20 February 2018, paragraph 81.

[93] National Employment Standards, s90.

[94] Ai Group submission, 20 February 2018, paragraph 82.

weekend penalty rates.[95] Ai Group submits that this creates an additional entitlement that is not bestowed by the current award.[96]

[172] Ai Group submitted that a similar issue arises in clause 34.3(d)(ii) of the revised PLED. Ai Group submitted that under clause 29.3(b)(ii) of the current award a shiftworker is entitled to the "shift loading (including relevant weekend penalty rates)", which gives an entitlement to any weekend shift loadings that would have been paid had the employee not been on leave during that period. Further, the amount payable is only the amount additional to the base rate of pay for the employee's ordinary hours (minimum hourly rate in this instance). Ai Group submitted that clause 34.3(d)(ii) is problematic for the same reasons as outlined in relation to clause 34.3(c)(ii) above, except the reference is to clause 28 instead of clause 23.[97]

[173] Ai Group submitted that subparagraphs 34.3(c)(ii) and 34.3(d)(ii) be replaced with the following proposed subparagraphs:

> '(c)(ii) Relevant weekend penalties specified in clause 23—Penalty rates (employees other than shiftworkers) for the employee's ordinary hours of work in the period. For the purposes of this clause, the relevant weekend penalty does not include the minimum hourly rate for the employee's ordinary hours of work.
>
> (d)(ii) Relevant penalty rates for shiftwork (excluding public holiday penalty rates) as specified in clause 28—Penalty rates for shiftwork for the employee's ordinary hours of work in the period. For the purposes of this clause, the relevant penalty rates for shiftwork do not include the minimum hourly rate for the employee's ordinary hours of work.'[98]

[174] Ai Group noted its consistent concerns in the 4-yearly review about the interaction of annual leave loading clauses and clauses that provide for weekend and shift rates. Ai Group submitted that the addition of the final sentence in clauses 34.3(c)(ii) and (d)(ii) attempts to remedy that issue.

[175] The issue raised by Ai Group about interaction between the NES, the annual leave loading clause, and penalty rates effects of a number of other awards. These issues have been referred to the plain language Full Bench to be dealt with as a separate process with other affected awards.[99] We are of the view that it is more appropriate to deal with these issues as a part of a separate process with other awards referred to this Full Bench for the same purpose.

[176] We note the issue raised by Ai Group set out at [171] and [172] is associated with the movement of the public holiday penalty from the public holiday clause to the penalty rates clauses. We have decided to insert the word "weekend" before the words "penalty rates" in clause 34.3(c)(ii) and the words "shift and weekend" before the words "penalty rates" in clause 34.3(d)(ii) as an interim measure. We note that clause 34.4 will be reviewed with other awards and parties will have further opportunity to comment in relation to clause 34.3 before it is finalised.

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[95] Ai Group submission, 20 February 2018, paragraph 82.

[96] Ai Group submission, 20 February 2018, paragraph82.

[97] Ai Group submission, 20 February 2018, paragraphs 86 – 88.

[98] Ai Group submission, 20 February 2018, paragraphs 88 – 89.

[99] [2017] FWCFB 5536 at paragraphs 583 – 592.

Clause 35 – new item – Personal/carer's leave and compassionate leave (clause 35.2)

[177] The MTA submitted that the NES allows casual employees to take carer's leave "…to care for a member of the employee's immediate family, or a member of the employee's household" and the current award gives a more generous entitlement. The MTA submitted that the revised PLED wording entitles an employee to care for or support any person. The MTA submitted this was an error and clauses 35.2 – 35.5 should be deleted.

[178] Clause 30.2(a) of the current award (Personal/carer's leave for casual employees) provides:

> '**30.2 Personal/carer's leave for casual employees**
>
> **(a)** Casual employees are entitled to be not available for work or to leave work to care for a person who is sick and requires care and support or who requires care due to an emergency.
>
> **(b)** Such leave is unpaid. A maximum of 48 hours absence is allowed by right with additional absence by agreement.'

[179] Clauses 35.2 – 35.5 of the revised PLED provide:

> '**35.2** Subject to clause 35.3, casual employees are entitled to be absent from work (whether by making themselves unavailable for work or by leaving work) to care for a person who requires care or support because of:
>
> **(a)** illness or an injury; or
>
> **(b)** an emergency.
>
> **35.3** A casual employee may only be absent from work under clause 35.2 for a period of up to 48 hours.
>
> **35.4** With the agreement of the employer, a casual employee may be absent from work for a purpose mentioned in clause 35.2 for longer than 48 hours.
>
> **35.5** A casual employee is not entitled to be paid for time away from work for a purpose mentioned in clause 35.2.'

[180] We are of the view that the revised PLED does not introduce any additional entitlements for casual employees or constitute a substantive change from the current award. The current award uses the term "a person" and the revised PLED replicates that. The revised PLED will not be amended in the way proposed by the MTA. This new item is resolved.

Clause 37 – Item 145 – Substitution of public holidays

[181] Item 145 relates to clause 37.3 of the revised PLED. In the January Statement interested parties were invited to make final submissions in relation to this item. Business SA submitted that the revised PLED did not properly reflect provisions of the current award.[100]

[100] Business SA submissions, 15 February 2018, point 4.

[182] An issue relating to substitution of public holidays by agreement was also raised in the course of the review of the *Educational Services (Post-Secondary Education) Award 2010*. Section 115(3) of the Act provides that a modern award may contain terms providing for "an employer and an 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. Given its general nature, the issue of whether an award term which permits substitution by agreement between an employer and a *majority* of employees excludes the NES, or any provision of the NES within the meaning of s.55(1) of the Act, has been referred to the Plain Language Full Bench for review.[101] Item 145 is referred to be dealt with by this Full Bench in separate proceedings, along with other awards affected by the substitution of public holidays issue.

Clause 41 – new Item – Consultation about change of contract

[183] Ai Group and the MTA questioned if clause 41 of the revised PLED (Consultation about change of contract) should be in the Award and submitted that it appears to have been included by error.[102] This clause was inserted in error and will be removed from the revised PLED. This item is resolved.

Schedule A – Item 146 – Classifications and Schedule A

[184] Item 146 relates to the classification structure in Schedule A of the revised PLED. The ASU made no further submissions and ABI supported Schedule A as it appeared in the revised PLED.[103] The MTA submitted that the reference to typewriters in A.3.2(b) should be deleted in an attempt to remove archaic terms from the award.[104]

[185] During the September conference the Vice President noted that aspects of the award, including definitions and some tasks such as operating a telephone switchboard, may need to be brought into the 21st century.[105] The Vice President foreshadowed the need to undertake a deep analysis of the type of work which people currently perform under the award.[106] There was little appetite for such change during proceedings and the majority of parties have not made submissions in support of such changes.

[186] In the absence of an alternative term being proposed by the MTA we will not change A.3.2(b) at this time. However, we re-iterate the Vice President's proposition that a modern analysis of the work performed under this award would improve its relevance and should be conducted in the future.

[187] Business SA had previously submitted that it did not support use of the word "competencies" in the place of "characteristics", as used in classifications schedule in the July PLED, on the basis that there was potential for this change to have unintended effects on the classification of employees.[107] The word "competencies" was changed to "characteristics" in

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[101] [2018] FWC 1501.

[102] Ai Group submission, 20 February 2018, paragraph 92; Motor Trades Association, 15 February 2018, paragraph 13.

[103] ASU submission, 15 February 2018, paragraph 15; ABI & NSWBC submission, 22 February 2018 at paragraph 2.2(d).

[104] MTA submission, 15 February 2018, page 2.

[105] Transcript, 15 September 2017, PNs 52, 129 and 143.

[106] Transcript, 15 September 2017, PN 143.

[107] Business SA submission, 28 February 2017, paragraph 15.1.

Schedule A in the revised PLED and will be also changed where it appears in clause 12.1, as set out at [60] above.

[188] In relation to A.2.1, Business SA had previously submitted that the words "the less experienced employees' work may be subject to checking at all stages" had been removed.[108] Business SA had submitted that this wording should be retained as these words provide for a more experienced employee to closely check the work of another employee without creating an issue of authority or unreasonable actions. These words were re-inserted into the revised PLED at A.2.1(c).

[189] Ai Group proposed a number of amendments to Schedule A. The proposed amendments can be characterised as typographical errors, drafting issues and the use of "and/or".[109]

Typographical errors

[190] The following typographical errors were identified by Ai Group:

- A.1.4, Note 2: "ure" should be replaced with "are"; and
- A.4.2: "skilss" should be replaced with "skills".[110]

[191] These errors will be corrected.

Drafting issues

[192] Ai Group submitted that the word "supervision" should be replaced with "direction" in A.2.1(a).[111] Ai Group contended that the two words are not synonymous and "direction" is consistent with the current award.[112] We agree that the word "direction" is appropriate and reflects the current award provision. The word "supervision" will be replaced with "direction" in A.2.1(a) of the revised PLED to maintain the current award wording.

[193] Ai Group submitted that the words "such as" should be replaced with "for example" in A.3.2(c).[113] Ai Group submitted that "such as" results in the types of documents listed being "coloured" by the types of text documents referred to, in circumstances where the current award B.2.2(iii) does not limit the types of text documents.[114] We disagree. The words "such as" do not limit the types of text documents for the purpose of A.3.2(c) but provide examples of the types of documents that can be produced by word processing. Also, according to the Macquarie dictionary online, "such as" has the same meaning as "for example". We are not persuaded to vary A.3.2(c).

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[108] Business SA submission, 28 February 2017, paragraph 15.2.

[109] Ai Group submissions, 20 February 2018, paragraph 60.

[110] Ai Group submission, 20 February 2018, paragraph 60.

[111] Ai Group submission, 20 February 2018, paragraph 60.

[112] Ai Group submission, 20 February 2018, paragraph 60.

[113] Ai Group submission, 20 February 2018, paragraph 60.

[114] Ai Group submission, 20 February 2018, paragraph 60.

[194] Similarly, Ai Group submitted the words "such as" should be replaced with "for example" in A.3.2(i).[115] Ai Group also submitted "such as" "colours" the method by which employees in this classification would typically provide general advice and information and there is no limitation by virtue of current award B.2.2(ix). Ai Group gives the example that there could be no suggestion under the current award clause that the information could be provided online via a live chat function. We disagree. The words "such as" do not limit the means by which general advice could be delivered but provide examples of how it could be delivered and, as mentioned above, "such as" has the same meaning as "for example". A.3.2(i) will not be amended.

[195] Ai Group submitted that A.7.3 should be moved so it appears below A.7.4.[116] Having regard to current award B.6.2, Ai Group submitted that A.7.3 applies only to a call centre principal customer contact leader. A.7.3 is based on a sentence appearing below current award B.6.2(v) (Call centre principal customer contact leader). We are satisfied that this clause should be relocated to below A.7.4(c) of the revised PLED to reflect the terms of the current award.

Use of "and/or"

[196] Ai Group made submissions regarding the use of "and", "or" and "and/or" in a number of clauses.[117]

[197] Ai Group submitted that the word "and" should be deleted from the end of the A.2.2(a)(i) – (iv) of the revised PLED. Ai Group submitted the drafting of the list at current award B.1.2(i) does not require or suggest that an employee would perform all those duties but the revised PLED does contemplate that all those duties would be performed.[118] A.2.2(a)(i) – (iv) appear below the lead in words directly under the clause title of A.2.2(i), which state "including" in the lead in words. The words "including" suggests that the list is not exhaustive. However, we accept that the word may cause confusion by suggesting that all the duties in A.2.2(a) must be performed. We will delete the word "and" from the end of A.2.2(a)(i) to (iii).

[198] Other issues that Ai Group raised relating to "and" and "or" arose in the context of A.2.2(a), A.3.2(a), A.3.2(f)(ii) and (iv), A.4.2(c), A.4.2(d)(iv), A.4.2(e) and A.6.2(b) of the revised PLED. The issues Ai Group identified stem from the use of the word "and" in the revised PLED in the place of forward slashes ("/") used in the current award. Having regard to the context of each instance identified, Ai Group submitted that "and" should be replaced with "or".

[199] For example, Ai Group submitted that the word "and" between "reception" and "switchboard" should be replaced with "or" in A.2.2(a) and A.3.2(a). Ai Group submitted that B.1.2(i) and B.2.2(i) of the current award lists "reception/switchboard" as a typical duty whereas A.2.2(a) lists "reception and switchboard" and the two are substantively different.[119]

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[115] Ai Group submission, 20 February 2018, paragraph 60.

[116] Ai Group submission, 20 February 2018, paragraph 60.

[117] Ai Group submission, 20 February 2018, paragraph 60.

[118] Ai Group submission, 20 February 2018, paragraph 60.

[119] Ai Group submission, 20 February 2018, paragraph 60.

We are satisfied that, under the current award, an employee's duties may include either reception or switchboard and not necessarily both. The word "and" will be replaced with "or" in A.2.2(a) and A.3.2(a).

[200] Ai Group also submitted that the first "and" in both A.3.2(f)(ii) and (iv) should be replaced with "or" on the basis that it is not uncommon in the industry for employees to do either of the tasks in the respective subclauses, but not both. We agree that the first "and" in both A.3.2(f)(ii) and (iv) should be replaced with "or".

[201] Similar issues arise in all of the subclauses identified at [199] and [200]. We have determined that the word "and" will be replaced with the word "or" in accordance with Ai Group's submission in the following places in order to reflect the terms of the current award:

- A.2.2(a) and A.3.2(a): between the words "reception" and "switchboard";
- A.3.2(f)(ii) and (iv): between "incoming" and "outgoing" in (ii) and between "debit" and "credit" in (iv);
- A.4.2(c): between the words "public" and "suppliers";
- A.4.2(d)(iv): between "processing" and "keyboard";
- A.4.2(e): between "reference lists" and "personal contact systems"; and
- A.6.2(b): between "finance" and "tax", "wage" and "salary" and "personnel" and "payroll".

[202] Ai Group also raised issues regarding the use of "and" or "or" in the place of "and/or" in the equivalent provisions of the current award. The issues raised affect A.3.1(d) and A.3.2(f) of the revised PLED.

[203] Ai Group submitted that at each instance the word "or" is used at A.3.1(d) it should be replaced with "and/or", consistent with B.2.1 of the current award. Ai Group submits the absence of "and" changes the effect of the clause. Ai Group also submitted that the word "and" between "records" and "journals" at A.3.2(f) should be replaced with "and/or" to reflect B.2.2(vi) of the current award.[120]

[204] We acknowledge that in both instances identified by Ai Group there has been a change in terminology from "and/or" in the current award to either "and" or "or" in the revised PLED. However, the term "and/or" lacks clarity. We note the Plain Language Guidelines state that "and/or" should not be used in modern awards.[121] The use of "and/or" is difficult for the average reader to understand because it does not clearly indicate whether one or all of the options it relates to are requirements.

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[120] Ai Group submission, 20 February 2018, paragraph 60.

[121] Guidelines – Plain language drafting of modern awards, 20 June 2017, 5.10.

[205] In both instances where Ai Group submitted that the words "and/or" should be re-instated in the revised PLED, the minimum requirement for classification at the particular level would be to have just one of the characteristics or to perform just one of the duties mentioned. The employee *may* also be required to possess or perform more than one of the characteristics or duties to be classified at that level, but that is not the minimum requirement.

[206] To clarify this position in respect of A.3.1(d) of the revised PLED (B.2.1 of the current award), we have determined to add "or any combination of one or more of these requirements" to the end of the sentence.

[207] In respect of A.3.2(f) of the revised PLED (B.2.2(vi) of the current award), we have determined to replace the words "records and journals" with the words "records or journals (or both)".

[208] No party made any further submission in relation to item 5 (in part) about Schedule A and the interaction with clause 4.1 (coverage) in accordance with paragraph [25] of the January Statement. Item 5 is resolved.

Schedule B – Item 148 – Summary of hourly rates of pay

[209] Item 148 relates to the note under the heading of Schedule B (Summary of hourly rates of pay) of the revised PLED. Following the September conference the plain language expert proposed that the note be amended as follows to address the parties" concerns:

> 'NOTE: Employers who pay wages in accordance with this schedule satisfy their obligations under the award to pay wages for hours worked.'

[210] In the January Statement the Commission invited interested parties to make submissions in relation to item 148 and the note proposed by the expert.

[211] The ASU did not oppose the wording proposed by the expert.[122] Ai Group submitted the note addressed its concerns.[123] ABI supported further consultation in relation to this issue.[124]

[212] In the January Statement we noted that broader consultation may be required as the note in the July PLED was based on a note included in all exposure drafts by a decision [2015] FWCFB 4658.[125] The note at Schedule B (item 148) will remain as it appears in the revised PLED but may be amended when further consideration is given to this note along with other modern awards.

[213] The MTA also made submissions about the rates in Schedule B.[126] The MTA noted that the calculations of penalties and overtime in the PLED are based on hourly rates rounded to the nearest cent. MTA submits that this can cause a discrepancy of up to a few cents per

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[122] ASU submission, 15 February 2018, paragraph 25.

[123] Ai Group submission, 20 February 2018, paragraph 61.

[124] ABI & NSWBC submission, 22 February 2018 at paragraph 2.1(b).

[125] [2015] FWCFB 4658 at [63].

[126] MTA submission, 15 February 2018, page 7 – 8.

hour compared to calculations based on unrounded rates. The MTA submitted the most accurate method of calculation is to use the weekly rates of pay without rounding at each step, as rounding results in additional steps in the calculation which should not be completed unless there is an express instruction to do so. The MTA provided an example in relation to the junior rate for 20 year old employees working on a public holiday which resulted in the employee receiving 2 cents less per hour due to the way rates are rounded in the PLED. MTA also submitted there were "a few errors" in the following rates of the revised PLED and provided an alternative schedule:[127]

- Errors with the overtime public holiday penalty rate for permanent adult employees (not shiftworkers) for Levels 3 and above;
- Errors with the casual adult shiftworker – ordinary and penalty rates for Levels 4 and above;
- Errors with permanent junior (not shiftworker) penalty rates – Level 2-year 2 and Call centre principal customer contact specialist;
- Omission of casual overtime rates; and
- Omission of junior shiftwork rates.

[214] Ai Group submitted that it had not had the opportunity to review the MTA's proposed schedule of rates and that should the Commission adopt the MTA's proposed schedule, interested parties should be given an opportunity to review it.

[215] We will consider inserting casual overtime rates into the PLED following the determination of the overtime for casual employees common issue.[128] Junior shiftwork rates will be added to the next version of the PLED.

[216] In relation to the rounding issues, we are not persuaded to amend the rates in the manner proposed by the MTA. The issue raised by MTA in relation to rounding has also arisen in the Award stage proceedings in relation to the *Pastoral Award 2010*:

> '[279] The disparity between the rates in the Exposure draft by the Commission and those calculated by the NFF appear to be due to the NFF's failure to round the figures at each step in the calculation. When calculating the hourly adult rate, the weekly rate is to be divided by 38. However, it appears the NFF has not rounded the hourly figure to two decimal places before proceeding with further calculations. As a result, the starting figure for the NFF calculations is the unrounded adult hourly rate. Using the rates for the 2015–16 financial year as an example, this means that instead of arriving at an hourly adult rate of $17.29, the NFF has arrived at an hourly adult rate of $17.286842. The NFF's method is inconsistent with the how the Commission calculates rates and that explains the discrepancy between the NFF's proposed rates and those in the exposure draft.[129]
>
> [280] We do not propose to amend the rates in Schedule B.7.2 and B.7.3.'

[127] MTA submission, 15 February 2018, page 7 – 8.

[128] See AM2017/51—Overtime for casuals

[129] [2017] FWCFB 3433

[217] The Full Bench of the Commission has decided that hourly rates will be included in the majority of exposure drafts. This will provide clarity about the rates for part-time and casual employees covered by awards. It also ensures greater clarity about which rate is to be used when calculating the penalty and overtime provisions as these rates are based on percentages of the minimum hourly rate. While rounding rules for calculating hourly rates are not included in modern awards, basing the calculation of loadings, penalty rates and overtime rates on rounded hourly rates is not inconsistent with the terms of the current award.

[218] Further, the approach is consistent with other awards (such as the *Restaurant Industry Award 2010*) that currently contain both weekly and hourly rates which are rounded to the nearest cent. In the PLED 'minimum hourly rate' is a defined term and is the reference rate for calculating loadings, shift penalties and overtime under the award. The minimum hourly rate included in column 3 of Table 3 of the PLED includes minimum hourly rates rounded to the nearest cent. We are not persuaded to depart from this approach.

[219] The MTA, or any other interested party, may make additional submissions in relation to specific errors in the rates (other than errors related to rounding). Parties making submissions should identify specific errors in particular tables. Submissions should be filed by **4.00 pm on Monday 24 September 2018**.

Items related to the format and style of tables

[220] In the January Statement items 4, 48, 49, 59, 63, 65, 91 (in part), 110, 121 (in part) and 148 were identified as being items related to format and it was noted that the Commission considered items 4, 48, 49, 59, 63, 65, 91 (in part), 110, 121 (in part) and 148 to be resolved. We confirm these items are resolved.

Next steps

[221] This decision resolves the majority of issues related to the plain language re-drafting of the Clerks award. A revised exposure draft incorporating changes to reflect this decision will issue shortly.

[222] Further consideration will be given to items related to the terminology used to describe shift rates, the interaction of shiftwork and annual leave provisions, and rounding rules for the schedule of hourly rates. Interested parties will have the opportunity to make submissions on these issues as a part of separate proceedings.

[223] Interested parties are invited to make submissions in accordance with the directions at paragraphs [13], [52], [130] and [219] by **4.00 pm on Monday 24 September 2018**. Submissions should be sent to amod@fwc.gov.au.

[224] Liberty to apply.

PRESIDENT

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